

SMU Annual Texas Survey

Volume 3

2017

Survey of Recent Mandamus Decisions of the Texas Supreme Court

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Recommended Citation

Honorable Douglas S. Lang, et al., *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 3 SMU Ann. Tex. Surv. 265 (2017)
<http://scholar.smu.edu/smuatxs/vol3/iss1/12>

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SURVEY OF RECENT MANDAMUS DECISIONS OF THE TEXAS SUPREME COURT

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I. INTRODUCTION

Generally, “[m]andamus is an extraordinary remedy granted only when the relator shows that the trial court abused its discretion and that no adequate appellate remedy exists.”¹ The Texas Supreme Court recently stated that “mandamus review is not—and should not be—an easily wielded tool, but such review of significant rulings in exceptional cases may be essential to, among other things, ‘spare private parties and the public the time and money utterly wasted enduring eventual reversal of

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1. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (per curiam) (orig. proceeding) (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)).

improperly conducted proceedings.’”² That statement is consistent with the supreme court’s past and continuing treatment of mandamus as a limited remedy and further reflects the “heavily circumstantial” nature of the “benefit-and-detriment analysis” by which its use is to be determined.³

Although the standard for granting mandamus relief can differ based on particular circumstances,⁴ the primary focus of this article is the availability of mandamus relief to correct a clear abuse of discretion by a lower court when there is no adequate remedy by appeal. During the Survey period of this article, December 1, 2015, through November 30, 2016, the Texas Supreme Court delivered opinions in fifteen mandamus cases.⁵ Fourteen of those fifteen opinions involved requests for relief pursuant to that standard.⁶ This article analyzes, summarizes, and categorizes those fourteen opinions to examine and describe the supreme court’s current decisional approach.

II. MANDAMUS FUNDAMENTALS

Pursuant to the Texas Government Code, each of the fourteen courts of appeals of Texas “may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court.”⁷ Also, the courts of appeals may issue writs of mandamus pertaining to certain district and county court judges or the performance of election duties.⁸ The Texas

2. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 299 (Tex. 2016) (orig. proceeding) (quoting *In re Prudential*, 148 S.W.3d at 136).

3. *See In re H.E.B. Grocery Co.*, 492 S.W.3d at 304.

4. *See infra* text accompanying notes 10–11.

5. Those cases are as follows: *In re Nat’l Lloyds Ins.*, 507 S.W.3d 219 (Tex. 2016) (per curiam) (orig. proceeding); *In re Heredia*, 501 S.W.3d 70 (Tex. 2016) (per curiam) (orig. proceeding); *In re City of Dallas*, 501 S.W.3d 71 (Tex. 2016) (per curiam) (orig. proceeding); *In re Keenan*, 501 S.W.3d 74 (Tex. 2016) (per curiam) (orig. proceeding); *In re Oceanografia, S.A. de C.V.*, 494 S.W.3d 728 (Tex. 2016) (per curiam) (orig. proceeding); *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708 (Tex. 2016) (orig. proceeding); *In re J.B. Hunt Transp.*, 492 S.W.3d at 287; *In re H.E.B. Grocery Co.*, 492 S.W.3d at 300; *In re Lazy W Dist. No. 1*, 493 S.W.3d 538 (Tex. 2016) (orig. proceeding); *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276 (Tex. 2016) (orig. proceeding); *In re DePinho*, 505 S.W.3d 621 (Tex. 2016) (per curiam) (orig. proceeding); *In re M–I L.L.C.*, 505 S.W.3d 569 (Tex. 2016) (orig. proceeding); *In re Phillips*, 496 S.W.3d 769 (Tex. 2016) (orig. proceeding); *In re Bent*, 487 S.W.3d 170 (Tex. 2016) (orig. proceeding); *In re RSR Corp.*, 475 S.W.3d 775 (Tex. 2015) (orig. proceeding). Also, in two additional mandamus cases in which no majority opinion was delivered, individual justices of the supreme court delivered concurring and dissenting opinions. *See In re State of Texas*, 489 S.W.3d 454 (Tex. 2016) (orig. proceeding) (Willett, J., concurring in dismissal of petition for writ of mandamus in a case involving the right to same-sex marriage); *In re C.T.*, 491 S.W.3d 323 (Tex. 2016) (orig. proceeding) (Guzman, J., dissenting to denial of petition for writ of mandamus in case involving right of Texas Department of Family and Protective Services to retain conservatorship following emergency removal).

6. The remaining case involved mandamus to compel performance of a ministerial duty of the Texas Comptroller. *See In re Phillips*, 496 S.W.3d at 770–71; *see also* TEX. GOV’T CODE ANN. § 22.002 (West Supp. 2016); *infra* text accompanying note 10.

7. TEX. GOV’T CODE ANN. § 22.221 (a)–(b) (West 2004).

8. *See id.*; TEX. ELEC. CODE ANN. § 273.061 (West 2010). In a recent opinion delivered outside the Survey period of this article, the Texas Court of Criminal Appeals concluded “courts of appeals in Texs do not have jurisdiction to issue writs of mandamus

Supreme Court has mandamus jurisdiction concurrent with the courts of appeals as to district court judges and election duties.⁹ Further, the supreme court may issue mandamus as to rulings of the courts of appeals or to compel the performance of certain judicial, ministerial, or discretionary acts or duties authorized by state law.¹⁰ Additionally, in rare instances, Texas statutes specifically provide for mandamus jurisdiction in cases pertaining to certain matters under those statutes.¹¹

A petition for writ of mandamus is an original appellate proceeding and is governed procedurally by Texas Rule of Appellate Procedure 52.¹² 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 must be stated in the petition.¹³ Also, lack of compliance with the remaining requirements of Rule 52 may result in denial of relief.¹⁴

III. MANDAMUS STATISTICS

The supreme court's consistency in treating mandamus as a remedy of limited availability is demonstrated by its most recent statistics. During the supreme court's 2016 fiscal year, which ran from September 1, 2015, to August 31, 2016, 188 new petitions for writ of mandamus were filed with the supreme court.¹⁵ Dispositions were made in 194 mandamus cases.¹⁶ The petition for writ of mandamus was denied in 79.8%, or 155, of those cases.¹⁷ In 6.7%, or 13, of those cases, the petition was condition-

against statutory county courts." *Powell v. Hocker*, No. WR-85,177-01, 2017 WL 1244452, at *4 (Tex. Crim. App. Apr. 5, 2017) (orig. proceeding).

9. TEX. CONST. art. V, §§ 1, 3, 6; TEX. GOV'T CODE ANN. § 22.002. Pursuant to Section 22.002(a), the supreme court or a justice of the supreme court may issue 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 a 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." TEX. GOV'T CODE ANN. § 22.002(a). According to *Powell*, 2017 WL 1244452, at *4, mandamus jurisdiction respecting statutory county court judges does not lie currently in the courts of appeals.

10. TEX. GOV'T CODE ANN. § 22.002.

11. *See, e.g., In re Nestle USA, Inc.*, 387 S.W.3d 610, 617 (Tex. 2012) (orig. proceeding) (concluding statutory language allowed for supreme court mandamus review of constitutionality of franchise tax statute).

12. TEX. R. APP. P. 52.

13. TEX. R. APP. P. 52.3(e); *see also State v. Naylor*, 466 S.W.3d 783, 793 (Tex. 2015) (orig. proceeding).

14. *See, e.g., In re Mendez*, No. 05-16-01403-CV, 2016 WL 7230395, at *1 (Tex. App.—Dallas Dec. 14, 2016, orig. proceeding) (mem. op.); *In re Marzett*, No. 05-16-01319-CV, 2016 WL 7163852, at *1 (Tex. App.—Dallas Nov. 22, 2016, orig. proceeding) (mem. op.); *In re Brown*, No. 05-14-00169-CV, 2014 WL 1031043, at *1 (Tex. App.—Dallas Feb. 26, 2014, orig. proceeding) (mem. op.).

15. *See generally Supreme Court Activity Detail: FY 2016*, TEX. COURTS ONLINE, <http://www.txcourts.gov/media/1436288/sc-activity-2016.pdf> [<https://perma.cc/T8C4-9L9G>] (last visited May 5, 2017).

16. Dispositions can include petitions for writ of mandamus filed in the previous fiscal year and not disposed of during that fiscal year. *See id.*

17. *Id.*

ally granted.¹⁸ When compared with statistics for the preceding four years,¹⁹ those numbers show only slight variation:

Table One
Supreme Court Mandamus Statistics: Past Five Fiscal Years

FISCAL YEAR	2016	2015	2014	2013	2012
New petitions filed	188	220	219	219	214
Total dispositions ²⁰	194	225	216	222	221
Petitions denied	79.8%	72%	81.9%	78.8%	73%
Petitions granted	6.7%	7.5%	5.5%	2.2%	6.3%

As to the fifteen mandamus opinions described above within the Survey period of this article, the petition for writ of mandamus was granted in fourteen of those fifteen cases and denied in the remaining case.²¹ In eight of those fifteen cases, oral arguments were heard by the supreme court.²² The petition for writ of mandamus was granted in seven of those eight cases. Also, the petition for writ of mandamus was granted in all seven cases in which oral arguments were not heard.

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

A. DISCOVERY/DISCLOSURE

*In re H.E.B. Grocery Co.*²³ required the Texas Supreme Court to consider the propriety of mandamus relief regarding the trial court's denial of a defendant's motion to conduct a physical examination of a plaintiff in a personal injury case. In that case, Daniel Rodriguez filed a negligence claim against HEB, alleging that he was injured when he fell in the parking lot of an HEB grocery store. HEB retained Dr. William Swan to give medical expert testimony. Upon request by opposing counsel, Swan pro-

18. *See id.*

19. *Id.*; *see also* Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 2 SMU ANN. TEX. SURV. 261, 265 & n.27 (2016); 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).

20. As described above, dispositions for a particular fiscal year can include petitions for writ of mandamus filed in the previous fiscal year and not disposed of during that fiscal year. *See supra* note 16.

21. Pursuant to Texas Rule of Appellate Procedure 52.8(d), "[w]hen granting relief, the court must hand down an opinion as in any other case." However, a court is not required to issue an opinion when denying relief. TEX. R. APP. P. 52.8(d).

22. *See* TEX. R. APP. P. 52.8(b)(4) (stating "court may set the case for oral argument.").

23. 492 S.W.3d 300 (Tex. 2016) (per curiam) (orig. proceeding).

vided a report stating his opinion about Rodriguez's injuries. Swan "did not examine Rodriguez before preparing [that] report," but rather based his opinions "solely on a review of Rodriguez's medical records."²⁴ Subsequently, "HEB filed a motion requesting that Rodriguez be required to submit to a physical examination by Dr. Swan," which was denied by the trial court.²⁵ Following an unsuccessful attempt to obtain mandamus relief in the court of appeals, HEB petitioned for mandamus in the supreme court.²⁶

The supreme court observed that pursuant to Texas Rule of Civil Procedure 204.1, the trial court "may" grant a motion to "obtain a physical or mental examination of another party . . . if the movant establishes that (1) 'good cause' exists for the examination, and (2) the mental or physical condition of the party the movant seeks to examine 'is in controversy.'"²⁷ Additionally, "the U.S. Supreme Court stated that a negligence plaintiff who asserts a mental or physical injury 'places that . . . injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.'"²⁸ The supreme court concluded that HEB had satisfied the requirements of Rule 204.1 and therefore the trial court abused its discretion by denying HEB's motion for a physical examination.²⁹

Next, the supreme court considered whether there was a "clear and adequate remedy at law, such as a normal appeal."³⁰ The supreme court stated, "The adequacy of an appellate remedy is determined by balancing the benefits and detriments of mandamus," a balance that is "heavily circumstantial."³¹ Based on its "benefit-and-detriment analysis of the circumstances," the supreme court concluded HEB lacked an adequate appellate remedy because (1) "HEB's defense hinge[d] in large part on its challenges to the nature, extent, and cause of Rodriguez's injuries"; (2) those issues depended "significantly on competing expert testimony"; and (3) HEB sought "to allow its expert the same opportunity as Rodriguez's expert to fully develop and present his opinion, ensuring a fair trial."³² Accordingly, the supreme court conditionally granted "HEB's petition

24. *Id.* at 302.

25. *Id.*

26. *Id.*

27. *Id.* at 303 (citing TEX. R. CIV. P. 204.1).

28. *Id.* at 304 (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 119 (1964)).

29. *Id.*

30. *Id.* (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (orig. proceeding)). It appears that throughout the past several decades, the supreme court has used the terms "clear and adequate remedy" and "adequate remedy" interchangeably in describing mandamus requirements. *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 840–41 (Tex. 1992) (orig. proceeding) (using both terms without distinction in describing mandamus requirements). The supreme court has not specifically addressed the definition of "clear" as used in the term "clear and adequate remedy." *Cf. In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding) (describing mandamus requirement as "no adequate remedy by appeal" and discussing how to define "adequate" in that context).

31. *In re H.E.B. Grocery Co.*, 492 S.W.3d at 304 (citing *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding)).

32. *Id.* at 304–05.

for writ of mandamus and direct[ed] the trial court to . . . enter an order requiring Rodriguez to submit to a physical examination on reasonable and appropriate terms and conditions.”³³

In *In re DePinho*,³⁴ the Texas Supreme Court concluded mandamus was proper to correct the trial court’s authorization of pre-suit discovery where the potential claim was unripe. William Bornmann was employed as the head of a research laboratory at The University of Texas MD Anderson Cancer Center (MD Anderson). “In 2013, Bornmann’s research team . . . discovered an antibiotic with the potential to treat cancer and type-2 diabetes.”³⁵ Bornmann signed an “invention disclosure report” (IDR) presented to him by an employee of MD Anderson, which listed a number of “contributors,” including Bornmann and the president of MD Anderson, Ronald DePinho.³⁶ In August 2014, MD Anderson decided Bornmann’s contract would not be renewed and his lab would be closed.

Shortly before the expiration of his contract, Bornmann filed a petition pursuant to Texas Rule of Civil Procedure 202.1(b)³⁷ seeking to take pre-suit depositions of DePinho and another high-level employee of MD Anderson, Andrew Dennis (collectively, Relators). In his petition, “Bornmann theorized that ‘his lab [was being] closed to benefit . . . DePinho.’”³⁸ Specifically, according to Bornmann, DePinho planned to subsequently file a “new” IDR without Bornmann’s name and obtain a patent respecting the antibiotic in question, which would then be licensed to a company owned by DePinho. Bornmann sought to “investigate a potential tortious interference claim against Dr. DePinho as well as other potential causes of action.”³⁹ The trial court granted Bornmann’s request for Rule 202 depositions of Relators. After an unsuccessful attempt to obtain mandamus relief in the court of appeals, Relators filed a petition for writ of mandamus in the supreme court.

The supreme court observed, (1) “Generally, a party ‘cannot obtain by Rule 202 what it would be denied in the anticipated action’”; and (2) “allowing courts to authorize Rule 202 depositions for potential suits over which they lack jurisdiction would untether pre-suit discovery from the suit it purports to be in aid of.”⁴⁰ Then, the supreme court addressed Relators’ argument that Bornmann could not obtain discovery on his potential claims because such claims were “unripe” and therefore not within

33. *Id.* at 305.

34. 505 S.W.3d 621 (Tex. 2016) (per curiam) (orig. proceeding).

35. *Id.* at 622.

36. *Id.* IDRs are used by the UT System to identify the employee-creators of an invention and their respective contributions for purposes of sharing royalties with the employee-creators. *Id.* at n.1.

37. See TEX. R. CIV. P. 202.1(b). That rule provides, “A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions . . . to investigate a potential claim or suit.” *Id.*

38. *In re DePinho*, 505 S.W.3d at 622.

39. *Id.*

40. *Id.* at 623 (citing *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (per curiam) (orig. proceeding)).

the trial court's jurisdiction. The supreme court reasoned that all of Bornmann's claims "rely upon Bornmann's theory that DePinho will soon file a new IDR that prevents Bornmann from sharing in any royalties that might result from his lab's discovery."⁴¹ Accordingly, the supreme court stated, "[Bornmann's] claims—all of which rely upon the same hypothetical patent application—are not yet ripe because the facts upon which they rely have yet to occur."⁴² Therefore, the supreme court concluded, "[T]he trial court clearly abused its discretion by ordering Rule 202 depositions and mandamus is proper."⁴³

*In re Christus Santa Rosa Health System*⁴⁴ involved a request for mandamus relief respecting the production of privileged documents. Dr. Gerald Marcus Franklin performed thyroid surgery on Leslie Baird in a facility operated by Christus Santa Rosa Health System (Christus). That surgery was unsuccessful and "Christus convened a medical peer review committee to review Dr. Franklin's performance in the surgery."⁴⁵ Subsequently, Baird filed a malpractice claim against Franklin and his medical group. "Franklin filed a motion to designate Christus as a responsible third party, alleging that Christus . . . failed to inform him that . . . a critical piece of equipment[would be] unavailable" during the surgery.⁴⁶ Then, Baird added Christus as a defendant.

Franklin served a "request for production on Christus, asking for, among other things, documents from Christus's medical peer review file."⁴⁷ Christus contended those "documents were privileged under the medical peer review committee privilege" in Section 160.007 of the Texas Occupations Code.⁴⁸ Additionally, Christus filed a privilege log listing the documents withheld based on that privilege. In response, Franklin argued (1) an exception to the medical peer review privilege applies where "a medical peer review committee takes action that could result in censure, suspension, restriction, limitation, revocation, or denial of membership or privileges in a health care entity"; and (2) that exception is applicable in this case.⁴⁹

Upon the filing of a motion to compel by Franklin, "Christus sent the documents listed in the privilege log to the trial court for an in camera inspection."⁵⁰ Following a hearing, "the trial court ordered Christus to produce the documents to Dr. Franklin under a protective order [allowing disclosure] only to Dr. Franklin and his attorney."⁵¹ However, the

41. *Id.* at 625.

42. *Id.* (citing *Camarena v. Tex. Emp't Comm'n*, 754 S.W.3d 149, 151 (Tex. 1988)).

43. *Id.* (citing *In re Jorden*, 249 S.W.3d 416, 420 (Tex. 2008) (orig. proceeding)). The supreme court did not specifically address the existence of an adequate appellate remedy.

44. 492 S.W.3d 276 (Tex. 2016) (orig. proceeding).

45. *Id.* at 278.

46. *Id.*

47. *Id.*

48. *Id.* (citing TEX. OCC. CODE ANN. § 160.007(a) (West 2012)).

49. *Id.* at 281 (quoting TEX. OCC. CODE ANN. § 160.007(d)).

50. *Id.* at 278.

51. *Id.* at 279.

record showed the trial court explained that, during the *in camera* inspection, Franklin (1) “reviewed the documents only to ‘cull back . . . information regarding other people’s . . . health information and/or [S]ocial [S]ecurity numbers’”; and (2) “didn’t look at the [peer review] report for the merits of it one way or the other.”⁵² Christus sought mandamus relief in the court of appeals without success, then filed a petition for writ of mandamus in the supreme court.

The supreme court stated that “the trial court abuses its discretion when it fails to adequately inspect documents tendered for an *in camera* inspection before compelling production ‘when such review is critical to the evaluation of a privilege claim.’”⁵³ Further, the supreme court stated, “If the trial court issues an erroneous order requiring the production of privileged documents, the party claiming the privilege is left without an adequate appellate remedy.”⁵⁴ The supreme court stated in part, “We cannot determine from this record whether the medical peer review committee made a recommendation or final decision required to trigger the exception under section 160.007(d).”⁵⁵ The supreme court concluded that the trial court “clearly abused its discretion in failing to adequately review the merits of the documents to determine whether the privilege applied and, if so, whether the exception in section 160.007(d) was satisfied, before ordering production.”⁵⁶ The petition for writ of mandamus was conditionally granted and the trial court was directed to “vacate the parts of its . . . order that compel production of the medical peer review committee records at issue here and determine whether, upon further examination, the section 160.007(d) exception to the medical peer review privilege applies in this case.”⁵⁷

*In re National Lloyds Insurance*⁵⁸ involved the issue of whether a pre-trial discovery order was overbroad. The plaintiffs were owners of insurance policies with National Lloyds. Following two hail storms, the plaintiffs sued National Lloyds alleging underpayment of their insurance claims. The lawsuit was transferred to a “pretrial court” by the Multidistrict Litigation Panel of Texas. The “[p]laintiffs served National Lloyds with requests for production” of, among other things, (1) “[a]ll documents regarding the generalized assessment, review, evaluation and/or summary of [National Lloyds’s] handling of claims arising out of [the hail storms in question]”; and (2) “[a]ny document general in nature which applies to more than one claim created, gathered, or reviewed by [Na-

52. *Id.* at 282 (internal quotation marks omitted).

53. *Id.* at 279 (quoting *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 261 (Tex. 2005) (orig. proceeding)).

54. *Id.* (citing *In re Mem’l Hermann Hosp. Sys.*, 464 S.W.3d 686, 697–98 (Tex. 2015) (orig. proceeding); *In re Living Ctrs.*, 175 S.W.3d at 256; *Mem’l Hosp.–The Woodlands v. McCown*, 927 S.W.2d 1, 12 (Tex. 1996) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding)).

55. *In re Christus*, 492 S.W.3d at 285.

56. *Id.* at 286.

57. *Id.* at 287.

58. 507 S.W.3d 219 (Tex. 2016) (per curiam) (orig. proceeding).

tional Lloyds] relating to [the hail storms in question],” including “any follow-up documents.”⁵⁹ “After reviewing emails produced by National Lloyds, Plaintiffs . . . [moved] to compel production of various . . . system-generated management reports referenced in emails,” which plaintiffs contended were required as a response to their requests for production.⁶⁰ Additionally, the plaintiffs “sought sanctions against National Lloyds for its failure to produce the reports.”⁶¹ National Lloyds argued, (1) “[T]he reports sought exceeded the scope of the prior requests for production”; and (2) discovery as to those reports was “overbroad” and in violation of a prior case involving National Lloyds in which the supreme court held that a “trial court had abused its discretion in ordering a defendant insurer to produce evidence related to insurance claims other than the plaintiff’s claim.”⁶² The pretrial court signed an order that read: “Management Reports and Emails—National Lloyds is ordered to produce all emails, reports attached to emails, and any follow-up correspondence and information related to those reports which were sent or received by a National Lloyds employee or any affiliated adjusting company employees.”⁶³ Additionally, the order required National Lloyds to pay the plaintiffs’ attorney’s fees as sanctions. The court of appeals denied National Lloyds’s request for mandamus relief as to the portions of that order described above, and National Lloyds then petitioned for mandamus relief in the supreme court.

The supreme court stated, “A discovery order that compels production beyond the rules of procedure is an abuse of discretion for which mandamus is the proper remedy.”⁶⁴ Then, the supreme court observed that the discovery order in question “is not limited by location or weather event and exceeds the scope of [the plaintiffs’] requests for production.”⁶⁵ Further, the supreme court rejected the plaintiffs’ arguments that the breadth of the discovery order was proper (1) in light of the fact that the case is “an MDL case” involving “large-scale discovery”; or (2) because plaintiffs were seeking to show National Lloyds “had knowledge of its own misdeeds and a pattern and practice to defraud its insureds.”⁶⁶ The supreme court concluded that because the discovery order “was not tailored with regard to time, place, or subject matter,” it was overbroad and mandamus relief was warranted.⁶⁷ Additionally, as to the sanctions awarded against National Lloyds, the supreme court stated that the pretrial court “is better situated to determine whether the attorney’s fees award remains appropriate in light of the Court’s decision today” and

59. *Id.* at 221.

60. *Id.*

61. *Id.* at 222.

62. *Id.*; see *In re Nat’l Lloyds Ins.*, 449 S.W.3d 486, 488–90 (Tex. 2014) (per curiam) (orig. proceeding).

63. *In re Nat’l Lloyds Ins.*, 507 S.W.3d at 222.

64. *Id.* at 223 (quoting *In re Nat’l Lloyds*, 449 S.W.3d at 488).

65. *Id.* at 225.

66. *Id.*

67. *Id.* at 226.

directed the pretrial court to “reevaluate the ordered sanctions.”⁶⁸

In *In re Keenan*,⁶⁹ the Texas Supreme Court considered whether a trial court’s restrictions respecting evidence in a homeowner’s challenge to the actions of a homeowners’ association warranted mandamus relief. Carolyn Frost Keenan owned a home that was subject to deed restrictions enforced by River Oaks Property Owners, Inc. (ROPO), a homeowners’ association. In 2014, ROPO filed a lawsuit against Keenan in which it sought to require “Keenan to remove improvements that allegedly violated a limit on impervious cover . . . found in 2006 ‘Amended Restrictions’ that purported to amend the neighborhood’s deed restrictions.”⁷⁰ Keenan filed a counterclaim seeking a declaration “that the Amended Restrictions were ‘not properly enacted’ and were ‘unenforceable’ [because] an insufficient number of homeowners had voted for the Amended Restrictions.”⁷¹ Also, “Keenan served a discovery request for production of the homeowner ballots on the 2006 Amended Restrictions.”⁷² Upon ROPO’s objection “that the ballots were confidential and privileged voting records and were irrelevant to the dispute[,] Keenan moved to compel production.”⁷³ The trial court signed an order that granted Keenan access to the ballots but also provided that (1) “only Keenan’s counsel could review the ballots”; (2) “Keenan could not copy the ballots”; and (3) “the contents of the ballots could not be disclosed ‘to anyone else’ without further court order.”⁷⁴ After inspecting the ballots, Keenan’s counsel “made clear his belief . . . that ROPO had received insufficient votes to approve the Amended Restrictions” and asked that the trial court’s order be modified to remove the restrictions on access to the ballots.⁷⁵ At a hearing on that request, the trial court declined to order production of the ballots but stated orally that (1) “it might let Keenan subpoena them at trial”; and (2) “counsel could share his notes on the ballots with Keenan’s expert.”⁷⁶

The court of appeals denied Keenan’s request for mandamus relief that would allow review of the ballots by Keenan’s expert. Then, Keenan filed a petition for mandamus relief in the supreme court. The supreme court observed that in determining whether a relator has an adequate remedy by appeal, the court “may consider whether mandamus can spare the litigants and public ‘the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.’”⁷⁷ Additionally, the supreme court stated, “[A] key issue is whether ROPO obtained sufficient

68. *Id.*

69. 501 S.W.3d 74 (Tex. 2016) (per curiam) (orig. proceeding).

70. *Id.* at 75.

71. *Id.*

72. *Id.* at 76.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)).

votes to enact the 2006 Amended Restrictions,” and “Keenan is entitled to challenge the sufficiency of the votes.”⁷⁸ The supreme court reasoned that “[t]he outcome of the dispute should not turn, unnecessarily, on the credibility of a party’s attorney”; but rather, “Keenan’s expert should be able to review directly the ballots and testify as to whether a vote threshold . . . was achieved.”⁷⁹ Further, as to an argument by ROPO “that votes cast in an election are traditionally treated as confidential,” the supreme court stated the trial court is not foreclosed from “entering an appropriate protective order.”⁸⁰ The supreme court conditionally granted mandamus relief and directed the trial court to “permit Keenan to copy the ballots and disclose them for purposes of discovery, expert analysis, trial preparation, and trial.”⁸¹

In the case of *In re City of Dallas*,⁸² the Texas Supreme Court concluded an issue affecting whether jurisdiction existed that required the supreme court’s *sua sponte* review before it could address the merits of the case. The City of Corsicana, Navarro County, and Navarro College (collectively, Navarro) filed a petition pursuant to Texas Rule of Civil Procedure 202 in the county court at law seeking authorization for pre-suit depositions “to investigate a potential tortious interference claim against the City of Dallas” (Dallas).⁸³ In its petition, Navarro alleged Dallas’s tortious interference caused Navarro County to lose “approximately 200 jobs that were formally located within Navarro County.”⁸⁴ Although “Navarro did not specify the damages it would seek in the anticipated suit,” it stated that it was injured because (1) “jobs are no longer located in Navarro County where Navarro County taxing authorities and businesses can benefit” from them; and (2) “the loss of unabated tax revenues on the real property and inventory has . . . caused significant injury.”⁸⁵ Dallas filed a plea to the jurisdiction based on governmental immunity, which the county court at law denied. Further, the county court at law granted Navarro’s Rule 202 petition and authorized the requested pre-suit depositions. The court of appeals granted Dallas’s request for mandamus relief in part, narrowing the scope of the county court at law’s Rule 202 order.⁸⁶ Then, Dallas sought mandamus relief in the supreme court.

The supreme court observed, (1) “[F]or a party to properly obtain Rule 202 pre-suit discovery, ‘the court *must* have subject-matter jurisdiction

78. *Id.*

79. *Id.* at 77.

80. *Id.*

81. *Id.* at 78.

82. 501 S.W.3d 71 (Tex. 2016) (per curiam) (orig. proceeding).

83. *Id.* at 73; see TEX. R. CIV. P. 202 (titled “Depositions Before Suit or to Investigate Claims”).

84. *In re City of Dallas*, 501 S.W.3d at 74.

85. *Id.*

86. *Id.* at 73 (citing *City of Dallas v. City of Corsicana*, No. 10-14-00090-CV, 2015 WL 4985935, at *7 (Tex. App.—Waco Aug. 20, 2015, orig. proceeding) (mem. op.) *mand. conditionally granted sub. nom. In re City of Dallas*, 501 S.W.3d 71).

over the anticipated action’”;⁸⁷ (2) “a court is duty-bound to determine its jurisdiction regardless of whether the parties have questioned it”;⁸⁸ (3) “[c]ounty courts at law are courts of limited jurisdiction and many, including the county court at law in this case, lack jurisdiction over a ‘matter in controversy’ that exceeds \$[2]00,000”;⁸⁹ and (4) the record showed the county court at law asked counsel for Navarro, “In regards to damages, do y’all fall under the jurisdiction of my court?” and Navarro’s counsel responded, “Well, we wouldn’t if . . . we were here litigating the lawsuit,” but “[t]he only thing we’re asking for is discovery.”⁹⁰ The supreme court concluded it could not say “with certainty that the amount in controversy of Navarro’s potential claim exceed[ed] \$200,000.”⁹¹ Consequently, the supreme court conditionally granted the petition for writ of mandamus and directed the county court at law “to vacate its order authorizing depositions and to first determine its jurisdiction.”⁹²

In *In re M–I L.L.C.*,⁹³ the Texas Supreme Court addressed whether the trial court acted properly regarding the protection of alleged trade secrets. Jeff Russo was employed by M–I as the business development manager of a division that sold mesh screens used in oil and gas drilling. After several years in that position, Russo left M–I and became the global product line manager of the screen division of a competitor, NOV. M–I sent a letter to Russo stating that he retained trade secrets and confidential information. The letter also asserted that Russo was in breach of a non-compete agreement with M–I.⁹⁴ Russo sued M–I, requesting a declaration that his non-compete agreement with M–I was unenforceable. M–I (1) filed counterclaims against Russo for, among other things, breach of the non-compete agreement and misappropriation of trade secrets; and (2) “asserted third-party claims against NOV for misappropriation of trade secrets and tortious interference.”⁹⁵ The relief sought by M–I included a temporary injunction. At the hearing on M–I’s application for a temporary injunction, M–I sought to present the testimony of the global business line manager of its screen division, LaTosha Moore, in order to establish its trade secrets. “M–I requested that everyone, except the parties’ counsel, their experts, and Russo be excluded from the courtroom” during M–I’s presentation of that testimony.⁹⁶ The trial court denied that request on the ground that excluding NOV’s designated representative

87. *Id.* at 73 (quoting *In re DePinho*, 505 S.W.3d 621, 623 (Tex. 2016) (per curiam) (orig. proceeding)).

88. *Id.* (citing *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004), *superseded by statute*, Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen. Laws 3783, 3783, *as recognized in* *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500 (Tex. 2012)).

89. *Id.* (quoting *United Servs. Auto. Ass’n v. Brite*, 215 S.W.3d 400, 401 (Tex. 2007)).

90. *Id.* at 74.

91. *Id.*

92. *Id.*

93. 505 S.W.3d 569 (Tex. 2016) (orig. proceeding).

94. *Id.* at 573.

95. *Id.*

96. *Id.*

would be “a total violation of due process.”⁹⁷ However, the trial court stated it would order NOV’s designated representative not to disclose or use any trade secrets he heard. M–I requested, and was granted, a recess in order to pursue mandamus relief in the court of appeals. M–I consulted the court of appeals *in camera*, and “[a]s an offer of proof, [] submitted . . . an affidavit from Moore detailing the testimony she was prepared to offer at the temporary injunction hearing.”⁹⁸ The court of appeals denied mandamus relief.⁹⁹ Immediately thereafter, Russo and NOV filed a motion requesting the trial court to compel production of the Moore affidavit submitted by M–I to the court of appeals, contending “it was a discoverable witness statement.”¹⁰⁰ The trial court granted that motion without reviewing the Moore affidavit. Then, M–I sought mandamus relief in the supreme court.

The supreme court stated there was “no dispute” that the mandamus requirement of no adequate appellate remedy was satisfied because “no adequate appellate remedy exists for an erroneous order to disclose a trade secret.”¹⁰¹ Further, the supreme court stated, (1) “[C]ourts have discretion to exclude parties and their representatives in limited circumstances when countervailing interests overcome [the] presumption” in favor of participation, and (2) “[i]n the present case, this balancing required the trial court to determine the degree of competitive harm M–I would have suffered from the dissemination of its alleged trade secrets to [NOV’s designated representative].”¹⁰² The supreme court reasoned that “[w]ithout knowing what M–I’s alleged trade secrets were, the trial court simply could not have conducted the required balancing.”¹⁰³ Additionally, the supreme court reasoned that “[b]ecause the Moore affidavit itself was the only evidence that could substantiate whether it did, in fact, contain trade secrets, the trial court had no choice but to review it *in camera* before ruling on whether to produce it over M–I’s assertion that it contained trade secrets.”¹⁰⁴ The supreme court concluded the trial court abused its discretion by (1) not properly balancing the competing interests at stake before making its determination as to whether NOV’s designated representative should be excluded from the preliminary injunction

97. *Id.* at 574.

98. *Id.* at 573.

99. *In re M–I L.L.C.*, No. 14–14–00705–CV, 2014 WL 5591575, at *1 (Tex. App.—Houston [14th Dist.] Nov. 4, 2014, orig. proceeding) (per curiam) (mem. op.), *mand. conditionally granted* 505 S.W.3d 569 (Tex. 2016) (orig. proceeding).

100. *In re M–I L.L.C.*, 505 S.W.3d at 573.

101. *Id.* at 574 (citing *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (per curiam) (orig. proceeding)).

102. *Id.* at 575–76 (first citing *Helminski v. Ayerst Labs.*, a Div. of Am. Home Prods. Corp., 766 F.2d 208, 217 (6th Cir. 1985); and then citing *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987) (orig. proceeding) (“requiring court to consider harm to party’s proprietary interest before restricting dissemination of trade secrets”)).

103. *Id.* at 576.

104. *Id.* at 579 (citing *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (per curiam) (orig. proceeding) (“recognizing that, when allegedly privileged documents are the only evidence to substantiate the claim of privilege, the trial court must review them *in camera*”)).

hearing; and (2) ordering the Moore affidavit disclosed without reviewing it in camera.¹⁰⁵ Consequently, the supreme court conditionally granted mandamus relief.¹⁰⁶

B. LAWSUIT FORUM

*In re Oceanografia, S.A. de C.V.*¹⁰⁷ involved the issue of whether the trial court properly applied the relevant factors in denying a motion to dismiss based on forum non conveniens. A merchant vessel operated by Oceanografia, a Mexican entity, sank off the coast of Mexico as it was ferrying Mexican workers to an offshore drilling site, resulting in the drowning of one of its workers.¹⁰⁸ The vessel's owner was a Mexican entity controlled by a Louisiana entity. A Texas entity, OSA International, LLC, was Oceanografia's marketing affiliate.

In 2008, Oceanografia, OSA, the vessel's owner, and the owner's Louisiana affiliate (collectively, defendants) were sued in Texas by the deceased's beneficiaries and ninety-one of the surviving workers, all of whom lived in Mexico, except one. The three non-Texas defendants moved to dismiss the lawsuit based on forum non conveniens, pursuant to Section 71.051 of the Texas Civil Practice and Remedies Code.¹⁰⁹ The trial court denied both that motion and a special appearance filed by Oceanografia. During approximately the next six years, Oceanografia unsuccessfully appealed the denial of its special appearance, engaged in discovery, and participated in attempts at mediation. Then, "[i]n June 2014, defendants sought mandamus relief from the court of appeals,"¹¹⁰ regarding the denial of the above-described motion to dismiss. The court of appeals denied that relief, "concluding that defendants' lack of diligence in pursuing relief had prejudiced plaintiffs."¹¹¹ Ultimately, defendants sought mandamus relief in the Texas Supreme Court.

First, the supreme court concluded defendants' delay in seeking mandamus relief from the denial of the motion to dismiss for forum non conveniens was not unreasonable because (1) "to press ahead might have compromised [Oceanografia's] appeal of the denial of its special appearance"; and (2) plaintiffs showed no prejudice from the delay.¹¹² Second, the supreme court addressed the six factors listed in Section 71.051(b) respecting dismissal for forum non conveniens:

- (1) [A]n alternate forum exists in which the claim or action may be tried;
- (2) the alternate forum provides an adequate remedy;
- (3) maintenance of the claim or action in the courts of this state would

105. *Id.* at 580.

106. *Id.*

107. 494 S.W.3d 728 (Tex. 2016) (per curiam) (orig. proceeding).

108. *Id.* at 730.

109. *See id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West Supp. 2016)).

110. *Id.*

111. *Id.*

112. *Id.* at 731 (citing *In re E.I. du Pont Nemours & Co.*, 92 S.W.3d 517, 524–25 (Tex. 2002) (orig. proceeding)).

work a substantial injustice to the moving party; (4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim; (5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.¹¹³

The supreme court concluded, (1) "The first, fourth, and sixth factors clearly weigh in favor of dismissal"; and (2) the evidence did not support findings that Mexican courts would not provide an adequate remedy; "that maintaining this action in Texas[, as compared to Mexico,] would not work a substantial injustice"; or that the balance of the relevant interests predominated in favor of maintaining the action in Texas.¹¹⁴ The supreme court conditionally granted mandamus relief and directed the trial court to issue an order dismissing the case for forum non conveniens.¹¹⁵

In *In re Nationwide Insurance Co. of America*,¹¹⁶ the Texas Supreme Court considered the propriety of the trial court's denial to enforce a contractual forum-selection clause. In December 2012, a former independent agent of Nationwide named Brian Besch filed a lawsuit in Texas against several Nationwide affiliates for breach of contract, fraud, and occupational disparagement. The contract sued upon contained a clause identifying Franklin County, Ohio, as the proper forum for a dispute respecting the matter to which the lawsuit pertained. In January 2015, Nationwide sought to enforce the forum-selection clause by moving to dismiss the Texas lawsuit. Besch argued that (1) Nationwide had waived the clause by "its substantial participation in the Texas litigation coupled with the delay in asserting its rights"; and (2) such "participation and delay was prejudicial because [Besch's] contract claim" was now barred in Ohio pursuant to a limitations period contained in the contract and enforceable under Ohio law.¹¹⁷ Although "Nationwide [then] agreed to waive enforcement of the contractual-limitations clause[, the] trial court . . . rejected [that] waiver as 'untimely' and denied [Nationwide's] motion to dismiss."¹¹⁸ After mandamus relief was denied by the court of appeals, Nationwide sought mandamus relief in the supreme court.

The supreme court observed that a trial court abuses its discretion by refusing to enforce a contractual forum-selection clause "absent clear evidence that '(1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement

113. *Id.* at 731–32 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b)).

114. *Id.* at 732–33.

115. *Id.* at 733.

116. 494 S.W.3d 708 (Tex. 2016) (orig. proceeding).

117. *Id.* at 711.

118. *Id.* at 712.

would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.”¹¹⁹ The supreme court added, “[W]e have repeatedly held that appeal is inadequate to remedy the erroneous denial of such a motion.”¹²⁰ Further, the supreme court noted it is ordinarily “unreasonable or unjust” for a court to enforce a forum-selection clause if that clause has been waived.¹²¹ Then, the supreme court turned to the applicable test for determining waiver in forum-selection clause cases, which “embodies aspects of estoppel” and requires consideration of whether a party has “substantially invoke[ed] the judicial process to the other party’s detriment or prejudice.”¹²² The supreme court rejected Besch’s argument that “Nationwide’s delay [was] prejudicial because Nationwide’s assertion of its right under the forum-selection clause came after the expiration of the contractual-limitations period.”¹²³ Rather, the supreme court concluded that, even assuming Nationwide’s conduct substantially invoked the judicial process, Besch “never actually suffered the prejudice of which he complains” and “[t]he assumed loss of his contract claim, once theoretical, does not exist because of Nationwide’s voluntary waiver of the contractual-limitations period.”¹²⁴ The supreme court conditionally granted mandamus relief and “direct[ed] the trial court to enforce the parties’ [contractual] forum-selection clause.”¹²⁵

C. MOTION FOR NEW TRIAL

*In re Bent*¹²⁶ concerned the propriety of the trial court’s order granting a motion for new trial, an issue involving application of requirements

119. *Id.* (quoting *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231–32 (Tex. 2008) (per curiam) (orig. proceeding)).

120. *Id.* (citing, *inter alia*, *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (per curiam) (orig. proceeding)).

121. *Id.*

122. *Id.* at 713 (quoting *In re ADM Inv’r Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010) (orig. proceeding)). The supreme court noted: (1) “Besch concedes that the ‘time, effort, and funds’ he expended in the Texas litigation are not the type of detriment ‘typically . . . deemed [] sufficient by Texas courts to avoid a forum-selection clause’; and (2) “[m]oreover, delay alone is generally insufficient to establish waiver.” *Id.* at 713–14 (first citing *Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559–60 (Tex. 2004) (per curiam) (orig. proceeding); and then citing *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (per curiam) (orig. proceeding)).

123. *Id.* at 714.

124. *Id.* Additionally, the supreme court rejected Besch’s argument that he would “be prejudiced if the forum-selection clause [was] enforced because his fraud claim was also barred by limitations in Ohio.” *Id.* The supreme court reasoned that, unlike Besch’s breach of contract claim, his fraud claim “did not become barred until several months after Nationwide asserted its rights under the mandatory forum-selection clause,” and therefore “Besch had a reasonable opportunity to preserve [that] claim in Ohio.” *Id.* at 714–15.

125. *Id.* at 717. A dissenting opinion was filed by Justice Guzman, in which Justice Brown joined. *Id.* The dissent argued in part that Besch’s contract claim was “potentially prejudice[d] because there [was] no proof Nationwide would honor its waiver of the contractual-limitations clause.” *Id.* at 716, 721 (Guzman, J., dissenting).

126. 487 S.W.3d 170 (Tex. 2016) (orig. proceeding).

shaped by the Texas Supreme Court in recent years.¹²⁷ Stacey and Mark Bent purchased a home in 2005 and secured homeowner's insurance with USAA. After incurring damage to their home from a hurricane and flooding, the Bents filed several insurance claims and eventually sued USAA for breach of their homeowner's policy and various violations of the Texas Insurance Code. While that litigation was proceeding, the Bents met with city officials respecting city restrictions on their efforts to repair their house and were informed that an ordinance required the home to be rebuilt at least one foot above the flood plain in which it sat.

At the conclusion of trial, the jury found USAA did not breach the homeowner's policy, but did make a misleading statement in violation of the insurance code respecting whether the policy covered tree removal. The jury awarded the Bents damages of \$150,000 for the diminished value of the home, \$250,000 for mental anguish, and \$185,000 in attorney's fees through trial. The Bents filed a motion for new trial, which was granted by the trial court. In its order, the trial court provided five bases:

(1) [T]he jury's finding that USAA did not breach the homeowner's policy was contrary to the great weight and preponderance of the evidence; (2) USAA violated the trial court's order in limine regarding the Bents' failure to seek a variance from the relevant . . . city ordinance; (3) the evidence did not support the jury's award for the diminished value of the Bents' home; (4) the jury improperly failed to award appellate attorney's fees; and (5) the jury's finding as to mental-anguish damages was not supported by a finding that USAA "knowingly" violated the Insurance Code, a predicate for which both sides failed to argue.¹²⁸

The court of appeals granted USAA's request for mandamus relief, concluding the trial court abused its discretion on each of its bases for granting a new trial. Then, the Bents sought mandamus relief in the supreme court, contending "the trial court acted within its discretion on every basis except for the mental-anguish-damages predicate," which they did not present for review.¹²⁹

The supreme court observed that it had held in other mandamus cases involving motions for new trial that "the significance of the issue—protection of the right to jury trial—justified mandamus review under the circumstances."¹³⁰ Also, the supreme court stated that

a trial court does not abuse its discretion in ordering a new trial "so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal

127. See *id.* at 173 (citing *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 748–49 (Tex. 2013) (orig. proceeding); *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688–89 (Tex. 2012) (orig. proceeding); *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding)). According to the supreme court, "Within the past decade, this Court's jurisprudence has evolved to more firmly secure Texans' constitutional right to a jury trial in the new-trial context." *Id.* at 175.

128. *Id.*

129. *Id.*

130. *Id.* at 176 (quoting *In re Columbia Med. Ctr.*, 290 S.W.3d at 209).

standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.”¹³¹

Further, the supreme court noted it had held that “[a]ppellate courts must be able to conduct merits-based review of new[-]trial orders’ and if ‘a trial court’s articulated reasons are not supported by the underlying record, the new[-]trial order cannot stand.’”¹³²

The trial court’s first basis for granting a new trial, that “the jury’s finding that USAA did not breach the Bents’ homeowner’s policy[, was] ‘so contrary to the great weight and preponderance of the evidence . . . as to be clearly wrong and manifestly unjust,’” was found by the supreme court to turn on the prompt-payment provision in the policy.¹³³ However, the supreme court stated that the trial court’s explanation did not meet the applicable “facial requirements” because (1) “the trial court never pinpoint[ed] the events or dates it believed triggered USAA’s prompt-payment obligation”; and (2) “its explanation serves only to suggest the trial court failed to properly ascertain the nature of that provision.”¹³⁴ As to the second basis, the supreme court stated that the record showed the disputed order in limine “only limited questions as to whether the Bents would have received a variance if they applied for one,” and USAA did not violate that particular restriction.¹³⁵ As to the third basis, the supreme court observed that while the trial court’s order “discusses the parties’ arguments as to what the evidence showed,” that order “makes no reference to the evidence at all,” but rather, “offers only the conclusory comment that the jury’s award ‘seems arbitrary.’”¹³⁶ Therefore, the supreme court concluded, the trial court’s third basis did not meet the applicable standard.¹³⁷ Finally, as to the fourth basis, the supreme court stated, (1) “[A]bsent any reference to what evidence was adduced as to reasonable and necessary attorney’s fees, the failure to award attorney’s fees under a mandatory-fee statute is not in itself a reason for which a new trial is legally appropriate”; and (2) although the trial court’s order in question stated that “evidence supporting an award of reasonable and necessary attorney’s fees is ‘overwhelming,’” that basis was “facially insufficient” because it did not “indicate that the trial judge considered the

131. *Id.* (quoting *In re United Scaffolding*, 377 S.W.3d at 688–89).

132. *Id.* at 177 (quoting *In re Toyota*, 407 S.W.3d at 758). The supreme court explained that *In re Toyota* did not create a new standard of review and “the abuse-of-discretion standard applies to merits review just as it does in all mandamus proceedings.” *Id.* at 178. Also, the supreme court noted the case before it did not require it to engage the question of “[h]ow exacting can or should an appellate court’s review be when there is no direct conflict’ between the record and the stated bases for a new trial.” *Id.* at 177.

133. *Id.* at 178.

134. *Id.* at 179.

135. *Id.* at 182.

136. *Id.* at 183.

137. *Id.*

specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings."¹³⁸ The supreme court concluded that because the trial court abused its discretion as to all four of the challenged bases, "the court of appeals acted appropriately in conditionally granting mandamus relief directing the trial court to vacate its order and enter judgment on the jury's verdict."¹³⁹

D. DISQUALIFICATION OF COUNSEL

*In re RSR Corp.*¹⁴⁰ involved the issue of whether the trial court improperly disqualified a party's counsel who was privy to documents supplied by a former finance manager of the opposing party. The law firm of Bickel & Brewer represented RSR in a lawsuit filed in 2008 against Inppamet S.A., a Chilean manufacturer of mining products, for breach of contract and misappropriation of trade secrets. While that lawsuit was pending, Inppamet sued RSR in Chile. RSR's counsel in the Chilean litigation was the law firm of Bofill Mir & Alvarez Jana (BMAJ).

In April 2010, Inppamet's finance manager, Hernan Sobarzo, resigned and took with him approximately 2.3 gigabytes of data, including emails and other documents. Several months later, BMAJ retained Sobarzo as a consultant and paid him to meet with its attorneys numerous times to discuss Inppamat and its payments to RSR under the contract in dispute. Attorneys and consultants from Bickel & Brewer were often present at those meetings and viewed documents provided by Sobarzo.

"Inppamet moved to disqualify Bickel & Brewer from representing RSR."¹⁴¹ The trial court granted that motion, relying primarily on *In re American Home Products Corp.*,¹⁴² a Texas Supreme Court case addressing "disqualification of counsel for hiring the other side's former paralegal or legal assistant."¹⁴³ The court of appeals denied RSR's petition for writ of mandamus, and RSR then sought mandamus relief in the supreme court.

The supreme court stated, "A party whose counsel is improperly disqualified has no adequate remedy by appeal," and, therefore, mandamus relief was appropriate "if the trial court abused its discretion by disqualifying Bickel & Brewer."¹⁴⁴ Additionally, the supreme court observed,

138. *Id.* at 184 (citing *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 689 (Tex. 2012) (orig. proceeding)).

139. *Id.* The supreme court did not specifically address the adequacy of an appellate remedy, but, as described above, repeatedly cited *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 209–10 (Tex. 2009) (orig. proceeding), in which it discussed the adequacy of an appellate remedy in the motion for new trial context. *See id.* at 173–74, 176.

140. 475 S.W.3d 775 (Tex. 2015) (orig. proceeding).

141. *Id.* at 778.

142. 985 S.W.2d 68 (Tex. 1998) (orig. proceeding).

143. *In re RSR Corp.*, 475 S.W.3d at 778.

144. *Id.* (first citing *In re Guar. Ins. Servs., Inc.*, 343 S.W.3d 130, 132 (Tex. 2011) (per curiam) (orig. proceeding); and then citing *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (per curiam) (orig. proceeding)).

“[W]e may not make factual determinations in mandamus proceedings.”¹⁴⁵ Then, the supreme court addressed RSR’s position that because Sobarzo was a fact witness, the standard in *American Home Products* was inapplicable. That court concluded, (1) “[T]he *American Home Products* screening requirement does not govern a fact witness with information about his former employer if his position with that employer existed independently of litigation and he did not primarily report to lawyers”; and (2) “[t]o the extent the fact witness discloses his past employer’s privileged and confidential information, the factors outlined by *In re Meador* . . . should guide the trial court’s discretion regarding disqualification.”¹⁴⁶ Further, the supreme court stated that although the trial court abused its discretion by applying the wrong standard, it need not “decide whether disqualification would have been proper under *Meador* because the trial court did not reach the issue and did not resolve all fact issues relevant to a *Meador* analysis.”¹⁴⁷ The supreme court conditionally granted mandamus relief, stating, “The writ will issue only if the trial court does not vacate its order granting Inppamet’s motion to disqualify.”¹⁴⁸

E. JURISDICTION/“AUTHORITY”

In the case of *In re J.B. Hunt Transport, Inc.*,¹⁴⁹ the Texas Supreme Court was faced with multiple questions respecting dominant jurisdiction, including determination of the legal standard governing the availability of mandamus relief regarding denial of a plea in abatement. A tractor-trailer owned by J.B. Hunt Transport struck a disabled Isuzu vehicle that had entered the truck’s traffic lane, resulting in injuries to the Isuzu’s occupants. J.B. Hunt Transport filed a lawsuit in Waller County, Texas, to recover for damage to its property. Ten days later, the Isuzu’s occupants (the Real Parties) filed a personal injury lawsuit against J.B. Hunt Transport in Dallas County. Both sides filed dueling pleas in abatement, asserting dominant jurisdiction in the respective courts in which they had filed their lawsuits. The arguments made by the Real Parties included the following: (1) “[N]o dominant-jurisdiction question [existed] because the two suits [were] not inherently interrelated [pursuant to the standard described in Texas Supreme Court case law]; (2) J.B. Hunt did not have a bona fide intent to prosecute the Waller County suit,” but rather “intended to secure a favorable venue to defend a significant personal-injury case”; and “(3) J.B. Hunt engaged in inequitable conduct” preventing the Real Parties from filing their suit more promptly, and J.B. Hunt was

145. *Id.* (citing *In re Dep’t of Family & Protective Servs.*, 273 S.W.3d 637, 648 (Tex. 2009) (orig. proceeding)).

146. *Id.* at 776 (citing *In re Meador*, 968 S.W.2d 346 (Tex. 1998) (orig. proceeding)). Additionally, the supreme court disapproved of a court of appeals decision relied upon by Inppamet (*In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139, 144 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied])) “for disqualifying a firm that hired the opposing side’s former engineer without first considering the *Meador* factors.” *Id.* at 782.

147. *Id.* at 782.

148. *Id.*

149. 492 S.W.3d 287 (Tex. 2016) (orig. proceeding).

therefore estopped from claiming dominant jurisdiction in Waller County.¹⁵⁰ Following a hearing, the Dallas County court concluded exceptions to the first-filed rule applied and therefore it, rather than the Waller County court, had dominant jurisdiction.¹⁵¹ J.B. Hunt Transport unsuccessfully sought mandamus relief in the court of appeals, then filed a petition for writ of mandamus in the supreme court.

The supreme court noted, in part, (1) “The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts”;¹⁵² and (2) “[a]s a result, when two suits are inherently interrelated, ‘a plea in abatement in the second action *must* be granted.’”¹⁵³ As to whether the required inherent interrelationship existed, the supreme court observed it had previously established courts should be guided by the compulsory counterclaim rule in Texas Rule of Civil Procedure 97(a).¹⁵⁴ However, the supreme court stated it had mischaracterized that rule in the language of a prior case upon which the Real Parties’ argument was based.¹⁵⁵ The supreme court clarified that, notwithstanding its language used in several previous cases, “a counterclaim is compulsory if, in addition to Rule 97(a)’s other requirements, it was not the subject of a pending action when the original suit was commenced.”¹⁵⁶ Then, the supreme court noted that the parties did not dispute that this requirement, as properly characterized, had been met.

Next, the supreme court considered whether the trial court had abused its discretion respecting exceptions to the first-filed rule. As to alleged inequitable conduct by J.B. Hunt Transport, the supreme court stated that, even assuming J.B. Hunt Transport’s conduct was inequitable, the Real Parties had “fatally failed to allege that the conduct caused their delay, if any, in filing suit.”¹⁵⁷ Further, as to J.B. Hunt Transport’s bona fide intention to prosecute its lawsuit, the supreme court stated the record showed “quintessential acts of prosecuting a suit” by J.B. Hunt Transport.¹⁵⁸ The supreme court concluded “the trial court abused its discretion in not granting J.B. Hunt’s plea in abatement.”¹⁵⁹

Finally, the supreme court addressed the proper legal standard for mandamus review of erroneously denied pleas in abatement in dominant-

150. *Id.* at 291, 296 (internal quotation marks omitted).

151. *Id.* at 289.

152. *Id.* at 294 (internal quotation marks omitted) (quoting *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974) (orig. proceeding)).

153. *Id.* (quoting *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988) (orig. proceeding)).

154. *Id.* at 292 (citing TEX. R. CIV. P. 97(a)).

155. *Id.* (citing with disapproval *Wyatt*, 760 S.W.2d at 247).

156. *Id.* at 293.

157. *Id.* at 295.

158. *Id.* at 296. Those acts included J.B. Hunt Transport’s “attempting to obtain waivers of personal service and threatening to obtain a TRO in the court in which [it had] sued.” *Id.*

159. *Id.* at 298.

jurisdiction cases.¹⁶⁰ The supreme court observed that in *Abor v. Black*,¹⁶¹ it concluded “mandamus relief is unavailable to correct an erroneous denial of a plea in abatement where there is ‘no conflict of jurisdiction’—that is, there was no injunction or order in one court ‘which actively interferes with the exercise of jurisdiction’ in the other court.”¹⁶² However, the supreme court “revisited the contours of mandamus relief” more recently in *In re Prudential Insurance Co. of America* and “reaffirmed that entitlement to mandamus relief requires the relator to establish both (1) a trial court’s abuse of discretion, and (2) no adequate remedy by appeal.”¹⁶³ Further, the supreme court stated that “adequate” is “a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts.”¹⁶⁴ The supreme court observed, “Many Texas courts of appeals have split on the question of whether *Prudential* abrogates *Abor* and permits more flexible mandamus review of erroneously denied pleas in abatement in dominant-jurisdiction cases.”¹⁶⁵ Then, the supreme court stated:

We now hold that *Prudential* indeed abrogates *Abor*’s inflexible understanding of an adequate remedy by appeal. Permitting a case to proceed in the wrong court necessarily costs “private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” That was often the vice of *Abor*’s strict standard. But *Prudential*’s virtue is that it spares private parties and the public those costs. *Abor* is therefore at odds with *Prudential* and no longer provides the governing standard for an adequate remedy by appeal. Therefore, a relator need only establish a trial court’s abuse of discretion to demonstrate entitlement to mandamus relief with regard to a plea in abatement in a dominant-jurisdiction case.¹⁶⁶

The supreme court conditionally granted mandamus relief and directed the trial court to grant J.B. Hunt Transport’s plea in abatement.¹⁶⁷

*In re Lazy W District No. 1*¹⁶⁸ arose from a trial court’s refusal to appoint special commissioners in a condemnation action involving two governmental entities. The Tarrant Regional Water District (the Water District) petitioned for condemnation of a water pipeline easement across land owned by Lazy W District No. 1 (Lazy W), a municipal utility district. Pursuant to Chapter 21 of the Texas Property Code, which governs

160. *Id.*

161. 695 S.W.2d 564 (Tex. 1985) (orig. proceeding), *abrogated by In re J.B. Hunt*, 492 S.W.3d 287.

162. *In re J.B. Hunt Transp.*, 492 S.W.3d at 298 (quoting *Abor*, 695 S.W.2d at 567).

163. *Id.* at 299 (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)).

164. *Id.* (quoting *In re Prudential*, 148 S.W.3d at 136).

165. *Id.*

166. *Id.* at 299–300 (footnotes omitted) (quoting *In re Prudential*, 148 S.W.3d at 136).

167. *Id.* at 300.

168. 493 S.W.3d 538 (Tex. 2016) (orig. proceeding).

the exercise of eminent domain authority, the trial court “appointed three special commissioners to determine the value of the proposed easement.”¹⁶⁹ Before any hearing was held by the commissioners, Lazy W filed “a plea to the jurisdiction, asserting its immunity as a governmental entity and requesting that the appointments be vacated and the petition dismissed.”¹⁷⁰ The trial court vacated the appointments and “issued an order declining to appoint special commissioners before hearing and ruling on the Lazy W’s plea.”¹⁷¹ The Water District successfully obtained mandamus relief in the court of appeals, which concluded that (1) “the trial court was without jurisdiction to refuse to appoint special commissioners”; (2) “Lazy W’s plea of [governmental] immunity was premature”; and (3) “the trial court’s only course was to ignore the plea until after an objection to the commissioners’ award.”¹⁷² The trial court was directed by the court of appeals “to appoint special commissioners and allow them to proceed.”¹⁷³ Then, Lazy W sought mandamus relief in the Texas Supreme Court.

The supreme court observed that condemnation proceedings pursuant to Chapter 21 have two parts. “The first part, involving the commissioners, . . . is essentially an official, compulsory mediation of the value dispute with the goal of avoiding a trial” and has been characterized as “administrative.”¹⁷⁴ According to the supreme court, “[T]rial courts lack jurisdiction to interfere with proceedings pending before the commissioners.”¹⁷⁵ The second part, which follows a proper objection to the commissioners’ award, is “judicial,” and the trial court “has jurisdiction to proceed as in any other case.”¹⁷⁶ However, the supreme court stated, (1) “Courts *always* have jurisdiction to determine their own jurisdiction”; (2) “[t]he Property Code does not limit the trial court’s power or responsibility to determine its jurisdiction”; and (3) “the special commissioners’ proceeding should not be a probable waste of time and effort.”¹⁷⁷ The supreme court concluded, “The trial court had the obligation to consider the Lazy W’s assertion of immunity when the plea to the jurisdiction was filed” and therefore “did not abuse its discretion in determining to do so.”¹⁷⁸ Consequently, the court of appeals abused its discretion in grant-

169. *Id.* at 540, 542 (citing TEX. PROP. CODE ANN. §§ 21.001-103 (West 2014)).

170. *Id.* at 541 (footnote omitted).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 542 (citing *Amason v. Nat. Gas Pipeline Co.*, 682 S.W.2d 240, 241 (Tex. 1984); *Pearson v. State*, 315 S.W.2d 935, 936-37 (Tex. 1958)).

175. *Id.* (citing *Ex parte Edmonds*, 383 S.W.2d 579, 580 (Tex. 1964) (orig. proceeding); *State v. Giles* (368 S.W.2d 943, 947 (Tex. 1963) (orig. proceeding)).

176. *Id.* at 542-43 (first citing *Amason*, 682 S.W.2d at 241; and then citing *John v. State*, 826 S.W.2d 138, 141 n.5 (Tex. 1992) (per curiam); *Pearson*, 315 S.W.2d at 937).

177. *Id.* at 544 (quoting *Hous. Mun. Emps.’ Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007)).

178. *Id.*

ing mandamus relief.¹⁷⁹

*In re Heredia*¹⁸⁰ involved an untimely challenge to an affidavit of indigence. Norma Heredia filed a personal injury claim against a retail store based on a slip-and-fall incident. The trial court granted the store's motion for no-evidence summary judgment and Heredia appealed. In connection with that appeal, "Heredia timely filed . . . an affidavit of indigence in the trial court," and "[n]o one filed a challenge . . . within the following ten days."¹⁸¹ However, one month after the date the affidavit was filed, the court of appeals, acting *sua sponte*, signed an order, "purportedly 'pursuant to Texas Rule of Appellate Procedure 20.1(e),' allowing any interested parties to file a challenge to Heredia's affidavit in the ten days following the date of that order."¹⁸² Additionally, the court of appeals "ordered that if a contest was 'timely filed,' the trial court should conduct a hearing, prepare findings of fact and conclusions of law, and supplement the appellate record."¹⁸³ Three days after the court of appeals' order, a challenge to Heredia's affidavit was filed by the court reporter, who stated that the trial court had not notified her of the indigence affidavit as required by Rule 20.1 and that she was unaware of it until she received the court of appeals' order.¹⁸⁴ Next, "the trial court set a hearing to determine Heredia's indigence."¹⁸⁵ Heredia moved to stay that hearing and sought mandamus relief in the Texas Supreme Court.

The supreme court observed that pursuant to Rule 20.1, "an affidavit of indigence filed in a trial court is operative unless challenged within ten days of its filing."¹⁸⁶ Further, the supreme court stated that although the appellate rules "allow for suspension of a rule's operation [for] 'good cause' . . . lack of notice 'in this context to a court reporter of the filing of an affidavit of indigence is not good cause in light of Rule 20.1.'"¹⁸⁷ The supreme court conditionally granted Heredia's petition for writ of mandamus and directed the court of appeals to allow her "to proceed with her appeal without payment of costs."¹⁸⁸

179. *Id.* The supreme court did not address or mention the existence of an adequate remedy by appeal. However, the supreme court has previously concluded that no adequate appellate remedy exists when a court acts without jurisdiction. See *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam) (orig. proceeding); see also *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (per curiam) (orig. proceeding).

180. 501 S.W.3d 70 (Tex. 2016) (per curiam) (orig. proceeding).

181. *Id.* at 70.

182. *Id.* (citing TEX. R. APP. P. 20.1(e)).

183. *Id.*

184. *Id.*

185. *Id.* at 71.

186. *Id.* (citing TEX. R. APP. P. 20.1).

187. *Id.* (quoting *Morris v. Aguilar*, 369 S.W.3d 168, 171 (Tex. 2012) (per curiam)). Additionally, the supreme court cited *Rios v. Calhoon*, 889 S.W.2d 257, 258–59 (Tex. 1994) (per curiam) (orig. proceeding), a Rule 20.1 case that the supreme court described as "explaining that without a timely challenge 'the party is absolutely entitled to the exemption from costs, and the trial court lacks the authority to affect the party's entitlement.'" *Id.*

188. *Id.* The supreme court did not address or mention the existence of an adequate remedy by appeal. *But see In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287 (Tex. 2016) (orig. proceeding).

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

The following chart distributes the cases described above into categories of (1) “specific discussion of adequacy of party’s appellate remedy”; (2) “conclusory statement as to adequacy of appellate remedy”; (3) “adequacy of appellate remedy not addressed, but case(s) cited”; and (4) “adequacy of appellate remedy not addressed, no case cited.”

Table Two

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Act Constituting Abuse of Discretion	Mandamus Disposition
Specific discussion of adequacy of party’s appellate remedy	<i>In re</i> Christus Santa Rosa Health Sys., 492 S.W.3d 276 (Tex. 2016)	<i>Discovery</i> : Trial court (t. ct.) did not properly review allegedly privileged documents before ordering production	Granted
	<i>In re</i> H.E.B. Grocery Co., 492 S.W.3d 300 (Tex. 2016) (per curiam)	<i>Discovery</i> : T. ct. improperly denied request that plaintiff be required to submit to medical examination	Granted
	<i>In re</i> J.B. Hunt Transp., Inc., 492 S.W.3d 287 (Tex. 2016)	<i>Dominant Jurisdiction</i> : T. ct. improperly denied plea in abatement because court where suit was first filed had dominant jurisdiction	Granted
Conclusory statement as to adequacy of appellate remedy	<i>In re</i> RSR Corp., 475 S.W.3d 775 (Tex. 2015)	<i>Disqualification of Counsel</i> : T. ct. abused discretion by applying inapplicable analysis under the law where party’s counsel consulted with former finance manager of opposing party	Granted
	<i>In re</i> M-I L.L.C., 505 S.W.3d 569 (Tex. 2016)	<i>Disclosure of Trade Secrets</i> : T. ct. did not properly balance competing interests before refusing to exclude party’s representative from hearing involving trade secrets	Granted
	<i>In re</i> Keenan, 501 S.W.3d 74 (Tex. 2016) (per curiam)	<i>Discovery</i> : T. ct. improperly denied homeowner’s request for production of HOA ballots in lawsuit brought by HOA	Granted
	<i>In re</i> Nat’l Lloyds Ins. Co., 507 S.W.3d 219 (Tex. 2016) (per curiam)	<i>Discovery</i> : T. ct. improperly granted motion to compel that was overbroad	Granted
Adequacy of appellate remedy not addressed, but case(s) cited	<i>In re</i> Bent, 487 S.W.3d 170 (Tex. 2016)	<i>Motion for New Trial</i> : Ct. of app. properly granted mandamus relief where t. ct. abused discretion by granting new trial on bases that were insufficient and/or not supported by record	Denied
	<i>In re</i> DePinho, 505 S.W.3d 621 (Tex. 2016) (per curiam)	<i>Pre-Suit Discovery</i> : T. ct. abused discretion by allowing pre-suit discovery because former employee’s potential patent claim was not yet ripe	Granted
	<i>In re</i> Nationwide Ins. Co. of Am., 494 S.W.3d 708 (Tex. 2016)	<i>Lawsuit Forum</i> : T. ct. improperly refused to enforce contractual forum selection clause where no prejudice was shown	Granted
	<i>In re</i> Oceanografia, S.A. de C.V., 494 S.W.3d 728 (Tex. 2016) (per curiam)	<i>Lawsuit Forum</i> : T. Ct. improperly denied motion to dismiss for forum non conveniens because record did not support t. ct.’s findings as to relevant factors	Granted
	<i>In re</i> City of Dallas, 501 S.W.3d 71 (Tex. 2016) (per curiam)	<i>Discovery</i> : County court at law improperly authorized pre-suit discovery before determining whether it had jurisdiction	Granted
Adequacy of appellate remedy not addressed, no case cited	<i>In re</i> Lazy W Dist. No. 1, 493 S.W.3d 538 (Tex. 2016)	<i>Jurisdiction</i> : Ct. of app. improperly granted mandamus relief because t. ct. did not abuse discretion by considering plea to jurisdiction before appointing commissioners in condemnation case	Granted
	<i>In re</i> Heredia, 501 S.W.3d 70 (Tex. 2016) (per curiam)	<i>“Authority”</i> : T. ct. lacked authority to extend time to file affidavit of indigency as to appeal	Granted

As the chart illustrates, three of the fourteen cases described above contained a specific discussion of the adequacy of a party's appellate remedy; four contained a conclusory statement respecting such remedy; and seven did not specifically address the adequate appellate remedy element. However, in five of the seven cases in which the adequate appellate remedy element was not specifically addressed, the supreme court cited cases with analogous fact situations in which it addressed whether an adequate appellate remedy existed. Further, as to the remaining two of those seven cases, (1) one involved a conclusion by the supreme court that there was no abuse of discretion by the trial court, thus making the existence of an adequate appellate remedy immaterial; and (2) the other involved the trial court's lack of "authority" to act, which the supreme court has concluded leaves a party without an adequate appellate remedy.

VI. CONCLUSION

Although the Texas Supreme Court's mandamus opinions issued during this Survey period generally demonstrate an analytical method consistent with prior years, the supreme court's treatment of the adequate remedy by appeal element in *In re J.B. Hunt Transport*¹⁸⁹ is not an insignificant development. That case shows that the supreme court remains constant, not only in limiting the availability of mandamus as a remedy, but also in maintaining a "heavily circumstantial" approach respecting the existence of an adequate remedy by appeal.¹⁹⁰ Thus, a focus on the circumstantial posture of a case remains an important consideration when pursuing mandamus relief in the supreme court.

189. See *In re J.B. Hunt* 492 S.W.3d at 298–300.

190. See *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 304 (Tex. 2016) (per curiam) (orig. proceeding).