

NO. 12-11-00391-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

*IN RE:*

§

*COMPLETERX, LTD.,*

§

*ORIGINAL PROCEEDING*

*RELATOR*

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***OPINION***

Good Shepherd Hospital sued Relator, CompleteRx, Ltd., for an accounting. CompleteRx made an offer of settlement to Good Shepherd pursuant to Texas Rule of Civil Procedure 167. On Good Shepherd's motion, the trial court entered an order modifying the deadline for Good Shepherd to respond to the offer.

In this original mandamus proceeding, CompleteRx challenges the trial court's December 8, 2011 order modifying the deadline for responding to the offer. We agree with CompleteRx that the trial court clearly abused its discretion in rendering the order. We also agree that CompleteRx does not have an adequate remedy at law. Accordingly, we conditionally grant the requested mandamus relief.

**FACTUAL AND PROCEDURAL BACKGROUND**

Between October 1, 2005, and March 1, 2010, Good Shepherd and CompleteRx had a pharmacy management agreement whereby CompleteRx managed Good Shepherd's pharmacy. During that time, CompleteRx administered prescription drugs to patients and then billed Good Shepherd for those drugs. Following termination of the agreement, Good Shepherd audited the sale of prescription drugs for a one year period and determined that CompleteRx had substantially overcharged it. Good Shepherd extrapolated the amount of the overcharges over the period of the agreement and concluded that the total overcharges by Complete Rx could be

### AVAILABILITY OF MANDAMUS

To be entitled to mandamus relief, CompleteRx must meet two requirements. First, it must show that the trial court clearly abused its discretion. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding). Second, it must show that it has no adequate remedy by appeal. *Id.* at 135-36.

A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding). The test for abuse of discretion is whether the court acted without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). (orig. proceeding). The reviewing court may not substitute its judgment for that of the trial court on matters within the trial court's discretion. *See Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding). The trial court's ruling should be set aside only if it was arbitrary or unreasonable. *See Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004).

Review of a trial court's determination of the legal principles controlling its ruling is much less deferential. *Walker*, 827 S.W.2d at 840. A trial court has no discretion in determining what the law is or applying the law to the facts. *Id.* Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. *Id.*

Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of the costs and benefits of appellate review. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories. *Id.* Appeal is not an adequate remedy when the trial court's abuse of discretion thwarts legislative intent for speedier resolution of lawsuits. *See In re United Servs. Auto Ass'n*, 307 S.W.3d 299, 314 (Tex. 2010) (orig. proceeding).

### HISTORY OF RULE 167

In 2003, our legislature determined that our state faced "a general environment of excessive litigation." House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S., at 1 (2003) [hereinafter *Analysis*]. Reformers in the legislature argued that the civil justice system should provide appropriate incentives to litigants to avoid unnecessary expense and

(a) The supreme court shall promulgate rules implementing this chapter. The rules must be limited to settlement offers made under this chapter. The rules must be in effect on January 1, 2004.

(b) The rules promulgated by the supreme court must provide:

(1) the date by which a defendant or defendants must file the declaration required by Section 42.002(c);

(2) the date before which a party may not make a settlement offer;

(3) the date after which a party may not make a settlement offer; and

(4) procedures for;

(A) making an initial settlement offer;

(B) making successive settlement offers;

(C) withdrawing a settlement offer;

(D) accepting a settlement offer;

(E) rejecting a settlement offer; and

(F) modifying the deadline for making, withdrawing, accepting, or rejecting a settlement offer.

TEX. CIV. PRAC. & REM. CODE ANN. § 42.005(a)-(b) (West 2008). In response, the supreme court, through its advisory committee, worked on a proposed offer of judgment/settlement rule for one and one-half years before adopting Texas Rule of Civil Procedure 167 prior to the January 1, 2004 deadline set by the legislature. *See* Carlson, *supra*, at 6. Texas Rule of Civil Procedure 167.2(a) specifies how the settlement offer provision is to be invoked:

(a) *Defendant's declaration a prerequisite; deadline.* A settlement offer under this rule may not be made until a defendant – a party against whom a claim for monetary damages is made – files a declaration invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.

TEX. R. CIV. P. 167.2(a).

The supreme court also placed the following time limitations on when the offer can be made:

(e) *Time limitations.* An offer may not be made:

(1) before a defendant's declaration is filed;

(2) within 60 days after the appearance in the case of the offeror or offeree, whichever is later;

(3) within 14 days before the date the case is set for a conventional trial on the merits, except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.

offer”). Therefore, Good Shepherd argues that we must harmonize Texas Rule of Civil Procedure 167.5(a) with Texas Civil Practice and Remedies Code Section 42.005(b)(4)(F).

It is well established that when a conflict arises between a statute and a rule of procedure, we must harmonize the statute and the rule if possible. See *La Sara Grain Co. v. First Nat’l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984) (holding that courts are to construe statutes so as to harmonize with other relevant laws, if possible”). Ultimately, however, the statute prevails unless the rule has been adopted subsequent to the statute and repeals the statute as provided by Texas Government Code Section 22.004. *Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 298 (Tex. 2011). But this case does not involve a conflict between a procedural statute and a procedural rule. Cf. *M.R.R. v. State*, 903 S.W.2d 49, 52 (Tex. App.—San Antonio 1995, no pet.) (harmonizing statute and rule where statute required appellate court to consider statement of facts and rule of procedure prohibited court from considering late statement of facts absent timely motion for extension). Instead, it is a legislative directive to the supreme court.

The legislature specifically authorized the supreme court to promulgate procedural rules to implement Chapter 42 of the civil practice and remedies code. See TEX. CIV. PRAC. & REM. CODE ANN. § 42.005(a), (b)(4); see also TEX. GOV’T CODE ANN. § 22.004(a) (West Supp. 2011). Good Shepherd urges that the supreme court did not fully comply with Section 42.005 and that reading Rule 167 and Section 42.005 together will comply with the legislature’s intent. However, the rules of construction do not authorize us to, in effect, modify the rule so that it addresses modification of the deadline for accepting or rejecting an offer. See *Christus Spohn*, 222 S.W.3d at 437 (requiring construction of unambiguous procedural rule according to its plain or literal meaning).

Good Shepherd also contends that even if we consider only the express language of Rule 167, we must uphold the trial court’s order. Specifically, the trial court’s order provides, in part, that “Rule 167 shall not be effectively invoked or an offer made until such time as the agreed auditor files his final report.” This order was signed approximately one month after CompleteRx filed its declaration invoking Rule 167. Good Shepherd points out that Rule 167 permits a trial court to modify the deadline for effective invocation of Rule 167 and the making of an initial offer. Therefore, it contends, the trial court acted within its authority in modifying the deadline for invoking Rule 167, even though that modification effectively extended the time for Good

period. Because approximately one year of the agreement was not addressed in its audit, CompleteRx made an offer of \$70,000.00 to Good Shepherd to settle the case. This shifted the risk to Good Shepherd as contemplated under Chapter 42 and Rule 167. The trial court's order permitting Good Shepherd to delay its acceptance or rejection of Complete Rx's offer of settlement until after the court-appointed auditor completed his work took away the benefit of the statute for CompleteRx, i.e., requiring Good Shepherd to pay the entire cost of the court-appointed auditor if its own audit was correct. Because CompleteRx has no other way to take advantage of the statute, the trial court's order thwarted the legislature's intent. Accordingly, we hold that remedy by appeal is inadequate.

#### DISPOSITION

Having concluded that the trial court clearly abused its discretion by granting Good Shepherd's motion to modify the time limit to respond to CompleteRx's offer of settlement and that Complete Rx does not have an adequate remedy at law, we *conditionally grant mandamus relief*. We trust that the trial court will promptly vacate its order granting Good Shepherd's motion for modification of time limits pursuant to Texas Rule of Civil Procedure 167.5 signed December 8, 2011. The writ will issue only if the trial court fails to comply with the court's opinion and order *within ten days* after the date of the opinion and order. The trial court shall furnish this court, within the time for compliance with the court's opinion and order, a certified copy of its order evidencing such compliance. Our stay of the trial court's order is lifted.

JAMES T. WORTHEN  
Chief Justice

Opinion delivered April 18, 2012.  
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(PUBLISH)



**COURT OF APPEALS**  
**TWELFTH COURT OF APPEALS DISTRICT OF TEXAS**  
**ORDER**

**APRIL 18, 2012**

**NO. 12-11-00391-CV**

**COMPLETERX, LTD.,**  
Relator

v.

**HON. DAVID SCOTT BRABHAM,**  
Respondent

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**ORIGINAL PROCEEDING**

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ON THIS DAY came to be heard the petition for writ of mandamus filed by **COMPLETERX, LTD.** Said petition for writ of mandamus having been filed herein on December 9, 2011, and the same having been duly considered, because it is the opinion of this Court that the petition is meritorious, it is therefore **CONSIDERED, ADJUDGED and ORDERED** that the said petition for writ of mandamus be, and the same is, hereby **conditionally granted.**

And because it is further the opinion of this court that the trial judge will act promptly and vacate its order granting plaintiff's motion for modification of time limits pursuant to Texas Rule of Civil Procedure 167.5 signed December 8, 2011, and in its stead, will issue a certified copy of its order evidencing such compliance, the writ will not issue unless the Honorable David Scott Brabham, Judge of the 188th Judicial District Court of Gregg County,