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## Survey of Recent Mandamus Decisions of the Texas Supreme Court

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# SURVEY OF RECENT MANDAMUS DECISIONS OF THE TEXAS SUPREME COURT

*Douglas S. Lang\**  
*Rachel A. Campbell\*\**

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## I. INTRODUCTION

The Texas Supreme Court has long held that mandamus relief in that court is an “extraordinary remedy, not issued as a matter of right, but at the discretion of the court.”<sup>1</sup> Additionally, the supreme court has stated that while mandamus “can correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal,” appellate courts must be mindful that “the benefits of mandamus review are easily lost by overuse.”<sup>2</sup> Consistent with those statements, during the Survey period of January 1, 2014, through December 31, 2015, the supreme court granted mandamus relief only in limited circumstances. This article surveys the twenty-four published Texas Supreme Court mandamus opinions delivered during that time period, with particular focus on the twenty-one opinions in that group that involved the availability of mandamus relief to correct a clear abuse of discretion by a lower court when there is no adequate remedy by appeal. The purpose of this article is to identify and describe the approach and methods of analysis employed by the supreme court in recent mandamus opinions.

In Part II of this article, we briefly describe the fundamentals of the jurisdictional bases and standards of proof for mandamus. Part III provides a statistical analysis of mandamus cases in the Texas Supreme Court during the past two fiscal years, 2014 and 2015. In Part IV, we categorize and summarize each of the twenty-one mandamus opinions issued by the supreme court during the survey period in which a party alleged a clear abuse of discretion by a lower court and no adequate remedy by appeal. Those summaries offer an examination and comparison of how mandamus review is addressed in each particular category. Part V focuses on the supreme court’s varying approaches to addressing the adequacy of an appellate remedy in those twenty-one cases. Our analysis, presented in a chart format, shows that while it is not unusual for the supreme court to provide only a conclusory statement, or no mention at all, about the element of adequacy of an appellate remedy, the outcomes appear consistent with prior cases involving analogous fact situations. In Part VI, we describe the supreme court’s mandamus decisions during the survey period that fall outside the parameters of Part V. Finally, Part VII concludes this article with observations based on the foregoing parts.

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1. *In re Reece*, 341 S.W.3d 360, 374 (Tex. 2011) (orig. proceeding) (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding)).

2. *In re Prudential*, 148 S.W.3d at 138.

## II. MANDAMUS FUNDAMENTALS

The basis for jurisdiction over writs of mandamus in the intermediate appellate courts of Texas is statutory. Specifically, § 22.221 of the Texas Government Code provides the following:

- (a) Each court of appeals or a justice of a court of appeals may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court.
- (b) Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against a . . . judge of a district or county court in the court of appeals district; or . . . judge of a district court who is acting as a magistrate at a court of inquiry . . . in the court of appeals district.<sup>3</sup>

Additionally, other statutes provide for mandamus in the courts of appeals respecting specific matters, such as election duties.<sup>4</sup>

The Texas Supreme Court's mandamus jurisdiction stems from the Texas Constitution and statutes, and has been described by that court as *broad*.<sup>5</sup> In addition to mandamus jurisdiction concurrent with the courts of appeals pursuant to § 22.221 and statutes allowing for mandamus as to specific matters,<sup>6</sup> the supreme court possesses general original jurisdiction to issue writs of mandamus pursuant to Article V, Section 3(a) of the Texas Constitution.<sup>7</sup> Also, § 22.002(a) of the Government Code provides in part that the supreme court or a justice of the supreme court may issue writs of mandamus “agreeable to the principles of law regulating those writs” against “a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals, or any [other] officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.”<sup>8</sup> Further, the supreme court or, in vacation, a justice of that court, may issue a writ of mandamus to “compel a statutory county court judge, a statutory probate court judge, or a district judge to proceed to trial and judgment in a

3. TEX. GOV'T CODE ANN. § 22.221(a), (b) (West 2015).

4. *See, e.g.*, TEX. ELEC. CODE ANN. § 273.061 (West 2015) (“The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.”).

5. *See In re Dow*, 481 S.W.3d 215, 224 (Tex. 2015) (per curiam) (orig. proceeding); *In re Reece*, 341 S.W.3d at 373.

6. Unlike § 273.061 of the Election Code, see Tex. Elec. Code Ann. § 273.061 (West 2015), certain Texas statutes allow for mandamus relief only in the supreme court. *See, e.g.*, *In re Nestle USA, Inc.*, 387 S.W.3d 610, 617 (Tex. 2012) (orig. proceeding) (mandamus review of constitutionality of franchise tax statute was proper where legislature used language that gave supreme court power for such review).

7. *See* TEX. CONST. art. V, § 3(a). Specifically, that section authorizes the supreme court to issue writs of mandamus in two instances: (1) “as may be necessary to enforce its jurisdiction” and (2) “in such cases as may be specified” by the Legislature. *See In re Dow*, 481 S.W.3d at 224.

8. TEX. GOV'T CODE ANN. § 22.002(a) (West 2015).

case” agreeable to the principles and usages of law.<sup>9</sup> Finally, § 22.002(c) provides:

Only the supreme court has the authority to issue a writ of mandamus . . . against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.<sup>10</sup>

Rule 52 of the Texas Rules of Appellate Procedure governs mandamus proceedings in both the supreme court and the courts of appeals.<sup>11</sup> A petition seeking mandamus relief must state the basis of the court’s jurisdiction.<sup>12</sup> If the supreme court and the court of appeals have concurrent jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do so, which reason must be stated in the petition.<sup>13</sup> Further, failure to adhere to the other procedural provisions of Rule 52 may result in denial of relief.<sup>14</sup>

Despite mandamus not being an equitable remedy, a court issues a writ of mandamus under equitable principles.<sup>15</sup> “[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.”<sup>16</sup> On appeal, a court will issue mandamus “to correct such an abuse of discretion when there is no adequate remedy by appeal.”<sup>17</sup> “The adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments.”<sup>18</sup> “An appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments.”<sup>19</sup> “When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.”<sup>20</sup> And the specific facts of each case determine whether the appellate remedy is adequate.<sup>21</sup>

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9. *Id.* § 22.002(b).

10. *Id.* § 22.002(c).

11. *See* TEX. R. APP. P. 52.

12. *See id.* 52.3(e).

13. *See id.*

14. *See, e.g.,* State v. Naylor, 466 S.W.3d 783, 793 (Tex. 2015) (orig. proceeding); *In re* Butler, 270 S.W.3d 757, 758–59 (Tex. App.—Dallas 2008, orig. proceeding); *In re* Cullar, 320 S.W.3d 560, 567–68 (Tex. App.—Dallas 2010, orig. proceeding).

15. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding) (quoting *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex.1993) (orig. proceeding)).

16. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); *accord In re* Conner, 458 S.W.3d 532, 535 (Tex. 2015) (per curiam) (orig. proceeding); *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 218 (Tex. 2009) (orig. proceeding).

17. *In re* Conner, 458 S.W.3d at 535 (citing *In re Prudential*, 148 S.W.3d at 136).

18. *In re* Essex Ins. Co., 450 S.W.3d 524, 528 (Tex. 2014) (per curiam) (orig. proceeding) (quoting *In re* Team Rocket, L.P., 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding)).

19. *In re Prudential*, 148 S.W.3d at 136.

20. *Id.*

21. *In re* McAllen Med. Ctr., Inc., 275 S.W.3d 458, 469 (Tex. 2008) (orig. proceeding).

## III. MANDAMUS STATISTICS

Mandamus statistics for the Texas Supreme Court's 2014 fiscal year, which ran from September 1, 2013, to August 31, 2014, show that 219 new petitions for writ of mandamus were filed in the supreme court during that period.<sup>22</sup> Dispositions were made in 216 mandamus cases.<sup>23</sup> The petition for writ of mandamus was denied in 81.9%, or 177, of those dispositions and conditionally granted in 5.5%, or twelve, of those dispositions.<sup>24</sup> During the 2015 fiscal year, which ran from September 1, 2014, to August 31, 2015, 220 new petitions for writ of mandamus were filed in the supreme court and dispositions were made in 225 mandamus cases.<sup>25</sup> In 72%, or 162, of those dispositions, the petition for writ of mandamus was denied, and in 7.55%, or seventeen, of those dispositions, the petition was conditionally granted.<sup>26</sup> When compared with statistics for 2010–2013,<sup>27</sup> these figures show that the supreme court has consistently made mandamus relief available only in limited circumstances and that the percentage of cases in which the supreme court granted relief has not varied substantially over the past six years.

In the twenty-four mandamus opinions issued by the supreme court during the Survey period, the Texas Supreme Court granted petition for writ of mandamus in whole or in part in seventeen of those cases.<sup>28</sup> The supreme court denied petition for writ of mandamus in six of those cases and dismissed for lack of jurisdiction in one case. Oral argument was heard by the supreme court in eleven of those twenty-four cases.<sup>29</sup>

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22. See generally *Supreme Court Activity Detail: FY 2014*, TEX. COURTS ONLINE, <http://www.txcourts.gov/media/652335/SC-Activity-2014.pdf> [https://perma.cc/LM8N-VY3J] (last visited Oct. 18, 2016).

23. See *id.*

24. See *id.* Petitions otherwise disposed of were dismissed, abated, or struck. See *id.*

25. See generally *Supreme Court Activity Detail: FY 2015*, TEX. COURTS ONLINE, <http://www.txcourts.gov/media/1359925/2-SC-Activity-2015-revised.pdf> [https://perma.cc/Z2S9-JSA3] (last visited Oct. 18, 2016).

26. See *id.* The other thirty-six petitions disposed of were dismissed, abated, or struck. See *id.*

27. The percentages of petitions for writ of mandamus in the supreme court conditionally granted in 2010, 2011, 2012, and 2013, respectively, were 10.4%, 8.55%, 6.3%, and 2.25%. See Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 1 SMU ANN. TEX. SURV. 101, 103 n.16 (2014), [smulawreview.law.smu.edu/getattachment/Journals/TX-Survey/2015-Texas-Survey/Mandamus-\(1\).pdf](http://smulawreview.law.smu.edu/getattachment/Journals/TX-Survey/2015-Texas-Survey/Mandamus-(1).pdf); Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 66 SMU L. REV. 1155, 1156–57 (2013).

28. See generally TEX. R. APP. P. 52.8(d) (“When denying relief, the court may hand down an opinion but is not required to do so. When granting relief, the court must hand down an opinion as in any other case.”). The supreme court has not specifically stated its criteria for deciding whether to hand down an opinion when denying relief. We note that among the six opinions described above in which relief was denied, three included dissents or concurrences. See *State v. Naylor*, 466 S.W.3d 783 (Tex. 2015) (orig. proceeding); *In re State Bd. for Educator Certification*, 452 S.W.3d 802 (Tex. 2014) (orig. proceeding); *In re Ford Motor Co.*, 442 S.W.3d 265 (Tex. 2014) (orig. proceeding). One case decided an issue of first impression. See *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015) (orig. proceeding). None of those six opinions were per curiam.

29. See TEX. R. APP. P. 52.8(b)(4) (“[T]he court may set the case for oral argument.”).

IV. SUBJECT MATTER CATEGORIES OF RECENT TEXAS  
SUPREME COURT MANDAMUS CASES INVOLVING ALLEGED  
ABUSE OF DISCRETION BY LOWER COURT AND NO  
ADEQUATE REMEDY BY APPEAL

A. MOTION FOR NEW TRIAL

*In re Whataburger Restaurants LP*<sup>30</sup> involved a determination of whether the facts and circumstances supported the trial court's granting of a motion for new trial. A lawsuit was filed by a restaurant patron, Jose Acuna, against Whataburger Restaurants LP (Whataburger) for injuries arising from a fight. During the jury selection process, potential jurors completed a written questionnaire that asked whether they had "ever been a party to a lawsuit."<sup>31</sup> The trial court rendered a take-nothing judgment based on the jury's 10-2 verdict in Whataburger's favor.

Acuna filed a motion for new trial in which he asserted that one of the jurors who had joined in the majority verdict, Georgina Chavez, "had committed misconduct by failing to disclose in her questionnaire that she had been a defendant in two prior [debt] collection suits and a bankruptcy action."<sup>32</sup> The trial court granted Acuna's motion for new trial based on its findings that Chavez did not complete her juror questionnaire correctly, and that her "mistake was material and . . . it resulted in probable injury."<sup>33</sup>

Following the denial of mandamus relief in the court of appeals, Whataburger sought mandamus review in the Texas Supreme Court. The supreme court stated in part that (1) "[a] writ of mandamus shall issue to correct a clear abuse of discretion committed by a trial court in granting a new trial";<sup>34</sup> and (2) "[a] trial court does not abuse its discretion so long as its stated reason for granting a new trial is legally appropriate and specific enough to indicate that the trial court derived the reasons from the particular facts and circumstances of the case at hand."<sup>35</sup> Additionally, the supreme court noted that "[t]o warrant a new trial for jury misconduct, the movant must establish (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury."<sup>36</sup> The supreme court observed that Acuna's attorney testified in the trial court that if Chavez had testified she had been a defendant in prior lawsuits, he would have questioned her about those suits and struck her as a juror.<sup>37</sup> However, the supreme court stated, "Generally, such testimony about what a person

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30. 429 S.W.3d 597 (Tex. 2014) (per curiam) (orig. proceeding).

31. *Id.* at 598.

32. *Id.*

33. *Id.*

34. *Id.* (citing *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 762 (Tex. 2013) (orig. proceeding)).

35. *Id.* The supreme court did not specifically discuss adequacy of an appellate remedy.

36. *Id.* (quoting *Golden Eagle Archery v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000)).

37. *Id.* at 599.

‘would have’ done . . . is speculative and conclusory in the absence of some evidentiary support.”<sup>38</sup>

According to the supreme court, the evidence of what Acuna’s attorney actually did supported a contrary conclusion because (1) although four prospective jurors each disclosed they had been defendants in prior lawsuits, Acuna’s attorney did not challenge them; (2) one of those four sat as a juror and joined the majority verdict; and (3) Acuna failed to provide evidence to suggest Chavez’s experience as a defendant in a lawsuit was meaningfully different from other prospective jurors’ experiences.<sup>39</sup> The supreme court concluded that “[b]ecause the record contains no competent evidence that Chavez’s nondisclosure resulted in probable injury, and the only competent evidence supports that it did not, the trial court abused its discretion in granting a new trial.”<sup>40</sup> Mandamus relief was conditionally granted by the supreme court and the trial court was ordered to withdraw its order and render judgment on the verdict.<sup>41</sup>

*In re Health Care Unlimited, Inc.*<sup>42</sup> addressed the issue of whether the granting of a motion for new trial based on a juror’s communications with a party’s representative was improper. Belinda Valdemar died in an automobile accident that involved a vehicle driven by an employee of Health Care Unlimited (HCU).<sup>43</sup> Valdemar’s estate and survivors (collectively, Valdemar’s Survivors) sued HCU, alleging HCU was vicariously liable. The jury found that the HCU employee was not acting within the scope of her employment and thus HCU was not vicariously liable for her negligence.

“Valdemar’s Survivors moved for a mistrial, alleging that the presiding juror, Dominique Alegria, had engaged in juror misconduct by communicating with another HCU employee, Sonny Villarreal, during breaks while the jury was deliberating.”<sup>44</sup> At a hearing on that motion in the trial court, Alegria and Villarreal admitted they had telephone conversations during the time the jury was deliberating, but stated that their discussions involved only preparations for an approaching church retreat.<sup>45</sup> Further, Alegria denied seeing or noticing Villarreal at the trial.<sup>46</sup>

The trial court granted the motion for mistrial, treating it as a motion for new trial.<sup>47</sup> In its order, the trial court found (1) Villarreal “sat behind and conferred with HCU’s counsel during the evidential part of the trial ‘in the full view of the jury’”; and (2) Alegria “violated the court’s instructions by communicating with an HCU representative during the trial

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38. *Id.*

39. *See id.* at 599–600.

40. *Id.* at 600.

41. *See id.*

42. 429 S.W.3d 600 (Tex. 2014) (per curiam) (orig. proceeding).

43. *Id.* at 601.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*



of the case.”<sup>48</sup> The trial court concluded in the order that “[i]n light of the totality of the circumstances, the integrity of the verdict rendered in this cause has been compromised and in the interest of justice, a new trial should be granted.”<sup>49</sup>

After unsuccessfully seeking mandamus relief in the court of appeals, HCU filed a petition for writ of mandamus in the Texas Supreme Court. The supreme court noted that it had concluded in previous cases that an appellate court may “conduct a merits-based review of a trial court’s order granting a new trial” and “evaluate the correctness of the stated reason.”<sup>50</sup> Additionally, the supreme court observed that pursuant to Texas Rule of Civil Procedure 327(a), a movant for a new trial based on jury misconduct must establish that (1) “the misconduct occurred, (2) it was material, and (3) it probably caused injury.”<sup>51</sup> As to those requirements, the supreme court stated that “[t]o show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he would otherwise have done on one or more issues vital to the judgment.”<sup>52</sup> According to the supreme court, the record revealed that rather than applying that standard, “the trial court essentially used an ‘appearance of impropriety’ standard” in granting the motion in question.<sup>53</sup> The supreme court reasoned that because “there is no evidence that the communications [between Alegria and Villarreal], although prohibited by the trial court, were related to the trial or probably affected its outcome,” the facts did not support a finding of probable injury as required by Rule 327.<sup>54</sup> Accordingly, the supreme court concluded that the trial court abused its discretion and mandamus relief was appropriate.<sup>55</sup>

## B. REFUSAL TO DISMISS

### 1. *Forum Non Conveniens*

*In re Ford Motor Co.*<sup>56</sup> presented a novel fact situation that required the Texas Supreme Court to interpret the definition of *plaintiff* in the “Texas-resident exception” to the Texas forum non conveniens statute.<sup>57</sup> The case arose when a tire burst on a Ford vehicle being driven in Mexico

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48. *Id.* at 601–02.

49. *Id.* at 602.

50. *Id.* (citing *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 757–58 (Tex. 2013) (orig. proceeding)).

51. *Id.* (citing TEX. R. CIV. P. 327(a) and *Golden Eagle Archery v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000)).

52. *Id.* at 603 (quoting *Redinger v. Living, Inc.*, 689 S.W.2d 415, 419 (Tex. 1985)).

53. *Id.*

54. *Id.*; see TEX. R. CIV. P. 327.

55. *In re Health Care Unlimited*, 429 S.W.3d at 600. The adequacy of a remedy by appeal was not specifically addressed by the supreme court.

56. 442 S.W.3d 265 (Tex. 2014) (orig. proceeding) (court’s opinion authored by Justice Willett, while dissenting opinions were rendered by Justices Johnson and Boyd).

57. *Id.* at 268 (That exception “allows plaintiffs who are legal residents of Texas to anchor a case in a Texas forum even if forum non conveniens would otherwise favor dismissal.”); see TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2015).

by Juan Tueme Mendez. Juan was injured and the passenger, Juan's brother Cesar Tueme Mendez, was killed.<sup>58</sup>

Juan, who was not a legal resident of Texas, sued his deceased brother's estate in Hidalgo County, where Cesar's estate was being administered. Juan alleged in his petition that Cesar had failed to properly maintain the vehicle and the tires. Cesar's estate in turn filed a third-party claim against Ford and Michelin, alleging defective design and negligence.<sup>59</sup>

Additionally, several family members of Cesar, who were legal residents of Texas, intervened in the lawsuit as wrongful death beneficiaries, asserting claims against Ford. Several months later, Juan amended his petition to add Ford as a defendant in his personal injury claim.

Ford filed a motion to dismiss based on forum non conveniens, which was denied by the trial court. In a petition for writ of mandamus to the court of appeals, Ford contended that the denial amounted to an abuse of discretion because the intervening beneficiaries were not plaintiffs under the Texas-resident exception.<sup>60</sup> After that relief was denied, Ford sought mandamus relief in the supreme court. Ford did not dispute that (1) Texas Civil Practice and Remedies Code § 71.051 states the law of Texas respecting forum non conveniens;<sup>61</sup> (2) subsection (e) of that statute creates an exception to the forum non conveniens rule for plaintiffs who are legal residents of Texas;<sup>62</sup> and (3) subsection (h)(2) of that statute defines plaintiff.<sup>63</sup> Rather, Ford argued none of the wrongful death beneficiaries

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58. See *In re Ford*, 442 S.W.3d at 268.

59. *Id.*

60. *Id.*

61. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (“If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action.”).

62. *Id.* § 71.051(e). Under that subsection, “[t]he court may not stay or dismiss a plaintiff’s claim under Subsection (b) if the plaintiff is a legal resident of this state” and “[i]f an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court may not stay or dismiss the action under Subsection (b) if the plaintiffs who are legal residents of this state are properly joined in the action and the action arose out of a single occurrence.” Act of May 29, 1997, 75th Leg., R.S., ch. 424 § 1, Sec. 71.051(e) Tex. Sess. Law. Serv. (West 1997) (amended 2015) current version at TEX. CIV. PRAC. REM. CODE ANN. § 71.051(e) (West 2015). Subsection (e) was amended subsequent to court’s decision.

63. “Subsection 71.051(h)(2) defines *plaintiff* as follows:

“Plaintiff” means a party seeking recovery of damages for personal injury or wrongful death. In a cause of action in which a party seeks recovery of damages for personal injury to or the wrongful death of another person, “plaintiff” includes both that other person and the party seeking such recovery. The term does not include a counterclaimant, cross-claimant, or third-party plaintiff or a person who is assigned a cause of action for personal injury, or who accepts an appointment as a personal representative in a wrongful death action, in bad faith for purposes of affecting in any way the application of this section.

Act of May 29, 1997, 75th Leg., R.S., ch. 424 § 1, Sec. 71.051(h)(2), Tex. Sess. Law. Serv. (West 1997) (amended 2015) current version at TEX. CIV. PRAC. REM. CODE ANN. § 71.051(h)(2) (West 2015). Subsection (h) was amended subsequent to court’s decision.

qualified as a plaintiff under the statutory definition for two reasons: (1) “the beneficiaries are third-party plaintiffs expressly excluded by the definition”; and (2) “the wrongful death beneficiaries are combined with the decedent into one single plaintiff” and the legal residency of the decedent, who in this case was not a legal resident of Texas, controls.<sup>64</sup>

Empathizing with Ford, the supreme court recognized that Ford “does not have an adequate remedy by appeal” because “[w]e have held that no adequate remedy by appeal can rectify an erroneous denial of a forum non conveniens motion.”<sup>65</sup> But after a lengthy analysis that focused on the language and intent of the forum non conveniens statute, the supreme court rejected both of Ford’s arguments and reasoned, “the intervening wrongful-death beneficiaries are distinct plaintiffs within the meaning of the Texas-resident exception.”<sup>66</sup> Consequently, the supreme court denied mandamus relief, concluding that the denial of Ford’s motion to dismiss did not constitute an abuse of discretion.<sup>67</sup>

In *In re Bridgestone Americas Tire Operations, LLC (In re Bridgestone)*,<sup>68</sup> the Texas Supreme Court again addressed application of the Texas-resident exception to the Texas forum non conveniens statute described above.<sup>69</sup> Specifically, the supreme court faced the issue of whether that exception applies in a case in which a Texas resident filed suit as next friend of two nonresident minors.<sup>70</sup> The two minors (the children) and their parents resided in Mexico when the parents were killed in a vehicle accident in Mexico. After the parents passed away, “the children’s maternal grandparents became the children’s legal guardians by operation of Mexico law and took custody of the children in Mexico.”<sup>71</sup> Even though the children had a legal guardian, the maternal uncle of the children, a resident of Texas, filed a wrongful death lawsuit against Bridgestone in Texas as “next friend” of the children. Specifically, he alleged a defective tire manufactured by Bridgestone had caused the accident. Bridgestone moved to dismiss for forum non conveniens, arguing that the case belonged in Mexico, not Texas. The trial court, however, denied that motion.

After an unsuccessful effort to obtain mandamus relief in the court of appeals, Bridgestone filed a petition for writ of mandamus in the supreme court. Bridgestone contended that Rodriguez’s Texas residency did not foreclose dismissal for two reasons: (1) “Rodriguez lacked authority to

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64. *In re Ford*, 442 S.W.3d at 270.

65. *Id.* at 269 (citing *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007) (orig. proceeding)).

66. *Id.* at 270–84.

67. *See id.* at 284.

68. 459 S.W.3d 565 (Tex. 2015) (orig. proceeding) (opinion authored by Justice Lehrmann).

69. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2015), *supra* notes 57–67.

70. *In re Bridgestone*, 459 S.W.3d at 568.

71. *Id.*

sue as the children's next friend because they had a legal guardian";<sup>72</sup> and (2) "a next friend is not a 'plaintiff' whose residency may trigger the [Texas-resident] exception."<sup>73</sup>

First, the supreme court reasoned that although the children's grandparents were recognized as the children's guardians under the law of Mexico, they had no authority to sue in that capacity on the children's behalf in Texas.<sup>74</sup> Therefore, the supreme court concluded, the children could sue by next friend in Texas.<sup>75</sup> Next, the supreme court observed that (1) the Texas forum non conveniens statute defines plaintiff as "a party seeking recovery of damages for personal injury or wrongful death"; and (2) Texas law is well-settled that "[i]n a suit by a 'next friend,' the real party plaintiff is the child and not the next friend."<sup>76</sup> Consequently, that court concluded, "a next friend's legal residency in Texas does not trigger the forum-non-conveniens statute's Texas-resident exception."<sup>77</sup>

Despite these conclusions, the supreme court overturned the trial court's decision because the forum non conveniens factors mandated dismissal.<sup>78</sup> That court concluded (1) "the forum-non-conveniens factors 'clearly and overwhelmingly favor a Mexican forum for resolution of the dispute'";<sup>79</sup> and (2) the trial court abused its discretion in denying Bridgestone's motion to dismiss.<sup>80</sup> The supreme court conditionally granted Bridgestone's petition for writ of mandamus and ordered the trial court to vacate its order denying Bridgestone's motion to dismiss and "set terms and conditions for . . . dismissing [this] action . . . as the interests of justice may require."<sup>81</sup>

## 2. *Want of Prosecution*

In the case of *In re Conner*,<sup>82</sup> the Texas Supreme Court addressed the issue of "whether a trial court abuses its discretion by refusing to grant a motion to dismiss for want of prosecution in the face of unmitigated and unexplained delay."<sup>83</sup> In 2004, Donald and Crystal Peel filed a lawsuit against Michael Conner and his employer, IESI Solid Waste Services (collectively, Conner), alleging injuries from a vehicle accident. The Peels

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72. *Id.* at 569; see TEX. R. CIV. P. 44 (stating in part that "[m]inors . . . who have no legal guardian may sue and be represented by 'next friend'").

73. *In re Bridgestone*, 459 S.W.3d at 569.

74. *Id.* at 577.

75. *See id.*

76. *Id.* at 572–73 (quoting *Garcia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984)); see also TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2) (West 2015).

77. *In re Bridgestone*, 459 S.W.3d at 573.

78. *Id.* at 577.

79. *Id.* (citing *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 675–76 (Tex. 2007) (orig. proceeding)).

80. *Id.* The opinion contains no specific discussion of adequacy of an appellate remedy.

81. *Id.*; TEX. CIV. PRAC. & REM. CODE § 71.051(c).

82. 458 S.W.3d 532 (Tex. 2015) (per curiam) (orig. proceeding).

83. *Id.* at 534.

did not respond to Conner's timely answer and discovery request.<sup>84</sup> The Peels, however, responded in June 2007, when Conner filed a summary judgment motion, several months before a trial setting. The trial judge cancelled the trial setting, but never addressed the motion. In September 2011,

the Peels had taken no other action to advance the case and Conner moved to dismiss for want of prosecution. The Peels responded that the delay was due to their counsel's health issues, but did not indicate when those health issues had occurred. The trial court refused to dismiss the case.

In October 2013, when the Peels still had done nothing further to pursue their claims, Conner again moved to dismiss for want of prosecution. At the hearing on that motion, [1] the Peels offered no additional excuse for their delay . . . [and] [2] Connor cited court records showing that the Peels's counsel had appeared in numerous matters during the prior two years.<sup>85</sup>

The trial court again declined to grant summary judgment, but rather set the case for trial and directed the Peels to respond to Conner's 2004 discovery requests. Conner filed a petition for mandamus relief in the court of appeals, requesting that the trial court be directed to dismiss the case. After that relief was denied, Conner filed a petition for writ of mandamus in the supreme court.

The supreme court stated in part that (1) "a delay of an unreasonable duration . . . , if not sufficiently explained, will raise a conclusive presumption of abandonment of the plaintiff's suit";<sup>86</sup> and (2) "[t]his presumption justifies the dismissal of a suit under either a court's inherent authority or Rule 165a of the Texas Rules of Civil Procedure."<sup>87</sup> Further, the supreme court noted that Rule 165a(2) provides for dismissal for want of prosecution when a case is "not disposed of within time standards promulgated by the Supreme Court," which standards generally require civil cases to be "brought to trial or final disposition within eighteen months of the appearance date."<sup>88</sup> The supreme court concluded (1) "[t]he Peels' failure to provide good cause for their nearly decade-long delay mandates dismissal under Rule 165a(2)"; and (2) "[a]bsent any reasonable explanation for the delay, the trial court clearly abused its discretion by disregarding the conclusive presumption of abandonment."<sup>89</sup> Additionally, the supreme court reasoned that "a trial court's erroneous refusal to dismiss a case for want of prosecution cannot effectively be

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84. *Id.*

85. *Id.*

86. *Id.* (quoting *Callahan v. Staples*, 161 S.W.2d 489, 491 (Tex. 1942) (orig. proceeding)).

87. *Id.* (citing TEX. R. CIV. P. 165a).

88. *In re Conner*, 458 S.W.3d at 535 (citing TEX. R. CIV. P. 165a(2); TEX. R. JUD. ADMIN. 6.1(b)(1)).

89. *Id.*

challenged on appeal.”<sup>90</sup> Specifically, the court stated:

A defendant should not be required to incur the delay and expense of appeal to complain of delay in the trial court. To deny relief by mandamus permits the very delay dismissal is intended to prevent. In addition, the danger that a trial will be hampered by stale evidence and lost or clouded memories is particularly distinct after the delay in this case.<sup>91</sup>

Accordingly, the supreme court conditionally granted Conner’s petition for writ of mandamus and directed the trial court to dismiss the case for want of prosecution.<sup>92</sup>

### 3. *Direct Action Against Insurer*

In *In re Essex Insurance Co.*,<sup>93</sup> the Texas Supreme Court addressed for the first time whether a plaintiff can maintain a direct action against a defendant’s liability insurer for a declaratory judgment on coverage before liability is determined by agreement or judgment. Rafael Zuniga sued San Diego Tortilla (SDT) after incurring injury to his hand while operating a tortilla machine at an SDT facility.<sup>94</sup> Essex Insurance Company (Essex), which had issued a commercial general liability policy insuring SDT, investigated the accident and “concluded that the policy [did] not cover Zuniga’s claims because Zuniga was an SDT employee at the time of the accident” and therefore a policy exclusion concerning bodily injury to employees applied.<sup>95</sup> Zuniga and SDT, however, disagreed, asserting instead that Zuniga was working at SDT as an independent contractor. Essex maintained its position that Zuniga was an employee, but “agreed to defend SDT under a reservation of its right to refuse to indemnify SDT against any judgment.”<sup>96</sup>

“After Essex rejected Zuniga’s offer to settle his claims against SDT for the policy limits,” Zuniga added Essex as a defendant and sought “a declaration that the policy require[d] Essex to indemnify SDT for its liability to Zuniga . . . . Essex moved to dismiss Zuniga’s claims [against Essex as ‘baseless’] under Texas Rule of Civil Procedure 91a.”<sup>97</sup> Specifically, Essex argued that (1) under Texas’s “no direct action” rule, an injured party cannot sue the tortfeasor’s insurer directly until the tortfeasor’s liability has been finally determined by agreement or judgment; and (2) the “no direct action” rule, Zuniga’s lack of standing, and a lack of ripeness barred Zuniga from suing Essex until SDT’s liability to Zuniga was determined.<sup>98</sup> The trial court denied Essex’s motion to

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90. *Id.*

91. *Id.*

92. *See id.*

93. 450 S.W.3d 524 (Tex. 2014) (per curiam) (orig. proceeding).

94. *Id.* at 525.

95. *Id.*

96. *Id.*

97. *Id.* (citing TEX. R. CIV. P. 91a).

98. *Id.* at 525–26.

dismiss.<sup>99</sup>

After being denied mandamus relief in the court of appeals, Essex filed a petition for writ of mandamus in the supreme court. In response, Zuniga argued that (1) his claims against Essex did not violate the “no direct action” rule because he sought merely a declaration, as opposed to a money judgment; and (2) the Texas Declaratory Judgments Act expressly permitted him to seek such relief.<sup>100</sup> But the supreme court (1) rejected both of those arguments, citing policy considerations that included avoiding prejudice and conflicts of interest; and (2) concluded that the trial court abused its discretion by denying the motion to dismiss Zuniga’s claims.<sup>101</sup>

After finding that the trial court abused its discretion, the supreme court addressed whether Essex had met the mandamus requirement of no adequate remedy by appeal.<sup>102</sup> The supreme court observed that “[t]he adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments.”<sup>103</sup> Further, the court stated:

Balancing these interests, we have previously held that “mandamus relief is appropriate to ‘spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.’” *In re John G. & Marie Stella Kenedy Mem’l Found.*, 315 S.W.3d 519, 523 (Tex. 2010) (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004)). In light of the conflict of interest and prejudice that we have noted above, we conclude that mandamus relief is appropriate to spare the parties and the public the time and money spent on fatally flawed proceedings.<sup>104</sup>

Accordingly, the supreme court conditionally granted the mandamus relief requested by Essex.<sup>105</sup>

#### 4. Workers’ Compensation

*In re Crawford & Co.* required the Texas Supreme Court to assess whether numerous claims filed by an injured worker fell within the exclusive jurisdiction of the Division of Workers’ Compensation of the Texas Department of Insurance (the Division).<sup>106</sup> Glenn Johnson suffered em-

99. *See id.* at 526.

100. *Id.*

101. *See id.* at 527–28.

102. *Id.* at 528.

103. *Id.* (quoting *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding)).

104. *Id.* In a footnote, the supreme court noted that Essex also asserted it need not demonstrate that it lacks an adequate remedy on appeal to obtain mandamus relief because the trial court “exceeded its jurisdiction” by denying Essex’s Rule 91a motion. *Id.* at 526 n.2. The supreme court, however, stated it need not reach that argument because Essex demonstrated it does not have an adequate remedy by appeal. *Id.*

105. *See id.*

106. *In re Crawford & Co.*, 458 S.W.3d 920, 921 (Tex. 2015) (per curiam) (orig. proceeding); *see* TEX. LAB. CODE ANN. § 402.001(b) (West 2015) (establishing “division of work-

ployment-related injuries that entitled him to lifetime workers' compensation benefits. But disputes over the details of his benefits eventually led to a contested case hearing. In a separate proceeding, Johnson and his wife filed a lawsuit against his employer's workers' compensation insurance provider, its claims services contractors, and the claims services contractors' employee Patsy Hogan (collectively, Crawford). According to the Johnsons, "[r]ather than manage the claim' and adjust it 'in a fair and reasonable manner,'" Crawford delayed and denied benefits that the Johnsons were entitled to receive.<sup>107</sup> In their lawsuit, the Johnsons (1) asserted numerous causes of action, including tort claims,<sup>108</sup> contract claims,<sup>109</sup> and statutory claims under the Texas Insurance Code and the Texas Deceptive Trade Practices Act;<sup>110</sup> and (2) sought relief, including actual damages for physical and other injuries, exemplary damages, statutory damages, and "injunctive relief prohibiting Crawford from continuing to engage in such 'extreme and outrageous' conduct."<sup>111</sup>

The Johnsons acknowledged in the trial court that claims for workers' compensation benefits must be pursued through the administrative procedures of the Texas Workers' Compensation Act.<sup>112</sup> They, however, contended in their pleading that their claims could be pursued in the courts without exhausting the Act's administrative remedies because such claims were for "additional, independent, and 'unrelated' damages."<sup>113</sup> Crawford disagreed and filed a plea to the jurisdiction and motion for summary judgment. Specifically, Crawford argued that the Division had "exclusive jurisdiction over all of the Johnsons' claims because they arose out of the workers' compensation claims-handling process."<sup>114</sup> "The trial court dismissed the Johnsons' claims for breach of the common law duty of good faith and fair dealing and for violations of the Texas Insurance Code but refused to dismiss the other claims."<sup>115</sup> After the court of appeals refused to grant Crawford's mandamus relief, Crawford sought mandamus relief in the supreme court.

The supreme court conditionally granted Crawford's mandamus relief.<sup>116</sup> In its analysis, the supreme court noted the rule applied in its previous case, *Texas Mutual Insurance Co. v. Ruttiger*:<sup>117</sup> "[T]he [Workers'

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ers' compensation" as a division within the Texas Department of Insurance to administer and operate the workers' compensation system of the state of Texas).

107. *In re Crawford*, 458 S.W.3d at 922.

108. *See id.* at 922. (The Johnsons' tort claims included "negligence; gross negligence; negligent, fraudulent, and intentional misrepresentation; fraud; fraud by non-disclosure; fraudulent inducement; intentional infliction of emotional distress; malicious prosecution; and conspiracy").

109. *See id.* (Contract claims asserted by the Johnsons included "breach of contract; quantum meruit; and breach of the common law duty of good faith and fair dealing").

110. *See id.*

111. *Id.*

112. *See* TEX. LAB. CODE ANN. §§ 401.001–419.007 (West 2015).

113. *In re Crawford*, 458 S.W.3d at 922.

114. *Id.* at 922–23.

115. *Id.* at 923.

116. *Id.* at 928–29.

117. 381 S.W.3d 430, 431 (Tex. 2012).



Compensation Act] provides the exclusive process and remedies for claims arising out of a carrier's investigation, handling, or settling of a claim for workers' compensation benefits."<sup>118</sup> Further, the supreme court stated, "in assessing whether a claim falls within the Division's exclusive jurisdiction, courts must look at the substance of the claim."<sup>119</sup> After an analysis in which it addressed the substance of each of the Johnsons' claims, the supreme court concluded that all of those claims arose out of Crawford's investigation, handling, and settling of the Johnsons' claim for workers' compensation benefits and therefore fell within the Division's exclusive jurisdiction.<sup>120</sup> The supreme court stated that "[b]ecause the Johnsons failed to exhaust their administrative remedies under the Act prior to filing this action, the trial court lacked jurisdiction and should have dismissed it."<sup>121</sup> And thus, the supreme court concluded Crawford was entitled to mandamus relief.<sup>122</sup>

### 5. Enforcement of Settlement

In the case of *In re Vaishangi*,<sup>123</sup> the Texas Supreme Court addressed whether the trial court had jurisdiction to enforce a settlement agreement when the defendant moved to enforce the agreement nearly one year after the case's dismissal. A group of several entities and individuals (collectively, Vaishangi) purchased "a commercial real estate lien note and related security instruments" from Southwestern National Bank (the Bank) to finance a hotel.<sup>124</sup> Subsequently, "the Bank accelerated the note and began proceedings to foreclose on the hotel property."<sup>125</sup> In response, Vaishangi filed a lawsuit in Harris County district court (the trial court) alleging breach of contract and wrongful foreclosure.<sup>126</sup> The parties settled and had the agreement memorialized in a "handwritten Rule 11 agreement" that was signed by the parties and the trial court.<sup>127</sup> In the agreement, Vaishangi "agree[d] to execute" a certain loan-modification agreement.<sup>128</sup> On that same day that the parties memorialized the agreement, the Bank filed the Rule 11 agreement together with an unsigned

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118. *In re Crawford*, 458 S.W.3d at 925–26.

119. *Id.* at 926.

120. *See id.* at 928.

121. *Id.* at 929.

122. *See id.* (citing *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 624 (Tex. 2007) (orig. proceeding) (granting mandamus to require dismissal of claims over which public utility commission had exclusive jurisdiction because "[a]llowing the trial court to proceed if the PUC has exclusive jurisdiction would disrupt the orderly processes of government") and *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004) (orig. proceeding) (same)). The supreme court did not specifically mention adequacy of an appellate remedy. *Cf. In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam) (orig. proceeding) (where trial court lacked jurisdiction and order was therefore void, party did not have adequate remedy by appeal and was entitled to mandamus relief).

123. 442 S.W.3d 256 (Tex. 2014) (per curiam) (orig. proceeding).

124. *Id.* at 257.

125. *Id.* at 258.

126. *Id.*

127. *Id.*; see TEX. R. CIV. P. 11.

128. *In re Vaishangi*, 442 S.W.3d at 258.

loan-modification agreement in the trial court.<sup>129</sup> Several days later, “the trial court signed an agreed order dismissing all claims.”<sup>130</sup> The signed order, however, failed to incorporate the entire Rule 11 agreement.<sup>131</sup>

After further disagreements about the terms of the settlement and the remaining principal, the Bank foreclosed on the hotel property and Vaishangi filed suit in Bexar County for wrongful foreclosure. In response, the Bank filed a “Motion to Enforce Settlement Agreement”—the agreement that arose in the Harris County lawsuit described above that had been dismissed eleven months prior.<sup>132</sup> Vaishangi argued (1) “the trial court had no jurisdiction to enforce the Rule 11 agreement because the trial court’s plenary power to do so expired thirty days after signing the dismissal order”; and (2) a “genuine issue of material fact existed regarding the balance owed under the modification agreement that should be resolved by trial.”<sup>133</sup> The trial court “issued an order granting the Bank’s motion to enforce the Rule 11 agreement [and] ordering Vaishangi to execute the modification agreement.”<sup>134</sup> Vaishangi unsuccessfully sought mandamus relief in the court of appeals, then filed a petition for writ of mandamus in the supreme court. Specifically, Vaishangi sought to “set aside the trial court’s enforcement order by contending that the trial court lacked jurisdiction” as to that order.<sup>135</sup>

Summarizing the issues, the supreme court made two observations: (1) “[i]f the Rule 11 agreement is a final judgment, as the Bank argues, the trial court maintains continuing jurisdiction to enforce that judgment”; and (2) “[i]f, however, the agreement is simply an interlocutory order, and the dismissal order signed four days later is the court’s final judgment, as Vaishangi argues, the trial court was without jurisdiction to enforce the Rule 11 agreement because its plenary power had expired.”<sup>136</sup> Additionally, the supreme court noted:

When parties dictate a settlement agreement on the record (creating an enforceable agreement under Rule 11) and the trial court approves it on the record, such a settlement agreement does not constitute an agreed judgment unless “[t]he words used by the trial court . . . clearly indicate the intent to render judgment at the time the words are expressed.”<sup>137</sup>

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* (“Because Vaishangi had not yet executed the loan-modification agreement, the motion to enforce requested that the court order Vaishangi to pay damages, costs, and attorney’s fees. Alternatively, the Bank requested that the court order Vaishangi to execute the loan modification agreement.”).

133. *Id.* at 258–59.

134. *Id.* at 259.

135. *Id.*

136. *Id.* (citing TEX. R. CIV. P. 329b(d) (providing trial court’s plenary power runs for thirty days after judgment is signed)).

137. *Id.* (citing *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995) (per curiam)).

Based on the record, the supreme court concluded that “[t]he only reasonable conclusion is that the dismissal order is the trial court’s final judgment and the Rule 11 agreement is not.”<sup>138</sup> According to the supreme court, (1) “[w]hen, as here, the trial court’s plenary power had expired, a party could not ‘reinvest the trial court that dismissed the case with jurisdiction to enforce the settlement agreement’ by filing a post-judgment motion to enforce the agreement”;<sup>139</sup> (2) “[w]hen the trial court nevertheless heard the motion and issued an order enforcing the settlement agreement, the trial court exceeded its jurisdictional authority”;<sup>140</sup> and (3) “[i]n these instances, mandamus is proper even without a showing that the relator lacks an adequate remedy on appeal.”<sup>141</sup>

## 6. Standing

*In re Fisher*<sup>142</sup> presented several mandamus issues, including whether an aggrieved party has standing to assert claims after the sale of a company and whether the trial court has jurisdiction over that party’s claims against certain parties. In May 2007, Mike Richey sold his Richey Oilfield Construction, Inc. (Richey Oil) interest to Nighthawk Oilfield Services, Ltd. (Nighthawk). Mark Fisher and Reece Boudreaux (relators or defendants) were limited partners of Nighthawk.<sup>143</sup> Under the terms of the transaction, (1) Richey Oil became Nighthawk’s wholly-owned subsidiary; and (2) Richey “remain[ed] employed as president of Richey Oil and [became] a limited partner in Nighthawk.”<sup>144</sup> In 2009, Nighthawk and Richey Oil filed for bankruptcy.

Richey sued defendants, asserting claims for breach of fiduciary duty, common law fraud, statutory fraud, violations of the Texas Securities Act, defamation, negligent misrepresentation, and interference with prospective business relations. In response, defendants argued that Richey’s claims should be dismissed for lack of subject matter jurisdiction because (1) Richey no longer had standing to claims related to his reputation or goodwill, because those rights had been conveyed to Nighthawk; and (2) several of Richey’s “other claims belonged to Nighthawk and could only

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138. *Id.* at 260.

139. *Id.* (citing *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009)). The supreme court noted that “[w]hile a party can certainly pursue a claim for breach of a settlement agreement even when that settlement agreement is not an agreed judgment, [t]he party seeking enforcement of the settlement agreement must pursue a separate claim for breach of contract.” *Id.*

140. *Id.* at 261.

141. *Id.* (citing *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (per curiam) (orig. proceeding) (“Mandamus is proper if a trial court issues an order beyond its jurisdiction.”)); see also *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam) (orig. proceeding) (where trial court lacked jurisdiction, party was without adequate remedy by appeal).

142. 433 S.W.3d 523 (Tex. 2014) (orig. proceeding) (opinion authored by Justice Johnson).

143. *Id.* at 525.

144. *Id.*

be brought by the bankruptcy trustee.”<sup>145</sup> Additionally, defendants moved to transfer venue or dismiss the lawsuit under the mandatory venue selection clauses in the documents signed by the parties at the time of the sale of Richey Oil. The trial court, however, denied defendants’ pleas to the jurisdiction and their motion respecting venue.<sup>146</sup> Defendants unsuccessfully sought mandamus relief in the court of appeals, then filed a petition for mandamus relief in the Texas Supreme Court.<sup>147</sup>

As to standing, Richey argued in the supreme court that (1) the defendants were not entitled to mandamus review on that issue because defendants could not show they lack an adequate remedy by appeal; and (2) even if defendants were granted mandamus review, Richey had standing because of the personal damages unique to him.<sup>148</sup> The supreme court observed: (1) Texas law provides that “a partner who is ‘personally aggrieved’ may bring claims for those injuries he suffered directly”; and (2) “Richey’s allegations do not affirmatively negate his having been ‘personally aggrieved.’”<sup>149</sup> Therefore, the supreme court concluded it “need not decide whether mandamus review [was] available to [defendants] as to Richey’s standing to assert his claims” in question because even if it was, the record did not demonstrate defendants were entitled to mandamus relief.<sup>150</sup>

As to defendants’ argument that Richey must file some of his claims against Nighthawk in bankruptcy court, the supreme court stated: (1) “[w]hether those claims should have been brought against another party (Nighthawk) is not a question of jurisdiction requiring dismissal, but is a question of liability”; and (2) “[defendants] did not argue in the trial court that they were the incorrect parties for Richey to bring the claims against.”<sup>151</sup> The supreme court concluded that the defendants “have not shown themselves entitled to mandamus relief on this ground.”<sup>152</sup>

### 7. Texas Citizens’ Participation Act

In *In re Lipsky*,<sup>153</sup> the Texas Supreme Court settled a disagreement among the courts of appeals respecting the Texas Citizens Participation Act (TCPA)<sup>154</sup> by announcing that “clear and specific evidence under the Act includes relevant circumstantial evidence.”<sup>155</sup> Property owners

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145. *Id.* at 527.

146. *See id.*

147. *See infra* notes 355–59 and accompanying text (explaining disposition of defendant’s request for mandamus relief with respect to venue).

148. *In re Fisher*, 433 S.W.3d at 527.

149. *Id.* at 527–28.

150. *Id.* at 528.

151. *Id.*

152. *Id.* In light of its conclusions, the supreme court did not address the adequacy of an appellate remedy.

153. 460 S.W.3d 579 (Tex. 2015) (orig. proceeding) (opinion authored by Justice Devine).

154. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West 2015) (titled “Actions Involving the Exercise of Certain Constitutional Rights”).

155. *In re Lipsky*, 460 S.W.3d at 584.

Steven and Shyla Lipsky contacted Alisa Rich, an environmental consultant, to obtain an analysis of water in a well on the Lipskys' property that the Lipskys suspected had been contaminated. Through tests, Rich confirmed that methane and other gases were present in the well. Steven Lipsky complained to the Texas Railroad Commission, alleging Range Resources Corporation and Range Production Company (Range), which operated two gas wells about a half-mile from the Lipskys' property, were partially responsible for contaminating his groundwater. The railroad commission investigated Steven's complaints, but concluded: "Range's operations in the area were not the source of the contamination."<sup>156</sup> Steven, however, "denounced the railroad commission's decision in the media and continued to blame Range," using allegations he made in his complaints.<sup>157</sup>

Subsequently, the Lipskys filed a lawsuit against Range, alleging that by conducting fracking operations near their property (1) Range was negligent, grossly negligent, and causing a nuisance; and (2) Range was contaminating their water well. Range "filed a counterclaim against the Lipskys and a third-party claim against Rich," alleging defamation, business disparagement, civil conspiracy, and various aiding and abetting claims.<sup>158</sup> The Lipskys and Rich contended that Range's claims constituted "an improper attempt to suppress their First Amendment rights" and moved to dismiss those claims pursuant to the TCPA.<sup>159</sup> The trial court denied the motion to dismiss Range's claims under the TCPA.<sup>160</sup> The Lipskys and Rich sought mandamus relief in the court of appeals<sup>161</sup> and that relief was granted in part.<sup>162</sup> Both Range and Steven then filed petitions for mandamus relief in the supreme court.

Addressing the evidentiary standard, the supreme court noted that the expedited dismissal available under the TCPA places a burden on the plaintiff to establish by "clear and specific evidence a prima facie case for each essential element of the claim in question."<sup>163</sup> Further, the supreme court observed that the parties' dispute required resolution of an issue on which the courts of appeals also were in disagreement: whether that burden requires a plaintiff to produce direct evidence supporting each element of its claim, or whether that burden allows consideration of

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156. *Id.* at 585.

157. *Id.*

158. *Id.*

159. *Id.*

160. *See id.*

161. *See id.* At the time the Lipskys and Rich sought mandamus relief in this case, "the courts of appeals disagreed as to whether the TCPA granted an interlocutory appeal from an order denying dismissal. The Legislature has since clarified that an interlocutory appeal is permitted from an interlocutory order denying a motion to dismiss under the TCPA." *Id.* at 585 n.2 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12)).

162. *Id.* at 586. Specifically, the court of appeals concluded the TCPA required dismissal of (1) all of Range's claims against Shyla Lipsky and Rich; and (2) the civil conspiracy and aiding and abetting claims against all defendants, including Steven. *Id.*

163. *Id.* at 587 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c)).

circumstantial evidence and reasonable inferences.<sup>164</sup> The supreme court concluded that “[t]hough the TCPA initially demands more information about the underlying claim, the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence.”<sup>165</sup>

Having established the evidentiary standard, the supreme court addressed Steven’s argument that “no clear and specific evidence showed he defamed Range or disparaged its business.”<sup>166</sup> As to business disparagement, the supreme court stated that the evidence relied upon by Range consisted of an affidavit that was conclusory and therefore did not satisfy the TCPA standard.<sup>167</sup> As to defamation, the supreme court stated that viewing *the entirety* of Steven’s publications in question, (1) “the gist of his statements were that Range was responsible for contaminating his well water and the Railroad Commission was unduly influenced to rule otherwise”; and (2) “[h]is statements were not presented as opinion but were ‘sufficiently factual to be susceptible of being proved true or false.’”<sup>168</sup> The supreme court agreed with the court of appeals’ conclusion that “there was some evidence of a defamatory statement concerning Range sufficient to defeat [the Lipskys’] TCPA motion to dismiss.”<sup>169</sup>

Finally, the supreme court agreed with the court of appeals “that no clear and specific evidence establishe[d] a prima facie case that Shyla Lipsky or Alisa Rich published any defamatory remarks concerning Range or conspired with Steven Lipsky ‘to publicly blame Range for the contamination.’”<sup>170</sup> Based on its conclusions, the supreme court denied the respective petitions for mandamus relief filed by Steven and Range.<sup>171</sup>

#### 8. *Intervention After Final Judgment*

*State v. Naylor*<sup>172</sup> arose from the State of Texas’s “attempt to intervene in a civil lawsuit after the trial court had rendered final judgment.”<sup>173</sup> In 2004, Texas residents Angelique Naylor and Sabina Daly married in Massachusetts. Subsequently, “Naylor filed for divorce in Travis County, Texas.”<sup>174</sup> Despite recognizing the district court’s jurisdiction over the controversy, Daly contested the divorce, arguing that Texas courts lack jurisdiction “to implicitly recognize same-sex marriage by issuing divorce decrees to same-sex couples.”<sup>175</sup> Following a hearing, “the trial court orally granted an ostensible divorce ‘pursuant to the agreement [the par-

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164. *See id.*

165. *Id.* at 591.

166. *Id.*

167. *See id.* at 593.

168. *Id.* at 594–95.

169. *Id.* at 595.

170. *Id.* at 597.

171. *Id.*

172. 466 S.W.3d 783 (Tex. 2015) (orig. proceeding) (Justice Brown authored the opinion of the court, Justice Boyd rendered the concurring opinion, and Justices Willett and Devine rendered dissenting opinions).

173. *Id.* at 786.

174. *Id.*

175. *Id.*

ties had] recited into the record,” which stipulated “that the judgment ‘is intended to be a substitute for . . . a valid and subsisting divorce,’ and ‘is intended to dispose of all economic issues and liabilities as between the parties whether they [are] divorced or not.’”<sup>176</sup>

The following day, the State (1) petitioned to intervene in the trial court, seeking “to oppose the Original Petition for Divorce and to defend the constitutionality of Texas and federal laws that limit divorce actions to persons of the opposite sex who are married to one another”; and (2) “raised a plea to the jurisdiction urging the trial court to dismiss Naylor’s petition.”<sup>177</sup> The trial court, however, declined to entertain the State’s petition in intervention because of the belatedness of the intervention. But the trial court encouraged the State to appeal. “[T]he court of appeals . . . dismissed the State’s appeal for want of jurisdiction, holding the intervention untimely and finding no basis for appellate standing.”<sup>178</sup> The State requested the Texas Supreme Court’s review concerning two matters: (1) “to allow the [State’s] intervention and to vacate the divorce”; and, alternatively, (2) to issue “a writ of mandamus ordering the [trial] court to vacate its decree and dismiss the petition for want of jurisdiction.”<sup>179</sup>

Despite the State’s request, the supreme court agreed with the court of appeals’ conclusion that there was no basis for the State’s appellate standing.<sup>180</sup> Further, the supreme court stated that even if jurisdiction were established, “we would find no abuse of discretion in the trial court’s decision not to consider the untimely petition.”<sup>181</sup> Specifically, the supreme court reasoned (1) “[t]he record reveal[ed] that the State . . . had adequate opportunity to timely intervene and simply failed to diligently assert its rights”; (2) under Texas law, “a plea in intervention comes too late if filed after judgment and may not be considered unless and until the judgment has been set aside”; and (3) upon filing its petition in intervention, “the State did not ask the court to set aside or otherwise revisit the disputed divorce decree.”<sup>182</sup>

Additionally, as to the State’s petition for writ of mandamus, the supreme court observed that pursuant to Texas Rule of Appellate Procedure 52.3(e), “[i]f [a] petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals.”<sup>183</sup> The supreme court noted that the State argued (1) “it did not file a mandamus petition in the court of appeals because it thought it would have standing to appeal”; and (2) “it did not submit its mandamus

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176. *Id.* at 787.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 792.

181. *Id.*

182. *Id.* (emphasis removed).

183. *Id.* at 793 (quoting TEX. R. APP. P. 52.3(e)).

arguments to the court of appeals because the effort would have been futile.”<sup>184</sup> The supreme court, however, reasoned that (1) “[a] litigant’s mistaken understanding of law is not a compelling reason for this Court to consider an unreviewed mandamus argument”; and (2) “a party may not circumvent the court of appeals simply by arguing futility.”<sup>185</sup> Consequently, the supreme court denied the State’s petition for writ of mandamus and affirmed the judgment of the court of appeals.<sup>186</sup>

### C. DISCOVERY

*In re Doe*<sup>187</sup> involved an issue of first impression respecting personal jurisdiction regarding a request for pre-suit discovery under Texas Rule of Civil Procedure 202.<sup>188</sup> An anonymous blogger who called himself “the Trooper” launched online posts that disparaged the operations and character of an Ohio company, with offices in Texas and elsewhere, and its chairman and chief executive officer (collectively, Reynolds). To determine the blogger’s identity, Reynolds sought to depose Google, Inc., the host of the blog, by filing a Rule 202 petition in Harris County district court. According to the petition, Reynolds (1) “‘anticipate[s] the institution of a suit’ against the Trooper”; and (2) “will sue for libel and business disparagement, and, if the Trooper is a Reynolds employee, for breach of fiduciary duty.”<sup>189</sup> Reynolds sent the petition to the Trooper’s email address and fulfilled the Rule 202 notice requirement.

Remaining anonymous and appearing through his counsel as “John Doe,” the Trooper opposed Reynolds’ petition.<sup>190</sup> He filed a special appearance in which he (1) “assert[ed] that his only contact with Texas is that his blog can be read on the Internet here”; (2) “argu[ed] that because he does not have minimal contacts with Texas sufficient for a Texas court to exercise personal jurisdiction over him, there is no proper court under Rule 202 to order a deposition to investigate a suit in which he may be a defendant”; and (3) “moved to quash the discovery on the ground that he has a First Amendment right to speak anonymously.”<sup>191</sup> The trial court disagreed and ordered Google, Inc.’s deposition to “prevent a failure or delay of justice in an anticipated suit.”<sup>192</sup> Likewise, the court of appeals denied mandamus relief, so the Trooper sought mandamus relief in the Texas Supreme Court.

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184. *Id.* at 793–94.

185. *Id.* (citing *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 729, 730 (Tex. 2006) (per curiam) (orig. proceeding)). The supreme court did not address the adequacy of an appellate remedy.

186. *Id.* at 786.

187. 444 S.W.3d 603 (Tex. 2014) (orig. proceeding) (Justice Hecht authored the opinion, and Justice Lehrmann rendered a dissenting opinion).

188. See TEX. R. CIV. P. 202.1–2 (allowing “a proper court” to authorize a deposition to investigate a potential claim before suit is filed).

189. *In re Doe*, 444 S.W.3d at 605.

190. *Id.* (Google, Inc. did not oppose Reynolds’ petition).

191. *Id.*

192. *Id.* (citing TEX. R. CIV. P. 202.4(a)(1)).



The supreme court concluded that a proper court pursuant to Rule 202 “must have personal jurisdiction over the potential defendant.”<sup>193</sup> Specifically, the court reasoned (1) “[u]nder Rule 120a, a defendant who files a special appearance in a suit is entitled to have the issue of personal jurisdiction heard and decided before any other matter”; and (2) by granting the discovery order, the trial court adjudicated the Trooper’s claimed First Amendment right to anonymity and thus forced the Trooper “to litigate the merits of an important issue before a court that has not been shown to have personal jurisdiction over him.”<sup>194</sup> Additionally, the supreme court stated that “[t]o allow a Rule 202 court to order discovery without personal jurisdiction over a potential defendant unreasonably expands the rule” and, contrary to the intent of Rule 202, would allow “anyone in the world to investigate anyone else in the world against whom suit could be brought within the court’s subject-matter jurisdiction.”<sup>195</sup> According to the supreme court, “[t]he burden is on the plaintiff in an action to plead allegations showing personal jurisdiction over the defendant,” and “[t]he same burden should be on a potential plaintiff under Rule 202.”<sup>196</sup> Thus, the supreme court concluded that the trial court exceeded its Rule 202 authority by allowing the requested pre-suit discovery and conditionally granted the petition for writ of mandamus.<sup>197</sup>

*In re National Lloyds Insurance Co.*<sup>198</sup> arose from a discovery request alleged to be overbroad. An insured, Mary Erving, filed claims with her homeowner’s insurance carrier (National Lloyds) for the storm damage to her Cedar Hill home in Dallas County, Texas.<sup>199</sup> After sending adjusters to inspect Erving’s home, National Lloyds paid the claims. Subsequently, Erving filed a lawsuit against National Lloyds, alleging that the insurer had undervalued her claims.<sup>200</sup> In preparation for trial, Erving made the following discovery requests: (1) “all claim files from the previous six years involving three specific adjusters”; and (2) “all claim files from the past year for properties in Dallas and Tarrant counties involving . . . the two adjusting firms that handled Erving’s claims.”<sup>201</sup> Arguing that the request was overly broad, unduly burdensome, and seeking irrelevant evidence, National Lloyds objected. Despite National Lloyds’s objection,

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193. *Id.* at 608.

194. *Id.* at 608–09 (citing TEX. R. CIV. P. 120a).

195. *Id.* at 610.

196. *Id.*

197. *Id.* at 611. The element of adequate remedy by appeal was not specifically addressed. *But cf. In re Jordan*, 249 S.W.3d 416, 419–20 (Tex. 2008) (orig. proceeding) (party to Rule 202 proceeding had no adequate remedy on appeal where trial court abused discretion in ordering discovery); *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam) (orig. proceeding) (where trial court lacked jurisdiction, party was without adequate remedy by appeal).

198. 449 S.W.3d 486 (Tex. 2014) (per curiam) (orig. proceeding).

199. *Id.* at 487.

200. *Id.* at 487–88. Specifically, Erving alleged “breach of contract, breach of duty of good faith and fair dealing, fraud, conspiracy to commit fraud, and violations of the Texas Deceptive Trade Practices Act and . . . the Texas Insurance Code.” *Id.*

201. *Id.*

the trial court issued an order compelling the two adjusting firms to produce the files for claims they handled. But the trial court “limited the order to claims related to properties in Cedar Hill and to the storms that caused the damage to Erving’s home.”<sup>202</sup> After the court of appeals denied mandamus relief, National Lloyds filed a petition for writ of mandamus in the Texas Supreme Court.

The supreme court observed that “[a] discovery order that compels production beyond the rules of procedure is an abuse of discretion for which mandamus is the proper remedy.”<sup>203</sup> Additionally, the supreme court noted that the Texas Rule of Civil Procedure 192.3(a) allows for discovery of “any matter that is not privileged and is relevant to the subject matter of the pending action” and provides, “[i]t is no ground for objection ‘that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.’”<sup>204</sup> The supreme court, however, cautioned, “even these liberal bounds have limits, and discovery requests must not be overbroad.”<sup>205</sup>

According to the supreme court, Erving essentially “proposed to compare National Lloyds’ evaluation of the damage to her home with National Lloyds’ evaluation of the damage to other homes to support her contention that her claims were undervalued.”<sup>206</sup> But the supreme court stated, given the many variables associated with any particular claim, “we fail to see how National Lloyds’ overpayment, underpayment, or proper payment of the claims of unrelated third parties is probative of its conduct with respect to Erving’s undervaluation claims at issue in this case.”<sup>207</sup> The supreme court concluded that “[b]ecause the information Erving seeks is not reasonably calculated to lead to the discovery of admissible evidence, the trial court’s order compelling discovery of such information is necessarily overbroad.”<sup>208</sup> Accordingly, the supreme court conditionally granted mandamus relief.<sup>209</sup>

*In re Ford Motor Co.*<sup>210</sup> involved discovery into the potential bias of an expert witness in a products liability, design defect case. The plaintiff,

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202. *Id.*

203. *Id.* (citing *In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009) (per curiam) (orig. proceeding); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (per curiam) (orig. proceeding)). The supreme court did not specifically address the element of adequacy of an appellate remedy. *But see In re Deere*, 299 S.W.3d at 820 (concluding overly broad discovery order satisfied mandamus requirement of “clear abuse of discretion for which there is no adequate remedy by appeal”).

204. *In re Nat’l Lloyds Ins. Co.*, 449 S.W.3d at 488 (citing TEX. R. CIV. P. 192.3(a)).

205. *Id.*

206. *Id.* at 489.

207. *Id.*

208. *Id.* at 490 (citing TEX. R. APP. P. 52.8(c)). In a footnote, the supreme court stated that its conclusions were based “on this plaintiff’s allegations” and added, “[w]e do not hold that evidence of third-party insurance claims can never be relevant in coverage litigation.” *Id.* at 489 n.2.

209. *Id.* at 490.

210. 427 S.W.3d 396 (Tex. 2014) (per curiam) (orig. proceeding).

Saul Morales, was apprehended by a police officer while fleeing from police on foot. As the officer attempted to handcuff Morales, the officer's parked, unoccupied vehicle rolled backward, struck, and injured Morales. Morales sued the manufacturer and seller of the police car (collectively Ford), alleging "the vehicle had a design defect that . . . caused the vehicle to go into an idle-powered reverse."<sup>211</sup> To support its defense, Ford retained two expert witnesses employed by Exponent, Inc. and Carr Engineering, Inc., respectively. After deposing both expert witnesses, "Morales sought corporate-representative depositions from Exponent and Carr Engineering on seventeen topics, arguing that the additional depositions were necessary to prove each testifying expert's bias in favor of Ford and other automobile manufacturers."<sup>212</sup> The trial court ordered that the requested discovery be allowed. Ford then filed a petition for writ of mandamus in the Texas Supreme Court.

Initially, the supreme court introduced two pertinent discovery rules: (1) Texas Rule of Civil Procedure 192.3(e) that "sets forth the scope of information that parties may discover about a testifying expert, which includes 'any bias of the witness'";<sup>213</sup> and (2) Texas Rule of Civil Procedure 195 that "addresses the methods for obtaining such information, limiting testifying-expert discovery to that acquired through disclosures, expert reports, and oral depositions of expert witnesses."<sup>214</sup> Additionally, the supreme court stated (1) "[t]he official comments to Rule 195 articulate a goal of minimizing 'undue expense' in conducting expert discovery";<sup>215</sup> (2) that goal "comports with efforts by this Court and others to curb discovery abuse through the implementation of carefully crafted principles and procedures";<sup>216</sup> and (3) "[c]ourts have recognized that discovery into the extent of an expert's bias is not without limits."<sup>217</sup> According to the supreme court, the particular deposition notices in this case, which sought "sensitive information covering twelve years," constituted "just the type of overbroad discovery the rules are intended to prevent."<sup>218</sup> Further, the supreme court stated (1) "neither expert's credibility has been impugned"; and (2) "Morales has not demonstrated any other circumstance to warrant deposing the witnesses' employers' corporate representatives."<sup>219</sup> Therefore, the supreme court conditionally granted Ford's petition for writ of mandamus.<sup>220</sup>

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211. *Id.* at 397.

212. *Id.*

213. *Id.* (citing TEX. R. CIV. P. 192.3(e)).

214. *Id.* (citing TEX. R. CIV. P. 195)).

215. *Id.*

216. *Id.*

217. *Id.* (citing *In re Weir*, 166 S.W.3d 861, 865 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam) (concluding mandamus was proper where trial court abused discretion by ordering expert to testify as to personal financial information and stating, "Because the information sought to be protected would be disclosed before any appeal would be available, relators lack an adequate legal remedy"))).

218. *Id.*

219. *Id.* at 398.

220. *Id.*

In the case of *In re Memorial Hermann Hospital System*,<sup>221</sup> the Texas Supreme Court addressed whether medical privileges protected certain documents from disclosure. A heart surgeon (Gomez) filed a lawsuit against a hospital system, a physician network, and several individual physicians (collectively, defendants), contending defendants retaliated against him and spread false impressions of his practice because he joined a competing hospital. Gomez's claims included, "business disparagement, defamation, tortious interference with prospective business relations, and improper restraint of trade under the Texas Free Enterprise and Antitrust Act" (TFEAA).<sup>222</sup> In response to Gomez's motion to compel production of certain documents, defendants asserted two privileges, the medical committee privilege and the medical peer review committee privilege, to protect the documents from discovery. After an in camera inspection, and the trial court's order to produce the specified documents, defendants unsuccessfully sought mandamus relief in the court of appeals, then filed a petition for writ of mandamus in the supreme court.

The supreme court observed, "Mandamus is proper when the trial court erroneously orders the disclosure of privileged information because the trial court's error cannot be corrected on appeal."<sup>223</sup> Then, the supreme court reasoned: (1) while records of and communications to a medical peer review committee are generally privileged and not discoverable, § 160.007(b) of the Texas Occupations Code<sup>224</sup> "provides a limited exception to confidentiality for proceedings, records, or communications that are relevant to an anticompetitive action";<sup>225</sup> (2) "Gomez's petition presents multiple viable anticompetitive actions";<sup>226</sup> (3) several specified documents examined by the trial court in camera "lack any apparent relevance to [Gomez's] claims" and therefore, the trial court "abused its discretion in compelling" defendants to produce those particular documents;<sup>227</sup> (4) "the trial court did not abuse its discretion in making a preliminary finding" that the remaining documents in question are "relevant to the anticompetitive actions" pleaded by Gomez;<sup>228</sup> and (5) those documents did not "enjoy any residual protection under the medical committee privilege."<sup>229</sup> The supreme court conditionally granted defendants' petition for writ of mandamus in part, "directing the trial court to modify its discovery order insofar as the order compelled production of [the] documents" specified by the supreme court as not relevant to Gomez's

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221. 464 S.W.3d 686 (Tex. 2015) (orig. proceeding) (opinion authored by Justice Willett).

222. *Id.* at 696–97; see TEX. BUS. & COM. CODE ANN. §§ 15.01–.52 (West 2015).

223. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 697–98 (citing *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 222 (Tex. 2004) (per curiam) (orig. proceeding)).

224. See TEX. OCC. CODE ANN. § 160.007(b) (2015).

225. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d at 700.

226. *Id.* at 713.

227. *Id.* at 715–16.

228. *Id.*

229. *Id.* at 716–17.

claims, but otherwise denied the petition for writ of mandamus.<sup>230</sup>

*In re Longview Energy Co.*<sup>231</sup> presented novel issues respecting supersedeas and discovery in a lawsuit filed by an oil and gas company (Longview) alleging breach of fiduciary duty against five defendants. The defendants consisted of (1) a minority shareholder of Longview's stock (Huff Energy); (2) Huff Energy's general partner (WRH); (3) an entity formed by Huff Energy to compete with Longview (Riley-Huff); and (4) two of Huff Energy's principals, William R. Huff and Rick D'Angelo. Longview (1) alleged breach of fiduciary duty in Riley-Huff's asset acquisition of a shale formation, the Eagle Ford shale, that was also being pursued by Longview; and (2) specifically "sought disgorgement of the defendants' unjust enrichment."<sup>232</sup>

The jury found (1) Huff and D'Angelo, two of Huff Energy's principals, breached their fiduciary duty to Longview; (2) "Huff Energy and Riley-Huff knowingly participated"; (3) "as a result, Riley-Huff 'wrongfully obtain[ed] assets in the Eagle Ford shale'"; and (4) "Riley-Huff had paid \$24.5 million for assets with a market value of \$42 million, had spent \$127 million to develop them, and had received \$120 million in past production revenue."<sup>233</sup> "The trial court awarded Longview a constructive trust over almost all Riley-Huff's Eagle Ford shale assets and future production revenues . . . and ordered Riley-Huff to convey them to Longview."<sup>234</sup> Additionally, Longview was awarded, "against all five defendants jointly and severally, the same future net production revenues covered by the constructive trust 'and an additional \$95,500,000.00.'"<sup>235</sup>

The defendants appealed the awards and "together posted a \$25 million bond as security to supersede enforcement of the judgment."<sup>236</sup> In response, "Longview moved in the trial court to require each of the five defendants to post security equal to the lesser of \$25 million or 50% of the defendants' net worth."<sup>237</sup> The trial court (1) "granted the motion except as to Riley-Huff"; (2) signed an order increasing the "security required for the other four defendants" (the security order); and (3) "ordered Huff Energy to produce on a monthly basis essentially all documents pertaining to the operation of the Eagle Ford shale assets held by Riley-Huff" (the discovery order).<sup>238</sup>

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230. *Id.* at 719.

231. 464 S.W.3d 353 (Tex. 2015) (orig. proceeding) (opinion authored by Chief Justice Hecht).

232. *Id.* at 355-56.

233. *Id.* at 356.

234. *Id.*

235. *Id.*

236. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b) (West 2015) (providing, "Notwithstanding any other law or rule of court, when a judgment is for money, the amount of security must not exceed the lesser of: (1) 50 percent of the judgment debtor's net worth; or (2) \$25 million").

237. *Id.* at 356.

238. *Id.*

The defendants sought relief from both orders described above by motion in the court of appeals. The court of appeals concluded “the defendants were together required to post only \$25 million in security to supersede the judgment as to them all,” but denied reversal of the discovery order.<sup>239</sup> Both Longview and the defendants petitioned the Texas Supreme Court for relief by mandamus.<sup>240</sup>

As to the discovery order, the supreme court observed that after the trial court rendered judgment in Longview’s favor, (1) Longview moved for post-judgment discovery of the defendants’ operation of the disputed assets under Texas Rule of Appellate Procedure 24.1(e), which provides, “[t]he trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause”;<sup>241</sup> and (2) the trial court granted the motion, and ordered defendants to produce essentially all information related to the assets covered by the judicially created constructive trust.<sup>242</sup> Then, the supreme court considered the defendants’ arguments that the trial court’s discovery order was an abuse of discretion, because (1) “Rule 24.1(e) should not permit discovery that’s not allowed” under Texas Rule of Civil Procedure 621a that governs post-judgment discovery; (2) “the trial court had no evidence of any threat of dissipation of assets”; and (3) the discovery order “undermines the right to an effective appeal by requiring the ongoing production of documents [and thereby] ‘giv[ing] Longview free rein to continue seeking discovery as a means of coercing . . . settlement.’”<sup>243</sup>

In rejecting the defendants’ first argument, the supreme court reasoned that “nothing in Rule 621a purports to limit Rule 24.1(e); to the contrary, Rule 621a permits discovery relevant to Rule 24 motions.”<sup>244</sup>

As to the defendant’s second argument, the supreme court observed that the purpose of the trial court’s discovery order was to provide Longview “discovery in lieu of security” as to the “constructive trust portion of its judgment” to avoid substantial hardship on the continued operation of the disputed assets. The supreme court concluded that “Longview was entitled to security to supersede the judgment without showing any [threat of dissipation of assets].”<sup>245</sup>

Finally, as to defendants’ third argument, the supreme court stated that “[t]he trial court and the court of appeals both considered [the defendants’] argument and concluded that the discovery order was reasonable,” and commented: “We are unable to find a reason to contradict them.”<sup>246</sup> The supreme court concluded that the trial court did not abuse discretion

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239. *Id.* at 356–57.

240. *Id.* at 357. As to disposition of the parties’ arguments about the security order, see *infra* notes 346–354 and accompanying text.

241. *Id.* at 361 (citing TEX. R. APP. P. 24.1(e)).

242. *Id.*

243. *Id.* at 362 (quoting Cross-Relators Br. on the Merits, at 11–12, *In re Longview Energy Co.*, 464 S.W.3d 353 (Tex. 2015) (No. 14-0175), 2014 WL 6453567)).

244. *Id.*

245. *Id.*

246. *Id.*

through its discovery order and, accordingly, denied mandamus relief.<sup>247</sup>

#### D. REGULATION OF PRACTICE OF LAW

*In re The State Bar of Texas*<sup>248</sup> involved the availability of expunged criminal court records for use in a pending disciplinary action against the lead prosecutor in the criminal case to which the records pertained. In November 2011, the Texas Commission for Lawyer Discipline (the Commission) received a news article about Joshua Bledsoe's aggravated robbery trial. According to the article, Bledsoe was acquitted because Jon L. Hall, the lead prosecutor in that case, suppressed exculpatory evidence. Subsequently, the Commission commenced a disciplinary action against Hall. Rather than appearing before a district court, Hall elected a grievance panel to hear his disciplinary action proceeding. In answer to an evidentiary petition filed by the Commission, "Hall complained that he did not have access to records necessary to his defense because all records from the aggravated robbery case had been expunged."<sup>249</sup> The Commission, with Bledsoe's consent, "filed a motion in the trial court that had presided over the criminal prosecution . . . [requesting] access to the expunged records for use in the pending disciplinary action."<sup>250</sup> After a hearing, a visiting judge in the trial court found that the underlying expunction order barred the Commission's reliance on any of the expunged records.<sup>251</sup> The grievance panel construed the trial court's actions as a bar to the disciplinary proceeding and granted Hall's motion for summary judgment.<sup>252</sup>

The Commission appealed the grievance panel's summary judgment to the Board of Disciplinary Appeals and sought review of the trial court's order in the court of appeals. Additionally, the Commission filed a petition for writ of mandamus in the Texas Supreme Court. The Commission argued in the supreme court that (1) the trial court's "application of the expunction statute was a clear abuse of discretion because it ignore[d] the acquitted defendant's wishes, contravene[d] the statute's primary purpose, and interfere[d] with the Commission's ability to prosecute the disciplinary action before the grievance panel";<sup>253</sup> and (2) mandamus relief in that court was appropriate "because the court of appeals cannot redress the ultimate consequence of the trial court's order—the dismissal of the Commission's disciplinary action."<sup>254</sup>

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247. *Id.* In light of its conclusion described above respecting abuse of discretion, the supreme court did not reach the element of adequacy of an appellate remedy.

248. 440 S.W.3d 621 (Tex. 2014) (orig. proceeding) (Justice Devine authored the opinion, and Justice Boyd rendered a concurring opinion).

249. *Id.* at 623.

250. *Id.*

251. *Id.*

252. *Id.* at 622.

253. *Id.* at 625.

254. *Id.* at 623–24; *see also In re State Bar of Tex.*, 113 S.W.3d 730, 732 (Tex. 2003) (orig. proceeding) (concluding mandamus was appropriate remedy to correct district court's interference in regulation of legal practice).

The supreme court observed that pursuant to Texas Code of Criminal Procedure article 55.01(a), “[a] person wrongfully arrested for a crime is ‘entitled to have all records and files relating to the arrest’ expunged, if certain conditions[, such as acquittal,] are met.”<sup>255</sup> The supreme court, however, pointed out, “Expunction . . . is not absolute.”<sup>256</sup> The supreme court noted that the code of criminal procedure provides two exceptions for acquittal cases, which apply under the following conditions:

- (1) the records and files are necessary [to investigate and prosecute] a person other than the person who is the subject of the expunction order; or
- (2) the state establishes that the records and files are necessary for use in (A) another criminal case . . . or (B) a civil case, including a civil suit or suit for possession of or access to a child.<sup>257</sup>

The supreme court concluded, “Given the waiver expressed by the acquitted defendant, the relevance of the expunged records to the disciplinary proceeding, and the Commission’s expressed need for those records, the trial court abused its discretion by extending the expungement order to the Commission and thereby interfering in the disciplinary proceeding.”<sup>258</sup> Further, the supreme court stated, “An order that directly interferes with the Commission’s ability to collect and present evidence is as much a direct interference in the disciplinary process as an order directed to a grievance panel itself.”<sup>259</sup> The supreme court concluded, “Because the court’s order interferes with the disciplinary process, disrupting the regulatory scheme promulgated by this Court to govern cases of attorney discipline, we conditionally grant relief and direct the trial court to vacate its order.”<sup>260</sup>

In *In re Dow*,<sup>261</sup> the Texas Supreme Court considered the issue of whether its authority to regulate the practice of law provided it with jurisdiction to interfere with a sanction imposed against an attorney by the Texas Court of Criminal Appeals. Miguel Angel Paredes was convicted of capital murder in 2001 and his execution was later set for October 28, 2014.<sup>262</sup> On June 9, 2014, David Dow, an “experienced post-trial capital defense attorney,” received a “letter from Paredes asking for last minute help.”<sup>263</sup> Dow responded and, from September 12 to October 14, “investigated whether Paredes’s trial counsel was ineffective in not presenting mitigating evidence” during the punishment phase of trial and “whether

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255. *In re State Bar of Texas*, 440 S.W.3d at 622 (citing TEX. CODE CRIM. PROC. ANN. art. 55.01(a) (West Supp. 2014–15)).

256. *Id.* at 624.

257. *Id.* at 624–25 (quoting TEX. CODE CRIM. PROC. ANN. art. 55.02 (West Supp. 2014–15)).

258. *Id.* at 627.

259. *Id.* (citing *State Bar of Tex. v. Jefferson*, 942 S.W.2d 575 (Tex. 1997) (per curiam) (orig. proceeding) (granting mandamus relief against district court that enjoined disciplinary proceedings before a grievance panel); *State v. Sewell*, 487 S.W.2d 716 (Tex. 1972) (orig. proceeding) (same)).

260. *In re State Bar of Texas*, 440 S.W.3d at 627.

261. 481 S.W.3d 215 (Tex. 2015) (per curiam) (orig. proceeding).

262. *Id.* at 220–21.

263. *Id.*



[Paredes's] habeas counsel was ineffective in allowing him to waive that claim."<sup>264</sup> On the afternoon of October 21, 2014, Dow filed several motions in the Texas Court of Criminal Appeals, including a motion to stay Paredes's execution. That relief was denied on October 23, and Paredes was executed as scheduled on October 28.

Subsequently, "the court of criminal appeals ordered Dow to appear . . . and show cause why he should not be sanctioned for violating [the Court of Criminal Appeals's] Miscellaneous Rule 11-003," which provides in part that "[a] motion for stay of execution . . . must be filed . . . at least seven days before the date of the scheduled execution date (exclusive of the scheduled execution date)."<sup>265</sup> Following a hearing, the court of criminal appeals held Dow in contempt and issued an order that "suspended [him] from practicing before the Court of Criminal Appeals for one year, without first obtaining leave to do so."<sup>266</sup> Dow filed a petition for writ of mandamus in the supreme court, "[complaining] that he should not have been sanctioned" and that his suspension, described above, "effectively bar[red] him from practicing law" during the time the suspension was in effect.<sup>267</sup> Further, Dow argued that the supreme court has jurisdiction "to prevent the Court of Criminal Appeals from exceeding its authority and from interfering with the [supreme court's] exclusive authority to regulate the practice of law."<sup>268</sup>

The supreme court observed that "Article V, Section 3(a) of the Texas Constitution authorizes this Court to issue the writ of mandamus in two instances: 'as may be necessary to enforce its jurisdiction' and 'in such cases as may be specified' by the Legislature."<sup>269</sup> The supreme court, however, concluded it did not have jurisdiction under the Texas Constitution over Dow's petition for mandamus relief, in part because § 22.002(a) of the Texas Government Code denied it that authority.<sup>270</sup> Additionally,

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264. *Id.* at 221–22.

265. *Id.* at 220, 223 (citing Misc. Docket No. 11-003 (Tex. Crim. App. June 30, 2011), reprinted in TEXAS RULES OF COURT 417–18 (West 2015), <http://www.txcourts.gov/media/208124/miscruleexecution.pdf> [<https://perma.cc/V7QP-M6TW>]).

266. *Id.* at 223.

267. *Id.* Additionally, Dow requested declaratory relief in the supreme court. *Id.* at 220.

268. *Id.* at 223–24.

269. *Id.* at 224 (citing TEX. CONST. art. V, § 3(a)).

270. *Id.* Specifically, as to mandamus necessary to enforce its jurisdiction, the supreme court stated in part (1) "we have repeatedly construed this provision as authorizing the Court to issue writs only when a lower court's action threatens to impair our appellate jurisdiction or nullify the effect of our judgments"; and (2) "Dow's petition does not fall into either category, and the Court of Criminal Appeals is not a 'lower court.'" *Id.* As to the second instance, the supreme court stated "the Legislature has not authorized this Court to issue the writ of mandamus to the Court of Criminal Appeals," but rather "has specifically denied this Court that authority" pursuant to § 22.002(a) of the Texas Government Code. *Id.*; see TEX. GOV'T CODE ANN. § 22.002(a) (West Supp. 2015). Section 22.002(a) provides in part:

The supreme court or a justice of the supreme court may issue . . . all writs of . . . mandamus . . . against a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of the court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.

the supreme court observed that “[t]he authority to regulate the practice of law in Texas belongs exclusively to this Court” and “is ‘derived from both statutory and inherent powers.’”<sup>271</sup> The supreme court, however, stated that its authority to regulate the practice of law “does not itself provide jurisdiction to issue the writ of mandamus.”<sup>272</sup> According to the supreme court, “[w]hile it is true that we have ‘consistently granted mandamus relief when a lower court interferes with the disciplinary process,’ our authority to do so is derived from [Texas Government Code] Section 22.022(a), the same provision that denies us authority to mandamus the Court of Criminal Appeals.”<sup>273</sup> Further, the supreme court reasoned in part,

The Court of Criminal Appeals has not undertaken to determine what lawyers may practice before it. Rather, it has imposed a sanction for the violation of a rule that provides for such a sanction. This in no way threatens our authority to regulate the Texas bar. . . . We need not decide here what action we might take should any court infringe on our authority to regulate the bar. That situation is not presented here.<sup>274</sup>

The supreme court concluded it lacked mandamus jurisdiction and dismissed Dow’s petition for mandamus relief.<sup>275</sup>

#### E. “AUTHORITY” TO ISSUE ORDER ON FAMILY CODE MATTER

In *In re Office of the Attorney General of Texas*,<sup>276</sup> the Texas Supreme Court addressed whether Texas Family Code § 105.006<sup>277</sup> gives a trial court authority to order the Office of the Attorney General (OAG) to remove a family violence indicator from a parent’s file and OAG’s system. OAG filed a lawsuit in the trial court seeking to establish paternity against a father, Cornelius Jackson. “[T]he associate judge issued a temporary order establishing the parent-child relationship” and “ordered Jackson to pay [monthly] child support.”<sup>278</sup> Additionally, “the associate judge determined no basis existed to show a history of family violence and ordered OAG to remove the family violence indicator from Jackson’s file and OAG’s system.”<sup>279</sup> “The trial court denied OAG’s request for de novo review . . . and affirmed and adopted the associate judge’s temporary order.”<sup>280</sup> After an unsuccessful attempt to obtain mandamus relief

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TEX. GOV’T CODE ANN. § 22.002(a).

271. *In re Dow*, 481 S.W.3d at 224.

272. *Id.* at 225.

273. *Id.*; see TEX. GOV’T CODE ANN. § 22.002(a) (West Supp. 2015).

274. *In re Dow*, 481 S.W.3d at 225–26.

275. *Id.* at 226. Additionally, the supreme court concluded (1) the declaratory relief requested by Dow “is available only to make mandamus effective”; and (2) “[b]ecause we lack mandamus jurisdiction, we also lack jurisdiction to grant declaratory relief.” *Id.*

276. 456 S.W.3d 153 (Tex. 2015) (per curiam) (orig. proceeding).

277. See TEX. FAM. CODE ANN. § 105.006 (West Supp. 2015).

278. *In re Office of the Attorney Gen. of Tex.*, 456 S.W.3d at 154.

279. *Id.*

280. *Id.*

in the court of appeals respecting the removal of the family violence indicator, OAG sought mandamus relief in the supreme court.

The supreme court observed that pursuant to § 105.006 of the Texas Family Code, final orders in child support proceedings must include certain personal information of the parties, including home and work addresses and social security numbers.<sup>281</sup> Under § 105.006(c), however, if a court finds that requiring a party to provide that required information to another party “is likely to cause the child or a conservator harassment, abuse, serious harm, or injury, the court may” (1) order the information not to be disclosed to another party; or (2) “render any other order the court considers necessary.”<sup>282</sup> According to the supreme court, the sole issue before it was “whether the trial court erred when it ordered OAG to remove the family violence indicator from Jackson’s files and OAG’s system, presumably under the authority of the Family Code’s ‘any other order’ phrase in section 105.006(c)(2).”<sup>283</sup>

The supreme court stated that because Texas is a participant in the federal child support enforcement program, federal law requires OAG to collect, store, and maintain certain required information respecting each child support case, including a “family violence indicator (domestic violence or child abuse).”<sup>284</sup> Further, after construing several statutes relied upon by the parties, including § 105.006(c)(2), the supreme court concluded (1) “[t]he Legislature has chosen to give OAG discretion to designate a case with the family violence indicator, and has not chosen to allow trial courts to intervene, except to weigh the designation in considering a request for disclosure”; and (2) “the trial court lacked authority to order OAG to remove the indicator from its files.”<sup>285</sup> Accordingly, the supreme court conditionally granted OAG’s petition for writ of mandamus and directed the trial court to vacate its order.<sup>286</sup>

## F. ARBITRATION

*Royston, Rayzor, Vickery & Williams, LLP v. Lopez* addressed whether parties could enforce an arbitration provision enshrined in an attorney–client employment contract.<sup>287</sup> The law firm (Royston, Rayzor) handled a divorce matter for Francisco Lopez. The employment contract between Lopez and Royston, Rayzor contained an arbitration provision

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281. *Id.* (citing TEX. FAM. CODE ANN. § 105.006(a)).

282. *Id.* at 156 (citing TEX. FAM. CODE ANN. § 105.006(c)).

283. *Id.* at 154.

284. *Id.* at 155.

285. *Id.* at 156–57.

286. *Id.* at 157. The supreme court did not mention or address lack of an adequate remedy on appeal, nor did it make clear in the case how the trial court’s lack of authority related to jurisdiction. *Cf. In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam) (orig. proceeding) (where trial court lacked jurisdiction, party was without adequate remedy by appeal).

287. *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 497 (Tex. 2015) (orig. proceeding) (Justice Johnson authored the opinion, and Justice Guzman rendered a concurring opinion).

that specified that “the client and firm will arbitrate disputes that arise between them, except for claims made by the firm for recovery of its fees and expenses.”<sup>288</sup> Subsequently, Lopez filed suit against Royston, Rayzor, claiming he was induced to accept an inadequate settlement. The law firm “moved to compel arbitration under both the Texas Arbitration Act . . . and common law.”<sup>289</sup> After the trial court denied that motion, Royston, Rayzor filed an “interlocutory appeal challenging the denial under the Arbitration Act and an original proceeding in the court of appeals seeking mandamus relief under common law.”<sup>290</sup> “The court of appeals affirmed the trial court’s refusal to order arbitration under the Arbitration Act and denied mandamus relief.”<sup>291</sup> Specifically, the court of appeals concluded the arbitration provision “was so one-sided it was substantively unconscionable and unenforceable.”<sup>292</sup>

In the Texas Supreme Court, Royston, Rayzor sought (1) relief from the court of appeals’ denial of its interlocutory appeal; and (2) “mandamus relief directing the trial court to order arbitration.”<sup>293</sup> The supreme court concluded Lopez did not meet his burden to prove that the arbitration provision was substantively unconscionable.<sup>294</sup> Further, in the interest of judicial economy, the supreme court considered Lopez’s additional arguments that the arbitration provision was (1) against public policy because it allegedly violated a Disciplinary Rule of the State Bar of Texas; and (2) illusory because it bound Lopez to arbitrate his claims against Royston, Rayzor, while “excluding the only possible claim the firm might ever realistically make against him.”<sup>295</sup> The supreme court, however, rejected both arguments,<sup>296</sup> reversed the judgment of the court of appeals, and remanded the case to the trial court for further proceedings.<sup>297</sup> Additionally, the supreme court stated that “[b]ecause we . . . resolve the ap-

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288. *Id.*

289. *Id.* at 498 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.021 (West 2011); L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 351 (Tex. 1977) (noting that arbitration in Texas can be pursuant to statute or common law)).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 502. Specifically, the supreme court (1) declined to consider several arguments asserted by Lopez in support of unconscionability because those arguments were “based on provisions in the contract as opposed to provisions in the arbitration provision”; and (2) stated in part that “although the provision was one-sided in the sense that it exempted any fee claims by Royston, Rayzor from its scope, excepting that one type of dispute does not make the agreement so grossly one-sided so as to be unconscionable.” *Id.* at 501–02.

295. *Id.* at 503, 505.

296. *Id.* at 504–05. As to those arguments, respectively, the supreme court stated in part (1) while “[i]t is true that public policy is not solely established through legislative enactments and may be informed by the Disciplinary Rules,” “where the Legislature has addressed a matter, as it has addressed the enforceability of arbitration provisions, we are constrained to defer to that expression of policy”; and (2) “the fact that the scope of an arbitration provision binds parties to arbitrate only certain disagreements does not make it illusory.” *Id.*

297. *Id.* at 506.

peal by means of Royston, Rayzor's interlocutory appeal under the Arbitration Act, we do not address the firm's petition for writ of mandamus."<sup>298</sup>

#### G. PERFORMANCE OF MINISTERIAL DUTY

*In re Woodfill*<sup>299</sup> involved an effort by a group of citizens to compel performance of a ministerial duty by the Houston City Council respecting a controversial "equal rights ordinance" passed by the council. On July 3, 2014, a coalition of Houston residents (collectively, Woodfill) "filed a referendum petition requesting the City Council to [either] reconsider and repeal [the ordinance] or put it to popular vote."<sup>300</sup> Approximately one month later, the city secretary reported in writing to the city council as follows: "I am able to certify that [the required number of signatures is 17,269]; and [t]he number of signatures verified on the petition submitted on July 3, 2014 is 17,846."<sup>301</sup> The city secretary's report, however, concluded with a paragraph noting that the city attorney conducted his own review of the petition filing and found that many of the signatures were on pages of the petition that were invalid and "[t]herefore, according to the City Attorney's Office only 2,449 pages containing 15,249 signatures can lawfully be considered toward the signatures required."<sup>302</sup>

"On August 4, 2014, the City announced it would not reconsider the ordinance."<sup>303</sup> Woodfill (1) immediately sought declaratory and injunctive relief in district court; and (2) filed an August 11, 2014, original mandamus proceeding in the court of appeals.<sup>304</sup> The court of appeals, however, denied mandamus relief, concluding relators "had an adequate remedy by appeal."<sup>305</sup> Woodfill then "filed a supplemental petition in the district court, requesting a writ of mandamus" and, simultaneously, sought mandamus relief in the Texas Supreme Court.<sup>306</sup>

The supreme court noted that under the city's charter, there are three general steps in a challenge to a city ordinance: (1) "the referendum petition must be 'signed and verified in the [required] manner and form' by the required number of voters and be timely filed"; (2) "the City Secretary must review the petition, certify the results of her review, and present such petition and certificate to the City Council"; and (3) "after

298. *Id.* at 499 (citing *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (explaining that mandamus is a discretionary remedy that issues only to correct a clear abuse of discretion where no other adequate remedy by law exists)).

299. 470 S.W.3d 473, 475 (Tex. 2015) (per curiam) (orig. proceeding).

300. *Id.*

301. *Id.* at 477.

302. *Id.*

303. *Id.* at 478.

304. *Id.*

305. *Id.*

306. While the mandamus proceedings in the supreme court were pending, the district court (1) rendered a final judgment that the "total number of valid signatures was . . . less than the required amount"; and (2) "denied all relief requested by [Woodfill]." *Id.* Woodfill's appeal of the trial court's judgment was pending in the court of appeals at the time the supreme court addressed Woodfill's petition for mandamus relief. *Id.*

receiving the petition and City Secretary's certificate, the City Council must either repeal the ordinance or submit it to popular vote."<sup>307</sup> The supreme court concluded (1) "the [City's] Charter gives the City Secretary, not the City Council, the discretion to evaluate the petition"; and (2) although "the City Secretary's report mentions the City Attorney's findings . . . the City Secretary certified [the] petition and thereby invoked the City Council's ministerial duty to reconsider and repeal the ordinance or submit it to popular vote."<sup>308</sup> Further, the supreme court rejected the city's argument that a mandamus proceeding to compel public officials to act on a referendum petition cannot originate in an appellate court.<sup>309</sup> Finally, the supreme court stated,

Under the circumstances here, the Relators do not have an adequate remedy by appeal because the appellate process will not resolve the case in time for the referendum to be placed on the November 2015 ballot. . . . Under such circumstances, mandamus has long been recognized as an appropriate remedy when city officials improperly refuse to act on a citizen-initiated petition.<sup>310</sup>

The supreme court conditionally granted Woodfill's petition for writ of mandamus and stated (1) "[a]ny enforcement of the ordinance shall be suspended"; and (2) "[i]f the City Council does not repeal the ordinance by August 24, 2015 . . . the City Council must order that the ordinance be put to popular vote during the November 2015 election."<sup>311</sup>

## V. TEXAS SUPREME COURT'S APPROACH TO ADDRESSING ADEQUATE REMEDY

As described above, the level of the Texas Supreme Court's analysis respecting the element of lack of an adequate remedy by appeal varies. The chart below groups the cases described above by the level of analysis respecting that element.

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307. *Id.* at 476.

308. *Id.* at 478 (emphasis removed).

309. *Id.* at 481.

310. *Id.* at 480–81. *Cf. In re Dorn*, 471 S.W.3d 823, 824–25 (Tex. 2015) (orig. proceeding) (Brown, J., concurring as to order issued without opinion) (mandamus relief denied where relators seeking to amend city charter offered no explanation for failure to diligently pursue remedies available to them).

311. *In re Woodfill*, 470 S.W.3d at 481. The same ordinance was subsequently addressed again by the supreme court on mandamus in *In re Williams*, 470 S.W.3d 819 (Tex. 2015) (per curiam) (orig. proceeding). Because *In re Williams* did not involve any proceeding in a lower court, that case is not included in this section, but rather is addressed below. *See infra* note 360–70.

Table

<b>Appellate Remedy Treatment</b>	<b>Opinion</b>	<b>Subject Matter of Case &amp; Act Constituting Abuse of Discretion</b>	<b>Mandamus Disposition</b>
Specific discussion of adequacy of party's appellate remedy	<i>In re Ford Motor Co.</i> , 442 S.W.3d 265 (Tex. 2014)	<i>Forum Non Conveniens</i> : No abuse of discretion because wrongful death plaintiffs were entitled to "Texas-resident exception" to forum non conveniens statute	Denied
	<i>In re Essex Ins. Co.</i> , 450 S.W.3d 524 (Tex. 2014) (per curiam)	<i>Direct Action Against Insurer</i> : Trial court (t. ct.) abused discretion by improperly refusing to dismiss direct claims brought by insured against insurer before liability was established	Granted
	<i>In re Conner</i> , 458 S.W.3d 532 (Tex. 2015) (per curiam)	<i>Want of Prosecution</i> : T. ct. abused discretion by refusing to dismiss claims arising from vehicle accident for want of prosecution after unexplained delay	Granted
	<i>In re Woodfill</i> , 470 S.W.3d 473 (Tex. 2015) (per curiam)	<i>Performance of Ministerial Duty</i> : City improperly refused to fulfill ministerial duty to repeal "equal rights" ordinance or submit it to popular vote	Granted
Conclusory statement as to adequacy of appellate remedy	<i>In re State Bar of Texas</i> , 440 S.W.3d 621 (Tex. 2014)	<i>Regulation of Practice of Law</i> : T. ct. abused discretion by denying disciplinary commission's request to use expunged records in attorney disciplinary action	Granted
	<i>In re Mem'l Hermann Hosp. Sys.</i> , 464 S.W.3d 686 (Tex. 2015)	<i>Discovery</i> : T. ct. abused discretion by ordering hospital to disclose privileged documents during discovery in lawsuit filed by surgeon	Granted
Adequacy of appellate remedy not addressed, but case(s) cited	<i>In re Fisher</i> , 433 S.W.3d 523 (Tex. 2014)	<i>Standing</i> : No abuse of discretion where t. ct. denied plea to jurisdiction based on lack of standing in lawsuit by limited partner against oil company	Denied
	<i>In re Ford Motor Co.</i> , 427 S.W.3d 396 (Tex. 2014) (per curiam)	<i>Discovery</i> : T. ct. abused discretion by ordering overly expansive discovery as to bias of experts in design defect case	Granted
	<i>In re Whataburger Rest. LP</i> , 429 S.W.3d 597 (Tex. 2014) (per curiam)	<i>Motion for New Trial</i> : T. ct. in premises liability case abused discretion by granting new trial based on juror misconduct where no probable injury shown	Granted
	<i>In re Health Care Unlimited, Inc.</i> , 429 S.W.3d 600 (Tex. 2014) (per curiam)	<i>Motion for New Trial</i> : T. ct. in negligence case abused discretion by granting new trial based on juror misconduct where no probable injury shown	Granted
	<i>In re Vaishangi</i> , 442 S.W.3d 256 (Tex. 2014) (per curiam)	<i>Enforcement of Settlement</i> : T. ct. abused discretion by granting motion to enforce settlement agreement in lawsuit by borrower against lender because plenary power had expired	Granted
	<i>In re Nat'l Lloyds Ins. Co.</i> , 449 S.W.3d 486 (Tex. 2014) (per curiam)	<i>Discovery</i> : T. ct. abused discretion by ordering overly broad discovery in lawsuit by insured against property insurer	Granted
	<i>In re Crawford &amp; Co.</i> , 458 S.W.3d 920 (Tex. 2015) (per curiam)	<i>Workers' Compensation</i> : T. ct. abused discretion by not dismissing claims that fell within exclusive jurisdiction of Texas Division of Workers' Compensation	Granted

	<i>In re</i> Bridgestone Americas Tire Operations, LLC, 459 S.W.3d 565 (Tex. 2015)	<i>Forum Non Conveniens</i> : T. ct. abused discretion by refusing to dismiss wrongful death claim by two nonresident minors on forum non conveniens grounds	Granted
	<i>In re</i> Lipsky, 460 S.W.3d 579 (Tex. 2015)	<i>Texas Citizens' Participation Act</i> : No abuse of discretion where t. ct. denied plaintiff's motion to dismiss counterclaims based on anti-SLAPP law	Denied
	<i>In re</i> Longview Energy Co., 464 S.W.3d 353 (Tex. 2015)	<i>Discovery</i> : No abuse of discretion by ct. of appeals in affirming t. ct.'s discovery order in case involving unjust enrichment claim against oil company	Denied
	State v. Naylor, 466 S.W.3d 783 (Tex. 2015)	<i>Intervention After Final Judgment</i> : Petition for writ of mandamus denied because relator did not first present petition to court of appeals or state compelling reason for not doing so	Denied
	Royston, Rayzor, Vickery & Williams, LLP v. Lopez, 467 S.W.3d 494 (Tex. 2015)	<i>Arbitration</i> : Because t. ct.'s denial of motion to compel arbitration in client's malpractice lawsuit against law firm was reversed and remanded, corresponding petition for writ of mandamus was denied	Denied
	<i>In re</i> Dow, 481 S.W.3d 215 (2015) (per curiam)	<i>Regulation of Practice of Law</i> : Supreme court's authority to regulate practice of law does not confer authority to issue writ of mandamus against court of criminal appeals.	Dismissed for Lack of Jurisdiction
Adequacy of appellate remedy not addressed, no case cited	<i>In re</i> Doe, 444 S.W.3d 603 (Tex. 2014)	<i>Discovery</i> : T. ct. abused discretion by permitting pre-suit discovery as to identity of potential defendant because no personal jurisdiction over him	Granted
	<i>In re</i> Office of the Attorney Gen., 456 S.W.3d 153 (Tex. 2015) (per curiam)	" <i>Authority</i> " on Family Code Matter: T. ct. abused discretion by ordering OAG to remove family violence indicator from father's OAG file	Granted

As shown in the chart, during the Survey period, out of the twenty-one supreme court opinions that addressed the availability of mandamus relief to correct a clear abuse of discretion by a lower court when there is no adequate remedy by appeal, four contain a specific discussion respecting the adequacy of an appellate remedy.<sup>312</sup> In two others, the supreme court made a conclusory statement as to adequacy of an appellate remedy.<sup>313</sup> The remaining fifteen cases do not address the adequate remedy element. However, (1) in six of those fifteen cases, the petition for mandamus relief was denied or dismissed without reaching the adequate remedy requirement;<sup>314</sup> (2) in seven of the remaining nine

312. See *In re* Conner, 458 S.W.3d 532, 535 (Tex. 2015) (per curiam) (orig. proceeding); *In re* Woodfill, 470 S.W.3d at 480–81; *In re* Ford Motor Co., 442 S.W.3d 265, 269 (Tex. 2014) (orig. proceeding); *In re* Essex Ins. Co., 450 S.W.3d 524, 528 (Tex. 2014) (per curiam) (orig. proceeding).

313. See *In re* Mem'l Hermann Hosp. Sys., 464 S.W.3d 686, 719 (Tex. 2015) (orig. proceeding); *In re* State Bar of Texas, 440 S.W.3d 621, 627 (Tex. 2014) (orig. proceeding).

314. See *In re* Lipsky, 460 S.W.3d 579, 597 (Tex. 2015) (orig. proceeding); *In re* Longview Energy Co., 464 S.W.3d 353, 354 (Tex. 2015) (orig. proceeding); State v. Naylor, 466 S.W.3d 783, 783 (Tex. 2015) (orig. proceeding); *In re* Dow, 481 S.W.3d 215, 226 (Tex. 2015) (per curiam) (orig. proceeding); Royston, Rayzor, Vickery & Williams, LLP v.



of those cases, the supreme court cited analogous cases in which adequacy of an appellate remedy was addressed;<sup>315</sup> and (3) in the other two of the remaining nine cases, the facts are analogous to prior supreme court cases in which adequacy of an appellate remedy was addressed.<sup>316</sup> Thus, those opinions illustrate the continuing applicability of the supreme court's statement that "the adequacy of an appeal depends on the facts involved in each case."<sup>317</sup>

## VI. OTHER TEXAS SUPREME COURT MANDAMUS OPINIONS WITHIN SURVEY PERIOD<sup>318</sup>

### A. SUPERSEDEAS

*In re State Board for Educator Certification*<sup>319</sup> involved an attempt by the Board to supersede the trial court's decision to reverse the Board's revocation of a teaching certificate. The case arose when Erasmo Montalvo filed suit to overturn the revocation of his teaching certification. The trial court concluded "the Board's decision was not supported by substantial evidence and was arbitrary and capricious" and "issued a per-

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Lopez, 467 S.W.3d 494, 506 (Tex. 2015) (orig. proceeding); *In re Fisher*, 433 S.W.3d 523, 535 (Tex. 2014) (orig. proceeding).

315. See *In re Crawford*, 458 S.W.3d 920, 928–29 (Tex. 2015) (per curiam) (orig. proceeding) (citing *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 624 (Tex. 2007) (orig. proceeding); *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004) (orig. proceeding)); *In re Bridgestone*, 459 S.W.3d 565, 577 (Tex. 2015) (orig. proceeding) (citing *In re Pirelli Tire, Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007) (orig. proceeding)); *In re Ford Motor Co.*, 427 S.W.3d 396, 397 (Tex. 2014) (per curiam) (orig. proceeding) (citing *In re Weir*, 166 S.W.3d 861, 865 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam)); *In re Health Care Unlimited*, 429 S.W.3d 600, 602 (Tex. 2014) (per curiam) (orig. proceeding) (citing *In re Toyota Motor Sales*, 407 S.W.3d 746, 762 (Tex. 2013) (orig. proceeding); *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688–89 (Tex. 2012); *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 206 (Tex. 2009)); *In re Whataburger*, 429 S.W.3d 597, 598 (Tex. 2014) (per curiam) (orig. proceeding) (citing *In re Toyota Motor Sales*, 407 S.W.3d at 762); *In re Vaishangi*, 442 S.W.3d 256, 261 (Tex. 2014) (per curiam) (orig. proceeding) (citing *In re Sw. Bell Tel. Co.*, 35 S.W.3d at 605); *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014) (per curiam) (orig. proceeding) (citing *In re Deere*, 299 S.W.3d 819, 820 (Tex. 2009) (orig. proceeding)).

316. See *In re Office of the Attorney Gen.*, 456 S.W.3d 153, 157 (Tex. 2015) (per curiam) (orig. proceeding) (granting mandamus because trial court "lacked authority" to order OAG to remove family violence indicator); *In re Doe*, 444 S.W.3d 603, 611 (Tex. 2014) (orig. proceeding) (granting mandamus because trial court's order exceeded its authority under Texas Rule of Civil Procedure 202). The supreme court has held mandamus relief is proper where a trial court issues an order beyond its jurisdictional authority. *In re Vaishangi*, 442 S.W.3d at 261 (citing *In re Sw. Bell Tel. Co.*, 35 S.W.3d at 605). Also, the supreme court has concluded a "party to [a] Rule 202 proceeding has no adequate remedy on appeal if [a trial] court abused its discretion in ordering discovery that would compromise procedural or substantive rights." *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) (per curiam) (orig. proceeding) (citing *In re Jordan*, 249 S.W.3d 416, 420 (Tex. 2008) (orig. proceeding)); see *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (per curiam) (orig. proceeding).

317. *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 469 (Tex. 2008) (orig. proceeding).

318. Due to their factual or procedural posture, these cases involved either no alleged abuse of discretion by a lower court or no consideration of the adequacy of a remedy by appeal.

319. 452 S.W.3d 802 (Tex. 2014) (orig. proceeding) (Justice Willett authored the opinion, and Justice Guzman rendered a concurrence).

manent injunction prohibiting the Board from ‘treating as revoked or revoking’ Montalvo’s certification.”<sup>320</sup> Further, after Montalvo posted security with the trial court, that court ordered that “pursuant to Rule 24.2(a)(3) of the Texas Rules of Appellate Procedure . . . any appeal taken of this Judgment . . . will not supersede this Judgment during the pendency of such appeal.”<sup>321</sup> “The Board appealed the trial court’s revocation reversal and separately sought mandamus relief challenging the trial court’s denial of supersedeas.”<sup>322</sup> The court of appeals, however, denied mandamus relief and abated the merits of the Board’s appeal pending the Texas Supreme Court’s resolution of the “narrow procedural issue [of] whether the trial court had discretion to deny suspension of its judgment.”<sup>323</sup>

In addressing the Board’s request for a writ of mandamus, the supreme court observed (1) Rule 24.2(a)(3) provides that “[w]hen, as here, the judgment is not for money or property, the judgment creditor can post security that gives the trial court discretion to ‘decline to permit the judgment to be superseded’”;<sup>324</sup> (2) under Texas Civil Practice and Remedies Code § 6.001, “[g]overnmental entities, like the Board, are exempt from bond requirements”;<sup>325</sup> (3) Texas Rule of Appellate Procedure 25.1(h) states that “[e]nforcement of a judgment can proceed unless the judgment is suspended” by posting security pursuant to the rules of appellate procedure, or “the appellant is entitled to supersede the judgment without security by filing a notice of appeal”;<sup>326</sup> and (4) “[t]his is our first opportunity to squarely address which rule trumps.”<sup>327</sup> After substantial analysis, the supreme court rejected the Board’s argument that Rule 25.1(h) removes a trial court’s discretion to deny supersedeas under [Rule] 24.2(a)(3).<sup>328</sup> The supreme court stated, “The Board may appeal without security—this is undisputed—but it has no unqualified right to supersedeas in light of the trial court’s discretion under [Rule] 24.”<sup>329</sup> Accordingly, the Board’s petition for writ of mandamus was denied.<sup>330</sup>

In the case of *In re Corral-Lerma*,<sup>331</sup> the Texas Supreme Court addressed the issue of whether an award of attorney’s fees pursuant to the Texas Theft Liability Act constitutes compensatory damages for purposes of calculating the security amount required for superseding enforcement of a judgment. A contractor (Border Demolition) filed a lawsuit against

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320. *Id.* at 803.

321. *Id.*

322. *Id.*

323. *Id.* at 803–04.

324. *Id.* at 804 (citing TEX. R. APP. P. 24.2(a)(3)).

325. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (West 2002)).

326. *Id.* (citing TEX. R. APP. P. 25.1(h)).

327. *Id.* at 805.

328. *Id.* at 808. The supreme court stated in a footnote, “We need not consider whether the trial court abused its discretion under [Rule] 24.2(a)(3), because neither the Board nor Montalvo raised that argument in this Court.” *Id.* at 808 n.37.

329. *Id.* at 808.

330. *Id.* at 809.

331. 451 S.W.3d 385 (Tex. 2014) (per curiam) (orig. proceeding).

Eduardo Lerma to recover payment for demolition work it had performed for Lerma. Subsequently, Lerma's wife, Teresa Corral-Lerma, "filed a separate suit against Border Demolition under the Texas Theft Liability Act."<sup>332</sup> Border Demolition filed a counterclaim against Corral-Lerma to recover attorney's fees under that Act. The trial court granted summary judgment in favor of Border Demolition and awarded it "\$78,001 in attorney's fees through trial and conditional fees for appeal, as well as court costs and post-judgment interest."<sup>333</sup>

"In lieu of a supersedeas bond, Coral-Lerma deposited \$3,599.20, an amount equal to the court costs awarded to Border Demolition."<sup>334</sup> "Border Demolition moved for a review and increase of the appellate security," which the trial court denied.<sup>335</sup> On review of the sufficiency of the security amount, the court of appeals granted Border Demolition's motion and held that an award of attorney's fees under the Texas Theft Liability Act "falls within the common definition of compensatory damages" and therefore is properly included in determining the "amount of security for money judgment" pursuant to Texas Civil Practice and Remedies Code § 52.006.<sup>336</sup> Corral-Lerma then petitioned for writ of mandamus in the supreme court.<sup>337</sup>

Before the supreme court, Border Demolition acknowledged that subsequent to the issuing of the court of appeals' opinion described above, the Texas Supreme Court held in *In re Nalle Plastics* "that attorney's fees are neither compensatory damages nor costs for purposes of superseding enforcement of a money judgment."<sup>338</sup> Border Demolition, however, argued (1) "an exception should apply under the Texas Theft Liability Act" because that Act, unlike the statute at issue in *In re Nalle Plastics*, "provides for attorney's fees even without an underlying damages recovery"<sup>339</sup> and therefore, according to the court of appeals, an attorney's-fees award under the theft liability act "is more like a compensatory-damages award";<sup>340</sup> (2) "failure to create an exception to *Nalle Plastics* under the facts of this case allows Corral-Lerma to supersede the judgment . . . during appeal with essentially no security against the risk of delay in enforcing the judgment";<sup>341</sup> and (3) "even if Corral-Lerma's security

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332. *Id.* at 386; see TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b) (West 2015).

333. *In re Corral-Lerma*, 451 S.W.3d at 386.

334. *Id.*

335. *Id.*

336. *Id.* Section 52.006 of the Texas Civil Practice and Remedies Code provides in relevant part that "when a judgment is for money, the amount of security must equal the sum of: (1) the amount of compensatory damages awarded in the judgment; (2) interest for the estimated duration of the appeal; and (3) costs awarded in the judgment." TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(a).

337. *In re Corral-Lerma*, 451 S.W.3d at 385; see TEX. R. APP. P. 24.4 (allowing for supreme court mandamus review of supersedeas rulings).

338. *In re Corral-Lerma*, 451 S.W.3d at 386 (citing *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 176 (Tex. 2013) (orig. proceeding)).

339. *Id.*

340. *Id.*

341. *Id.* at 387.

amount need not cover the attorney’s-fees award, it nonetheless must include interest on those fees” because § 52.006 requires security covering the “interest for the estimated duration of the appeal.”<sup>342</sup>

The supreme court rejected all three arguments. First, the supreme court stated that the “statutory distinction” described by Border Demolition “does not undermine the inherent differences between compensatory damages and attorney’s fees we acknowledged in *Nalle Plastics*.”<sup>343</sup> Second, as to the alleged unfair risk complained of by Border Demolition, the supreme court stated in part (1) “under the scheme the legislature enacted, Border Demolition is hardly alone”; and (2) “[i]t is the legislature’s prerogative to strike that balance and our duty to enforce the statute as we find it.”<sup>344</sup> Finally, the supreme court reasoned that (1) prior to the enactment of § 52.006, “the security amount was required to cover the entire amount of a money judgment, court costs, and interest”; and (2) “[i]t is unreasonable to construe [§ 52.006] to require interest on categories of a judgment the Legislature specifically sought to exclude from the security amount.”<sup>345</sup> The supreme court conditionally granted mandamus relief and directed the court of appeals “to withdraw its order granting Border Demolition’s motion to increase the amount of security required to supersede the trial court’s judgment against Corral-Lerma pending appeal.”<sup>346</sup>

As described above, *In re Longview Energy Co.*<sup>347</sup> involved a petition for mandamus relief in the Texas Supreme Court respecting both the posting of supersedeas security and a discovery order pursuant to Texas Rule of Appellate Procedure 24, which governs suspension of enforcement of judgments pending appeal in civil cases. As to the security order, the supreme court observed that pursuant to § 52.006(a) of the Texas Civil Practice and Remedies Code<sup>348</sup> and Texas Rule of Appellate Procedure 24,<sup>349</sup> the security posted “[t]o suspend the execution of a money judgment on appeal” must cover compensatory damages.<sup>350</sup> The supreme

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342. *Id.*

343. *Id.* at 386–87.

344. *Id.* at 387.

345. *Id.* The supreme court specifically disapproved of two prior court of appeals opinions “to the extent they hold that a security amount must include interest on attorney’s fees or any other category of a judgment not required to be included in the security amount.” *Id.* at 387–88 (disapproving, in part, *Tex. Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 344 S.W.3d 628, 629 (Tex. App.—Houston [14 Dist.] 2011, order [mand. denied]); *Shook v. Walden*, 304 S.W.3d 910, 929 (Tex. App.—Austin 2010, pet. denied)).

346. *Id.* at 388 (citing *In re Nalle Plastics Family Ltd. P’ship*, 406 S.W.3d 168, 176 (Tex. 2013) (orig. proceeding)).

347. 464 S.W.3d 353 (Tex. 2015) (orig. proceeding). For a description of the facts in this case, see *supra* notes 230–39 and accompanying text.

348. See *supra* note 335.

349. Rule 24.2(a)(1) states in part, “When the judgment is for money, the amount of the bond, deposit, or security must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment.” TEX. R. APP. P. 24.2 (a)(1).

350. *In re Longview Energy Co.*, 464 S.W.3d at 355.

court noted that while the defendants contended the judgment’s monetary award of future production revenues and an additional \$95.5 million did not constitute as compensatory damages, plaintiff Longview argued that “the award is not punitive and therefore must be compensatory.”<sup>351</sup> In rejecting Longview’s position, the supreme court stated in part (1) “Longview offers no explanation for what the [\$95.5 million] figure represents”; (2) “[w]e cannot conclude that the award is compensatory when it cannot be explained”; and (3) “the award bears no resemblance to any recognized form of damages.”<sup>352</sup> The supreme court concluded that “[i]n no sense can the monetary award in Longview’s judgment be said to be compensatory damages” and the defendants therefore were “not required to post security for those amounts.”<sup>353</sup> Thus, the supreme court reasoned, it “need not consider whether the court of appeals correctly applied the cap on security pursuant to Section 52.006(b) and Rule 24.2(a)(1).”<sup>354</sup> Accordingly, without addressing adequacy of an appellate remedy, the supreme court denied mandamus relief as to the security order.<sup>355</sup>

#### B. MANDATORY VENUE

As described above, the mandamus relief requested in *In re Fisher*<sup>356</sup> included relief from the trial court’s refusal to transfer claims pursuant to venue selection clauses in several agreements signed by the parties at the time plaintiff Richey sold his oil company to defendants. Each of those agreements contained a clause stating that actions “arising out of or relating to” those agreements *may* be brought in Tarrant County and were not to be brought in any other court.<sup>357</sup> Richey, however, filed his claims described above in Wise County, where he resided.

In their petition for mandamus relief in the Texas Supreme Court, defendants contended that the trial court abused its discretion by not enforcing the parties’ “mandatory venue agreement under the major transaction statute, Texas Civil Practice and Remedies Code § 15.020.”<sup>358</sup> Richey argued that § 15.020 and the venue selection clauses in the agree-

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351. *Id.* at 360.

352. *Id.* at 360–61.

353. *Id.* at 361.

354. *Id.* In reaching that conclusion, the supreme court cited *In re Nalle Plastics Family Ltd. P’ship*, 406 S.W.3d 168, 174 (Tex. 2013) (orig. proceeding).

355. *Id.* at 362. The supreme court also addressed the petition for mandamus relief as to the discovery order. *See supra* notes 240–46 and accompanying text.

356. 433 S.W.3d 523, 528 (Tex. 2014) (orig. proceeding). For a description of the facts of this case, *see supra* notes 141–43 and accompanying text.

357. *Id.* at 531.

358. *Id.* at 527; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(c) (West Supp. 2015) (“[n]otwithstanding any other provision of this title, an action arising from a major transaction may not be brought in a county if . . . the party bringing the action has agreed in writing that an action arising from the transaction may not be brought in that county . . . or . . . must be brought in another county of this state”); *see also id.* § 15.0642 (West 2002) (specifically authorizing mandamus relief to enforce a statutory mandatory venue provision).

ments were inapplicable because (1) his claims did not arise from or relate to the transactions to which the venue agreements pertained; (2) “the contractual venue selection clause [was] permissive, not mandatory”; and (3) “venue [was] mandatory in Wise County” under a Civil Practice and Remedies Code provision “requiring a suit for libel or slander to be brought in the county where the plaintiff resided” at the time the cause of action accrued.<sup>359</sup> After extensive analysis focused on the substance of Richey’s claims and the language of the applicable statutes, the supreme court rejected all three of Richey’s arguments and conditionally granted mandamus relief.<sup>360</sup> The trial court was directed to vacate its order denying defendants’ motion to transfer venue and grant the venue motion.

### C. CITY’S PERFORMANCE OF MINISTERIAL ELECTION DUTY

*In re Williams*<sup>361</sup> required the Texas Supreme Court to address whether the particular language on a ballot satisfied a city council’s ministerial duty to submit an ordinance to popular vote. The case pertained to the same City of Houston referendum petition at issue in the *Woodfill* case described above,<sup>362</sup> but involved a subsequent alleged abuse of discretion by the Houston City Council rather than a review of a lower court ruling. “Pursuant to a citizen-initiated referendum petition” respecting a controversial equal rights ordinance, “the Houston City Council ordered that the ordinance be submitted to voters in the upcoming November 2015 election.”<sup>363</sup> Williams and other signers of the referendum petition (Relators) contested the wording of the issue on the ballot. Specifically, Relators contended that the city’s charter “requires a choice of ‘Yes’ or ‘No’ (or ‘For’ or ‘Against’) as to the ordinance itself,” but the wording used by the City Council required voters to “choose between ‘Yes’ and ‘No’ regarding the repeal of the ordinance.”<sup>364</sup>

Without pursuing relief in the trial court or court of appeals, Relators filed a petition for writ of mandamus in the supreme court, two days after the complained-of ballot language was adopted by the city council. The supreme court observed (1) it has jurisdiction under the Texas Election Code to “issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election”;<sup>365</sup> and (2) “[w]hen the law imposes a ministerial duty on the City Council and the City Council does not comply, and there is no adequate remedy by appeal, mandamus may issue.”<sup>366</sup> Additionally, the supreme court stated, “[W]e note ‘the imminence of the election places this case within the narrow class of cases in which resort to the court of appeals is ex-

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359. *In re Fisher*, 433 S.W.3d at 529.

360. *Id.* at 529–34.

361. 470 S.W.3d 819, 820 (Tex. 2015) (per curiam) (orig. proceeding).

362. *See supra* notes 298–310 and accompanying text.

363. *In re Williams*, 470 S.W.3d at 820.

364. *Id.* at 822.

365. *Id.* at 821 (citing TEX. ELEC. CODE ANN. § 273.061).

366. *Id.* at 820.

cused.’”<sup>367</sup> The supreme court concluded the city had not complied with its ministerial duty to submit the ordinance to an affirmative vote by the people of Houston.<sup>368</sup> Further, the supreme court rejected the city’s argument that “despite the short deadlines, a post-election election contest provides an adequate remedy by appeal.”<sup>369</sup> Rather, the supreme court stated, “We have previously rejected this argument, holding that if ‘defective wording can be corrected’ prior to the election, then ‘a remedy will be provided that is not available through a subsequent election contest.’”<sup>370</sup> The supreme court conditionally granted mandamus relief and directed the City Council to “word the proposition such that voters will vote directly for or against the ordinance.”<sup>371</sup>

## VII. CONCLUSION

The limited availability of mandamus relief has remained consistent and warrants the continued characterization of such relief as an “extraordinary remedy not issued as a matter of right.”<sup>372</sup> Further, while the Texas Supreme Court’s opinions in cases involving an alleged abuse of discretion by a lower court and no adequate remedy on appeal vary in the level of analysis of the adequacy of an appellate remedy, the supreme court’s opinions from the past two years show that the supreme court continues to focus on the specific facts of each case to determine whether a remedy is adequate. Thus, reliance on a formulaic approach in such cases is unlikely to be in a party’s best interest.

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367. *Id.* at 821.

368. *Id.* at 823.

369. *Id.*

370. *Id.* (citing *Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999) (orig. proceeding)).

371. *Id.*

372. *In re Reece*, 341 S.W.3d 360, 374 (Tex. 2011) (orig. proceeding).