

SUPREME COURT OF TEXAS

In re Coppola

535 S.W.3d 506 (Tex. 2017) · Decided December 15, 2017

SUMMARY

The Texas Supreme Court conditionally granted mandamus relief after the trial court denied the Coppolas' timely motion to designate the plaintiffs' attorneys as responsible third parties under Texas Civil Practice and Remedies Code section 33.004. The court held that a motion filed more than sixty days before the operative trial setting was timely and that the trial court could not deny the motion for pleading deficiencies without allowing an opportunity to replead. The court also held that attorneys may be designated as responsible third parties and that mandamus relief is ordinarily available when a timely designation is erroneously denied.

CASE DETAILS

COURT	Supreme Court of Texas
JURISDICTION	Texas
DECIDED	December 15, 2017
DISPOSITION	writ_granted
PROCEDURAL POSTURE	The Coppolas petitioned for mandamus relief after the trial court denied their motion for leave to designate Adams's transactional attorneys as responsible third parties under Texas Civil Practice and Remedies Code section 33.004. The court of appeals denied mandamus relief.
STANDARD OF REVIEW	Mandamus requires a clear abuse of discretion and no adequate remedy by appeal. In the context of a timely filed section 33.004(a) motion to designate a responsible third party, a relator ordinarily need establish only the trial court's abuse of discretion because the benefits of mandamus review generally outweigh its detriments.
PRECEDENTIAL VALUE	Published Texas Supreme Court opinion; precedential.
PARTIES	Frank Coppola, Bridget Coppola v. Nancy Adams, Adams Investment Properties, LLC

TOPICS

civil procedure

appellate procedure

statutory interpretation

writ of certiorari

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether a motion to designate a responsible third party filed more than sixty days before a new trial setting is timely when filed after the initial trial date.
2. Whether a trial court may deny a timely motion to designate a responsible third party without giving the movant an opportunity to replead alleged pleading deficiencies.
3. Whether Texas's responsible-third-party statute categorically prohibits designation of attorneys as responsible third parties.
4. Whether mandamus relief is ordinarily available when a trial court erroneously denies a timely section 33.004(a) designation motion.
5. Whether the Coppolas could obtain dismissal of Adams's claims for lack of ripeness in the mandamus proceeding despite not raising the issue or requesting that relief below.

HOLDINGS

1. A motion to designate a responsible third party is timely under Texas Civil Practice and Remedies Code section 33.004(a) when filed on or before the sixtieth day before the trial date existing when the motion is filed, even if the motion is filed after an earlier trial setting.
2. When a timely section 33.004(a) designation motion is challenged as inadequately pleaded, the trial court may not deny the motion without first affording the movant an opportunity to replead.
3. Texas Civil Practice and Remedies Code chapter 33 does not categorically prohibit designating attorneys as responsible third parties.
4. Ordinarily, a relator need establish only a trial court's abuse of discretion to obtain mandamus relief from denial of a timely section 33.004(a) motion to designate a responsible third party.
5. The Coppolas were not entitled to dismissal for lack of ripeness in this mandamus proceeding because they had not made a predicate request for that relief below and did not show that this was one of the rare occasions warranting relaxation of that requirement.

KEY QUOTATIONS

"Trial courts have no discretion to deny a timely filed motion to designate absent a pleading defect and an opportunity to cure, which did not occur here."

"Applying section 33.004(a) according to its plain language, the Coppolas' motion to designate was timely filed."

"Accordingly, we hold that, ordinarily, a relator need only establish a trial court's abuse of discretion to demonstrate entitlement to mandamus relief with regard to a trial court's denial of a timely-filed section 33.004(a) motion."

“By special definition, a “responsible third party” is “any person who is alleged to have caused or contributed to causing in anyway the harm for which recovery of damages is sought.””

FACTUAL BACKGROUND

The Coppolas seller-financed Adams's purchase of unimproved property intended for a veterinary clinic and pet boarding facility. Before closing, Adams confirmed the zoning and retained two attorneys for advice concerning the promissory note, purchase agreement, price options, and financing. The Coppolas provided a survey showing a fifteen-foot right-of-way, but Adams later discovered that local ordinances required a twenty-five-foot right-of-way for commercial improvements. Adams sued the Coppolas, and the Coppolas sought to designate Adams's attorneys as responsible third parties based on their alleged failure to disclose the ordinance's effect.

PROCEDURAL HISTORY

Adams sued the Coppolas for fraud and deceptive trade practices arising from the sale of unimproved property. More than sixty days before the third trial setting, the Coppolas moved to designate Adams's attorneys as responsible third parties, alleging that the attorneys failed to advise Adams about the right-of-way ordinance affecting the property's intended use. The trial court summarily denied the motion without granting leave to replead, and the court of appeals denied mandamus relief. The Texas Supreme Court conditionally granted mandamus relief and denied the Coppolas' alternative request to dismiss Adams's claims as unripe.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

The trial court was directed to vacate its order denying the Coppolas' section 33.004(a) motion to designate responsible third parties. The writ would issue only if the trial court failed to do so. The Coppolas' alternative request to dismiss Adams's claims as unripe was denied.

CASES CITED

- In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding)
- El Paso Healthcare Sys., Ltd. v. Murphy, 518 S.W.3d 412, 418 (Tex. 2017)
- American Title Co. v. Bomac Mortgage Holdings, LP, 196 S.W.3d 903, 908-09 (Tex. App.—Dallas 2006, pet. granted, judgm't vacated w.r.m.)
- In re Smith, 366 S.W.3d 282, 288-89 (Tex. App.—Dallas 2012, orig. proceeding)
- Lippincott v. Whisenhunt, 462 S.W.3d 507, 508 (Tex. 2015)
- In re Bustamante, 510 S.W.3d 732, 739 (Tex. App.—San Antonio 2016, orig. proceeding) (en banc)
- In re Volvo Group N. Am., LLC, No. 10-16-00113-CV, 2016 WL 3136354, at *2 (Tex. App.—Waco June 2, 2016, orig. proceeding) (mem. op.)
- In re Greyhound Lines, Inc., No. 05-07-01646-CV, 2014 WL 1022329, at *4 (Tex. App.—Dallas Feb. 21, 2014, orig. proceeding) (mem. op.)

- In re E. Rio Hondo Water Supply Corp., No. 13-12-00528-CV, 2012 WL 5377898, at *10 (Tex. App.—Corpus Christi Oct. 29, 2012, orig. proceeding) (mem. op.)
- In re Altec Indus., Inc., No. 10-12-00207-CV, 2012 WL 2469542, at *2 (Tex. App.—Waco June 22, 2012, orig. proceeding) (mem. op.)
- In re Brokers Logistics, Ltd., 320 S.W.3d 402, 408 (Tex. App.—El Paso 2010, orig. proceeding)
- In re CVR Energy, Inc., 500 S.W.3d 67, 81-82, 84 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding [mand. denied])
- In re McAllen Med. Ctr., Inc., 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding)
- In re J.B. Hunt Transport, Inc., 492 S.W.3d 287, 299-300 (Tex. 2016) (orig. proceeding)
- Waco Indep. Sch. Dist. v. Gibson, 22 S.W.3d 849, 851 (Tex. 2000)
- In re City of Dallas, 501 S.W.3d 71, 73-74 (Tex. 2016) (orig. proceeding)
- Rusk State Hosp. v. Black, 392 S.W.3d 88, 94-95 (Tex. 2012)
- In re Perritt, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding)

OPINION

PER CURIAM.

PER CURIAM In this tort suit arising from a real-estate transaction, relators Frank and Bridget Coppola seek mandamus relief from an order denying leave to designate the plaintiffs'-transactional attorneys as responsible third parties.

The motion to designate, which was filed long after an initial trial date but more than sixty days before a new trial setting, was timely. See Tex. Civ. Prac.& Rem. Code § 33.004. Trial courts have no discretion to deny a timely filed motion to designate absent a pleading, defect and an opportunity to cure, which did not occur here. See *id.* We therefore conditionally grant the writ.

The Coppolas seller-financed the sale of unimproved, property to veterinarian Nancy Adams, and Adams Investment Properties, LLC (collectively Adams). Adams intended to use the property to build a veterinary clinic and pet boarding facility and, before closing, confirmed with a city official that the land was properly zoned. Adams also hired two attorneys to furnish legal advice about the promissory note, purchase agreement, price options,- and financing.

At closing, the Coppolas provided Adams with a survey showing the property bore a 15-foot right-of-way. Adams subsequently discovered that local ordinances require a 25-foot right-of-way for any commercial improvement. She sued the Coppolas for fraud and deceptive trade practices, alleging they failed to disclose right-of-way limitations that render the property unusable for its intended purpose.

Seventy-six days before the third trial setting, the Coppolas requested leave- to designate Adams's legal advisors as responsible third parties. The Coppolas alleged the attorneys breached their duty of care to Adams by failing to disclose the right-of-way ordinance's effect in relation to Adams's

desired use of the property. Adams argued the motion was untimely, failed to sufficiently plead facts concerning the attorneys' alleged responsibility for the damages, and improperly sought-to designate attorneys as responsible third parties.

The trial court summarily denied the motion to designate without granting leave to replead, and the court of appeals denied mandamus relief. No. 01-16-00614-CV, 2016 WL 4766043, at *1 (Tex. App. — Houston [1st Dist.] Sept. 13, 2016, orig. proceeding) (mem. op.). ■ Subject to certain limitations not at issue here, section 33.004 of- the Texas Civil Practice and Remedies Code permits a tort defendant to designate a person as a responsible third party by filing a motion “on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a ■ later date.” Tex. Civ.

Prac. & Rem, Code § 33.004(a); see id. § 33.002 (making the proportionate-responsibility statute applicable to tort and deceptive-trade-practices claims). The trial court “shall grant leave to designate... a responsible third party” unless another party objects within fifteen days after service. Id. § 33.004(f). Even with a timely filed objection, the court must allow the designation unless the objecting party establishes (1) the defendant did not plead sufficient facts concerning the person's alleged responsibility and (2) the pleading defect persists after an opportunity to replead.

Id. § 33.004(g). The trial court may later strike the designation if, after adequate time for discovery, no legally sufficient evidence of responsibility exists. Id. § 33.004(Z). Mandamus relief is warranted when the trial court clearly abused its discretion and the relator has no adequate appellate remedy.

In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). In this case, the trial court erroneously denied the Coppo-las' motion because it was filed more than sixty days before the trial setting and the trial court did not afford an opportunity to cure any pleading deficiency.

We find nothing in the proportionate-responsibility statute supporting a construction of section 33.004(a) as limiting the phrase “the trial date” to an initial trial setting rather than the trial date at the time a motion to designate is filed.

Moreover, Adams's policy arguments notwithstanding, nothing in the proportionate-responsibility statute precludes a party from designating an attorney as a responsible third party. See *El Paso Healthcare Sys., Ltd. v. Murphy*, 518 S.W.3d 412, 418 (Tex. 2017) (statutes are construed using a text-based approach that gives effect to the plain meaning of undefined terms, within the context of the statute as a whole, unless doing so produces an absurd result).

Relying on *American Title Co. v. Bomac Mortgage Holdings, LP*, Adams asserts that a trial resetting does not alter an original designation deadline absent a court order or the parties'

agreement to extend the deadline. 196 S.W.3d 903, 908-09 (Tex. App.—Dallas 2006, pet. granted, judgment vacated w.r.m.). Adams misconstrues Bomac’s holding.

In Bomac, the motion to designate was untimely when filed; the trial continuance occurred after the motion was filed; the trial was continued for the “very limited” purpose of allowing additional discovery; and the scheduling order explicitly stated that a trial continuance would not alter any deadlines unless specifically provided by order. *Id.* None of these circumstances are presented here.

Bomac is thus inapposite. Applying section 33.004(a) according to its plain language, the Coppolas’ motion to designate was timely filed. We need not determine whether the Coppolas pleaded sufficient facts regarding the attorneys’ alleged responsibility, because even if a deficiency existed, the trial court lacked discretion to deny the motion to designate without affording them an opportunity to replead.

See Tex. Civ. Prac. & Rem. Code § 33.004(g); see also *In re Smith*, 366 S.W.3d 282, 288 (Tex. App.—Dallas 2012, orig. proceeding) (“[T]he trial judge was statutorily required to give relators an opportunity to replead before denying their motion, regardless of whether they made a specific request for time to replead.”).

In rejoinder, Adams posits that parties are — or should be — categorically prohibited from designating attorneys as responsible third parties. This argument cannot be squared with the statute’s provisions. By special definition, a “responsible third party” is “any person who is alleged to have caused or contributed to causing in anyway the harm for which recovery of damages is sought.” Tex. Civ.

Prac. & Rem. Code § 33.011(6). The statute explicitly exempts from the definition “a seller eligible for indemnity under Section 82.002” and no others. *Id.* Even if we were to credit Adams’s speculative concerns about the possibility of collateral disciplinary consequences, we cannot judicially amend the statute to exempt legal professionals and must, instead, “apply the statute as written.” *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex.

2015). We further note that Adams’s policy concerns seem unfounded in light of the statutory directive that neither a section 33.004 designation nor a finding of fault against the person “impose[s] liability on the person.” Tex. Civ. Prac. & Rem. Code § 33.004(i). And, more to the point, neither can “be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.” *Id.* We next address the adequacy of an appellate remedy, an issue we have not previously considered in the context of a section 33.004 responsible-third-party designation.

Relying on the standard articulated in *In re Prudential Insurance Co. of America*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding), however, a majority of our intermediate appellate courts have held

that when a timely filed motion to designate a responsible third party is erroneously denied, no adequate remedy by appeal ordinarily exists. See *In re Bustamante*, 510 S.W.3d 732, 739 (Tex.

App.—San Antonio 2016, orig. proceeding) (en banc) (overturning prior precedent holding otherwise); see also *In re Volvo Group N. Am., LLC*, No. 10-16-00113-CV, 2016 WL 3136354, at *2 (Tex. App.—Waco June 2, 2016, orig. proceeding) (mem. op.); *In re Greyhound Lines, Inc.*, No. 05-07-01646-CV, 2014 WL 1022329, at *4 (Tex. App.—Dallas Feb. 21, 2014, orig. proceeding) (mem. op.); *In re E. Bio Hondo Water Supply Corp.*, No. 13-12-00528-CV, 2012 WL 5377898, at *10 (Tex.

App.—Corpus Christi Oct. 29, 2012, orig. proceeding) (mem. op.); *In re Altec Indus., Inc.*, No. 10-12-00207-CV, 2012 WL 2469542, at *2 (Tex. App.—Waco June 22, 2012, orig. proceeding) (mem. op.); *In re Smith*, 366 S.W.3d 282, 288-89 (Tex. App.—Dallas 2012, orig. proceeding); *In re Brokers Logistics, Ltd.*, 320 S.W.3d 402, 408 (Tex. App.—El Paso 2010, orig. proceeding).

In *Prudential*, we explained that “adequate” is merely “a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts” and an “adequate” appellate remedy exists when “any benefits to mandamus review are outweighed by the detriments.” 148 S.W.3d at 136.

In weighing the benefits of mandamus review, we conclude, consistent with the weight of appellate authority, that the benefits generally outweigh the detriments. Allowing a case to proceed to trial despite erroneous denial of a responsible-third-party designation “would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of [the relator’s] defense in ways unlikely to be apparent in the appellate record.” *In re CVR Energy, Inc.*, 500 S.W.3d 67, 81-82 (Tex.

App.—Houston [1st Dist.] 2016, orig. proceeding [mand. denied]) (internal quotation marks omitted, alteration in original) (discussing and collecting authorities weighing benefits against detriments of mandamus review).

The denial of mandamus review impairs— and potentially denies — a litigant’s significant and substantive right to allow the fact finder to determine the proportionate responsibility of all responsible parties. See *id.* at 84 (“The denial of [a party’s] right to allow the jury to determine the proportionate responsibility of all responsible parties is a significant ruling and mandamus review will prevent the impairment or loss of this substantive right.”); see also *In re McAllen Med.*

Ctr., Inc., 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding) (“The most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial — regardless of the outcome — would defeat the substantive right involved.”).

Accordingly, we hold that, ordinarily, a relator need only establish a trial court's abuse of discretion to demonstrate entitlement to mandamus relief with regard to a trial court's denial of a timely-filed section 33.004(a) motion. Cf. *In re J.B. Hunt Transport, Inc.*, 492 S.W.3d 287, 299-300 (Tex. 2016) (orig. proceeding) (holding similarly with regard to a plea in abatement in a dominant-jurisdiction case).

As an "alternative" request for relief, the Coppolas ask the Court to dismiss Adams's claims altogether, asserting she has not suffered a cognizable injury unless and until she unsuccessfully pursues a variance from the 25-foot right-of-way ordinance. Ripeness is a component of subject-matter jurisdiction, *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000), and courts have a duty to determine their jurisdiction, *In re City of Dallas*, 501 S.W.3d 71, 73 (Tex.

2016) (orig. proceeding). We have recognized that issues-affecting subject-matter jurisdiction, like ripeness, maybe raised for the first time on appeal, including interlocutory appeal. See *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 94-95 (Tex. 2012). This is not an appeal, however, but a mandamus proceeding. Due to the ex-traordinary nature of -the remedy, the right to mandamus relief generally requires a predicate request for action by the respondent, and the respondent's erroneous refusal to act.

In re Perritt, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding). The record bears nary a hint that ripeness was questioned in the proceedings below, and the Coppolas have not argued or shown that, the facts present one of the "rare occasions" in which the predicate-request requirement should be ■ relaxed. See *id.* We therefore deny the Coppolas' alternative relief request.¹ Without hearing oral argument, see Tex. R. App.

P. 52.8(c), we conditionally grant the petition for writ of mandamus and direct' the trial court to vacate its order denying the Coppolas' section 33.004(a) motion to designate responsible third parties. The writ will issue only if it fails to do so..

In *In re City of Dallas*, we considered sua sponte the subject-matter' jurisdiction of a county court to grant a Rule 202 pre-suit discovery petition when the damages for- the claims under investigation likely exceeded the court's jurisdictional maximum, 501 S.W.3d 71, 73-74 (Tex. 2016) (orig. proceeding) (citing Tex. R. Civ. P. 202.1(b)), We observed courts cannot render binding judgments in matters over which subject-matter jurisdiction is lacking nor allow a party to obtain by Rule 202 what it would be denied in the anticipated action.

Thus, if the county court lacked ■ subject-matter jurisdiction over the anticipated action, it could not grant relief under Rule 202. The record did not conclusively negate jurisdiction based on the amount in controversy, but rather than addressing the ultimate merits issue, we directed the trial court to vacate its order granting the Rule 202 petition and remanded with instructions to determine jurisdiction in the first instance.

Id. at 74. Notably, the issue, in the mandamus proceeding concerned the ultimate relief requested in the underlying action, and the parties had made a predicate request to dismiss for want of jurisdiction, albeit on other grounds. Id. at 73.

In re City- of Dallas is thus distinguishable.