

2022

Survey of Recent Mandamus Decisions of the Texas Supreme Court

Honorable Douglas S. Lang
Thompson Coburn LLP

Recommended Citation

Honorable Douglas S. Lang, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 8 SMU ANN. TEX. SURV. 201 (2022)
<https://scholar.smu.edu/smuatxs/vol8/iss1/9>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Annual Texas Survey by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SURVEY OF RECENT MANDAMUS DECISIONS OF THE TEXAS SUPREME COURT

*Honorable Douglas S. Lang**

TABLE OF CONTENTS

I. INTRODUCTION	203
II. MANDAMUS FUNDAMENTALS	204
III. MANDAMUS STATISTICS	205
IV. SUBJECT MATTER CATEGORIES OF RECENT TEXAS SUPREME COURT MANDAMUS CASES	206
A. MANDAMUS WHERE TRIAL COURT HAS JURISDICTION	206
1. <i>No Jurisdiction of Public Utility Commission Over Common-Law Negligence Claims Against Public Utility—A Trilogy</i>	206
2. <i>Mandamus and Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code Ann. § 27.003— Ecclesiastical Abstention Doctrine Bars Defamation Claims</i>	208
3. <i>Mandamus Where Trial Court Has No Jurisdiction—Mandamus Denied to Compel Dismissal Under Rule 91a or Claims For Intentionally or Knowingly Benefiting From Participation in a Sex-Trafficking Venture—Tex. Civ. Prac. & Rem. Code Ann. § 98.002</i>	209
4. <i>When the Trial Court Has No Jurisdiction of Claims—Permissive Interlocutory Appeal (Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d)) After Denial of Motion for Summary Judgment. (Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. § 7902(a))</i>	211
5. <i>Denial of Rule 91a Motion to Dismiss—No Legal Basis for Claims Against Insurer</i>	212
B. PRETRIAL MATTERS	213
1. <i>Mandamus to Compel Discovery of Medical Care Providers’ “Negotiated Rates” To Challenge</i>	

	“Reasonableness of Full Rates” Charged to Uninsured—A Dilogy of Cases	213
2.	Pretrial Procedure—Texas Civil Practice and Remedies Code Section 18.001, Competency of Counter-affidavits Offered to Challenge Reasonableness and Necessity of Alleged Medical Expenses—Another Medical Expense Affidavit duology	216
3.	Discovery—Is the Witness “Subject to the Control of a Party?”	218
4.	Discovery—Regarding Scope of Arbitration Clause.....	219
5.	Untimely Designation of Unknown Person as Responsible Third Party—The “Empty Chair”—Tex. Civ. Prac. & Rem. Code Ann. § 33.004(k)	220
C.	ELECTION BALLOT ISSUES—CORRECTION OF BALLOT DESCRIPTION OF PROPOSED ORDINANCE—AN ELECTION BALLOT DILOGY	222
	1. <i>In re Durnin</i>	222
	2. <i>In re Petricek</i>	223
D.	COMPLEX UNINSURED MOTORIST COVERAGE CASES—A UIM DILOGY.....	224
	1. <i>In re USAA General Indemnity Co.</i>	224
	2. <i>In re State Farm Mutual Automobile Insurance Co.</i>	225
E.	MANDAMUS AVAILABILITY—FINAL JUDGMENT PRECLUDES MANDAMUS RELIEF	226
	1. <i>Electric Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC</i>	226
F.	WAIVER OF MANDAMUS RELIEF BY UNDUE OR UNREASONABLE DELAYS IN FILING-UNLESS JUSTIFIED	227
	1. <i>In re American Airlines</i>	227
G.	STAY ENFORCEMENT OF SCHOOL DISTRICT “MASK MANDATE,” GOVERNOR’S ORDER UNDER TEXAS DISASTER ACT—STATUS QUO	228
	1. <i>In re State</i>	228
H.	TEXAS SUPREME COURT ORIGINAL JURISDICTION—MANDAMUS AGAINST OFFICERS OF EXECUTIVE DEPARTMENTS OF THE STATE: GOVERNMENT CODE CHAPTER 2260; ARTICLE V, SECTION 3 OF THE TEXAS CONSTITUTION	229
	1. <i>In re City of Galveston</i>	229
I.	MANDAMUS WHERE NO APPEAL IS AVAILABLE—RELIEF FROM <i>EX PARTE</i> TEMPORARY RESTRAINING ORDER.....	230
	1. <i>In re Abbott</i>	230

J. FAMILY LAW—CRIMINAL CONTEMPT FOR VIOLATION OF AMBIGUOUS ORDER 233
 1. *In re Janson* 233

K. MANDAMUS DENIED AS TO EMERGENCY CHILD PROTECTIVE ORDER—DISSENT EXPRESSES CONCERN FOR SAFETY 234
 1. *In re Texas Department of Family and Protective Services* 234

L. COUNTER SUPERSEDEAS DURING INTERLOCUTORY APPEAL 235
 1. *In re Texas Education Agency* 235

M. MINISTERIAL DUTY TO PAY WRONGFUL IMPRISONMENT COMPENSATION—TIM COLE ACT 236
 1. *In re Brown* 236

V. MANDAMUS AUTHORITIES CITED BY THE TEXAS SUPREME COURT 236

VI. CONCLUSION 242

I. INTRODUCTION

The objective of this Article is to demonstrate the versatility of the legal tool of mandamus to provide “mid-course correction” during the trial court process. Mandamus correction can put the case on a suitable track for trial.

Mandamus relief is appropriate when a petitioner demonstrates a court’s ruling is a clear abuse of discretion and it has no adequate remedy by appeal.¹ However, mandamus is an “extraordinary” remedy and not a matter of right.²

Although the Texas Supreme Court’s mandamus opinions during the past year drew on previously recognized authorities, mandamus relief in the supreme court remains very much dependent on the particular circumstances of each case. Further, it is obvious there is always room for disagreement between the justices. Out of forty-one mandamus opinions released during the Survey period of December 1, 2020 through November 30, 2021, dissenting opinions were published in eight cases, and concurring opinions were published in four cases.

This Article analyzes, summarizes, and categorizes the supreme court mandamus opinions delivered during the Survey period. A particular focus of the Article is the mandamus element of lack of an adequate appellate remedy and whether the Texas Supreme Court’s opinions cite the seminal case on mandamus, *In re Prudential Insurance Co. of America*.

* Justice, (Former), Fifth District Court of Appeals of Texas; Thompson Coburn LLP, Dallas, Texas. B.S.B.A., Drake University; J.D., University of Missouri. Prior to joining the bench, Justice Lang was a partner in the Dallas office of Gardere Wynne Sewell LLP. Justice Lang clerked for the Hon. Fred L. Henley of the Supreme Court of Missouri from May 1972 to May 1973.

2. *In re Acad., Ltd.*, 625 S.W.3d 19, 35–36 (Tex. 2021) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding).

The Texas Supreme Court's opinions occasionally omit discussion of the aforementioned element. However, the opinions issued during this Survey period show a renewed focus on the detailed legal analysis of both critical elements of mandamus.

II. MANDAMUS FUNDAMENTALS

The Texas Supreme Court's jurisdiction over writs of mandamus stems from the Texas constitution.³ Specifically, § 3 of article V 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 [Texas] Supreme Court to issue writs of . . . mandamus in such cases as may be specified, except as against the Governor of the State."⁴

Consistent with those constitutional grants of authority, § 22.002(a) of the Texas Government Code provides that the Supreme Court or a justice of that 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.⁵

Further, the Texas Government Code § 22.002 states that "[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:

[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.⁶

Additionally, a number of Texas statutes and rules provide for mandamus proceedings in certain courts as to specifically identified matters.⁷

3. "Mandamus . . . is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles." *In re Prudential*, 148 S.W.3d at 138 (quoting *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding)).

4. See TEX. CONST. art. V, §§ 1, 3, 6.

5. *Id.* § 3(a). Also, § 6 of article V 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).

6. TEX. GOV'T CODE ANN. § 22.002(a).

7. *Id.* § 22.002(b)–(c). The mandamus jurisdiction of the Texas courts of appeals is less broad than that of the Texas Supreme Court. Specifically, pursuant to Texas Government Code § 22.221: (1) each of the fourteen courts of appeals or a justice thereof "may

Texas Rule of Appellate Procedure 52 provides procedural requirements for mandamus proceedings in both the supreme court and the courts of appeals.⁸ “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 must be stated in the petition.⁹ Further, failure to comply with the additional requirements of Rule 52 may result in denial of relief.¹⁰

III. MANDAMUS STATISTICS

Statistics for the Texas Supreme Court’s four most recent fiscal years show that the rate at which the petitions have been granted in that period, in the range from 3.3% to 9.0%, demonstrates that mandamus is

issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court,” and (2) “[e]ach 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).

8. *See, e.g., In re Brown*, 614 S.W.3d 712, 714 (Tex. 2020) (orig. proceeding); *In re Lester*, 602 S.W.3d 469, 471 (Tex. 2020) (orig. proceeding) (citing the Tim Cole Act, TEX. CIV. PRAC. & REM. CODE ANN. § 103.001–103.154). The remedy of mandamus at the Texas Supreme Court is provided to compel performance of the ministerial duty of the Comptroller of Public Accounts. *See, e.g., In re Smith*, 333 S.W.3d 582, 585 (Tex. 2011) (orig. proceeding); *In re Occidental Chem. Corp.*, 561 S.W.3d 146, 153–54 (Tex. 2018) (orig. proceeding) (concluding that the statute gives the Texas Supreme Court original jurisdiction to hear and determine certain suits involving the imposition of ad valorem taxes by multiple taxing units on the same property and confers original mandamus jurisdiction in the supreme court); *City of Hous. v. Hous. Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 582–84 (Tex. 2018) (affirming the denial of the city’s plea to the jurisdiction where the suit for mandamus was a proper proceeding to compel the disclosure of information pursuant to the 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 that the statutory language allowed for Texas Supreme Court mandamus review of the constitutionality of a franchise tax statute); TEX. R. APP. P. 24.4(a) (providing that a party may seek Texas Supreme Court mandamus review of a court of appeals’ ruling on a motion challenging a trial court’s determination of the amount of security required to supersede judgment); TEX. ELEC. CODE ANN. § 273.061(a) (“The [Texas] [S]upreme [C]ourt 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.”).

9. *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.* at 52.2. “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.*

10. *See id.* at 52.3(e); *see also In re Abbott*, 601 S.W.3d 802, 807 (Tex. 2020) (orig. proceeding) (per curiam); *State v. Naylor*, 466 S.W.3d 783, 794 (Tex. 2015) (orig. proceeding) (“[A] party may not circumvent the court of appeals simply by arguing futility.”); *Chambers-Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 356 (Tex. 2019) (orig. proceeding) (“Texas Rule of Appellate Procedure 52.3(e) provides that if a mandamus petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals.”). *Cf. In re Abbott*, 601 S.W.3d at 807 n.1 (noting that without citing Texas Rule of Appellate Procedure 52.3(e), the Texas Supreme Court said, “[b]ecause this is a matter of state-wide importance requiring immediate attention, the relators’ decision to bypass the court of appeals is warranted. *See Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (orig. proceeding).”).

indeed an “extraordinary” remedy.¹¹

TEXAS SUPREME COURT MANDAMUS STATISTICS: PAST FOUR FISCAL YEARS AS REPORTED BY THE OFFICE OF COURT ADMINISTRATION.

IV. SUBJECT MATTER CATEGORIES OF RECENT TEXAS SUPREME COURT MANDAMUS CASES

A. MANDAMUS WHERE TRIAL COURT HAS NO JURISDICTION

1. *No Jurisdiction of Public Utility Commission Over Common-law Negligence Claims Against Public Utility—A Trilogy*

a. *In re CenterPoint Energy Houston Electric, LLC*¹²

This case addressed whether the Texas Public Utility Commission’s (PUC) exclusive jurisdiction over an electric utility’s rates, operations, and services extends to certain issues raised in common-law tort suits against utilities. The issue was raised when CenterPoint Energy Houston Electric, LLC (CenterPoint) was sued for negligence when a “good Samaritan” was electrocuted while attempting to help the victims of a wreck that downed a CenterPoint power line.

CenterPoint filed a plea to the jurisdiction. It claimed the PUC had exclusive jurisdiction to adjudicate issues of duty and breach that underlie these claims because, according to CenterPoint, the plaintiffs’ central complaints about defects in the power line regarding fuse size implicated fundamental policy questions about how electric utilities must design, install, operate, and maintain their electric distribution systems.¹³ That plea was denied, and CenterPoint pursued mandamus.

After substantial statutory analysis, the Texas Supreme Court observed that the Probate Court, where suit was brought, had concurrent jurisdiction with the district courts as to the plaintiffs’ claims for survival and wrongful death.¹⁴ However, the supreme court determined the PUC did not have exclusive jurisdiction in this case because the plaintiffs and their decedent were not what the statute refers to as “affected person[s]” as to an electric utilities’ “rates, operations, and services” authorized to bring a complaint at the PUC.¹⁵ In addition, the supreme court declared that the PUC’s regulatory scheme had not displaced the jurisdiction of the courts to address the common-law duty of reasonable care.¹⁶

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

12. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding); see *infra* Appendix, Table 1.

13. 629 S.W.3d 149, 149 (Tex. 2021) (orig. proceeding) (opinion by Justice Busby; concurrence by Justice Boyd; dissent by Chief Justice Hecht, joined by Justice Blacklock).

14. *Id.* at 154.

15. *Id.* at 155 (citing *King v. Deutsche Bank Nat’l Tr. Co.*, 472 S.W.3d 848, 856 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

16. TEX. UTIL. CODE ANN. § 15.051(a). See also § 31.001(a), (b).

Having addressed PURA in depth, the supreme court concluded that the trial court had not abused its discretion.¹⁷ Accordingly, mandamus relief was denied.

Chief Justice Hecht, joined by Justice Blacklock, dissented, stating their view that the PUC had exclusive jurisdiction of the action to adjudicate the standard of care applicable to the issue because PURA states the PUC has “exclusive jurisdiction” of the “services of an electric utility.” According to the dissent, that subject matter includes any allegedly defective devices used in providing its “services,”¹⁸ such as the fuses claimed to be defective in this case.

b. *In re Oncor Electric Delivery Co. LLC*¹⁹

On the heels of the *CenterPoint* case, the Texas Supreme Court again addressed the question of whether an electric utility may compel a plaintiff who alleges a common-law personal injury claim to appear before the PUC before filing a lawsuit. In this case, an Oncor customer brought a personal injury action alleging negligence and consumer-protection violations arising from the customer’s electrocution while trimming a tree near a “drop line” that crossed the customer’s property to the neighbor’s house. The customer had previously asked Oncor to trim the tree, but it refused.

The supreme court yet again determined that the public utility “may not [compel the customer to appear before the PUC] unless the claim complains about the utility’s rates or its provision of electrical service.”²⁰ In accord with the *CenterPoint* decision, the supreme court concluded that this personal injury claim against a utility, allegedly arising under duties at common law and consumer-protection statutes, was not a regulatory action within the exclusive jurisdiction of the PUC.

As in *CenterPoint*, the supreme court determined the trial court did not abuse its discretion in denying Oncor’s plea to the jurisdiction. Accordingly, the petition for writ of mandamus was denied.

Once again, Chief Justice Hecht dissented. He was joined by Justices Boyd and Blacklock. The dissent contended that the majority’s decision was in conflict with the supreme court’s earlier decision in *Oncor Electric Delivery Co. LLC v. Chaparral Energy*.²¹ In *Chaparral*, the supreme court held, “because Chaparral’s breach-of-contract claim in this case complains of Oncor’s services, we conclude that the scope of the PUC’s exclusive jurisdiction encompasses that claim.”²² The dissent observed, “[w]hile the PUC could not award Chaparral damages, that did not deprive the agency of all jurisdiction[] [and] Chaparral, the Court ex-

17. *In re CenterPoint Energy Houston Elec., LLC.*, 629 S.W.3d. at 165.

18. *Id.*

19. *Id.* at 170, 173.

20. 630 S.W.3d 40, 40 (Tex. 2021) (orig. proceeding) (opinion by Justice Bland; dissent by Chief Justice Hecht, joined by Justices Boyd and Blacklock).

21. *Id.* at 43.

22. 546 S.W.3d 133, 143 (Tex. 2018).

plained, could seek damages ‘in the district court *after* the PUC has exercised its exclusive jurisdiction’ to determine Oncor’s legal duty to Chaparral.”²³

c. *In re Texas-New Mexico Power Co.*²⁴

In a third utility case, Chief Justice Hecht did not dissent. He wrote the Texas Supreme Court’s opinion declaring that the homeowner’s negligence claims against the power company did not involve rates, operations, or services and therefore did not fall within the PUC’s exclusive jurisdiction.

The record reflected that some homeowners sued the power company, alleging it was negligent in not requiring its contractor, before a hurricane struck, to secure large wooden mats it had placed on the ground to protect it when heavy equipment was moved in order to construct a new substation. According to the homeowners, the negligent acts resulted in the mats being washed into a nearby bayou, blocking the drain ports and causing the bayou to overflow and flood their homes. After the trial court denied the power company’s motion to dismiss for lack of subject matter jurisdiction, the power company sought mandamus.

Chief Justice Hecht wrote:

Section 32.001(a) of [PURA] grants the [PUC] ‘exclusive original jurisdiction over the rates, operations, and services of an electric utility.’ [] In *Oncor Electric Delivery Co. v. Chaparral Energy, LLC*, we held that the PUC’s exclusive jurisdiction extends to ‘issues underlying a customer’s claim that a PUC-regulated utility breached a contract by failing to timely provide electricity services.’ The issue now before us in this original proceeding and another decided today—*In re Oncor Electric Delivery Co.*—is whether the PUC’s exclusive original jurisdiction extends to issues underlying a tort claim. In this case, we conclude that the negligence claim asserted against the electric utility does not involve its rates, operations, and services.²⁵

Accordingly, the supreme court determined the trial court did not abuse its discretion by denying the plea to the jurisdiction and mandamus relief was denied.²⁶

2. *Mandamus and Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code Ann. § 27.003—Ecclesiastical Abstention
Doctrines Bars Defamation Claims*

a. *Diocese of Lubbock v. Guerrero*²⁷

In this per curiam opinion, the Texas Supreme Court addressed a mandamus petition and the merits of the Catholic Diocese of Lubbock’s de-

23. *Id.* at 141.

24. *Oncor*, 630 S.W.3d at 56.

25. 625 S.W.3d 42, 42 (Tex. 2021) (orig. proceeding) (opinion by Chief Justice Hecht).

26. *Id.* at 43.

27. *Id.* at 43–44.

fense to claims of defamation and intentional infliction of emotional distress asserted by Jesus Guerrero, a Catholic deacon. The claims arose when the Diocese included Guerrero's name on a list of clergy credibly accused of sexual abuse. In the trial court, the Diocese filed a plea to the jurisdiction, arguing that the ecclesiastical abstention doctrine barred Guerrero's claims, and it followed the plea with a motion to dismiss under the TCPA.²⁸ The trial court denied both.

The Diocese appealed the order denying the motion to dismiss and sought mandamus relief from the order denying its jurisdictional plea. The Court of Appeals for the Seventh District of Texas at Amarillo denied the Diocese's mandamus petition²⁹ and affirmed the trial court's TCPA order finding "clear and specific evidence creating a prima facie case on each element of defamation."³⁰

The Diocese petitioned the supreme court for review of the court of appeals' judgment under the TCPA and sought mandamus relief from the trial court's order denying its plea to the jurisdiction. The two matters were consolidated.

The supreme court determined that Guerrero's suit could not proceed for the reason that "the ecclesiastical abstention doctrine deprives the trial court of jurisdiction over Guerrero's suit because it is *inextricably intertwined* with the Diocese's internal directive to investigate its clergy and would necessarily require the court to evaluate the Diocese's application of Canon Law."³¹ Accordingly, the supreme court ordered the trial court to sustain the Diocese's plea to the jurisdiction and dismiss the underlying case.

3. *Mandamus Where Trial Court Has No Jurisdiction—Mandamus Denied to Compel Dismissal Under Rule 91a or Claims For Intentionally or Knowingly Benefiting From Participation in a Sex-Trafficking Venture—Tex. Civ. Prac. & Rem. Code Ann. § 98.002*

a. *In re Facebook, Inc.*³²

In three cases brought against Facebook, the plaintiffs claimed they were victims of sex trafficking and became entangled with their abusers

28. 624 S.W.3d 563, 563 (Tex. 2021) (per curiam) (Justice Blacklock concurred; Justice Boyd dissented); *see also In re Diocese of Lubbock*, 2021 WL 2386136 (Tex. 2021) (orig. proceeding).

29. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003.

30. *In re Diocese of Lubbock*, 592 S.W.3d 196, 198 (Tex. App.—Amarillo 2019, orig. proceeding).

31. *Diocese of Lubbock v. Guerrero*, 591 S.W.3d 244, 253 (Tex. App.—Amarillo 2019, pet. granted).

32. *Guerrero*, 624 S.W.3d at 564 (emphasis added). The term "inextricably intertwined" was utilized frequently in deceptive trade practice cases where there was a question as to whether a party was a "consumer" as a buyer of a product who also borrowed from the seller's credit affiliate. *See* TEX. BUS. & COM. CODE ANN. § 17.46(a); *see* *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 566 (Tex. 1984). The term "inextricably intertwined" has appeared in mandamus cases. *See Hjella v. Red McCombs Motors, Ltd.*, 2022 WL 789501, at *6 (Tex. App.—San Antonio 2022, orig. proceeding) (mem. op.) (segregation of attorney's fees where claims are inextricably intertwined); *In re*

through Facebook postings. They asserted claims for negligence, negligent undertaking, gross negligence, and products liability based on Facebook's alleged failure to warn of, or take adequate measures to prevent, sex trafficking on its internet platforms. Also, the plaintiffs raised claims under section 98.002 of the Texas Civil Practice and Remedies Code that provides for a civil action against those who intentionally or knowingly benefit from participation in a sex-trafficking venture.

Pursuant to Rule 91a of the Texas Rules of Civil Procedure, Facebook moved to dismiss all claims, alleging that they were barred by section 230 of the "Communications Decency Act" (CDA). That relief was denied. Subsequently, the Court of Appeals for the Fourteenth District of Texas at Houston, in a divided panel decision, denied mandamus relief.

Section 230 provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."³³ Specifically, Facebook contended that all the plaintiffs' claims were "inconsistent with section 230(c)(1), which says that '[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.'" In rendering its mandamus decision, the Texas Supreme Court concluded, "[t]he plaintiffs' statutory human-trafficking claims may proceed, but their common-law claims for negligence, gross negligence, negligent undertaking, and products liability must be dismissed."³⁴

The supreme court further reasoned:

We do not understand section 230 to 'create a lawless no-man's-land on the Internet' in which states are powerless to impose liability on websites that knowingly or intentionally participate in the evil of on-line human trafficking. *Fair Hous. Council v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).³⁵

Subsequently, the supreme court distinguished between an internet platform's responsibility for its own misdeeds and those of their users. The supreme court stated, "the federal precedent uniformly dictates that section 230 does not" hold platforms responsible for the users' misdeeds. The distinction of responsibility was clarified when Congress amended section 230 to indicate that civil liability may be imposed on websites that violate state and federal human-trafficking laws.

Finally, the supreme court held that "the statutory claim for knowingly or intentionally benefiting from participation in a human-trafficking venture is not barred by section 230 and may proceed to further litigation."³⁶

Magee, 2004 WL 1159405, at *1 (Tex. App.—San Antonio 2004, orig. proceeding [mand. denied]) (mem. op.) (question of possession inextricably intertwined with title or ownership).

33. 625 S.W.3d 80 (Tex. 2021) (Justice Blacklock delivered the Texas Supreme Court's opinion).

34. *Id.* at 83 (citing 47 U.S.C. § 230(e)(3)).

35. *Id.*

36. *Id.*

That claim was allowed to proceed. Mandamus was granted to dismiss the plaintiffs' other claims of negligence, negligent undertaking, gross negligence, and products liability.

4. *When the Trial Court Has No Jurisdiction of Claims—Permissive Interlocutory Appeal (Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d)) After Denial of Motion for Summary Judgment (Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. § 7902(a))*

a. *In re Academy, Ltd.*³⁷

This mandamus case describes a unique situation where mandamus may lie after a trial court denies a motion for summary judgment. Here, the motion for summary judgment claimed the trial court did not have jurisdiction.

This case arises out of a mass shooting disaster in 2017 at the First Baptist Church in Sutherland Springs, Texas. Victims of the shooting and their families filed multiple suits against Academy Sports + Outdoors (Academy), the retailer from which the perpetrator purchased the weapon.³⁸ The plaintiffs asserted claims for negligence; negligent hiring, training, and/or supervision; negligent entrustment; and gross negligence respecting the sale of the Ruger AR-556 rifle and thirty-round magazine to the perpetrator, Devin Kelley. Academy moved for summary judgment based upon the federal Protection of Lawful Commerce in Arms Act (PLCAA), which Congress passed to protect firearm retailers and manufacturers from certain lawsuits seeking damages arising out of the criminal conduct of third parties.

The trial court denied the motion. After unsuccessfully seeking mandamus relief in the Court of Appeals for the Fourth District of Texas at San Antonio, Academy filed a petition for writ of mandamus in the Texas Supreme Court, contending that the PLCAA requires dismissal of the underlying suits and that it lacked an adequate remedy by appeal.

The supreme court granted mandamus relief and held that the PLCAA barred the lawsuits and protected Academy from continued participation in litigation.³⁹ In so doing, the supreme court concluded:

requiring Academy to 'proceed[] to trial—regardless of the outcome—would defeat the substantive right' granted by the PLCAA. *In re McAllen Med. Ctr.*, 275 S.W.3d at 465; *see also In re Global-SanteFe Corp.*, 275 S.W.3d 477, 484 (Tex. 2008) (orig. proceeding) (holding that mandamus relief is available when the Legislature has enacted a statute to address findings 'that traditional rules of liti-

37. *Id.*

38. 625 S.W.3d 19, 19 (Tex. 2021) (opinion by Justice Lehrmann; concurrence by Justice Boyd); *see also In re Academy, Ltd.*, 625 S.W.3d 314, 314–15 (Tex. 2021) (per curiam) (orig. proceeding) (case addressing the same issue, as to a separate plaintiff. Per Curiam opinion said mandamus was denied to allow trial court to consider the decision in *In re Academy*, 625 S.W.3d at 19).

39. *In re Academy*, 625 S.W.3d at 22–23.

gation are creating an ongoing crisis,’ and ‘the purposes of the [enacted] statute would otherwise be defeated’ (quoting *In re McAllen Med. Ctr.*, 275 S.W.3d at 462)) (alteration in original).⁴⁰

Then, the supreme court provided an instructive discourse regarding whether Academy had an adequate appellate remedy. This discussion demonstrates the flexibility afforded by the doctrine of *In re Prudential* that allows the supreme court to determine when “extraordinary circumstances” merit “extraordinary relief.”⁴¹

The supreme court reasoned:

[W]hile we have held that ‘an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ,’ *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding), we clarified in *Prudential* that a flexible mandamus standard means that in some circumstances ‘the irreversible waste of judicial and public resources that would be required’ absent mandamus relief justifies granting such relief, 148 S.W.3d at 137 (quoting *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999) (orig. proceeding)) . . . To that end, in *In re United Services Automobile Ass’n*, we granted mandamus relief from an order denying summary judgment because the specter of a second ‘wasted’ trial on a claim barred by limitations constituted ‘extraordinary circumstances’ meriting ‘extraordinary relief.’ 307 S.W.3d at 314. Here, Academy faces multiple trials in the four underlying suits alone, plus multiple additional lawsuits arising from the Sutherland Springs shooting. Absent mandamus relief, Academy will be obligated to continue defending itself against multiple suits barred by federal law.⁴²

5. *Denial of Rule 91a Motion to Dismiss—No Legal Basis for Claims Against Insurer*

a. *In re Farmers Texas County Mutual Insurance Co.*⁴³

In this case, the Texas Supreme Court denied in part and granted in part mandamus relief. The supreme court’s opinion solved a complex settlement and insurance coverage problem.

In this case, Farmers, an automobile liability insurer, was sued by its insured for negligent failure to settle and for breach of contract. The insured’s claim arose following the insurer’s decision to settle claims against its insured within policy limits, but the insured obtained a release from the claimant that was contingent on the insured paying \$100,000.00 of the \$350,000.00 settlement.

After the insured paid her share, she filed suit for reimbursement. The insurer moved to dismiss pursuant to Rule 91a on the ground that the insured’s claims for negligent failure to settle and for breach of contract

40. *Id.* at 36.

41. *Id.* at 35.

42. *Id.* at 36.

43. *Id.* at 35–36.

have no basis in law.⁴⁴ The trial court denied the motion to dismiss. The supreme court agreed that the trial court did not abuse its discretion in that ruling.

The supreme court explained its holding was limited to the scope of Farmers' Rule 91a motion. The supreme court determined that *Stowers* and the other principles of Texas insurance law cited by Farmers do not foreclose, as a matter of law, a claim for breach of contract against an insurer regarding its indemnity obligation. Hence, in that regard, the trial court did not abuse its discretion in denying the motion to dismiss, and the Court of Appeals for the Fourth District of Texas at San Antonio erred in concluding otherwise. However, the supreme court concluded that the trial court did abuse its discretion in denying the motion to dismiss as to the insured's *Stowers* claim.⁴⁵

B. PRETRIAL MATTERS.

1. *Mandamus to Compel Discovery of Medical Care Providers' "Negotiated Rates" To Challenge "Reasonableness of Full Rates" Charged to Uninsured—A Dilogy of Cases*

a. *In re K & L Auto Crushers, LLC*⁴⁶

The defendants in a personal injury suit argued that the trial court abused its discretion by quashing their discovery requests that sought the plaintiff's medical providers' negotiated rates and costs. The Texas Supreme Court called upon its earlier decision in *In re North Cypress Medical Center Operating Co.*⁴⁷ as authority for this decision.

In the aforementioned case, the supreme court determined that the negotiated rates were relevant to the reasonableness of the provider's rates. Accordingly, in this case, the supreme court concluded that the trial court abused its discretion by denying outright the defendants' requests, which they expressly limited to the discovery approved in *North Cypress*.⁴⁸

Based upon two factors, the supreme court determined the trial court abused its discretion. First, the discovery requests were sufficiently tailored and the providers and the plaintiff did not submit evidence establishing that the requests were unduly burdensome.⁴⁹ Second, the trial court failed to consider whether a protective order would reasonably protect against the disclosure of any confidential information or trade secrets.⁵⁰

44. 621 S.W.3d 261, 264 (Tex. 2021) (orig. proceeding) (opinion by Justice Busby; Chief Justice Hecht, Justice Boyd, and Justice Blacklock joined as to Parts I and II; Chief Justice Hecht filed a dissenting opinion in which Justices Boyd and Blacklock joined).

45. *Id.*

46. *Id.* at 276–77.

47. 627 S.W.3d 239, 239 (Tex. 2021) (orig. proceeding) (opinion by Justice Boyd, concurrence by Justice Huddle in which Justice Boyd joined; Justice Guzman joined as to Parts II(A) and III).

48. 559 S.W.3d 128, 129 (Tex. 2018) (orig. proceeding).

49. *In re K & L Auto Crushers*, 627 S.W.3d at 244–45.

50. *Id.* at 245.

Further, the supreme court discussed at length its conclusion the defendant had no adequate appellate remedy. First, the supreme court determined that without obtaining the evidence sought in discovery in advance of trial, K & L Auto's ability to argue about the reasonableness of the charges would be impaired. "Thus, the denial prevent[ed] K & L Auto from both adequately presenting and defending the heart of its argument against the claimed damages."⁵¹

Second, the supreme court observed an appeal:

would be inadequate because the missing discovery is from a third party and cannot be made part of the appellate record or challenged on appeal, and the providers will not be parties to any appeal. *See In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding) (per curiam) ('Mandamus relief may be justified when . . . the trial court's discovery order disallows discovery which cannot be made a part of the appellate record, thereby denying the reviewing court the ability to evaluate the effect of the trial court's error.').⁵²

b. *In re ExxonMobil Corp.*⁵³

In this per curiam opinion, the Texas Supreme Court decided another mandamus case respecting the discovery of a medical provider's negotiated rates for private insurers and public payers. The supreme court noted that the facts of this case closely parallel those of *K & L Auto* and that opinion is dispositive of the issues presented. In applying *K & L Auto*, the supreme court concluded the trial court abused its discretion by denying ExxonMobil's discovery requests and that ExxonMobil has no adequate remedy on appeal.⁵⁴

The record showed that the underlying personal injury claims arose from a fire and explosion at ExxonMobil's Baytown Olefins Plant, and "[n]early sixty plaintiffs"⁵⁵ sued ExxonMobil, seeking millions of dollars in reimbursement for past medical expenses. Of that number, "[m]any were treated by the same medical providers, pursuant to 'letters of protection' provided by the plaintiffs' attorneys."⁵⁶

Through discovery, ExxonMobil obtained billing codes for the specific services the plaintiffs received. ExxonMobil used this information to formulate discovery requests for the amounts and rates these providers have accepted from the majority of their patients for the same procedures performed around the same time.

ExxonMobil served subpoenas on nine providers. It did not seek individual patient records. Rather, it requested broad discovery of the

51. *Id.*

52. *Id.* at 257.

53. *Id.*

54. 635 S.W.3d 631, 631 (Tex. 2021) (orig. proceeding) (per curiam) (opinion by Justice Lehrmann; Justice Blacklock did not participate).

55. *Id.* at 634–35.

56. *Id.* at 633.

amounts and rates the providers accepted from a majority of their patients for the same services around the same time. The providers sought protection from discovery claiming the requests sought irrelevant information, were unduly burdensome, and sought trade secrets and confidential information.⁵⁷

In response, ExxonMobil argued that the providers' undue burden objections were unsupported and, at a minimum, did not justify protection against *all* of the discovery requests. However, the trial court denied ExxonMobil's motion to enforce and granted the motions for protection without explanation. ExxonMobil sought mandamus relief from the Court of Appeals for the Fourteenth District of Texas at Houston, which denied the petition without substantive explanation.

The supreme court determined that ExxonMobil demonstrated the trial court abused its discretion and that it lacked an adequate remedy on appeal, citing *In re Prudential*. First, the supreme court observed that ExxonMobil claimed the trial court abused its discretion by denying ExxonMobil's motion to enforce and granting the motions for protection. As in *K & L Auto*, the supreme court commenced its analysis by addressing whether the evidence sought was relevant, "[g]iven that reasonableness is a well-settled common-law limitation on recoverable expenses, here, evidence of the providers' rates is relevant to determining whether they are reasonable, and thus recoverable."⁵⁸ The supreme court concluded that ExxonMobil's discovery requests were not overbroad.⁵⁹

Second, the supreme court determined the requests were not unduly burdensome because the providers raised only conclusory complaints regarding why the burden or expense entailed in responding to the requests outweighed the likely benefit or why the requests were "unreasonably cumulative or duplicative."⁶⁰ Further, the supreme court observed a straightforward premise that the Texas Rules of Civil Procedure expressly authorize—the discovery of relevant information from nonparties.⁶¹ "Here, the letters of protection under which the providers have secured a financial interest in the resolution of these claims offset the providers' nonparty status when balancing the burdens and benefits of discovery."⁶²

Third, the supreme court disposed of the providers' objection to producing confidential information or protected trade secret information by observing that a protective order could easily shield the information from unnecessary disclosure. Then, the supreme court observed, even though the trial court denied the discovery request without stating any reasons, that "it abused its discretion by failing to consider whether it could have

57. *Id.* at 633–34.

58. *Id.* at 634.

59. *Id.* at 634–35 (citing *In re K & L Auto. Crushers, LLC*, 627 S.W.3d 239, 250 (Tex. 2021)).

60. *Id.* at 635 (citing *In re Allstate Cnty. Mut. Ins. Co.*, 227 S.W.3d 667, 670 (Tex. 2007)).

61. *Id.*; TEX. R. CIV. P. 192.4.

62. *See* TEX. R. CIV. P. 205.3(c).

permitted discovery while issuing a protective order.”⁶³

Finally, the supreme court offered two reasons as to why there was no adequate remedy on appeal. First, “[t]he denied discovery was necessary to develop a defense that goes to the heart of ExxonMobil’s case—that the providers’ rates were unreasonable.”⁶⁴ Second, “the effects of the trial court’s denial of discovery will evade review by any higher court because the discovery ExxonMobil cannot obtain is from third parties, the providers, and thus cannot be included in the appellate record.”⁶⁵

2. *Pretrial Procedure—Texas Civil Practice and Remedies Code Section 18.001, Competency of Counter-affidavits Offered to Challenge Reasonableness and Necessity of Alleged Medical Expenses—Another Medical Expense Affidavit Dilogy*

a. *In re Allstate Indemnity Co.*⁶⁶

In this case, the Texas Supreme Court determined that the trial court abused its discretion by striking a counter-affidavit served under section 18.001 of the Civil Practice and Remedies Code. That order precluded “the offering party from contesting the reasonableness of the subject medical expenses at trial.”⁶⁷ As a foundation for its decision, the supreme court reaffirmed that section 18.001 is a “‘purely procedural’ statute that is designed to ‘streamline proof of the reasonableness and necessity of medical expenses.’”⁶⁸

The supreme court observed that in the absence of a proper controverting affidavit, section 18.001(b) merely provides that a claimant may rely on an affidavit setting forth the necessity and reasonableness of medical expenses to avoid offering expert testimony on those issues at trial, and, “if she does so, the affidavit ‘is sufficient evidence to support a finding of fact . . . that the amount charged was reasonable or that the service was necessary.’ Tex. Civ. Prac. & Rem. Code § 18.001(b).”⁶⁹ Then, the supreme court elaborated on the effect of an uncontroverted section 18.001(b) affidavit explaining that an uncontroverted affidavit may constitute *sufficient* evidence of reasonableness and necessity, but nothing in section 18.001:

even suggests an uncontroverted affidavit may be *conclusive* on reasonableness and necessity. There is no textual support for the assertion that the absence of a proper counteraffidavit constitutes a basis

63. *In re ExxonMobil*, 635 S.W.3d at 635.

64. *Id.*

65. *Id.*

66. *Id.* at 636.

67. 622 S.W.3d 870, 870 (Tex. 2021) (orig. proceeding) (opinion by Justice Huddle); *see also In re Hub Grp. Trucking, Inc.*, 625 S.W.3d 315, 316 (Tex. 2021) (orig. proceeding) (per curiam); *In re Savoy*, 631 S.W.3d 700, 700–01 (Tex. 2021) (orig. proceeding) (per curiam); *In re Parks*, 631 S.W.3d 700, 700 (Tex. 2021) (orig. proceeding) (per curiam) (these cases address the same issue, namely discussing counter-affidavits. The petitions were denied to allow the trial court to consider the decision in *In re Allstate*, 622 S.W.3d at 870).

68. *In re Allstate*, 622 S.W.3d at 873.

69. *Id.* at 881 (citing *Haygood v. De Escabedo*, 356 S.W.3d 390, 397 (Tex. 2011)).

to constrain the defendant's ability to challenge—through evidence or argument—the claimant's assertion that her medical expenses are reasonable and necessary.⁷⁰

However, the supreme court made clear that the ruling by the trial court was not, as argued by the real party in interest, Alaniz, “a ‘routine evidentiary ruling.’” The supreme court reviewed the gravity of the decision observing the effect of the trial court's order and noted the order:

(1) allows Alaniz to avoid presenting expert testimony at trial to establish evidence sufficient to support a finding of reasonableness as to her medical expenses; (2) excludes Dickison's testimony on any issue; and (3) prohibits Allstate from ‘offering evidence,’ ‘questioning witnesses,’ or ‘arguing to the jury’ about the reasonableness of Alaniz's medical expenses.⁷¹

Finally, the supreme court concluded that an appellate remedy in this case was inadequate because the trial court's order not only precluded Allstate from presenting its own evidence regarding the reasonableness of Alaniz's medical expenses, but it also “vitate[d] or severely compromise[d]” Allstate's efforts to challenge Alaniz's use of evidence through cross-examination or jury argument.⁷²

b. *In re Guevara*⁷³

Relators sought mandamus relief from the trial court's Order Granting Plaintiff's Motion to Strike and Motion to Exclude regarding controverting affidavits submitted under section 18.001 of the Texas Civil Practice and Remedies Code. Those stricken affidavits challenged the reasonableness and necessity of the real party's alleged medical expenses set forth in affidavits also submitted under section 18.001. The real party plaintiff argued the controverting affidavits did not comply with section 18.001(f) because the affiant chiropractor was not qualified to testify regarding the reasonableness or necessity of the medical expenses, the chiropractor's opinions were not relevant or based on a reliable foundation, and “the opinions expressed in the counteraffidavits [were] conclusory and lack[ed] the reliability required for the admission of expert testimony under *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex.

70. *Id.*

71. *Id.*

72. *Id.* at 883. Also, it is important to note that the supreme court made significant statements regarding the parameters it must consider in deciding the merits of a mandamus petition. The supreme court said, “[w]e next address whether mandamus relief is warranted. Mandamus is an ‘extraordinary’ remedy, not issued as a matter of right, but at the Court's discretion.” *Id.* “In deciding whether to grant mandamus relief, we look to whether an appeal is an inadequate remedy.” *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (per curiam) (orig. proceeding). “No specific definition captures the essence of or circumscribes what comprises an ‘adequate’ remedy; the term is ‘a proxy for the careful balance of jurisprudential considerations,’ and its meaning ‘depends heavily on the circumstances presented.’” *Id.* (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136–37 (Tex. 2004) (orig. proceeding) (emphasis added).

73. *Id.* at 883–84.

1995).”⁷⁴ The trial court granted the real party’s specific request that the relators be prohibited from “introducing evidence or argument[s]” that the medical expenses were unreasonable or unnecessary.⁷⁵

The Texas Supreme Court cited its opinion in *In re Allstate Indemnity Co.* and concluded that mandamus relief was appropriate since the trial court abused its discretion and its order “vitiat[e] or severely compromise[d]” the relator’s defense by precluding any challenge to the reasonableness or necessity of the real party’s medical expenses at trial.⁷⁶

3. Discovery—Is the Witness “Subject to the Control of a Party?”

a. *In re Millwork*⁷⁷

This per curiam opinion addressed whether a defendant was required to produce a witness for depositions whom the plaintiff alleged was “employed by[] or subject to the [relator’s] control” when a fatal industrial accident occurred.⁷⁸ The Texas Supreme Court concluded that the record contained no evidence of employment or control at the time of service of the deposition notice or thereafter. Rather, the record showed “uncontradicted evidence to the contrary.”⁷⁹ Accordingly, the supreme court determined that the trial court abused its discretion in compelling the relator to produce the witness for an oral deposition, and mandamus was conditionally granted.⁸⁰

The supreme court explained the trial court’s abuse of discretion when it said:

To construe Rule 199.3 otherwise would lead to the untenable result that a party could be compelled—on pain of sanctions—to produce a witness over which it possesses no power or authority merely because it may have held, at some point in the past, a right of control. *See* Tex. R. Civ. P. 215.1(b)(2)(A), (d) (authorizing sanctions for noncompliance with discovery order or request). This is not a reasonable construction of the rule.⁸¹

The supreme court continued to explain the inadequacy of appellate relief stating:

Appeal from a trial court’s discovery order is not adequate if . . . Texan Millwork has a right to proper application of the discovery rules governing depositions, and if discovery takes place under an improper order, the error cannot be rectified on appeal. *See, e.g., In re Berry*, 578 S.W.3d 173, 182 (Tex. App.—Corpus Christi—Edinburg 2019, orig. proceeding) . . . [a]s we have consistently held, parties lack an adequate appellate remedy from orders

74. 624 S.W.3d 920, 920 (Tex. 2021) (per curiam).

75. *Id.* at 920.

76. *Id.* at 920–21.

77. *Id.* (citing *In re Allstate*, 622 S.W.3d at 870).

78. 631 S.W.3d 706, 706 (Tex. 2021) (per curiam).

79. *Id.* at 709.

80. *Id.*

81. *Id.* at 713, 715.

compelling discovery beyond what the rules allow.⁸²

In a comment reminiscent of the idiom, “you can’t put the genie back in the bottle,” the supreme court topped off its conclusion with the befitting statement of, “‘once the deposition has been taken, it cannot be un-taken.’ *In re Liberty Cnty. Mut. Ins. Co.*, 557 S.W.3d 851, 858 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding).”⁸³

4. *Discovery-Regarding Scope of Arbitration Clause.*

a. *In re Copart, Inc.*⁸⁴

In this case, the Texas Supreme Court’s elaborate analysis of the abuse of discretion element of mandamus demonstrates what a relator should focus on when crafting a petition for writ of mandamus.

Copart, Inc. sought mandamus when the trial court ordered “limited” discovery to determine whether the real party’s claims against Copart were arbitrable. The trial court concluded that the motion for discovery and attached affidavit raised a fact issue regarding the arbitration agreement’s validity and enforceability and additionally provided, what was referred to as, “reason to believe” Copart’s employee’s deposition was material to that issue.

The supreme court began its analysis by observing that a motion and affidavit supporting a request for discovery must demonstrate a colorable basis or reason to believe that the requested discovery would be material in establishing whether the arbitration agreement actually exists and is enforceable, [*see, e.g., In re VNA, Inc.*, 403 S.W.3d 483, 486-487, 488 (Tex. App.—El Paso 2013, orig. proceeding) (“holding that the plaintiff’s sworn statement that she did not remember signing the contract was insufficient to raise a colorable basis for discovery on the circumstances around the signing”). *See also, In re Houston Pipe Line Co.*, 311 S.W.3d 449, 451 (Tex. 2009), (citing Tex. Civ. Prac. & Rem. Code § 171.086(a)(4), (6)).]⁸⁵ Also, the supreme court explained that when deciding a motion to compel arbitration, a trial court may authorize limited discovery if the court “cannot fairly and properly make its decision on the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability.”⁸⁶ However, the supreme court concluded that the trial court abused its discretion in ordering discovery since the real party’s motion and affidavit did not demonstrate any colorable basis or reason to believe that the requested discovery was material in establishing the agreement’s existence and enforceability.

The supreme court described, in significant detail, the requirements for the issuance of mandamus relief; that is (1) the trial court clearly abused

82. *Id.* at 713.

83. *Id.* at 714 (emphasis added).

84. *Id.* at 715.

85. 619 S.W.3d 710, 710 (Tex. 2021) (per curiam).

86. *Id.* at 713–14.

its discretion and (2) the relator lacks an adequate remedy by appeal.⁸⁷ Subsequently, the supreme court recited long-standing precedent respecting an appellate court's focus on "whether the trial court clearly abused its discretion—that is, whether the court 'act[ed] without reference to guiding rules or principles or in an arbitrary or unreasonable manner.' *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018)."⁸⁸ Additionally, the supreme court explained another established rule that is particularly relevant when the Federal Arbitration Act applies, namely that courts apply Texas procedure when deciding a motion to compel arbitration.⁸⁹ Accordingly, the supreme court concluded that the trial court clearly abused its discretion by ordering pre-arbitration discovery.

5. *Untimely Designation of Unknown Person as Responsible Third Party—The "Empty Chair"—Tex. Civ. Prac. & Rem. Code Ann. § 33.004(k).*

a. *In re Gonzales*⁹⁰

In this case, Gonzales challenged a trial court's order that allowed Houston Distributing's request to designate an "unknown" person as a responsible third party. The case arose from a multiple car, chain reaction motor vehicle collision where Gonzales alleged a truck driver employed by Houston Distributing caused the accident by rear-ending a pickup truck behind Gonzales, which then rear-ended Gonzales's pickup truck, which then rear-ended the car in front of him. The Court of Appeals for the First District of Texas at Houston denied Gonzales's mandamus petition, but the Texas Supreme Court rendered mandamus relief.

The record showed that 135 days after filing its original answer, Houston Distributing filed a motion for leave to designate an unknown person, referred to as "John Doe," as a responsible third party.⁹¹ The motion asserted that John Doe negligently caused the accident by cutting in front of Gonzales's truck and stopping suddenly. At this point, Houston Distributing had not filed an amended answer, instead alleging there to be an "unknown" responsible third party.

Within fifteen days after Houston Distributing filed its motion for leave to designate John Doe as an unknown responsible third party, Gonzales filed objections to, as well as a motion to strike, Houston Distributing's motion, arguing that Houston Distributing failed to timely file an amended answer alleging John Doe's responsibility as section 33.004(j) requires. The aforementioned section requires a party to file an amended answer "not later than 60 days after the filing of the defendant's original

87. *Id.* at 711–12 (citing *In re Houston Pipe Line Co.*, 311 S.W.3d 449, 451 (Tex. 2009) (orig. proceeding)).

88. *Id.* at 713 (citing the seminal case of *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)).

89. *Id.*

90. *Id.* (citing *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992)).

91. 619 S.W.3d 259, 259 (Tex. 2021) (per curiam).

answer” if an “unknown” responsible third party is claimed to be responsible. “*Id.* § 33.004(j) (stating requirements for designating ‘an *unknown* person as a responsible third party.’”⁹² (emphasis added).⁹³ However, the trial court granted Houston Distributing’s motion for leave to designate John Doe without expressly ruling on Gonzales’s objections.

More than two years later, Houston Distributing filed its first amended original answer, which still did not include allegations that John Doe or any other “unknown person” was responsible for causing the accident. Two days later, Gonzales filed a combined no evidence and traditional summary judgment motion as to John Doe’s alleged negligence, arguing that Houston Distributing could not submit John Doe’s responsibility to the jury because it failed to timely or adequately satisfy section 33.004(j)’s pleading requirements. Only then did Houston Distributing file a second amended answer, pleading for the first time that an unknown third party John Doe was a proximate and/or contributing cause to the plaintiff’s injuries and/or damages. Specifically, Houston Distributing alleged in this answer that “‘John Doe cut in front of the truck, thereby causing [Houston Distributing’s driver] to strike’ the second vehicle, which ‘then struck [the] [p]laintiff’s vehicle.’”⁹⁴

The trial court denied Gonzales’s summary judgment motion. Gonzales then filed a petition for writ of mandamus, which the court of appeals summarily denied.

Houston Distributing opposed mandamus relief, contending that subsection (j) does not provide the *exclusive* means by which a defendant may designate an unknown person as a responsible third party. Houston Distributing reasoned that because of subsection (a), which requires a defendant to file its motion for leave to designate “a person” as a responsible third party at least sixty days before a trial date, subsection (j) also allows the court to permit a later motion on a finding of good cause.

The supreme court disagreed stating, “subsection (j) is the only subsection that addresses the requirements for designating an ‘unknown’ person as a responsible third party, and it expressly provides that it applies ‘[n]otwithstanding’ any other provision.”⁹⁵ The supreme court concluded that, “[b]ecause Houston Distributing did not timely and adequately satisfy these pleading requirements, subsection (j) did not permit the trial court to grant leave for Houston Distributing to designate John Doe as an

92. *Id.* at 260 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(k) (“An unknown person designated as a responsible third party under Subsection (j) is denominated as ‘Jane Doe’ or ‘John Doe’ until the person’s identity is known.”)).

93. *Id.* at 261–62 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (j)) (“‘Notwithstanding’ any other provision of this section . . . if, *not later than 60 days* after the filing of the defendant’s original answer, the defendant alleges in an answer filed with the court that *an unknown person* committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit . . . the court shall grant a motion for leave to designate the unknown person as a responsible third party if [the specified conditions are satisfied].” (emphasis added)).

94. *Id.* at 262.

95. *Id.* at 261.

unknown responsible third party.”⁹⁶

Furthermore, the supreme court determined that, because the trial court failed to properly apply section 33.004, it abused its discretion by granting Houston Distributing’s motion for leave to designate John Doe as an “unknown” responsible third party. Moreover, the supreme court concluded there was no adequate remedy by appeal since the plaintiffs could not recover from the unknown third party.⁹⁷ Such a conclusion created an imbalance in the proportionate responsibility framework and required the plaintiff to try its suit against an “empty chair.”⁹⁸

C. ELECTION BALLOT ISSUES—CORRECTION OF BALLOT DESCRIPTION OF PROPOSED ORDINANCE—AN ELECTION BALLOT DILOGY

1. *In re Durnin*.⁹⁹

The Texas Supreme Court focused on a citizen-initiated ordinance that was on the ballot in Austin regarding camping in public spaces, sitting and lying down on public sidewalks, and the aggressive solicitation of money. Several citizens sought changes to the description of the proposed ordinance that was to be printed on the ballot. The City refused to make the change, so mandamus was sought. Over the objection of the City of Austin, the supreme court concluded that the language of the description proposed by the City was inconsistent with that of the specific ordinance such that the “the relators have clearly established their entitlement to mandamus relief.”¹⁰⁰

The inconsistency arose from the Council’s ballot language stating that the proposed ordinance “create[s] a criminal offense and a penalty for anyone sitting or lying down on a public sidewalk or sleeping outdoors [in or near downtown]” and for “anyone camping in a public area not designated by the Parks and Recreation Department.” However, the language of the ordinance itself did not state that it applies “to *anyone* who engages in the listed activities.” Rather, the ordinance specified exceptions “covering a variety of common uses of the sidewalk that the ordinance does not criminalize.” The supreme court concluded that although the term “anyone” is “just one word,” the description “suggest[s] to voters that the ordinance criminalizes and penalizes a much wider swath of conduct . . .”. It “threatens to ‘mislead the voters’ by ‘misrepresent[ing] the

96. *Id.* at 262–63.

97. *Id.* at 262.

98. *Id.* at 265. The Texas Supreme Court cited strong case law as to the adequacy of the remedy by appeal. It said, “[a]n appellate remedy is ‘adequate’ when any benefits of mandamus review are outweighed by the detriments. *Prudential*, 148 S.W.3d at 136. The ‘most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved.’ *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding).” *Id.* at 264.

99. *Id.* at 265.

100. 619 S.W.3d 250, 250 (Tex. 2021) (opinion by Justice Blacklock, dissenting opinion by Justice Boyd, joined by Justices Devine and Busby).

measure’s character and purpose or its chief features.’ *Dacus v. Parker*, 466 S.W.3d 820, 826 (Tex. 2015).”¹⁰¹ Accordingly, the supreme court directed the term “anyone” to be deleted from the two places it appeared in the description.

2. *In re Petricek*.¹⁰²

In another Austin ordinance case, a proposed ordinance set minimum standards for the Austin Police Department “to enhance public safety and police oversight, transparency and accountability.”¹⁰³ However, the City Council’s proposed ballot language “differed materially from the caption in the petition. “ As a result, the citizens who petitioned for the ordinance brought the mandamus proceeding challenging the City Council’s ballot language.

The Texas Supreme Court expressly described its jurisdiction under the Election Code to “issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election.’ Tex. Elec. Code § 273.061.” There, the supreme court carefully identified the prerequisite for mandamus of a clear abuse of discretion for which there is no adequate appellate remedy.¹⁰⁴

Next, the supreme court concluded that the voters who sign an initiative petition have standing to seek mandamus relief against the City Council if they can establish the elements for such relief. As to the adequacy of the appellate remedy, the supreme court concluded that “[i]f the ballot can be corrected before the election, a post-election contest is an inadequate remedy for mandamus purposes.”¹⁰⁵

After the necessary preliminary issues were determined, the supreme court identified the City Council’s discretion—which the supreme court noted it would not invade. The supreme court stated, “[w]hile we agree with [r]elator’s contention that the Austin City Charter requires the City to place the petitioned caption on the ballot verbatim if it complies with the law, we recognize that the City retains discretion to modify that caption if the City determines the caption does not.”¹⁰⁶ On the merits, the supreme court sided with the City in that the City correctly determined that the caption’s omission of the ordinance’s financial impact amounted to a violation of state law, requiring that the caption be modified. However, the supreme court decided the City’s other revisions to the caption were improper because they violated the City Charter, and those revisions were not necessary to bring the petitioned caption into compliance with the law.

101. *Id.* at 251.

102. *Id.*

103. 629 S.W.3d 913, 913 (Tex. 2021) (opinion by Justice Huddle).

104. *Id.* at 915.

105. *Id.* at 917 (citing *In re AutoNation, Inc.*, 228 S.W.3d 663, 667 (Tex. 2007), which cited *In re Prudential* as its authority.)

106. *Id.* (citing *In re Williams*, 470 S.W.3d 819, 821, 823 (Tex. 2015)).

D. COMPLEX UNINSURED MOTORIST COVERAGE CASES—A UIM
DILOGY

1. *In re USAA General Indemnity Company*¹⁰⁷

The Texas Supreme Court is not a stranger to odd fact scenarios, but this one involving uninsured motorist coverage (UIM) is unusual and includes a Gordian knot of complex facts.

In an automobile rear-end collision case, the defendant insured's policy limits were \$30,000.00. The plaintiff obtained a jury verdict that held the defendant insured 100% responsible for the accident and awarded the plaintiff \$160,000.00 in damages. In this same suit, the plaintiff had sued his own insurer, USAA General Indemnity Company, seeking coverage under his UIM policy for any covered amount that the defendant did not pay. The plaintiff and defendant agreed to settle for \$161,114.79 and dismiss the plaintiff's claims with prejudice.

The catch (or “wrinkle”¹⁰⁸ as the supreme court called it) in this case was that while USAA purported to consent to the negligence verdict and moved for judgment on it with respect to the plaintiff's UIM contract claim, the plaintiff and defendant settled and the case against the defendant was dismissed with prejudice.

The supreme court simplified the issue down to the following terms: USAA frames ‘[t]he key question [as] whether [it] is barred from consenting to be bound after the jury in the negligence trial reached a verdict.’ But we need not decide whether USAA could choose to bind itself after the jury returned a verdict because USAA's consent, even if timely, does not entitle it to judgment on the verdict. USAA may desire to bind itself but that does not make the verdict binding on [plaintiff].¹⁰⁹

In summary, the verdict was ineffective to bind anyone because no judgment was rendered on it.¹¹⁰

After an academic discussion of collateral estoppel, the supreme court declined to grant mandamus relief to compel the trial court to apply the jury verdict to the UIM case.¹¹¹ “In short, consent is not piecemeal—if you're in for a penny, you're in for a pound.”¹¹² “Whether USAA's post-dismissal consent to the [defendant's] suit was timely is disputed but ultimately immaterial because USAA cannot bind [the plaintiff] to an unen-

107. *Id.* at 916.

108. 629 S.W.3d 878, 878 (Tex. 2021) (opinion by Justice Guzman, dissenting opinion by Justice Bland joined by Justice Lehrmann); *see also In re Liberty Cnty. Mut. Ins. Co.*, 624 S.W.3d 796, 796 (Tex. 2021) (per curiam); *In re Allstate Fire and Cas. Ins. Co.*, 624 S.W.3d 795, 796 (Tex. 2021) (per curiam) (these cases address the same issue: denying petitions to give the trial court the opportunity to consider the decision issued in *In re USAA General Indemnity Company*).

109. *In re USAA Gen. Indem. Co.*, 629 S.W.3d at 885.

110. *Id.* at 885–86.

111. *See id.*

112. *Id.* at 887.

forceable jury verdict.”¹¹³

Additionally, before closing out its opinion, the majority castigated the dissent, stating:

Mandamus relief is not appropriate absent a clear abuse of discretion, yet the dissent would grant extraordinary relief here despite an inability to identify any authority compelling rendition of judgment on a verdict from a separate trial that was dismissed while the claim against the relator was under abatement and to which the relator was not a participant. The best the dissent can offer is to string together a series of inapt analogies to Mary Carter agreements, bifurcated phases of a single trial as opposed to separate trials, and cases in which judgment was rendered for parties who participated in the trial.¹¹⁴

2. *In re State Farm Mutual Automobile Insurance Company*.¹¹⁵

Decisions were rendered in this single opinion on several mandamus petitions filed regarding UIM coverage. The Texas Supreme Court observed that the common practice in such cases is that plaintiffs holding UIM coverage sue the defendant driver for negligence and assert claims against the UIM carrier for breach of their insurance policies as well as for statutory, extracontractual claims authorized by the Insurance Code. Following suit, the negligence claim is then severed from the UIM claims. Those UIM claims are abated while the negligence case proceeds on the issues of negligence and damages. At that point, a successful plaintiff may proceed on its Insurance Code claims.

The supreme court observed an irregularity which it has in other cases called a “wrinkle.”¹¹⁶ That “wrinkle” in these cases is that the insureds did not sue for breach of their insurance policies, but brought only extracontractual, Insurance Code claims. As such, the insureds’ claimed that since they did not bring breach of contract claims, rather only statutory claims, no bifurcation of the trial was required. The supreme court disagreed.

As in a few other cases, the supreme court provided a detailed analysis of the grounds for mandamus. It recited the generally understood elements that mandamus will issue “‘only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.’ *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)).” In addition, the supreme court observed that “abuse of discretion” is present when a court’s “ruling is arbitrary and unreasonable, made without regard for guiding

113. *Id.* at 886–87 (the court’s use of this idiom appropriately punctuates the point of law).

114. *Id.* at 887.

115. *Id.* Is this discussion a “wrinkle” noted between the majority view and that of the dissent a maldeduction or an academic discussion?

116. 629 S.W.3d 866, 866 (Tex. 2021) (opinion by Justice Blacklock).

legal principles or supporting evidence.”¹¹⁷ Finally, it identified how the adequacy of an appellate remedy is determined, i.e., “by balancing the benefits of mandamus review against its detriments.”¹¹⁸

State Farm maintained it lacked an adequate appellate remedy, “due to the time and money it would waste waiting on the eventual reversal of improperly conducted proceedings,” if the UIM claims against the insurers were not severed from the negligence claims brought against the defendant. The real parties disagreed. However, the supreme court concluded that the denial of a bifurcated trial “in these circumstances” leaves the insurer without an “adequate appellate remedy for the ‘time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.’”¹¹⁹

E. MANDAMUS AVAILABILITY—FINAL JUDGMENT PRECLUDES MANDAMUS RELIEF

1. *Electric Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC*.¹²⁰

In this case, the Texas Supreme Court addressed both mandamus and a review on the merits concerning a suit where Panda Power alleged fraud and fiduciary duty breach. However, the petition for mandamus relief specifically concerned the Court of Appeals for the Fifth District of Texas at Dallas’s review of a trial court’s interlocutory order as to jurisdiction.

In an interesting decision “not to decide,”¹²¹ the supreme court observed that the court of appeals rendered its decision, and before the parties asked the supreme court to review that decision, the trial court rendered a final judgment in the underlying suit. At that time, that judgment was pending review in the court of appeals.

The supreme court mused over the matters it would not decide before concluding that, “[b]ecause the trial court’s interlocutory order merged into the final judgment and no longer exists, we cannot grant the relief the parties seek. As a result, any decision we might render would constitute an impermissible advisory opinion, and these consolidated causes are moot.”¹²²

117. See *In re USAA Gen. Indem. Co.*, 629 S.W.3d at 885.

118. *In re State Farm Mut. Auto Ins. Co.*, 629 S.W.3d at 872 (citing *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding)).

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

120. *Id.* at 878 (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding)).

121. 619 S.W.3d 628, 628 (Tex. 2021) (opinion by Justice Boyd; concurring opinion by Justice Blacklock, joined by Justice Lehrmann; dissenting opinion by Chief Justice Hecht, joined by Justices Guzman and Devine).

122. *Id.* at 634. However, the concurrence and dissents contend that the jurisdictional issues should be decided because, as the dissent of Chief Justice Hecht posits, “[t]he parties want to know. The public wants to know. The Court refuses to answer.” *Id.* at 643.

F. WAIVER OF MANDAMUS RELIEF BY UNDUE OR UNREASONABLE
DELAYS IN FILING—UNLESS JUSTIFIED

1. *In re American Airlines, Inc.*¹²³

This case offers a comprehensive analysis of whether the relator has waived mandamus relief by delaying the filing of its petition. Prior to addressing the specific facts of this case, the Texas Supreme Court explained some of its prior rulings regarding waiver.

In the first case discussed, *Rivercenter Associates*, the supreme court held an “unexplained and unjustified four-month delay warranted denying mandamus relief to quash a jury demand.”¹²⁴ However, in a second case, *In re International Profit Associates*, the supreme court decided mandamus relief was not waived “even though substantial time had passed before the relator sought mandamus relief to compel enforcement of a forum-selection clause.”¹²⁵ The delay described in *International Profit Associates* did not result from the relator’s actions because the relator had worked diligently to move the case along, which:

‘d[id] not indicate the type of delay that forfeits a party’s right to mandamus relief.’ *Id.* at 676. We declined to charge the relator with the trial court’s and opposing party’s ‘errors and delays [that] hindered [the relator’s] ability to initiate mandamus proceedings.’ *Id.* Though significant, we found the delay was justified under the circumstances.¹²⁶

In this *American* case, the record showed the trial court issued an order compelling a contested “apex” deposition. It was a year later that American filed its petition for mandamus relief in the Court of Appeals for the Fifth District of Texas at Dallas. Nevertheless, the supreme court determined that American offered a “reasonable” explanation for that one-year period. More specifically, the supreme court noted that American received notice of an order limiting the scope of the deposition four months after its issuance. Those conditions required the issuance of a new notice of deposition. The new notice was not issued by the time the petition for writ of mandamus was filed. Finally, the real party did not provide an explanation for the failure to issue a new notice.

The supreme court’s conclusion was simple: “[o]n this record, the delay is neither unexplained nor unreasonable.”¹²⁷ Adding to that analysis, the supreme court pointed to its prior holdings that have “repeatedly found an adequate appellate remedy lacking when a trial court erroneously compels an apex deposition.”¹²⁸ Ultimately, the supreme court conditionally granted mandamus relief after dispensing with the real party’s argument that the permissive appeal statute supplied an adequate remedy by

123. *Id.* at 631.

124. 634 S.W.3d 38 (Tex. 2021) (per curiam).

125. *Id.* at 43 (citing *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993)).

126. *Id.* (citing *In re Int’l Profit Assocs., Inc.*, 274 S.W.3d 672, 675–77 (Tex. 2009)).

127. *Id.*

128. *Id.*

appeals. The supreme court concluded that method was inapplicable and American’s mandamus petition was conditionally granted to direct the trial court to vacate the “apex” deposition order.

G. STAY ENFORCEMENT OF SCHOOL DISTRICT “MASK MANDATE,”
GOVERNOR’S ORDER UNDER TEXAS DISASTER ACT—
STATUS QUO

1. *In re State*.¹²⁹

In a per curiam opinion, the Texas Supreme Court, on its own motion, stayed “mask mandate” policies of two school districts which required all its employees be vaccinated for COVID-19 by October 15. The question in this case was whether the Governor’s executive order that prohibited such requirements as those of the school districts’ orders were to prevail.

In a somewhat unusual decision, the supreme court granted the stay on its own authority under Rule 52.10(b) of the Texas Rules of Appellate Procedure.¹³⁰ The supreme court took that step to preserve the status quo while it considered the State’s petition for writ of mandamus that requested the policies be stayed because of the Governor’s order that prohibited enforcement of such policies.¹³¹

However, the supreme court noted that the rendering of the stay did not demonstrate its view of the merits of the challenges.¹³² As precedent for its move, the supreme court cited its stay orders respecting local governmental entities that sought to impose new mask mandates: *In re Greg Abbott*, No. 21-0686; *In re Greg Abbott*, No. 21-0687; *In re Greg Abbott*, No. 21-0720.¹³³

The school districts argued their vaccine mandates constituted the status quo because they predated the Governor’s order banning all COVID-19 vaccine mandates by a matter of days. However, the supreme court concluded “the Governor asserted his authority to control vaccine mandates at the state level in April, months before the School District implemented their mandates. The status quo between the parties is not local control over vaccine mandates.”¹³⁴

129. *Id.* (citing *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 659 (Tex. 2000) (orig. proceeding); *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 181 (Tex. 2000) (orig. proceeding)).

130. 2021 WL 4785741, at *1 (Tex. Oct. 14, 2021) (per curiam).

131. *Id.* at *1.

132. *Id.*

133. *Id.*

134. *Id.*

H. TEXAS SUPREME COURT ORIGINAL JURISDICTION—MANDAMUS
AGAINST OFFICERS OF EXECUTIVE DEPARTMENTS OF THE
STATE: GOVERNMENT CODE CHAPTER 2260;
ARTICLE V, SECTION 3 OF THE TEXAS
CONSTITUTION

1. *In re City of Galveston*¹³⁵

This decision of the Texas Supreme Court addressed the respective statutory rights and obligations of Galveston, Texas and the Texas Land Commission arising from a dispute between Galveston and a contractor as to a “block grant contract” that required the City to administer federal disaster relief funds. Typically, Chapter 2260 of the Government Code would require the Land Commissioner to refer a city’s dispute with a contractor to mediation, and failing settlement, for trial by an administrative judge.¹³⁶

In this case, however, the contractor sued the City of Galveston on the contract. In related claims, the Land Commissioner sued the contractor. However, the City settled with the private contractor. In conjunction with the settlement and dismissal of all claims, the City and the contractor requested that the Land Commissioner dismiss the contractor from the separate suit. In exchange, the City stipulated that it would not add any Land Commission employees as defendants in any related litigation. The stipulation provided, “[t]he City further stipulates and agrees that it will not add any GLO officials or employees as defendants in either their official or individual capacities in this or any related litigation.”¹³⁷

The settlement closed and the cases were dismissed. Before the dismissal order was signed by the trial court, the City gave notice to the Land Commission that it sought reimbursement for the settlement and requested that the Commissioner perform his duty to refer the claim for commencement of the process pursuant to Chapter 2260 of the Government Code.¹³⁸ This mandamus action was precipitated by the Commissioner’s refusal to do so.

After an exhaustive discussion of the process described in Chapter 2260 of the Government Code, the supreme court concluded that, “[a]bsent legislative authorization, a state agency may not refuse to refer the claim based on its unilateral interpretation of Chapter 2260.”¹³⁹ The supreme court proceeded to meticulously describe its authority to grant mandamus relief against a state official.¹⁴⁰ However, after this discussion of the law, the supreme court summarily declined to issue a writ of man-

135. *Id.*

136. 622 S.W.3d 851, 851 (Tex. 2021) (Justice Bland delivered the opinion of the Court, in which Chief Justice Hecht, Justice Guzman, Justice Lehrmann, Justice Boyd, Justice Devine, Justice Busby, and Justice Huddle joined, and in which Justice Blacklock joined except as to Part III.B.).

137. *Id.* at 854.

138. *Id.* at 855.

139. *Id.*

140. *Id.* at 857.

damus to order the Land Commissioner to refer the City of Galveston's contract dispute to mediation pursuant to Chapter 2260 of the Government Code.¹⁴¹ The supreme court's decision was based on the settlement agreement where the City agreed not to bring an action against the Commission in "*any related proceeding*." The supreme court declared that "[t]his case is a related proceeding. Accordingly, we decline to issue mandamus relief to compel Commissioner Bush to refer the City's claim."¹⁴²

Apparently offering some consolation to the City, the supreme court commented that the City is not required to follow the process for adjudication of the claim pursuant to Chapter 2260. Rather, the supreme court declared that "[a] failure to complete that process no longer limits the City's ability to seek recompense through legislative appropriation . . ."¹⁴³

I. MANDAMUS WHERE NO APPEAL IS AVAILABLE—RELIEF FROM *EX PARTE* TEMPORARY RESTRAINING ORDER

1. *In re Abbott*¹⁴⁴

The Texas Supreme Court exercised its mandamus power to direct a district court to withdraw its temporary restraining order (TRO) prohibiting the Texas House of Representatives (House) from physically compelling its members to enter the House Chambers to conduct business. The litigation arose at a time when Democratic party legislators walked out of the House Chambers so that a quorum would not be present for a vote on certain pieces of controversial voting legislation. Specifically, the TRO was sought by Democratic legislators to block the House from acting pursuant to Article III, Section 10 of the Texas constitution, as it had done in the past, to physically compel the attendance of absent members in order to produce a quorum.

Before launching into its analysis, the supreme court made a statement noting that the proceeding was neither about the politics nor the legislation that was to be presented in the House. Rather, the supreme court observed that the:

question now before this Court is not whether it is a good idea for the Texas House of Representatives to arrest absent members to compel a quorum. Nor is the question whether the proposed voting legislation giving rise to this dispute is desirable. Those are political questions far outside the scope of the judicial function. The legal

141. "Article V, section 3 of the Texas Constitution provides that the 'Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.' Consistent with Article V, the Legislature has conferred on this Court the authority to issue writs of mandamus against the officers of the executive departments of the State, including Commissioner Bush. A relator's burden to establish compelling circumstances justifying our sparing use of this power is a heavy one." *Id.* at 855 (footnote omitted).

142. *Id.* at 859.

143. *Id.* at 854.

144. *Id.* at 859.

question before this Court concerns only whether the Texas Constitution gives the House of Representatives the authority to physically compel the attendance of absent members.¹⁴⁵

The supreme court then focused directly on the law that identified the authority of the House to physically bring legislators into the Capitol building to conduct business. The supreme court described that authority as follows:

Article III, section 10 provides that two-thirds of the members of a legislative chamber ‘constitute a quorum to do business.’ TEX. CONST. art. III, § 10. It also authorizes ‘a smaller number’—less than two-thirds—to ‘compel the attendance of absent members, in such manner and under such penalties as each House may provide.’ Thus, in addition to setting the now-well-known quorum requirement at two-thirds, the constitution in its next breath gives the present members of each chamber a remedy against the absent members when a quorum is lacking. They may ‘compel the attendance of absent members’ in order to achieve a quorum so that business may be done. Just as article III, section 10 enables ‘quorum-breaking’ by a minority faction of the legislature, it likewise authorizes ‘quorum-forcing’ by the remaining members.¹⁴⁶

The supreme court also remarked that a very similar provision in the United States Constitution had been interpreted by the U.S. Supreme Court in *Kilbourn v. Thompson* to give the United States Congress similar powers to produce a quorum.

The merits analysis showed the supreme court was greatly distressed by the conduct of counsel for the plaintiffs and the trial court when the TRO was granted improvidently on an *ex parte* basis. In fact, the supreme court unbraided both with sharp criticism.

First, the supreme court specifically concluded that the trial court’s ruling was absolutely incorrect when it signed the TRO order stating that “the prevailing historical understanding of article III, section 10 has been ‘erroneous[]’ all along. *See* TRO at ¶ 1.”¹⁴⁷ In noting the district court heard only one side of the argument, the supreme court observed:

The district court reached this conclusion based on an *ex parte* presentation from Plaintiffs, not based on the adversarial process on which our legal system depends for the resolution of such questions. Curiously, Plaintiffs’ *ex parte* presentation to the district court did not include any mention of *Kilbourn v. Thompson*. Defendants, had they been given the chance, would have cited *Kilbourn* and made various other arguments that cast conclusive doubt on Plaintiffs’ po-

145. 628 S.W.3d 288, 288 (Tex. 2021) (opinion by Justice Blacklock); *see In re Abbott*, 601 S.W.3d 802 (Tex. 2020) (no adequate remedy by appeal to address *ex parte* TRO since TRO’s are not appealable. This case is not cited in this 2021 case.). *See also* Honorable Douglas S. Lang, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 7 SMU ANNUAL TEX. SURVEY 301, 333 (2021).

146. *In re Abbott*, 628 S.W.3d at 291.

147. *Id.* at 292.

sition, as they have done in this Court.¹⁴⁸

Subsequently, the supreme court suggested that the improvidently granted TRO might not have been issued had opposition counsel been given an opportunity to appear so that the trial court could hear other views. Rather, “the district court never gave [the opposition] the opportunity, instead issuing an order that overturns decades, even centuries, of historical precedent based on a novel interpretation of article III, section 10 proffered *ex parte* by Plaintiffs.”¹⁴⁹

The previously discussed remarks concluded with two biting statements. First, the supreme court noted, “[i]t is not understandable, however, that the district court chose to base its view of the law on an *ex parte* presentation when there was no valid basis on which to refuse to hear the contrary view from the defendants.”¹⁵⁰ The supreme court stated:

‘[E]*x parte* hearings are disfavored in this State as a rule.’ *Feldman v. Marks*, 960 S.W.2d 613, 615 (Tex. 1996). The reason for this rule is obvious, and this case provides a stark example of the rule’s wisdom. It should be obvious from what we have already said that Plaintiffs’ *ex parte* presentation of the constitutional issues raised by this case was an inadequate basis for the district court’s stated view of the law.¹⁵¹

Second, the supreme court criticized the failure of the plaintiffs’ counsel to give notice to counsel for the Governor, saying:

The only reason the order gives for why the defendants could not be notified is entirely unconvincing. The order states that, as government employees, the State’s lawyers could not have been expected to respond to a TRO application over the weekend. TRO at ¶ 2. As the district court should have been aware, this is simply not true. Like many other lawyers, the State’s lawyers frequently work nights and weekends to meet short deadlines and respond to emergency filings. Had Plaintiffs or the district court attempted to notify the State and solicit a response on short notice, there is no reason to doubt the State’s lawyers would have offered one. Yet neither Plaintiffs nor the district court even bothered to try. Instead, they assumed the State’s lawyers would rather not be bothered on a Sunday, and they forged ahead with an *ex parte* order on a sensitive matter of statewide importance. *This was a very clear abuse of discretion by the district court.*¹⁵²

In concluding its discussion and ordering mandamus relief, the supreme court announced, “we conclude that issuing the *ex parte* temporary restraining order despite Plaintiffs’ clear lack of a probable right to relief was a clear abuse of discretion by the district court.” As for the second

148. *Id.* at 298.

149. *Id.*

150. *Id.* at 298–99.

151. *Id.* at 299.

152. *Id.*

element of mandamus relief, the supreme court observed that the normal appellate process would have been inadequate. That is because the special session was to expire on September 6. The district court set a hearing on the plaintiffs' application for a temporary injunction on August 20, with no indication that it intended to rule on the application before the special session expired. The supreme court explained, "[a]bsent mandamus relief, a district court, through an *ex parte* TRO, would have essentially eliminated for the duration of the second special session the House's explicit constitutional authority to 'compel the attendance of absent members' in the manner of its choosing."¹⁵³ The supreme court concluded by castigating the "*ex parte* proceeding where one side is totally shut out of the process" as "an improper way to resolve matters of such significance."¹⁵⁴

J. FAMILY LAW—CRIMINAL CONTEMPT FOR VIOLATION OF AMBIGUOUS ORDER

1. *In re Janson*¹⁵⁵

The *Janson* case is instructive of the proof required to support a criminal contempt conviction for disobedience of a court order. The facts in the case are not surprising given the rancor that abounds in family law cases. However, the point of law is the lesson in this case, i.e., how and when mandamus relief may correct an erroneous criminal contempt order.

In this case, the mother was held in criminal contempt of court for violating part of an agreed order that specified the enrollment of her daughter in, and transportation to, certain extracurricular activities. The contempt ruling was based upon the testimony of both the father and mother. The trial court found that the mother was guilty of forty-eight violations of the agreed order. The trial court committed the mother to jail for 180 days but suspended the commitment and placed the mother on two years' deferred adjudication for each violation to run concurrently. The trial court also ordered the mother to pay \$1,500.00 of the father's attorney's fees. The mother petitioned for mandamus relief and claimed the agreed order was too ambiguous to be enforced by contempt.

The Texas Supreme Court recited the settled case law that holds, "[a] criminal contempt conviction for disobedience to a court order requires proof beyond a reasonable doubt;" however, there are three specific foundational requirements for a trial court to act: (1) the order must be "reasonably specific;" (2) the trial court must find "a violation of the order;" and (3) the evidence must show "the willful intent to violate the order."¹⁵⁶ Contempt orders are not appealable. As such, orders may be

153. *Id.* (emphasis added).

154. *Id.* at 300.

155. *Id.*

156. 614 S.W.3d 724, 724 (Tex. 2020) (per curiam).

reviewed only by writ of mandamus or habeas corpus.¹⁵⁷ Mandamus is the proper remedy when the contemnor is not jailed, and the relator must show that the trial court abused its discretion.¹⁵⁸

In addition, the supreme court recited settled law that for a person to be held in contempt for violating a court order, “the decree must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him.”¹⁵⁹ “A trial court necessarily abuses its discretion if it holds a person in contempt for violating an ambiguous order.”¹⁶⁰

In this specific case, the supreme court concluded that the agreed order “is, at best, ambiguous” as to the activity in which the daughter was to be enrolled. Accordingly, the trial court abused its discretion by holding the mother in criminal contempt.¹⁶¹ Mandamus relief was conditionally granted, directing the trial court to vacate its order holding the mother in contempt.¹⁶²

K. MANDAMUS DENIED AS TO EMERGENCY CHILD PROTECTIVE ORDER—DISSENT EXPRESSES CONCERN FOR SAFETY

1. *In re Texas Department of Family & Protective Services*¹⁶³

Petition for writ of mandamus was denied without an opinion. Justice Lehrmann dissented.

The Rules of Appellate Procedure do not require the Texas Supreme Court to write a reasoned opinion when it denies a petition for writ of mandamus.¹⁶⁴ However, on occasion, a Justice will disagree and her dissent will stand alone as testament to the case.

Justice Lehrman opined that the Court of Appeals for the Fourteenth District of Texas at Houston erred when it directed the trial court to vacate an order that would have continued possession of the child with Department of Child Protective Services (CPS). The result of the court of appeals’ order was that the child was to be returned to her parents. Justice Lehrman believed returning the child to the custody of her parents was an abuse of discretion. Only a few weeks before CPS had taken the child, the parents were accused of causing physical injury to the child.

Justice Lehrmann concluded that she would allow that process to continue with CPS in possession of the child until the final trial. In her view, “[r]equiring the Department to essentially prove its entire case within

157. *Id.* at 727 (citing *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding)).

158. *Id.* (citing *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding)).

159. *Id.*

160. *Id.* (quoting and citing *Ex parte Slavin*, 412 S.W.2d 43, 44 (Tex. 1967) (orig. proceeding)); see also *Ex parte Glover*, 701 S.W.2d 639, 640–41 (Tex. 1985) (orig. proceeding).

161. *Id.* (citing *In re Long*, 984 S.W.2d at 626.).

162. *Id.* at 728–29.

163. *Id.*

164. 623 S.W.3d 363, 363 (Tex. 2021) (mandamus denied without opinion; Justice Lehrmann dissented).

three weeks of emergency removal in order to protect a subject child finds no support in the law and deprives trial courts of their ability to protect children while the case is under investigation.”¹⁶⁵

L. COUNTER SUPERSEDEAS DURING INTERLOCUTORY APPEAL

1. *In re Texas Education Agency*¹⁶⁶

Suspension of adverse judgments typically requires a party to post a supersedeas bond or security. However, in this “ultra vires dispute,”¹⁶⁷ the Texas Education Agency (TEA) filed a notice of an interlocutory appeal from an injunction which, by law, automatically superseded, without bond or security, the trial court’s injunction.¹⁶⁸ However, the trial court allowed the plaintiff school district to “counter-supersede” the TEA’s supersedeas, even though section 22.004(i) of the Texas Government Code provides that this supersedeas right “is not subject to being counter-superseded’ under Texas Rule of Appellate Procedure 24.2(a)(3) ‘or any other rule’ except in ‘a matter that was the basis of a contested case in an administrative enforcement action.’”¹⁶⁹

The Texas Supreme Court’s review transpired in the wake of activity at the Court of Appeals for the Third District of Texas at Austin when the TEA filed a motion to vacate the trial court’s counter-supersedeas order, citing Texas Rule of Appellate Procedure 24.2(a)(3). The school district opposed the TEA’s motion to vacate the counter-supersedeas order and, in the alternative, filed a cross-motion urging the court of appeals to exercise its authority under Texas Rule of Appellate Procedure 29.3 to “make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal.”¹⁷⁰

The court of appeals granted the TEA’s motion to vacate the “counter-supersedeas” order, but the court of appeals determined it would render an order continuing the temporary injunction against the TEA pursuant to its “inherent authority and use [of] Rule 29.3 to make orders ‘to prevent irreparable harm to parties that have properly invoked’” its jurisdiction to preserve the status quo, to prevent the school district from suffering irreparable harm, and to protect its jurisdiction.¹⁷¹ The supreme court agreed with the reasoning of the court of appeals and declined to render mandamus relief regarding the court of appeals’ temporary orders.

165. See TEX. R. APP. P. 52.8(d).

166. *In re Tex. Dep’t of Fam. & Prot. Serv.*, 623 S.W.3d at 369.

167. 619 S.W.3d 679, 679 (Tex. 2021) (Justice Guzman delivered the opinion of the Texas Supreme Court, in which Justice Lehrmann, Justice Boyd, Justice Devine, Justice Blacklock, Justice Busby, Justice Bland, and Justice Huddle joined).

168. *Id.* at 680. The Houston Independent School District (HISD) sought a declaration that the Texas Education Agency’s (TEA) Commissioner lacked the authority to assume control of the entire school district to rectify performance deficiencies. *Id.* at 680–81.

169. *Id.* at 680, 681; see also TEX. GOV’T CODE ANN. § 22.004(i).

170. *In re Tex. Educ. Agency*, 619 S.W.3d at 680.

171. *Id.* at 681.

Chief Justice Hecht dissented. He wrote that the majority “evades these clear statutory and rule-based provisions” when it approved of the stay issued by the court of appeals:

In other words, using one Rule to give the District the very relief another Rule expressly denies, and not calling the effect ‘counter-supersedes,’ even though it is. This not only creates a conflict in the Rules; it directly violates state law. Even if it did not, the delay cannot be justified under the Rules. This case has been on appeal for more than a year, with the wellbeing of school children in limbo. And the end is not in sight. The result flaunts the Legislature’s will.¹⁷²

M. MINISTERIAL DUTY TO PAY WRONGFUL IMPRISONMENT COMPENSATION—TIM COLE ACT

1. *In re Brown*¹⁷³

The Texas Supreme Court issued mandamus relief to compel the Comptroller of Public Accounts to process the application of Alfred Dewayne Brown for compensation for the time he was wrongfully imprisoned as required by the Tim Cole Act.¹⁷⁴ The record showed that Brown filed his verified application for compensation after having met the high actual innocence bar as determined by the district attorney and trial judge. However, the Comptroller denied the application. The supreme court concluded that the Comptroller “consider[ed] matters beyond the verified documents to make a *de novo* jurisdictional determination.” Hence, the Comptroller exceeded his authority by failing to perform a ministerial duty, and the supreme court conditionally granted mandamus relief.¹⁷⁵

V. MANDAMUS AUTHORITIES CITED BY THE TEXAS SUPREME COURT

As indicated above, the Texas Supreme Court’s approach to analyzing the merits of mandamus petitions appears to have become more transparent for opinion readers. Such transparency is helpful to those practicing before Texas appellate courts. However, some questions remain as to what authorities are the strongest to support a request for mandamus relief.

The chart set out below identifies the primary mandamus authorities cited in each of the cases addressed in this Survey. This analysis should provide a foundation for effective mandamus advocacy.

172. *Id.* at 682.

173. *Id.* at 693 (Hecht, J., dissenting).

174. 614 S.W.3d 712, 712 (Tex. 2020) (opinion by Justice Guzman).

175. *Id.* at 713–14; see TEX. CIV. PRAC. & REM. CODE ANN. § 103.001–103.154; see also Honorable Douglas S. Lang, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 7 SMU ANNUAL TEX. SURVEY 301, 313–14 (2021).

Mandamus Authority Cited	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
<i>In re S.W. Bell Tel. Co., L.P.</i> , 325 S.W.3d 619 (Tex. 2007) (citing <i>Riverside Associates v. Rivera</i> , 858 S.W.3d (Tex. 1993).).	<i>In re CenterPoint Energy Houston Electric, LLC</i> , 629 S.W.3d 149 (Tex. 2021).	Public Utility Commission Jurisdiction over public utility issue questions; Plea to the Jurisdiction.	Denied. No jurisdiction at PUC.
<i>In re Prudential Ins. Co. of Am.</i> , 148 S.W.3d 124 (Tex. 2004). (<i>In re Prudential.</i>).	<i>In re Oncor Electric Delivery Company LLC</i> , 630 S.W.3d 40 (Tex. 2021).	Public Utility Commission Jurisdiction over public utility issue questions; Plea to the Jurisdiction.	Denied. No jurisdiction at PUC.
<i>Oncor Electric Delivery Co. v. Chaparral Energy, LLC</i> , 546 S.W.3d 133 (Tex. 2018).	<i>In re Texas-New Mexico Power Company</i> , 625 S.W.3d 42 (Tex. 2021).	Public Utility Commission Jurisdiction over public utility issue questions; Plea to the Jurisdiction.	Denied. No jurisdiction at PUC.
<i>Garland v. Houston</i> , 691 S.W.2d 603 (Tex. 1985).	<i>Diocese of Lubbock v. Guerrero</i> , 624 S.W.3d 563 (Tex. 2021); <i>See also, In re Diocese of Lubbock</i> , 2021 WL 2386136 (Tex. 2021), (orig. proceeding).	Plea to the Jurisdiction, Ecclesiastical abstention doctrine.	Granted. Defamation claim dismissed in separate opinion. No jurisdiction.
<i>In re Prudential.</i>	<i>In re Facebook, Inc.</i> , 625 S.W.3d 80 (Tex. 2021).	Tex. R. Civ. P. 91a, Motion to Dismiss	Granted, in part as to no jurisdiction.

Mandamus Authority Cited	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
<i>In re Prudential.</i>	<i>In re Academy, Ltd.</i> , 625 S.W.3d 19 (Tex. 2021); <i>See also, In re Academy, Ltd.</i> , 625 S.W.3d 314.	Denial of Motion for Summary Judgment claiming no jurisdiction.	Granted as to no jurisdiction.
<i>In re Essex Ins. Co.</i> , 450 S.W.3d 524 (Tex. 2014).	<i>In re Farmers Texas County Mutual Insurance Company</i> , 621 S.W.3d 261 (Tex. 2021).	Tex. R. Civ. P. 91a Motion to Dismiss.	Denied. Court had jurisdiction.
<i>In re Prudential.</i>	<i>In Re K & L Auto Crushers, LLC.</i> , 627 S.W.3d 239 (Tex. 2021).	Discovery denied as to medical services provider negotiated rates.	Granted. Discovery allowed.
<i>In re Prudential.</i>	<i>In re Exxon Mobile Corporation</i> , 635 S.W.3d 631 (Tex. 2021).	Discovery denied as to medical services provider negotiated rates.	Granted. Discovery allowed.
<i>In re USAA</i> (cites <i>In re Prudential</i>).	<i>In re Allstate Indemnity Company</i> , 622 S.W.3d 870 (Tex. 2021); <i>See also, In re Hub Group Trucking, Inc.</i> , 625 S.W.3d 315 (Tex. 2021); <i>In re Savoy</i> , 631 S.W.3d 700 (Tex. 2021); <i>In re Parks</i> , 631 S.W.3d 700 (Tex.2021),(Cases addressing the same issue, as to counter affidavits. Petitions denied to allow trial courts to consider the decision in <i>In re Allstate Indemnity Company</i> , 622 S.W.3d 870 (Tex. 2021).).	Tex. Civ. Prac. & Rem. Code § 18.001 Counter-affidavits struck.	Granted. Counter-affidavits proper.

Mandamus Authority Cited	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
<i>In re Allstate</i> (cites <i>In re Prudential</i>).	<i>In re Guevara</i> , 624 S.W.3d 920 (Tex. 2021).	Tex. Civ. Prac. & Rem. Code P. 18.001. Counter-affidavits struck.	Granted. Counter-affidavits proper.
<i>In re Gonzales</i> (cites <i>In re Prudential</i>).	<i>In re Millwork</i> , 631 S.W.3d 706 (Tex. 2021).	Discovery. Tex. R. Civ. P. 1993, Order compelled deposition of former employee not under control of Defendant.	Granted. Corporation had no control over deponent.
<i>In re Prudential</i> .	<i>In re Copart, Inc.</i> , 619 S.W.3d 710 (Tex. 2021).	Trial court allowed overbroad discovery.	Granted. Limited Discovery allowed when resisting arbitration.
<i>In re Prudential</i> .	<i>In re Gonzales</i> , 619 S.W.3d 259 (Tex. 2021)	Untimely designation of “unknown” responsible third party. Tex. Civ. Prac. & Rem. Code 33.004 (06).	Granted.
<i>In re Autonation, Inc.</i> , 228 S.W.3d 663 (Tex. 2007), (<i>In re Autonation</i>).	<i>In re Durnin</i> , 619 S.W.3d 250 (Tex. 2021).	Correction of ballot description of proposed ordinance.	Granted. Description improper.
<i>In re Autonation</i>	<i>In re Petricek</i> , 629 S.W.3d 878 (Tex. 2021).	Correction of ballot description of proposed ordinance.	Granted in part. Description improper.

Mandamus Authority Cited	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
<i>Walker v. Packer</i> , 827 S.W.2d 833 (Tex. 1992).	<i>In re USAA General Indemnity Company</i> , 629 S.W.3d 878 (Tex. 2021); <i>See also, In re Liberty County Mutual Insurance Company</i> , 624 S.W.3d 796 (Tex. 2021); <i>In re Allstate Fire and Casualty Insurance Company</i> , 624 S.W.3d 795 (Tex. 2021) (Petitions denied to give trial court opportunity to consider decision issued in <i>In re USAA General Indemnity Company</i> , 629 S.W.3d 878 (Tex. 2021)).	Uninsured motorists coverage allocation of coverage.	Granted to correct procedural errors in application of UMI relationship.
<i>In re Prudential</i>	<i>In re State Farm Mutual Automobile Insurance Company</i> , 629 S.W.3d 866 (Tex. 2021).	Uninsured motorist coverage case, bi-furcation of trial.	Granted to bifurcate trial.
<i>In re Prudential</i> .	<i>Electric Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC</i> , 619 S.W.3d 628 (Tex. 2021).	Court of Appeals interlocutory review of plea to the jurisdiction.	In an odd decision, Supreme Court “decided not to decide.”
<i>In re Int’l Profit Assoc. Inc.</i> , 274 S.W.3d 672 (Tex. 2009).	<i>In re American Airlines, Inc.</i> , 634 S.W.3d 38 (Tex. 2021).	Delay in filing objection to “apex” deposition. Question of waiver.	Granted. No waiver.

Mandamus Authority Cited	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
<i>In re Prudential.</i>	<i>In re State.</i> --- S.W.3d ----, 2021 WL 4785741 (Tex. 2021).	School district “mask mandate” conflict with Governor’s orders.	Granted. Governor’s orders pre-date school district orders.
<i>In re Autonation.</i>	<i>In re Abbott</i> , 628 S.W.3d 288 (Tex. 2021).	Temporary restraining order.	Granted. Temporary restraining order improvidently granted.
<i>In re Long</i> , 984 S.W.2d (Tex. 1999).	<i>In re Janson</i> , 614 S.W.3d 724 (Tex. 2020).	Review of Family Law Court Criminal Contempt Order.	Granted. Order allegedly violated was too vague.
No case cited.	<i>In re Texas Department of Family and Protective Services</i> , 623 S.W.3d 363 (Tex. 2021).	Court of Appeals vacated order that CPS hold custody of child.	Denied without opinion.
No case cited.	<i>In re Texas Education Agency</i> , 618 S.W.3d 679 (Tex. 2021).	TEA’s appeal of temporary injunction suspended by statute. Court of Appeals granted a stay pursuant to Tex. R. App. P. 29.3.	Denied. Although not provided for by statute, Court of Appeal had discretion to grant counter-supercedeas.
No case cited.	<i>In re Brown</i> , 619 S.W.3d 679 (Tex. 2021).	Comptroller refused to accept paperwork for Brown’s compensation fee “actual innocence.”	Granted. Comptroller had no discretion to deny under Tim Cole Act.

VI. CONCLUSION

In the recent past, it was common for the Texas Supreme Court to cite mandamus authorities other than *In re Prudential* or not address the elements of mandamus at all.¹⁷⁶ That practice created some uncertainty as to what authorities should guide the lower courts and counsel in addition to further assessing the viability of the *In re Prudential* balancing test.¹⁷⁷

A significantly greater number of opinions published during this Survey period cite *In re Prudential* and other authorities regarding mandamus. The reason for not citing *In re Prudential* in all cases is unclear.

However, clear guidance regarding the application of settled authorities is always needed. Without such clear guidance, counsel representing parties on appeal are in substantially the same position that appellate courts face when the parties to an appeal fail to brief their positions adequately.¹⁷⁸ Nevertheless, the detailed analysis offered by the supreme court in mandamus cases in this Survey period is a boon to practicing attorneys.

176. *In re Brown*, 614 S.W.3d at 723–24.

177. See Honorable Douglas S. Lang, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 7 SMU ANNUAL TEX. SURVEY 301, 313 (2021) (survey period of Dec. 1, 2019 through Nov. 30, 2020); see also Honorable Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 6 SMU ANNUAL TEX. SURVEY 387, 404–07 (2020); Honorable Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 5 SMU ANNUAL TEX. SURVEY 407, 428 (2019).

178. See *In Re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (“An appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.”).

APPENDIX

Table 1. Texas Supreme Court Mandamus Statistics: Past Four Fiscal Years as Reported by the Office of Court Administration.

FISCAL YEAR	2020	2019	2018	2017
Total Dispositions ¹	208	207	204	171
Petitions Denied	77% (161)	82%	79%	82%
Petitions Granted	9% (19)	3%	7%	6%

1. On appeal, parties are required to present not only a clear and concise argument, but also “appropriate citations to authorities.” TEX. R. APP. P. 38.1(i).

