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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

*The Honorable Douglas S. Lang\**  
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## I. INTRODUCTION

The Texas Supreme Court has consistently described mandamus as “both an extraordinary remedy and a discretionary one.”<sup>1</sup> To obtain mandamus relief respecting an action of a Texas court, the party seeking relief must generally show both that the lower court’s action constituted an abuse of discretion and that “appeal is an inadequate remedy.”<sup>2</sup> The first of those requirements, i.e., an abuse of discretion, is “fulfilled where a

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1. *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (per curiam) (orig. proceeding) (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding)).

2. *Id.* (citing *In re Prudential*, 148 S.W.3d at 135–36).

[lower] court acts without reference to guiding rules or principles or in an arbitrary or unreasonable manner.”<sup>3</sup> As to the second requirement, i.e., lack of an adequate remedy by appeal, “no specific definition captures the essence of or circumscribes what [constitutes] an ‘adequate’ remedy.”<sup>4</sup> Rather, the term “‘adequate’ is merely a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts”<sup>5</sup> and “its meaning ‘depends heavily on the circumstances presented.’”<sup>6</sup> “[A]n ‘adequate’ appellate remedy exists when ‘any benefits to mandamus review are outweighed by the detriments.’”<sup>7</sup>

During the two-year Survey period of this article, December 1, 2016, through November 30, 2018, the supreme court delivered seventeen opinions in mandamus cases addressing actions by courts.<sup>8</sup> This article analyzes, summarizes, and categorizes those seventeen opinions to examine and describe the supreme court’s current decisional approach to mandamus respecting lower court actions, with particular focus on the requirement that an adequate appellate remedy is missing. Six of those seventeen opinions pertain to discovery,<sup>9</sup> including an opinion in which the supreme court described for the first time detailed guidelines on the required format for production of electronic data.<sup>10</sup> The other subject matter categories to which those opinions pertain include designation of responsible third parties,<sup>11</sup> granting of a motion for new trial,<sup>12</sup> trial court

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3. *See id.*

4. *Id.*

5. *In re Coppola*, 535 S.W.3d 506, 509 (Tex. 2017) (per curiam) (orig. proceeding) (quoting *In re Prudential*, 148 S.W.3d at 136).

6. *In re Garza*, 544 S.W.3d at 840 (quoting *In re Prudential*, 148 S.W.3d at 137).

7. *In re Coppola*, 535 S.W.3d at 509 (quoting *In re Prudential*, 148 S.W.3d at 136).

8. Those cases are as follows: *In re Castle Tex. Prod. Ltd. P’ship*, 563 S.W.3d 216 (Tex. 2018) (per curiam) (orig. proceeding); *In re State*, 556 S.W.3d 821 (Tex. 2018) (orig. proceeding); *In re Xerox Corp.*, 555 S.W.3d 518 (Tex. 2018) (orig. proceeding); *In re Dawson*, 550 S.W.3d 625 (Tex. 2018) (per curiam) (orig. proceeding); *In re Mahindra, USA Inc.*, 549 S.W.3d 541 (Tex. 2018) (orig. proceeding); *In re N. Cypress Med. Ctr. Operating Co.*, 559 S.W.3d 128 (Tex. 2018) (orig. proceeding); *In re Garza*, 544 S.W.3d at 836; *In re Elizondo*, 544 S.W.3d 824 (Tex. 2018) (per curiam) (orig. proceeding); *In re Shipman*, 540 S.W.3d 562 (Tex. 2018) (per curiam) (orig. proceeding); *In re Silver*, 540 S.W.3d 530 (Tex. 2018) (orig. proceeding); *In re Accident Fund Gen. Ins. Co.*, 543 S.W.3d 750 (Tex. 2017) (per curiam) (orig. proceeding); *In re Turner*, 542 S.W.3d 553 (Tex. 2017) (per curiam) (orig. proceeding); *In re Coppola*, 535 S.W.3d at 506; *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017) (orig. proceeding); *In re Davenport*, 522 S.W.3d 452 (Tex. 2017) (orig. proceeding); *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017) (orig. proceeding); *In re Red Dot Bldg. Sys., Inc.*, 504 S.W.3d 320 (Tex. 2016) (per curiam) (orig. proceeding).

9. *See In re N. Cypress Med. Ctr.*, 559 S.W.3d at 129; *In re Garza*, 544 S.W.3d at 837; *In re Shipman*, 540 S.W.3d at 564; *In re Silver*, 540 S.W.3d at 532; *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d at 798; *In re State Farm Lloyds*, 520 S.W.3d at 598–99.

10. *See In re State Farm Lloyds*, 520 S.W.3d at 608–12.

11. *See In re Dawson*, 550 S.W.3d at 628; *In re Xerox Corp.*, 555 S.W.3d at 520; *In re Coppola*, 535 S.W.3d at 507.

12. *See In re Davenport*, 522 S.W.3d at 454.

jurisdiction/authority,<sup>13</sup> appointment or disqualification of counsel,<sup>14</sup> and challenges to the lawsuit forum.<sup>15</sup>

## II. MANDAMUS FUNDAMENTALS

The Texas Supreme Court's jurisdiction over writs of mandamus stems from the Texas constitution.<sup>16</sup> Specifically, section three of article five states, in part, (1) "under such regulations as may be prescribed by law," the supreme court and its justices "may issue the writs of mandamus . . . and such other writs, as may be necessary to enforce its jurisdiction," and (2) the Texas Legislature may confer original jurisdiction on the supreme court to "issue writs of . . . mandamus in such cases as may be specified, except as against the Governor of the State."<sup>17</sup>

Consistent with those constitutional grants of authority, Section 22.002(a) of the Texas Government Code provides that the supreme court or a justice of the supreme court

may issue . . . all 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 officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.<sup>18</sup>

Further, Government Code Section 22.002 states (1) "[t]he supreme court or, in vacation, a justice of the supreme 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 case," and (2)

[o]nly 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>19</sup>

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13. See *In re Castle Tex. Prod.*, 563 S.W.3d at 218; *In re Elizondo*, 544 S.W.3d at 825; *In re Accident Fund Gen. Ins. Co.*, 543 S.W.3d at 751; *In re Red Dot Bldg. Sys.*, 504 S.W.3d at 322.

14. See *In re State*, 556 S.W.3d 821, 822 (Tex. 2018) (orig. proceeding); *In re Turner*, 542 S.W.3d 553, 554 (Tex. 2017) (per curiam) (orig. proceeding).

15. See *In re Mahindra, USA Inc.*, 549 S.W.3d 541, 543 (Tex. 2018) (orig. proceeding).

16. See TEX. CONST. art. V, §§ 1, 3, 6(a).

17. *Id.* § 3. Also, section six of article five provides in part that the intermediate appellate courts of Texas shall have "appellate jurisdiction co-extensive with the limits of their respective districts" and "such other jurisdiction, original and appellate, as may be prescribed by law." *Id.* § 6(a).

18. TEX. GOV'T CODE ANN. § 22.002(a).

19. *Id.* § 22.002(b)–(c). The mandamus jurisdiction of the Texas courts of appeals is less broad than that of the supreme court. Specifically, pursuant to Government Code Section 22.221, (1) each of the fourteen courts of appeals or a justice thereof "may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court," and (2) each court of appeals may issue writs of mandamus against "a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district" and certain magistrates and associate judges. *Id.* § 22.221 (a)–(b).

Additionally, a number of Texas statutes and rules provide for mandamus proceedings in certain courts as to specifically identified matters.<sup>20</sup>

The procedural requirements for mandamus proceedings in both the supreme court and the courts of appeals are set out in Texas Rule of Appellate Procedure 52.<sup>21</sup> If the supreme court and a court of appeals have concurrent mandamus 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>22</sup> Further, failure to comply with the additional requirements of Rule 52 may result in denial of relief.<sup>23</sup>

### III. MANDAMUS STATISTICS

The Texas Supreme Court’s 2018 fiscal year, which is the most recent fiscal year for which statistics are available, ran from September 1, 2017 to August 31, 2018. During that fiscal year, 215 new petitions for writ of mandamus were filed in the supreme court.<sup>24</sup> Dispositions were made in 217 mandamus cases.<sup>25</sup> Of those 217 petitions for writ of mandamus disposed of, 15, or 6.9%, were conditionally granted and 166, or 76.5%, were denied.<sup>26</sup>

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20. *See, e.g., In re Occidental Chem. Corp.*, 561 S.W.3d 146, 153 (Tex. 2018) (orig. proceeding) (concluding statute that gives supreme court original jurisdiction to hear and determine certain suits involving imposition of ad valorem taxes by multiple taxing units on same property confers original mandamus jurisdiction in supreme court); *City of Houston v. Houston Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 570, 576, 583–84 (Tex. 2018) (affirming denial of city’s plea to jurisdiction where suit for mandamus was proper proceeding to compel disclosure of information pursuant to Texas Public Information Act and other nondiscretionary governmental action required by law); *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); TEX. R. APP. P. 24.4(a) (a party may seek supreme court mandamus review of court of appeals’ ruling on motion challenging trial court’s determination of amount of security required to supersede judgment); TEX. ELEC. CODE ANN. § 273.061 (“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”).

21. *See* TEX. R. APP. P. 52. The party seeking relief in a mandamus proceeding is the relator and “the person against whom relief is sought . . . is the respondent.” *Id.* “A person whose interest would be directly affected by the relief sought is a real party in interest and a party to the case. . . .” *Id.*

22. *See* TEX. R. APP. P. 52.3(e); *see also* *State v. Naylor*, 466 S.W.3d 783, 793–94 (Tex. 2015) (orig. proceeding) (“a party may not circumvent the court of appeals simply by arguing futility”).

23. *See, e.g., In re Charboneau*, No. 05-18-00551-CV, 2018 WL 2276226, at \*1–2 (Tex. App.—Dallas May 18, 2018, orig. proceeding) (mem. op.); *In re Phillips*, No. 05-18-00543-CV, 2018 WL 2213888, at \*1–3 (Tex. App.—Dallas May 15, 2018, orig. proceeding) (mem. op.); *In re Wade*, No. 05-17-00046-CV, 2017 WL 462364, at \*1 (Tex. App.—Dallas Feb. 2, 2017, orig. proceeding) (mem. op.).

24. *See Texas Supreme Court 2018 Annual Statistical Report*, <http://www.txcourts.gov/media/1442689/sc-activity-2018.pdf> [<https://perma.cc/QN48-NCK6>].

25. *Id.* Dispositions can include petitions for writ of mandamus filed in previous fiscal years and not disposed of during those fiscal years. *See id.*

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

The chart directly below shows a comparison of those numbers with statistics for the six preceding fiscal years. As illustrated by the chart, there has been only a slight fluctuation in the number of new petitions for writ of mandamus filed during that seven-year period. Further, the chart shows that, consistent with its description of mandamus as an extraordinary remedy, the supreme court generally grants less than eight percent of the petitions for writ of mandamus presented to it each fiscal year.

Texas Supreme Court Mandamus Statistics: Past Seven Fiscal Years

FISCAL YEAR	2018	2017	2016	2015	2014	2013	2012
New petitions filed	215	187	188	220	219	219	214
Total dispositions <sup>27</sup>	217	181	194	225	216	222	221
Petitions denied	76.5%	79%	79.8%	72%	81.9%	78.8%	73%
Petitions granted	6.9%	6.6%	6.7%	7.5%	5.5%	2.2%	6.3%

In the seventeen opinions issued during the Survey period that are specifically addressed in this article, the Texas Supreme Court granted the petition for writ of mandamus in twelve cases and denied the petition for writ of mandamus in the remaining five cases. The supreme court heard oral argument in four of the eleven cases in which it granted relief and in three of the five cases in which it denied relief.<sup>28</sup>

#### 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

*In re State Farm Lloyds*<sup>29</sup> established a new standard for determining the format for production of electronic data during discovery. That case involved electronic discovery in two consolidated cases in which residential homeowners sued their insurer, State Farm, “alleging underpayment of insured hail-damage claims.” Upon request by the homeowners, the trial court ordered State Farm to produce electronically stored information (ESI) in its “native or near-native forms . . . regardless of whether a more convenient, less expensive, and ‘reasonably usable’ format [was] readily available.”<sup>30</sup> After being denied mandamus relief in the Corpus Christi-Edinburg Court of Appeals, State Farm filed petitions for mandamus in the Texas Supreme Court respecting both cases.

27. As described above, dispositions for a particular fiscal year can include petitions for writ of mandamus filed in previous fiscal years and not disposed of during those fiscal years. Further, the dispositions in this chart include petitions for writs of mandamus dismissed, abated, struck, or withdrawn during the respective fiscal year. *See id.*

28. *See* TEX. R. APP. P. 52.8(b)(4) (“the court may set the case for oral argument”).

29. 520 S.W.3d 595, 615 (Tex. 2017) (orig. proceeding).

30. *Id.* at 600–01.

The supreme court held that when electronic data in “a reasonably usable form is readily available in the ordinary course of business, a trial court must assess,” on a case-by-case basis, “whether any enhanced burden or expense associated with a requested form is justified when weighed against the proportional needs of the case.”<sup>31</sup> Further, the supreme court described a list of seven factors to be considered in such analyses and addressed each factor in detail.<sup>32</sup> The factors are as follows: (1) the likely benefit of the requested discovery; (2) the needs of the case; (3) the amount in controversy; (4) the parties’ resources; (5) the importance of the issues at stake in the litigation; (6) the importance of the proposed discovery in resolving the litigation; and (7) any other articulable factor bearing on proportionality.<sup>33</sup> The supreme court concluded that ruling on the merits would be inappropriate since it only now expressed an opinion on the matter, and thus denied the request without prejudice so that the trial court could reconsider in light of the opinion.<sup>34</sup>

Although the supreme court did not specifically address the element of no adequate remedy by appeal, it cited *In re CSX Corp.*, a prior mandamus case in which it concluded that where a trial court compels production of “patently irrelevant or duplicative documents” no adequate remedy by appeal exists because the burden imposed is “far out of proportion to any benefit that may obtain to the requesting party.”<sup>35</sup>

In *In re National Lloyds Insurance Co.*,<sup>36</sup> the Texas Supreme Court addressed the discoverability of attorney-billing information. A discovery dispute arose in the context of multidistrict litigation against several insurers based on insured homeowners’ allegations of underpaid insurance claims. At issue was “whether a party’s attorney-billing information is discoverable when the party challenges an opposing party’s attorney fee request as unreasonable . . . but neither uses its own attorney fees as a comparator nor seeks to recover any portion of its own attorney fees.”<sup>37</sup> The supreme court concluded that “under such circumstances, (1) compelling en masse production of a party’s billing records invades the attorney work-product privilege; (2) the privilege is not waived merely because the party resisting discovery has challenged the opponent’s attorney fee request; and (3) such information is ordinarily not discoverable.”<sup>38</sup> Further, the supreme court stated “[t]o the extent factual information about hourly rates and aggregate attorney fees is not privileged, that information is generally irrelevant and nondiscoverable because it does not establish or tend to establish the reasonableness or

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31. *Id.* at 607.

32. *See id.* at 607–12.

33. *See id.* at 608–12.

34. *Id.* at 615.

35. *Id.* at 604 n.21 (citing *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (per curiam) (orig. proceeding)).

36. 532 S.W.3d 794 (Tex. 2017) (orig. proceeding).

37. *Id.* at 798.

38. *Id.* at 798–99.

necessity of the attorney fees an opposing party has incurred.”<sup>39</sup> The supreme court conditionally granted the insurers’ petition for mandamus relief and directed the trial court to vacate its order allowing discovery of such information. The supreme court did not specifically address the element of no adequate remedy by appeal, but cited the prior cases of *In re National Lloyds Insurance Co.*<sup>40</sup> and *In re Living Centers of Texas, Inc.*<sup>41</sup>

*In re Silver*<sup>42</sup> involved the applicability of the lawyer-client privilege to communications with a patent agent. A purported inventor of a certain technology, Silver, filed a breach of contract action against Tabletop Media, LLC. Silver alleged he had sold Tabletop a patent respecting the technology in question and Tabletop had failed to pay him. During discovery, “Tabletop sought production of emails between Silver and . . . the patent agent who represented Silver before the [United States Patent and Trademark Office (USPTO)].”<sup>43</sup> Although Silver did not dispute that his patent agent was not a licensed attorney, Silver claimed the emails were covered by the lawyer-client privilege.<sup>44</sup> Tabletop moved to compel production, which the trial court granted.<sup>45</sup> After an unsuccessful attempt to obtain mandamus relief in the Dallas Court of Appeals to “compel the trial court to withdraw the production order,” Silver sought mandamus relief in the Texas Supreme Court.

The supreme court’s analysis focused on the language of Texas Rule of Evidence 503, which “states the basic elements of the lawyer-client privilege.”<sup>46</sup> The supreme court held that (1) “within the scope of their practice before the USPTO, patent agents practice law”; (2) “because patent agents are authorized to practice law before the USPTO, they fall within Rule 503’s definition of ‘lawyer’”; and (3) “as such, their clients may invoke the lawyer-client privilege to protect communications that fall within the privilege’s scope.”<sup>47</sup> However, the supreme court also stated (1) “[t]he client’s communications with a registered patent agent regarding matters outside the agent’s authorized practice area might not be protected because these communications are not necessarily made to facilitate the rendition of professional legal services” and (2) when an *in camera* review is necessary to determine whether a privilege applies, “the trial court abuses its discretion when it fails to conduct an adequate *in camera* inspection.”<sup>48</sup> The supreme court concluded that “[t]o the extent the trial court erroneously determined that no privilege applied” to the

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39. *Id.*

40. 507 S.W.3d 219, 224 (Tex. 2016) (orig. proceeding) (per curiam) (granting mandamus relief when trial court ordered discovery of irrelevant information).

41. 175 S.W.3d 253, 256 (Tex. 2005) (orig. proceeding) (granting mandamus relief when trial court ordered discovery of privileged information).

42. 540 S.W.3d 530 (Tex. 2018) (orig. proceeding).

43. *Id.* at 533.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 536, 538.

48. *Id.* at 539.



documents in question and “ordered their wholesale production, without first determining the client’s claim of privilege, the [trial] court abused its discretion.”<sup>49</sup> Additionally, the supreme court stated “when the trial court orders production of privileged information, the party claiming the privilege has no adequate appellate remedy.”<sup>50</sup> The supreme court conditionally granted mandamus relief and directed “the trial court to conduct an appropriate *in camera* review and vacate its order to the extent it compel[led] production of Silver’s privileged communications.”<sup>51</sup>

*In re Shipman*<sup>52</sup> addressed the alleged lack of technical capability of a producing party in a discovery dispute pertaining to electronically stored information. Marion Shipman engaged with Jamie Shelton and others in various business ventures over a period of several decades. Those business dealings ceased in 2010. Approximately one year later, a bank sued Shipman and Shelton seeking recovery of loans made to an automobile dealership owned by Shelton that were guaranteed by Shipman. In 2014, Shelton asserted third-party claims against Shipman in that litigation for fraud, breach of contract, and breach of fiduciary duty.<sup>53</sup> During discovery, Shelton sought production of myriad records of Shipman pertaining to Shipman’s business dealings. Although Shipman produced responsive documents after receiving Shelton’s discovery requests, Shelton “was dissatisfied with Shipman’s production and filed a motion to compel.”<sup>54</sup> In July 2015, the trial court ordered Shipman to produce certain additional documents, primarily financial statements and spreadsheets respecting auto dealerships. In a deposition later that same month, “Shipman testified he had produced all such documents in his possession,” but had been unable to retrieve some relevant data stored on a computer that “crashed” in 2012.<sup>55</sup> However, several days later, “Shipman reported his son had helped him discover . . . a ‘backup’ folder on his replacement computer” that contained files from his old computer.<sup>56</sup> Responsive documents from that newly-discovered folder were produced. Then, Shipman and his attorney submitted affidavits asserting they had diligently searched Shipman’s physical and electronic files and “produced all responsive documents.”<sup>57</sup> At that point, Shelton filed a second motion to compel. Therein, Shelton (1) contended that in light of Shipman’s deposition testimony and belated production, it was “crystal clear” that Shipman had “misled” the trial court and “had failed to produce (or even to search for) entire categories of responsive, discoverable information,” and (2) requested that “the trial court [ ] compel Shipman to turn over his

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49. *Id.* at 538–39.

50. *Id.* at 538 (citing *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding)).

51. *Id.* at 539.

52. 540 S.W.3d 562 (Tex. 2018) (per curiam) (orig. proceeding).

53. *Id.* at 564.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 564–65.

computer for forensic inspection.”<sup>58</sup> The trial court ordered Shipman to produce for forensic examination all his electronically stored files of every kind for the past seventeen years.<sup>59</sup> After Shipman’s petition for writ of mandamus in the Austin Court of Appeals was denied, Shipman petitioned the Texas Supreme Court for mandamus relief.

In the Texas Supreme Court, Shipman argued in part (1) “the bare allegations” supporting Shelton’s second motion to compel were “insufficient to justify such an invasive search” and (2) “the trial court’s order [was] overly broad.”<sup>60</sup> Shelton responded in part that Shipman’s post-deposition production and equivocal testimony “indicate[d] he [was] incapable of or unwilling to search his computer for responsive documents.”<sup>61</sup> The supreme court observed that “[a]s a threshold to granting access to electronic devices, ‘the requesting party must show that the responding party has somehow defaulted in its obligation to search its records and produce the requested data.’”<sup>62</sup> Further, the supreme court stated, “we do not rely on ‘mere skepticism or bare allegations that the responding party has failed to comply with its discovery duties.’”<sup>63</sup> Then, the supreme court stated:

We do not suggest that a requesting party can never establish a discovery-obligation default under *Weekley* by offering evidence of a producing party’s technical ineptitude. Nor do we discount trial-court discretion in determining when that line is crossed. But the burden imposed by *Weekley* is high—forensic examination of electronic devices is “particularly intrusive and should be generally discouraged.” And notably absent from the record here is any examination of what exactly Shipman’s or his son’s technical capabilities actually are.<sup>64</sup>

The supreme court held that Shipman’s belated discovery of the “backup” folder and his “equivocation” at his deposition gave rise “only to ‘mere skepticism’ that responsive documents remain on Shipman’s computer” and “is no evidence that he cannot reliably produce responsive documents from his computer.”<sup>65</sup> Further, the supreme court stated that although Shelton “may ultimately be entitled to some relief,” the trial court’s order was “overly broad” in that “[t]he trial court appeared to grant greater relief than was sought in [Shelton’s] motion to compel, and there [was] no apparent connection between the vast majority of the devices and media the order covers and the documents [Shelton sought], or justification for its nearly twenty-year reach.”<sup>66</sup> The supreme court

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58. *Id.* at 565.

59. *Id.*

60. *Id.*

61. *Id.* at 568.

62. *Id.* at 568 (quoting *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 317 (Tex. 2009) (orig. proceeding)).

63. *Id.* (quoting *In re Weekley Homes*, 295 S.W.3d at 318).

64. *Id.* at 569 (citation omitted).

65. *Id.* at 568–69.

66. *Id.* at 570.

concluded, “As such, the trial court abused its discretion and Shipman is without an adequate remedy on appeal.”<sup>67</sup> Accordingly, Shipman’s petition for writ of mandamus was conditionally granted.

In *In re Garza*,<sup>68</sup> the Texas Supreme Court considered the propriety of mandamus relief when a discovery sanction would result in the sanctioned party’s claims being significantly compromised. A car being driven by Carolina Garza collided with a truck owned by UV Logistics, LLC (Logistics). Garza received medical treatment from Dr. Michael Leonard and two facilities owned by him. Subsequently, Garza sued Logistics, claiming past medical expenses of more than \$320,473.<sup>69</sup> Further, “Garza designated [ ] Leonard as a testifying expert witness and noticed his deposition.”<sup>70</sup> Logistics “had a subpoena duces tecum issued designating several categories of documents [Leonard] was to produce at his deposition,” but Leonard did not produce those records.<sup>71</sup> Logistics filed a motion “to exclude [ ] Leonard as an expert witness and to exclude” all medical records and “evidence in any form” regarding her treatment received from Leonard and the two facilities described above.<sup>72</sup> That motion was granted by the trial court. After unsuccessfully seeking mandamus relief from the San Antonio Court of Appeals, Garza petitioned for mandamus relief in the supreme court. Garza contended (1) the trial “court abused its discretion by sanctioning her for lawful actions of nonparties” and (2) “the sanctions effectively adjudicated the dispute, were disproportionate to any alleged violations of rules by the nonparties, substantively served as death penalty sanctions as to her case, and rendered any eventual remedy by appeal inadequate.”<sup>73</sup>

The supreme court concluded “the trial court acted arbitrarily and abused its discretion by imposing sanctions on Garza in the absence of evidence that she was an [offending party].”<sup>74</sup> Then, the supreme court addressed whether Garza had an adequate remedy by appeal. The supreme court concluded that if the evidence in question were excluded from trial, “then even though Garza’s claims might not be completely vitiated, they will be significantly compromised.”<sup>75</sup> Therefore, “an appeal [did] not provide an adequate remedy as to the order excluding” that evidence.<sup>76</sup> Accordingly, the supreme court conditionally granted Garza’s petition for writ of mandamus.

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67. *Id.* (citing *In re Weekley Homes*, 295 S.W.3d at 322 (concluding mandamus relief “is available when the trial court compels production beyond the permissible bounds of discovery”)); *see also id.* at 565 (quoting *In re Nat’l Lloyds Ins. Co.*, 449 S.W.3d 486, 488 (Tex. 2014) (per curiam) (orig. proceeding)).

68. 544 S.W.3d 836 (Tex. 2018) (per curiam) (orig. proceeding).

69. *Id.* at 838.

70. *Id.*

71. *Id.* at 838–39.

72. *Id.*

73. *Id.* at 839–40.

74. *Id.* at 842.

75. *Id.* at 843.

76. *Id.*

*In re North Cypress Medical Center Operating Co.*<sup>77</sup> involved the relevance of confidential pricing information sought in discovery. An uninsured patient was treated in the emergency room at North Cypress Medical Center (North Cypress) for injuries sustained in an automobile accident. North Cypress billed the uninsured patient for the services at its “full” prices, which totaled \$11,037.35, and filed a hospital lien for that amount. After unsuccessfully seeking a reduction of the bill, the patient sued North Cypress, “requesting a declaratory judgment that North Cypress’s charges were unreasonable and its lien invalid to the extent it exceed[ed] a reasonable and regular rate for services rendered.”<sup>78</sup> The patient served North Cypress with requests for production and interrogatories respecting, in part, information about North Cypress’s reimbursement rates from insurers and government payers. North Cypress “moved for a protective order, asserting [the requests] sought irrelevant information” and “it would ‘suffer irreparable harm’ from the disclosure of its ‘confidential and proprietary’ negotiated insurance contracts.”<sup>79</sup> The trial court denied that motion. After an unsuccessful attempt to obtain mandamus relief in the Fourteenth Houston Court of Appeals, North Cypress sought mandamus relief in the Texas Supreme Court.

First, the supreme court rejected North Cypress’s position that reimbursement rates from insurers and government payers were not relevant to the patient’s claims about the enforceability of the hospital lien. The supreme court stated, in part, (1) “because a valid hospital lien may not secure charges that exceed a reasonable and regular rate, the central issue in a case challenging such a lien is what a reasonable and regular rate would be,” and (2) “[w]e fail to see how the amounts a hospital accepts as payment from most of its patients are wholly irrelevant to the reasonableness of its charges to other patients for the same services.”<sup>80</sup> Next, the supreme court considered North Cypress’s confidentiality concerns. The supreme court stated:

Nothing in the record indicates that the trial court is unwilling to issue a protective order in the event North Cypress requests and demonstrates its entitlement to one. Nor does North Cypress explain why, in the event it is entitled to a protective order, such relief would be insufficient to address its concerns.<sup>81</sup>

Accordingly, the supreme court declined to grant mandamus relief.<sup>82</sup> Although the existence of an adequate remedy by appeal was not discussed,

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77. 559 S.W.3d 128 (Tex. 2018) (orig. proceeding).

78. *Id.* at 130.

79. *Id.*

80. *Id.* at 133.

81. *Id.* at 136.

82. *Id.* at 137. In a dissent joined by two other justices, Chief Justice Hecht stated, in part, (1) the majority’s conclusion contradicts the recent holding in *In re Nat’l Lloyds Ins. Co.*, 532 S.W.3d 794, 812–13 (Tex. 2017) (orig. proceeding), “that one party’s attorney’s fees in a case are generally irrelevant” to the reasonableness of the opposing party’s fees, and (2) the majority did not address “our concern in [*In re Nat’l Lloyds*], raised here as well, that any marginal relevance the requested discovery might have in a particular case is

the supreme court briefly described the general requirements for mandamus relief and cited two cases, *In re Prudential*<sup>83</sup> and *In re CSX Corp.*<sup>84</sup>

#### B. DESIGNATION OF RESPONSIBLE THIRD PARTIES

In *In re Coppola*,<sup>85</sup> the Texas Supreme Court addressed an issue of first impression respecting the availability of mandamus relief in cases involving improper denial of a motion to designate responsible third parties. Following a real estate transaction, the real estate purchaser filed a tort lawsuit against the vendor. The vendor moved for leave to designate the purchaser's transactional attorneys as responsible third parties pursuant to Section 33.004(a) of the Texas Civil Practice and Remedies Code, but that motion was denied by the trial court.<sup>86</sup> After an unsuccessful attempt to obtain mandamus relief in the First Houston Court of Appeals, the vendor sought mandamus relief in the supreme court.

The supreme court stated that, pursuant to that statute, trial courts have no discretion to deny a timely-filed motion to designate responsible third parties absent a pleading defect and an opportunity to cure.<sup>87</sup> As to timeliness, the supreme court (1) specifically rejected the purchaser's argument that Section 33.004(a) "limit[s] the phrase 'the trial date' to an initial trial setting rather than the trial date at the time a motion to designate is filed" and (2) concluded the vendor's motion to designate was timely because it was filed more than sixty days before the date for which trial was reset.<sup>88</sup> Additionally, the supreme court (1) rejected the purchaser's argument that parties are "categorically prohibited from designating attorneys as responsible third parties" because that position "cannot be squared with the statute's provisions" and (2) reasoned that it need not determine whether the vendor pleaded sufficient facts regarding the attorneys' alleged responsibility because "even if a deficiency existed, the trial court lacked discretion to deny the motion to designate without affording [the vendor] an opportunity to replead."<sup>89</sup> The supreme court conditionally granted the petition for writ of mandamus.

Further, the supreme court rejected the vendor's "alternative" request for dismissal of the purchaser's claims for lack of ripeness, a component of subject matter jurisdiction that generally "may be raised for the first

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outweighed by the real risks of abuse and confusion of the jury." *Id.* at 138 (Hecht, C.J., dissenting).

83. *Id.* at 130 (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding) (discussing considerations relevant to whether appellate remedy is adequate)).

84. *Id.* at 131 (citing *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) (concluding no adequate appellate remedy exists where discovery order compels production of irrelevant documents)).

85. 535 S.W.3d 506 (Tex. 2017) (per curiam) (orig. proceeding).

86. *Id.* at 507; see TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(a).

87. *In re Coppola*, 535 S.W.3d at 507.

88. *Id.* at 508.

89. *Id.* at 508–09.

time on appeal.”<sup>90</sup> The supreme court stated, in part, (1) “[d]ue to the extraordinary nature of the remedy, the right to mandamus relief generally requires a predicate request for action” and the “erroneous refusal to act” and (2) “[t]he record bears nary a hint that ripeness was questioned in the proceedings below” and the vendor has “not argued or shown that the facts present one of the ‘rare occasions’ in which the predicate-request requirement should be relaxed.”<sup>91</sup>

Additionally, the supreme court observed it had not previously considered the element of adequate remedy by appeal in the context of a Section 33.004 responsible-third-party designation.<sup>92</sup> The supreme court stated it has “explained that ‘adequate’ is merely ‘a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts’ and an ‘adequate’ appellate remedy exists when ‘any benefits to mandamus review are outweighed by the detriments.’”<sup>93</sup> Then, the supreme court stated (1) “[a]llowing a case to proceed to trial despite erroneous denial of a responsible-third-party designation ‘would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of [the vendor’s] defense in ways unlikely to be apparent in the appellate record’” and (2) in such case, “[t]he denial of mandamus review impairs—and potentially denies—a litigant’s significant and substantive right to allow the fact finder to determine the proportionate responsibility of all responsible parties.”<sup>94</sup> Accordingly, the supreme court held that “ordinarily, a relator need only establish a trial court’s abuse of discretion to demonstrate entitlement to mandamus relief with regard to a trial court’s denial of a timely-filed [S]ection 33.004(a) motion.”<sup>95</sup>

*In re Dawson*<sup>96</sup> involved a defendant’s designation of a responsible third party after the statute of limitations respecting the plaintiff’s claims had expired. Plaintiff Melissa Dawson was sitting at a restaurant table when a television fell from the wall of the restaurant, striking and injuring her. Dawson sued the restaurant’s owner and operator, Two for Freedom, LLC, for her injuries. In her discovery requests, Dawson sought, among other things, (1) “[t]he name and address of the individual(s) who installed the television” and (2) disclosure pursuant to Texas Rule of Civil Procedure 194.2(1) of “the name, address, and telephone number of any person who may be designated as a responsible third party.”<sup>97</sup> Two for

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90. *Id.* at 510.

91. *Id.*

92. *Id.* at 509.

93. *Id.* (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding)).

94. *Id.* (citations omitted).

95. *Id.* at 510 (citing by comparison *In re J.B. Hunt Transport, Inc.*, 492 S.W.3d 287, 299–300 (Tex. 2016) (orig. proceeding) (holding similarly as to plea of abatement in dominant jurisdiction case)).

96. 550 S.W.3d 625 (Tex. 2018) (per curiam) (orig. proceeding).

97. *Id.* at 627; see TEX. R. CIV. P. 194.2(1).

Freedom's discovery responses stated, in part, "[t]he television in question was installed by Michael Graciano."<sup>98</sup> Also, as to Dawson's request for disclosure of responsible third parties, Two for Freedom responded, "[d]efendant will supplement."<sup>99</sup> Two for Freedom did not supplement its discovery responses before the statute of limitations on Dawson's claims expired. Several weeks after that expiration date, Two for Freedom moved for leave to designate Graciano as a responsible third party, and the motion was granted by the trial court.<sup>100</sup> After being denied mandamus relief in the Fort Worth Court of Appeals, Dawson filed a petition for writ of mandamus in the Texas Supreme Court.<sup>101</sup>

The supreme court observed that under Chapter 33 of the Texas Civil Practice and Remedies Code, a defendant may not designate a responsible third party after limitations have expired "if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party."<sup>102</sup> Also, the supreme court stated Rule 194.2(1) required Two for Freedom to disclose "the name, address, and telephone number of any person who may be designated as a responsible third party."<sup>103</sup> The supreme court concluded that (1) Two for Freedom's responses did not satisfy its obligations under Rule 194.2(1) and Section 33.004(d) and (2) therefore, the trial court abused its discretion by granting leave for Two for Freedom to designate Graciano as a responsible third party after limitations had expired.<sup>104</sup>

Next, the supreme court considered whether Dawson lacked an adequate remedy by appeal. The supreme court stated (1) the most frequent use it has made of mandamus relief "involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved,"<sup>105</sup> and (2) it had recently concluded in *In re Coppola* that with regard to a trial court's denial of a timely-filed motion for leave to designate a responsible third party, "ordinarily, a relator need only establish a trial court's abuse of discretion to demonstrate entitlement to mandamus relief."<sup>106</sup> Then, the supreme court stated in part:

The right in *In re Coppola* was the defendants' "significant and substantive right to allow the fact finder to determine the proportionate responsibility of all responsible parties." In this case, Dawson seeks to protect her right, prescribed in [S]ection 33.004(d) of the Texas Civil Practice and Remedies Code, to not have to try her case against

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98. *In re Dawson*, 550 S.W.3d at 627.

99. *Id.*

100. *Id.* at 628.

101. *Id.*

102. *Id.* at 629 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(d)).

103. *Id.* (quoting TEX. R. CIV. P. 194.2(1)).

104. *Id.* at 630 (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding)).

105. *Id.* (quoting *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding)).

106. *Id.* (quoting *In re Coppola*, 535 S.W.3d 506, 510 (Tex. 2017) (per curiam) (orig. proceeding)).

an empty chair. We conclude that mandamus will lie to protect that right in this circumstance.<sup>107</sup>

Additionally, the supreme court stated (1) “even though mandamus is not an equitable remedy, equitable principles largely govern its issuance”; (2) pursuant to *In re Coppola*, a defendant is “‘ordinarily’ entitled to mandamus relief when a trial court erroneously prevents it from designating a responsible third party”; and (3) therefore, “it seems equitable and right—at least under these facts—that a plaintiff get the same relief when a trial court erroneously grants a defendant leave to so designate.”<sup>108</sup> Accordingly, the supreme court conditionally granted the writ of mandamus.<sup>109</sup>

*In re Xerox Corp.*<sup>110</sup> presented as a matter of first impression the question of whether Texas’s statutory proportionate-responsibility scheme applies to a civil-remedy action under the Texas Medicaid Fraud Prevention Act (TMFPA). Pursuant to a contract with the Texas Health and Human Services Commission, Xerox administered the Texas Medicaid program for nearly a decade.<sup>111</sup> Xerox’s duties included approving or denying prior-authorization requests for orthodontic services in accordance with Medicaid policy. The State of Texas sued Xerox for a civil remedy under TMFPA, alleging Xerox “approv[ed] vast numbers of prior-authorization requests for ineligible services” and such actions “caused the State to pay millions of dollars for unauthorized orthodontic services to Medicaid patients.”<sup>112</sup> As authorized by the TMFPA, “the State [sought] treble the amount of any Medicaid payment made as a result of an unlawful act; civil penalties of not less than \$5,500 per unlawful act; interest on the amount of unlawfully procured payments; and expenses, costs, and attorney’s fees.”<sup>113</sup> Additionally, the State filed separate TMFPA civil actions against multiple orthodontic service providers who had directly received disputed Medicaid payments. Xerox filed a motion to designate nearly seventy of those service providers as responsible third parties under Chapter 33 of the Texas Civil Practice and Remedies Code, which addresses proportionate responsibility.<sup>114</sup> That motion was denied by the trial court. After being denied mandamus relief in the Austin Court of Appeals, Xerox filed a petition for writ of mandamus in the Texas Supreme Court.<sup>115</sup>

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107. *Id.* (citations omitted).

108. *Id.* at 631 (citations omitted).

109. *Id.*

110. 555 S.W.3d 518, 520 (Tex. 2018) (orig. proceeding).

111. *Id.* at 520–21.

112. *Id.* at 521; see TEX. HUM. RES. CODE ANN. §§ 36.001–.132.

113. *In re Xerox*, 555 S.W.3d at 521.

114. *Id.*; see TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(6) (“‘Responsible third party’ means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought . . .”).

115. *In re Xerox*, 555 S.W.3d at 522. Following the filing of Xerox’s petition for writ of mandamus in the supreme court, the trial court judge who signed the complained-of order ceased to hold that office. *Id.* Pursuant to Texas Rule of Appellate Procedure 7.2(b), the supreme court abated the case to allow the successor trial court judge to reconsider the



The Texas Supreme Court described the issue before it as “a question of legislative intent, which we determine as a matter of law using well-established interpretive principles to construe the statutory language.”<sup>116</sup> Based on a lengthy and detailed analysis, the supreme court concluded a party found liable for violating the TMFPA may not shift the financial burden of that statute’s civil remedies to other wrongdoers under the proportionate-responsibility statute because “(1) a TMFPA civil-remedy action is not an ‘action for recovery of damages’ subject to apportionment, and (2) the TMFPA’s mitigated fault provision and other financial incentives for informants conflict with [C]hapter 33.”<sup>117</sup> Consequently, Xerox’s petition for writ of mandamus was denied. Although the supreme court did not reach the element of lack of an adequate remedy by appeal, the opinion included a cursory mention of both mandamus elements.<sup>118</sup>

### C. GRANTING OF MOTION FOR NEW TRIAL

*In re Davenport*<sup>119</sup> involved a merits-based review of the record to determine whether granting a new trial constituted an abuse of discretion. The underlying lawsuit was filed by two attorneys against a client to recover unpaid attorney fees. Following a jury verdict partially in favor of the client, the trial court granted the attorneys’ motion for new trial.<sup>120</sup> The trial court found that the parties’ contingency fee agreement “unambiguously” provided for recovery of an ownership interest in the client’s limited partnership as attorney fees.<sup>121</sup> After being denied mandamus relief in the San Antonio Court of Appeals as to the granting of a new trial, the client filed a petition for writ of mandamus in the Texas Supreme Court.<sup>122</sup>

The supreme court held that the “trial court’s finding was an abuse of discretion because the agreement unambiguously states that the lawyers were only entitled to attorney fees from a monetary recovery.”<sup>123</sup> Mandamus relief was conditionally granted and the trial court was ordered to vacate its new trial order and render a final judgment consistent with the supreme court’s opinion.<sup>124</sup> As to the element of lack of adequate remedy

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ruling in question. See TEX. R. APP. P. 7.2 (b). The successor trial court judge adopted the prior ruling, and the case then proceeded in the supreme court. See *In re Xerox*, 555 S.W.3d at 522 n.15.

116. *In re Xerox*, 555 S.W.3d at 522.

117. *Id.* at 527–39.

118. See *id.* at 522 n.17 (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)). The opinion in *In re Xerox* was delivered on the same date as *In re Dawson*, in which the supreme court addressed the element of adequate remedy by appeal in the context of designation of responsible third parties and relied heavily on *In re Coppola*. See *In re Dawson*, 550 S.W.3d 625, 630–31 (Tex. 2018) (per curiam) (orig. proceeding) (citing *In re Coppola*, 535 S.W.3d 506, 506–07 (Tex. 2017) (per curiam) (orig. proceeding)).

119. 522 S.W.3d 452, 455 (Tex. 2017) (orig. proceeding).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 454.

124. *Id.* at 459.

by appeal, the supreme court cited *In re Toyota Motor Sales, U.S.A., Inc.*<sup>125</sup> and stated in part that pursuant to that case, “[a]n appellate court may by mandamus direct a trial court to vacate a new trial order . . . when a merits-based review of the record establishes that the trial court abused its discretion.”<sup>126</sup>

#### D. TRIAL COURT JURISDICTION/AUTHORITY

*In re Castle Texas Production Limited Partnership*<sup>127</sup> addressed the applicability of mandamus relief when a trial court’s actions went beyond explicit instructions on remand from the Texas Supreme Court. In 2014, the Texas Supreme Court issued an opinion respecting accrual of postjudgment interest in a case involving the relator (Castle), which at that point had already been proceeding for nearly two decades.<sup>128</sup> In that opinion, the supreme court stated in part that “postjudgment interest must accrue from the trial court’s final judgment in 2009” and remanded the case to the trial court “to render judgment for Castle, with postjudgment interest to accrue in accordance with this opinion.”<sup>129</sup> On remand, the trial court issued a letter ruling in which it stated “that the record must be reopened to ‘determine postjudgment interest including the accrual period.’”<sup>130</sup> Castle sought mandamus relief in the Tyler Court of Appeals respecting that ruling, contending “the trial court exceeded the scope of the [supreme court’s] mandate by indicating its intent to re-open the record.”<sup>131</sup> Upon the denial of that relief, Castle petitioned for mandamus relief in the supreme court.<sup>132</sup>

The supreme court held that the trial court exceeded its authority when it ordered the reopening of the record and that “[m]andamus relief is appropriate to enforce our mandate.”<sup>133</sup> Specifically, the supreme court stated, in part, (1) the clear scope of the remand “was simply to render judgment for Castle with postjudgment interest accruing from the trial court’s final judgment issued in 2009”; (2) based on that “explicit instruction to the trial court on a limited remand, the trial court had a ministerial duty to render judgment for Castle with postjudgment interest to accrue in accordance with [the supreme court’s] opinion”; (3) there was “no need to re-open the record to comply with this directive”; and (4) the supreme court’s instruction for the trial court to proceed “in accordance with this opinion” was “not . . . an invitation to raise new arguments that

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125. *Id.* at 456 (citing *In re Toyota*, 407 S.W.3d 746, 758 (Tex. 2013) (orig. proceeding)).

126. *Id.*

127. 563 S.W.3d 216 (Tex. 2018) (per curiam) (orig. proceeding).

128. *Id.* at 217; see *Long v. Castle Tex. Prod. Ltd.*, 426 S.W.3d 73, 75 (Tex. 2014).

129. *In re Castle Tex. Prod. Ltd. P’ship*, 563 S.W.3d at 217 (quoting *Long*, 426 S.W.3d at 37 (emphasis omitted)).

130. *Id.* at 218.

131. *Id.*

132. *Id.*

133. *Id.* (citing *Wells v. Littlefield*, 62 Tex. 28, 31) (1884)).

would require re-opening the record.”<sup>134</sup> Further, with respect to lack of an adequate remedy by appeal, the supreme court (1) noted that the case “has dragged on for twenty-two years, through multiple appeals, remands,” and more, and (2) stated it was “fully cognizant of the additional time and resources that would be wasted by the trial court’s decision to re-open the record despite our directive to render judgment and finally dispose of this case.”<sup>135</sup>

In *In re Red Dot Building System, Inc.*,<sup>136</sup> the Texas Supreme Court addressed dominant jurisdiction respecting two “inherently interrelated” lawsuits brought in two different Texas counties. Venue was proper in either county. The supreme court concluded “the court in which the suit was first filed acquire[d] dominant jurisdiction.”<sup>137</sup> Therefore, the second-filed lawsuit should have been abated and mandamus relief was proper to secure that result.<sup>138</sup> The supreme court conditionally granted mandamus relief directing the second court to vacate its anti-suit injunction and grant the defendant’s plea in abatement in that court.<sup>139</sup> The supreme court stated it had recently made clear that in such circumstances, “if the court in the second action abuses its discretion by not abating the action, no additional showing is required for mandamus relief” and “[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.”<sup>140</sup>

*In re Accident Fund General Insurance Co.*<sup>141</sup> involved exclusive jurisdiction respecting workers’ compensation claims. An injured employee sued his workers’ compensation carrier, asserting claims premised on allegations that the “bona fide offer of employment” process required by the Texas workers’ compensation system was misused to fabricate grounds for firing him. The carrier filed a plea to the jurisdiction in the trial court, contending the Texas Division of Workers’ Compensation had exclusive jurisdiction over the employee’s claims because the employee’s administrative remedies had not been exhausted.<sup>142</sup> Following the denial of that plea and an unsuccessful attempt to obtain mandamus relief in the Corpus Christi-Edinburg Court of Appeals, the carrier successfully obtained mandamus relief in the Texas Supreme Court.<sup>143</sup>

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134. *Id.* (citing *Long*, 426 S.W.3d at 89; *Phillips v. Bramlett*, 407 S.W.3d 229, 234 (Tex. 2013)).

135. *Id.* (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding)).

136. 504 S.W.3d 320, 321 (Tex. 2017) (per curiam) (orig. proceeding).

137. *Id.* at 322.

138. *Id.*

139. *Id.* at 324.

140. *Id.* at 322 (citing *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 299–300 (Tex. 2016) (orig. proceeding)).

141. 543 S.W.3d 750, 751 (Tex. 2017) (per curiam) (orig. proceeding).

142. *Id.* at 752.

143. *Id.* at 755.

The supreme court held that employee's claims against the carrier "arise out of the statutory claims-handling process and, as a result, the current [Workers' Compensation Act] with its definitions, detailed procedures, and dispute resolution process demonstrate[s] legislative intent for there to be no alternative remedies."<sup>144</sup> Further, the supreme court stated in part "[b]ecause the Division has exclusive jurisdiction over [the employee's] claims against [the carrier] and [the employee] did not exhaust administrative remedies through the workers' compensation system before filing suit, allowing those claims to proceed in the trial court would disrupt the orderly process of government" and "[t]hus, mandamus relief for [the carrier] is appropriate."<sup>145</sup>

In *In re Elizondo*,<sup>146</sup> the Texas Supreme Court addressed the trial court's plenary power to amend a previous trial court order. Elizondo hired M&O Homebuilders and others (collectively, the Builders) to build a home. After a cost dispute arose, Elizondo sued the Builders for breach of contract and "placed a lien on the Builders' property on the theory that the Builders had improved it using funds intended for his home."<sup>147</sup> The Builders contended the lien was invalid, filed a motion to remove it, and submitted to the trial court an order drafted by them titled "Order on Defendants' Summary Motion to Remove Invalid Lien."<sup>148</sup> That order contained the following finality phrase: "This judgment is final, disposes of all claims and all parties, and is appealable. All relief not granted herein is denied."<sup>149</sup> Elizondo did not file a notice of appeal within thirty days of the trial court signing the order. Weeks later, Elizondo requested an amended order after realizing that the "original order had disposed of his entire case."<sup>150</sup> When the trial court signed and issued the amended order, the Builders filed for mandamus relief in the First Houston Court of Appeals, which directed the trial court to vacate the amended order. Elizondo then sought a "writ of mandamus directing the court of appeals to vacate its opinion," from the supreme court.<sup>151</sup>

The supreme court stated that the court of appeals correctly concluded that in determining finality of an order when there has not been a conventional trial on the merits, a reviewing court is "to look at the record only if the order [i]s not clear and unequivocal."<sup>152</sup> Then, the supreme court rejected Elizondo's argument that the original order was ambiguous.<sup>153</sup> Specifically, the supreme court stated, in part, (1) "the title and

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144. *Id.* at 754 (quoting *Tex. Mut. Ins. Co. v. Rottiger*, 381 S.W.3d 430, 444 (Tex. 2012)).

145. *Id.* at 754–55 (citing *In re Crawford & Co.*, 458 S.W.3d 920, 928–29 (Tex. 2015) (per curiam) (orig. proceeding); *In re Entergy Corp.*, 142 S.W.3d 316, 321–22 (Tex. 2004) (orig. proceeding)).

146. 544 S.W.3d 824, 825 (Tex. 2018) (per curiam) (orig. proceeding).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 826.

152. *Id.* at 827 (citing *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205–06 (Tex. 2001)).

153. *Id.* at 827–28 (citing *In re Daredia*, 317 S.W.3d 247, 248–49 (Tex. 2010) (per curiam) (orig. proceeding); *Lehmann*, 39 S.W.3d at 195–206).

the finality phrase admit of only one construction: the order (correctly) removes a lien and (incorrectly) disposes of Elizondo's other claims" and (2) the original order "may lack a basis in law, but it is not ambiguous."<sup>154</sup> Further, the supreme court stated that its "conclusion that the original order was final also decide[d] the issue of whether the amended order was void as an attempt to correct judicial error."<sup>155</sup> According to the supreme court:

The trial court's inclusion of the finality phrase in the original order constituted judicial error. It is settled that only errors made in entering a judgment are clerical; an error in rendition is judicial. Here, . . . the trial court signed an order that one of the parties submitted. As such, the finality phrase was part of the judgment that the trial court rendered. Since the amended order sought to correct judicial error after the trial court's plenary power had expired, the amended order was void.<sup>156</sup>

Consequently, the supreme court denied Elizondo's petition for writ of mandamus.<sup>157</sup> Although the supreme court made no mention of the mandamus element of lack of an adequate remedy by appeal, the opinion contained numerous citations and comparisons to *In re Daredia*, a case in which the supreme court stated mandamus was proper where an order is void because an adequate remedy is lacking in such circumstances.<sup>158</sup>

#### E. APPOINTMENT/DISQUALIFICATION OF COUNSEL

*In re Turner*<sup>159</sup> involved the issue of "whether a law firm must be disqualified after [employing] a paralegal who had previously worked for the opposing party's [law firm]."<sup>160</sup> The law firm that had first employed the paralegal, Vethan Law Firm, filed a motion to disqualify the second firm, The Cweren Law Firm, because of the paralegal's work on the same case at both firms.<sup>161</sup> The trial court denied that motion. Although Vethan's attempt to obtain mandamus relief in the Fourteenth Houston Court of Appeals was unsuccessful, mandamus relief was conditionally granted in the Texas Supreme Court.<sup>162</sup> The supreme court stated: (1) "to rebut the rebuttable presumption that a nonlawyer employee imparted confidential information obtained at her previous employment, the hiring firm must demonstrate that it instructed the nonlawyer employee to refrain from working on any matter on which she worked in any previous employment"; (2) "[t]he failure to provide this general instruction to a new employee creates an unacceptable risk of disclosure, even if the hir-

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154. *Id.* at 828.

155. *Id.* at 829.

156. *Id.* (citations omitted).

157. *Id.*

158. *Id.* at 827-28; see *In re Daredia*, 317 S.W.3d at 250.

159. 542 S.W.3d 553 (Tex. 2017) (per curiam) (orig. proceeding).

160. *Id.* at 554.

161. *Id.* at 555.

162. *Id.* at 558.

ing firm is unaware of the new employee's specific conflict"; and (3) "[h]ere, the record demonstrates that Cweren did not provide this instruction until after it discovered [the employee's] conflict."<sup>163</sup> Additionally, the supreme court stated, "Mandamus is available where a motion to disqualify is inappropriately denied as there is no adequate remedy on appeal."<sup>164</sup>

In *In re State of Texas*,<sup>165</sup> the Texas Supreme Court addressed whether a civilly committed sex offender was entitled to appointed counsel in a proceeding to amend his commitment order. The offender was civilly committed in 2010 pursuant to the Civil Commitment of Sexually Violent Predators Act contained in Chapter 841 of the Texas Health and Safety Code.<sup>166</sup> More than five years later, the State of Texas filed a motion to amend the offender's civil commitment order to conform to the Act's 2015 amendments. The amended Act requires, among other things, "commitment to a tiered treatment program that includes the possibility of total confinement, while the Act's previous version provided for outpatient treatment only."<sup>167</sup> The trial court denied a motion for appointment of counsel filed by the offender "and, after a hearing, signed an amended commitment order."<sup>168</sup> The offender sought and obtained mandamus relief in the Beaumont Court of Appeals, which ordered the trial court "to vacate its orders and appoint counsel to represent the [offender] in further proceedings on the State's motion [to amend]."<sup>169</sup> Then, the State filed a petition for writ of mandamus in the supreme court, contending the court of appeals abused its discretion by "erroneously [construing] the Act to entitle [the offender] to representation by counsel in . . . [the] modification proceeding solely because he already had appointed counsel in his then-pending biennial review" as required under the Act.<sup>170</sup>

The supreme court stated in part, "We may review a court of appeals' issuance of a writ of mandamus to determine if it constituted a clear abuse of discretion. . . . In doing so, however, our focus remains on the trial court's order."<sup>171</sup> Based on the provisions of the Act, the supreme court concluded that the court of appeals had abused its discretion by concluding the offender was statutorily entitled to appointed counsel for purposes of the State's motion to amend.<sup>172</sup> Then, the supreme court turned to constitutional due process arguments asserted by the offender in both courts below, but not reached by the court of appeals. The supreme court stated in part:

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163. *Id.* at 556–57 (citing *In re Columbia Valley Healthcare Sys., L.P.*, 320 S.W.3d 819, 824 (Tex. 2010) (orig. proceeding)).

164. *Id.* at 555 (citing *In re Columbia Valley Healthcare Sys.*, 320 S.W.3d at 824 n.2).

165. 556 S.W.3d 821, 822 (Tex. 2018) (orig. proceeding).

166. *Id.* at 824–25; see TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.151.

167. *State*, 556 S.W.3d at 822.

168. *Id.*

169. *Id.*

170. *Id.* at 826.

171. *Id.* (citations omitted).

172. *Id.* at 828.

The State argues that by reurging these unaddressed arguments here, [the offender] “effectively asks this Court to exercise mandamus jurisdiction in the first instance” without stating a compelling reason for doing so. We disagree. [The offender] presented his mandamus petition, which included his due process arguments, to the court of appeals. He presents these same arguments here as an alternative ground to deny the State’s petition. That the court of appeals chose to grant [the offender’s] petition for different reasons does not preclude us from addressing the arguments he raised.<sup>173</sup>

Further, following an analysis that took into account “the liberty interest at stake, the risk of erroneous deprivation, and the State’s interest,” the supreme court concluded “the minimum process to which [the offender] is entitled in connection with the State’s motion to amend his commitment order to conform to the Act’s 2015 amendments does not include appointed counsel.”<sup>174</sup> Accordingly, the supreme court concluded (1) “the trial court did not abuse its discretion in denying [the offender’s] request for appointed counsel on the State’s motion to modify his civil commitment order” and (2) “the court of appeals abused its discretion in granting [the offender] mandamus relief.”<sup>175</sup> The State’s petition for writ of mandamus was conditionally granted and the court of appeals was ordered to vacate its own order conditionally granting mandamus relief.<sup>176</sup> The supreme court did not specifically address the element of no adequate remedy by appeal, but cited *In re Cerberus Capital Management, L.P.*, in which the supreme court stated in part, “Mandamus is appropriate to correct an erroneous order disqualifying counsel because there is no adequate remedy by appeal.”<sup>177</sup>

#### F. LAWSUIT FORUM

The issue in *In re Mahindra, USA Inc.*<sup>178</sup> was whether certain survival and wrongful death claims fell within an exception to the doctrine of forum non conveniens. The decedent was killed at his home in Mississippi while working on a tractor sold to him in Mississippi by Mahindra USA, Inc. The decedent’s death was allegedly the result of a hydraulic line rupture that caused him to be crushed by the tractor’s front-end loader, which was manufactured by KMW, Ltd., a Kansas corporation. The incident was witnessed by the decedent’s fourteen-year-old granddaughter, Faith, who was visiting from Texas at the time. Jason Cooper, the decedent’s eldest son and a resident of Texas, filed a lawsuit in Texas against Mahindra and KMW, asserting claims for negligence and products liabil-

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173. *Id.* (citations omitted).

174. *Id.* at 830 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

175. *Id.* at 831.

176. *Id.*

177. *See id.* at 827 (citing *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (per curiam) (orig. proceeding)).

178. 549 S.W.3d 541, 543 (Tex. 2018) (orig. proceeding).

ity.<sup>179</sup> Jason sued the defendants in his individual capacity, “as administrator of his father’s estate, and as next friend of his daughter, Faith.”<sup>180</sup> Additionally, Christopher Cooper, another son of the decedent who is also a Texas resident, joined the lawsuit individually as a plaintiff.<sup>181</sup> Mahindra moved to dismiss the lawsuit based on forum non conveniens, contending Mississippi was a more appropriate forum.<sup>182</sup> The trial court denied that motion. After an unsuccessful attempt to obtain mandamus relief in the First Houston Court of Appeals, Mahindra filed a petition for writ of mandamus in the Texas Supreme Court.

As a threshold matter, the supreme court stated (1) when a trial court denies a motion to dismiss, “the movant cannot obtain a final judgment, and no immediate appeal is available” and (2) in such circumstances, “we have held the writ of mandamus to be an appropriate remedy to correct the court’s abuse of discretion.”<sup>183</sup> Further, the supreme court observed that the doctrine of forum non conveniens is codified as part of the Texas survival and wrongful death act.<sup>184</sup> That “codified version includes a Texas-residency exception that excludes certain claims from the doctrine because they are either prosecuted by a Texas-resident plaintiff or derivative of a Texas decedent.”<sup>185</sup>

Mahindra contended that although Jason and Christopher reside in Texas, the Texas-residency exception was inapplicable because (1) “only a plaintiff may invoke the exception and Jason and Christopher are not plaintiffs under an applicable definition of that term,” and (2) “Jason and Christopher are ‘derivative claimants’ of their father and, as such, may not invoke the exception because their father was not a Texas resident.”<sup>186</sup> In support of those contentions, Mahindra cited what it contended was applicable Mississippi law.<sup>187</sup>

The supreme court rejected Mahindra’s arguments. Specifically, the supreme court stated in part (1) forum non conveniens “goes to process rather than substantive rights” and therefore Texas law applied; (2) notwithstanding Jason’s representative claims as administrator of his father’s estate and next friend of Faith, both Jason and Christopher asserted individual wrongful death claims and “are not nominal or representative plaintiffs with respect to their own individual damages”; (3) “as plaintiffs and legal residents of Texas,” Jason and Christopher were entitled to invoke the forum non conveniens exception as to those claims; and (4) as to

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 543–44.

183. *Id.* at 545 (citing *In re Gen. Elec. Co.*, 271 S.W.3d 681, 694 (Tex. 2008) (orig. proceeding); *In re Pirelli Tire, LLC*, 247 S.W.3d 670, 679 (Tex. 2007) (orig. proceeding)).

184. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051.

185. *In re Mahindra, USA Inc.*, 549 S.W.3d at 543; see CIV. PRAC. & REM. CODE § 71.051(e).

186. *In re Mahindra, USA Inc.*, 549 S.W.3d at 544–45 (citing CIV. PRAC. & REM. CODE §§ 71.051(h)(1)–(2)).

187. *Id.*



the representative claims asserted by Jason, subsection 71.051(b) allows for trial court consideration of certain statutory factors in deciding whether to grant a motion to dismiss under the doctrine of forum non conveniens, including a “duplication-of-litigation factor,” and the record in this case did not show all of the statutory factors conclusively favored the alternative forum.<sup>188</sup> Consequently, the supreme court concluded that the trial court did not abuse its discretion by denying Mahindra’s motion to dismiss and denied the writ of mandamus.<sup>189</sup>

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

As illustrated by the cases described above, the Texas Supreme Court addresses the lack of adequate remedy element in varying depth. The chart below groups those cases according to the supreme court’s level of treatment of that element.

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 Coppola</i> , 535 S.W.3d 506 (Tex. 2017) (per curiam)	Designation of Parties: Trial court improperly denied motion to designate real estate purchaser’s attorney as responsible third party without opportunity to replead	Granted
	<i>In re Garza</i> , 544 S.W.3d 836 (Tex. 2018) (per curiam)	Discovery: T. ct. improperly imposed discovery sanctions on plaintiff in absence of evidence plaintiff was an offender	Granted
	<i>In re Dawson</i> , 550 S.W.3d 625 (Tex. 2018) (per curiam)	Designation of Parties: T. ct. improperly allowed defendant to designate contractor as responsible third party after limitations expired	Granted
	<i>In re Castle Tex. Prod. Ltd. P’ship</i> , 2018 WL 6005073	Authority: T. ct. exceeded its authority by taking action beyond scope of supreme court’s explicit instruction on limited remand.	Granted
Conclusory statement as to adequacy of appellate remedy	<i>In re Red Dot Bldg. Sys., Inc.</i> , 504 S.W.3d 320 (Tex. 2016) (per curiam)	Jurisdiction: Because t. ct. in which suit was first filed acquired dominant jurisdiction, t. ct. in second-filed suit improperly denied plea in abatement	Granted

188. *Id.* at 547–50 (citing CIV. PRAC. & REM. CODE §§ 71.051(b)–(e); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)).

189. *Id.* at 550.

APPELLATE REMEDY TREATMENT	OPINION	SUBJECT MATTER OF CASE & ACT CONSTITUTING ABUSE OF DISCRETION	MANDAMUS DISPOSITION
	<i>In re Shipman</i> , 540 S.W.3d 562 (Tex. 2018) (per curiam)	Discovery: T. ct. improperly ordered overbroad forensic examination of all electronic devices of party who appeared unable to conduct proper search of computer	Granted
	<i>In re Silver</i> , 540 S.W.3d 530 (Tex. 2018)	Discovery: T. ct. improperly compelled production of emails between inventor and his non-attorney patent agent because lawyer-client privilege applied	Granted
	<i>In re Mahindra, USA Inc.</i> , 549 S.W.3d 541 (Tex. 2018)	Lawsuit Forum: T. ct.'s denial of motion to dismiss claims based on forum non conveniens was consistent with applicable law and within t. ct.'s discretion	Denied
Adequacy of appellate remedy not addressed, but case(s) cited	<i>In re State Farm Lloyds</i> , 520 S.W.3d 595 (Tex. 2017)	Discovery: T. ct. should be allowed to reconsider order as to format of electronic discovery, in light of supreme court's new guidelines	Denied
	<i>In re Davenport</i> , 522 S.W.3d 452 (Tex. 2017)	New Trial: Appellate ct. should have vacated t. ct.'s new trial order where merits-based review of record showed no justification for t. ct.'s interpretation of parties' contract	Granted
	<i>In re Nat'l Lloyds Ins. Co.</i> , 532 S.W.3d 794 (Tex. 2017)	Discovery: T. ct. improperly ordered production of attorney-billing information because such information was work product and was irrelevant in insurance case	Granted
	<i>In re Turner</i> , 542 S.W.3d 553 (Tex. 2017) (per curiam)	Disqualification of Counsel: T. ct. improperly denied motion to disqualify law firm that employed opposing party's paralegal	Granted
	<i>In re Accident Fund Gen. Ins. Co.</i> , 543 S.W.3d 750 (Tex. 2017) (per curiam)	Jurisdiction: T. ct. improperly denied plea to jurisdiction because workers' compensation division had exclusive jurisdiction	Granted
	<i>In re Elizondo</i> , 544 S.W.3d 824 (Tex. 2018) (per curiam)	Jurisdiction: App. ct. correctly concluded t. ct.'s amended order was void, where order sought to correct judicial error after plenary power expired	Denied

APPELLATE REMEDY TREATMENT	OPINION	SUBJECT MATTER OF CASE & ACT CONSTITUTING ABUSE OF DISCRETION	MANDAMUS DISPOSITION
	<i>In re</i> N. Cypress Med. Ctr. Operating Co., Ltd., 2018 WL 1974376 (Tex. 2018)	Discovery: T. ct. did not abuse discretion in concluding insurance reimbursement rates were relevant in lawsuit by uninsured patient respecting amount of hospital lien	Denied
	<i>In re</i> Xerox Corp., 555 S.W.3d 518 (Tex. 2018)	Designation of Parties: T. ct. properly concluded civil remedy action under Medicaid fraud act was not subject to proportionate-responsibility statutes	Denied
	<i>In re</i> State of Tex., 556 S.W.3d 821 (Tex. 2018)	Appointment of Counsel: App. ct. improperly concluded sex offender was entitled to appointed counsel respecting State's motion to amend commitment order	Granted

## VI. CONCLUSION

The percentage of cases in which the filing of a petition for mandamus relief in the Texas Supreme Court results in the granting of that relief has varied little over the past seven years and consistently remains under eight percent.<sup>190</sup> Additionally, although the supreme court often merely cites prior cases in addressing the lack of an adequate remedy on appeal, the supreme court has by no means abandoned the application of a detailed analytical approach to that element when unique circumstances are presented.<sup>191</sup> Thus, the evolution of the remedy of mandamus continues to be guided by the well-established principles that mandamus is an extraordinary and discretionary remedy that “depends heavily on the circumstances presented.”<sup>192</sup> Further, the discretionary nature of mandamus was especially highlighted during this Survey period in *In re State Farm Lloyds*, in which the supreme court took the rare approach of neither granting nor denying mandamus relief on the merits, but rather utilizing the “opportunity” to “elucidate the guiding principles informing the exercise of discretion over electronic-discovery disputes.”<sup>193</sup>

190. See *supra* notes 24–27 and accompanying text; see also Hon. Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 3 SMU ANN. TEX. SURV. 265, 267 (2017), <https://scholar.smu.edu/smuatxs/vol3/iss1/> [https://perma.cc/35X6-DQPN].

191. See *In re* Coppola, 535 S.W.3d 506, 508 (Tex. 2017) (per curiam) (orig. proceeding); *In re* Garza, 544 S.W.3d 836, 840–41 (Tex. 2018) (per curiam) (orig. proceeding); *In re* Dawson, 550 S.W.3d 625, 630–31 (Tex. 2018) (per curiam) (orig. proceeding).

192. *In re* Garza, 544 S.W.3d at 840 (citing *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding)).

193. *In re* State Farm Lloyds, 520 S.W.3d 595, 599, 615 (Tex. 2017) (orig. proceeding).