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Survey of Recent Mandamus Decisions of the Texas Supreme Court

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SURVEY OF RECENT
MANDAMUS DECISIONS OF THE
TEXAS SUPREME COURT

Honorable Douglas S. Lang*

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I. INTRODUCTION

Mandamus relief must be considered whenever a critical adverse trial court ruling threatens to devastate the merits of a case. Texas appellate courts, including the Texas Supreme Court, are stingy about granting mandamus relief. However, mandamus is a versatile legal tool that can provide a critical mid-course correction in the trial court process. It is a fact that a mandamus correction can put a case on a suitable track for trial.

The core requirements for mandamus relief are twofold: (1) the petitioner must demonstrate that a court’s ruling is a clear abuse of discretion and (2) the petitioner has no adequate remedy by appeal. However, one must be mindful that mandamus is an “extraordinary” remedy and not a matter of right.

Mandamus relief granted by Texas Supreme Court is highly dependent on the particular circumstances of each case. This has long been true, especially since the 2004 decision of In re Prudential Insurance Co. of America. In that case, where it enforced a contractual jury waiver, the supreme court made it clear that there is no concrete formula for determining whether the remedy by appeal is adequate. It wrote:

2. Id. at 138 (citing Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding)) (“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.”).
3. See id.
4. See id. at 136.
An appellate remedy is “adequate” when any benefits of mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate. This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy’s principal virtue.5

Given the absence of “rigid rules,” there is always room for disagreement between the justices.6 Out of the eighteen mandamus opinions released during the Survey period of December 1, 2021, through November 30, 2022, dissenting opinions were published in two cases and concurring opinions were published in two cases.

This Article analyzes, summarizes, and categorizes the Texas 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 supreme court’s opinions cite the seminal case on mandamus, In re Prudential Insurance Co. of America’.7

In this Survey period, only one of the eighteen substantive cases issued cited In re Prudential Insurance Co. of America.8 One of the seventeen that did not cite In re Prudential cited Walker v. Packer9 as its primary mandamus authority.10 However, Walker was clearly modified by the later In re Prudential case. In re Prudential, by its very language, signaled a more “flexible” standard for determining whether a relator has an adequate remedy by appeal.11 Of the sixteen cases that cited neither In re Prudential nor Walker, two cited no mandamus authority at all.12 The other fourteen opinions cited more recent mandamus cases.13

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5. Id.
6. See id.
7. See id.
8. See In re YRC, Inc., 646 S.W.3d 805, 808 (Tex. 2022) (per curiam); infra Appendix B.
10. See In re Ayad, 655 S.W.3d 285, 289 (Tex. 2022) (per curiam); infra Appendix B.
11. Compare Walker, 827 S.W.2d at 840 (“The writ will issue ‘only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies.’” (quoting Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989)) (emphasis added)), with Prudential, 148 S.W.3d at 136 (“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. This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy’s principal virtue.”) (emphasis added).
12. See In re Younger, 659 S.W.3d 453, 453 (Tex. 2022) (orig. proceeding) (mem. op.) (Blacklock, J., concurring); In re G.S., 644 S.W.3d 160, 167–69 (Tex. 2022) (orig. proceeding) (Lehrmann, J., concurring); infra Appendix B.
13. See infra Appendix B.
II. MANDAMUS FUNDAMENTALS

The Texas Constitution vests jurisdiction in the Texas Supreme Court over writs of mandamus. 14 Specifically, § 3 of article V states, in part, “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 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.” 15

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

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. 16

Further, § 22.002(b) of the Texas Government Code 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.” 17 It then adds:

Only the supreme court has the authority to issue a writ of mandamus . . . against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform. 18

Additionally, a number of Texas statutes and rules provide for mandamus proceedings in certain courts for specifically identified matters. 19 Texas

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15. 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).
17. Id. § 22.002(b).
18. Id. § 22.002(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, each of the fourteen courts of appeals or a justice thereof “may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court,” and “each court of appeals . . . may issue . . . writs of mandamus . . . against a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district” and certain magistrates and associate judges. Id. § 22.221 (a)-(b).
19. See, e.g., In re Brown, 614 S.W.3d 712, 717 (Tex. 2020) (orig. proceeding); In re Lester, 602 S.W.3d 469, 472 (Tex. 2020) (orig. proceeding) (each citing the Tim Cole Act). 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
Rule of Appellate Procedure 52 provides procedural requirements for mandamus proceedings in both the supreme court and the courts of appeals.20 “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.21 Further, failure to comply with the additional requirements of Rule 52 may result in denial of relief.22

III. MANDAMUS STATISTICS

Statistics for the Texas Supreme Court’s five most recent fiscal years show that the rate at which the petitions have been granted in that period, in the range from 3.0% to 9.5%, demonstrates that mandamus is indeed an “extraordinary” remedy.23

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 imposition of ad valorem taxes by multiple taxing units on the same property); City of Houston v. Hous. Mun. Emps. Pension Sys., 549 S.W.3d 566, 582–84 (Tex. 2018) (affirming the denial of Houston's plea to jurisdiction where suit for mandamus was the proper proceeding to compel 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 constitutionality of the 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 trial court’s determination of 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 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 duty is a public officer.”).

20. 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. See 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.

21. Tex. R. App. P. 52.3(e); see In re Abbott, 601 S.W.3d 802, 807 (Tex. 2020) (orig. proceeding) (per curiam); State v. Naylor, 466 S.W.3d 783, 793–94 (Tex. 2015) (orig. proceeding) (“[A] party may not circumvent the court of appeals simply by arguing futility.”); Chambers–Liberty Counties 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.”) (citing Perry v. Del Rio, 66 S.W.3d 239, 257 (Tex. 2001) (orig. proceeding))).


### APPENDIX A

**Texas Supreme Court Mandamus Statistics: Past Five Fiscal Years as Reported by the Office of Court Administration**

<table>
<thead>
<tr>
<th>FISCAL YEAR</th>
<th>2022</th>
<th>2021</th>
<th>2020</th>
<th>2019</th>
<th>2018</th>
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<tr>
<td>Total Dispositions&lt;sup&gt;24&lt;/sup&gt;</td>
<td>214</td>
<td>220</td>
<td>208</td>
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<td>204</td>
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<tr>
<td>Petitions Denied</td>
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<td>169</td>
<td>161</td>
<td>170</td>
<td>162</td>
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<td></td>
<td>79.9%</td>
<td>76.81%</td>
<td>77%</td>
<td>82%</td>
<td>79%</td>
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<td>21</td>
<td>19</td>
<td>6</td>
<td>15</td>
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<tr>
<td></td>
<td>5.1%</td>
<td>9.5%</td>
<td>9%</td>
<td>3%</td>
<td>7%</td>
</tr>
</tbody>
</table>

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

A. Arbitration

1. *In re Ayad*25

In this case, the parties entered into a premarital agreement to submit disagreements to a binding arbitration under religious law.26 The trial court failed to address the objections of one of the parties as to the validity and enforceability of the agreement as required by the Texas Family Code.27 In so doing, the court incorrectly concluded in its written order that it “must refer parties to arbitration when it is contracted by the parties” and that it had “no discretion but to enforce the agreement.”28

The court of appeals denied mandamus relief.29 However, the Texas Supreme Court concluded the trial court abused its discretion in failing to address the defenses before compelling arbitration.30 While the result of the arbitration would ultimately be appealable, because the trial court “did not follow a statutory command—unique to the divorce context—that it try issues of validity and enforceability prior to ordering arbitration,” the relator had no adequate remedy by appeal.31 Accordingly, mandamus relief was granted, directing the trial court to address the defenses before making a decision to compel arbitration.32 Some cases were cited by the supreme court as authority for the adequacy of the appellate remedy, but they dealt with other statutory requirements that the supreme court concluded had not been met.33 Traditional mandamus cases were not cited as authority.

2. *In re Whataburger Restaurants LLC*34

The trial court denied Whataburger’s motion to compel arbitration of an employee’s injury claim on the basis that the arbitration agreement was unconscionable.35 The court of appeals reversed and remanded to the trial court but failed to address the employee’s cross points.36 The Texas Supreme Court granted the petition for review, decided the case

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25. 655 S.W.3d 285 (Tex. 2022) (per curiam).
26. Id. at 287.
28. Ayad, 655 S.W.3d at 289.
29. See id. at 287.
30. See id. at 290.
31. Id.
32. See id. at 291.
34. 645 S.W.3d 188 (Tex. 2022).
35. See id. at 192.
36. See id.
without hearing argument, and remanded to the court of appeals for consideration of the employee’s other argument that the arbitration policy was illusory because Whataburger could allegedly revoke the policy at any time.\(^{37}\) However, the court of appeals remanded to the trial court for consideration of additional evidence.\(^{38}\) Upon remand, Whataburger filed a supplemental motion to compel, the employee again claimed the policy was illusory, and the trial court denied that motion without stating any reasons.\(^{39}\)

However, the clerk of the court failed to give notice of the trial court’s order until 153 days after the order was signed, long after the twenty days to file notice of interlocutory appeal and the ninety-day extension allowed by Texas Rule of Civil Procedure 306a.\(^{40}\) Eight days after receiving the late notice, Whataburger filed a motion to reconsider, the trial court denied it, and Whataburger sought mandamus in the court of appeals.\(^{41}\)

After the court of appeals denied mandamus relief, the supreme court granted mandamus citing the clerk’s obligation under Rule 306a to send notice.\(^{42}\) Part of the supreme court’s reasoning was prophylactic to avoid sharp practices by lawyers when it said, “withholding mandamus relief here could encourage counsel who learn of a ruling denying arbitration, despite the clerk’s failure to give notice, to wait to inform opposing counsel until after the [ninety]-day deadline for seeking relief has passed.”\(^{43}\) Traditional mandamus authority was cited on this point.\(^{44}\)

The supreme court went even further and decided the merits of the denial of the motion to compel stating Whataburger’s policy was not illusory because the policy contains a detailed restriction on Whataburger’s ability to change the policy.\(^{45}\) The basis for deciding the merits of the enforceability of the arbitration policy rather than sending the case to the court of appeals as an interlocutory appeal was “because of the unusually elongated procedural history, we have addressed the merits directly as a matter of judicial economy . . . .”\(^{46}\) No specific mandamus authority was cited by the supreme court as the foundation for that decision. The supreme court mused about the loss of that right to appeal and noted that, under prior law, the only recourse was mandamus.\(^{47}\)

\(^{37}\) See id.
\(^{38}\) See id.
\(^{39}\) See id.
\(^{40}\) See id. at 193.
\(^{41}\) See id.
\(^{42}\) See id. at 194.
\(^{43}\) Id. at 193–94.
\(^{44}\) See id. at 193 (citing In re Allstate Indem. Co., 622 S.W.3d 870, 875 (Tex. 2021)).
\(^{45}\) See id. at 198.
\(^{46}\) Id. at 198 n.41.
\(^{47}\) See id.
B. Mandamus Where Trial Court’s Jurisdiction is Questioned

1. Eminent Domain

a. *In re Breviloba, LLC*48

In this case, the Texas Supreme Court addressed whether there is a jurisdictional ceiling that requires a case to be transferred from a county court at law to a district court when a counterclaim exceeds the $250,000.00 jurisdictional limit set by Texas Government Code § 25.0003(c)(1).49 Here, Breviloba, LLC sued H & S Hoke Ranch, LLC in the Walker County Court at Law to condemn a fifty-foot-wide pipeline easement across Hoke Ranch’s property.50 Hoke Ranch counterclaimed, asserting, among other things, over $13 million in damages if Breviloba retained ownership of the pipeline.51 After several adverse rulings, Hoke Ranch moved to transfer the counterclaims to the district court, arguing that the counterclaims exceeded the court’s jurisdictional limit.52 The county court at law denied the motion to transfer.53 The court of appeals granted Hoke Ranch’s petition for writ of mandamus and Breviloba sought mandamus relief from the supreme court.54

However, the supreme court concluded the amount-in-controversy limit did not apply because county courts at law have jurisdiction over eminent domain proceedings regardless of the amount in controversy.55 Without oral submission, the supreme court conditionally grant Breviloba’s petition for writ of mandamus and ordered the court of appeals to vacate its conditional writ.56 Accordingly, the case was to ultimately proceed in the county court at law.57 No traditional mandamus authorities were cited.

2. Discovery Regarding Special Appearance

a. *In re Christianson Air Conditioning & Plumbing, LLC*58

In this case, the Texas Supreme Court addressed the scope of discovery regarding personal jurisdiction under Texas Rule of Civil Procedure 120a after a special appearance is filed.59 The facts in this case showed an Indian

48. 650 S.W.3d 508 (Tex. 2022) (per curiam).
49. See id. at 509; Tex. Gov’t Code Ann. § 25.0003(c)(1) (“In addition to other jurisdiction provided by law, a statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in: (1) civil cases in which the matter in controversy exceeds $500[.]00 but does not exceed $250,000[.]00 . . . as alleged on the face of the petition . . . .”).
50. See *In re Breviloba*, 650 S.W.3d at 511.
51. See id. at 510.
52. See id.
53. See id.
54. See id.
55. See id. at 511.
56. See id. at 513.
57. Id.
58. 639 S.W.3d 671 (Tex. 2022).
59. See id. at 674.
manufacturer, NIBCO, and a Canadian engineering firm, Jana, were sued regarding an allegedly defective plastic pipe. After the parties failed to agree on the scope of two corporate representative depositions, the trial court granted a motion to compel the depositions on a list of thirty topics proposed by the plaintiffs. The court of appeals granted mandamus relief sought by Jana, ordering that discovery was not allowed on certain jurisdictional and merits topics. The plaintiffs petitioned the supreme court contending Rule 120a discovery need not relate exclusively to the jurisdictional issue. The supreme court agreed.

The supreme court did not draw a bright line between what discovery would be allowed and what was prohibited. However, it noted that a party opposing a special appearance may seek a continuance to conduct discovery on “essential facts” needed to proceed with that opposition. The supreme court also provided a helpful example describing a situation where “a plaintiff sues a nonresident manufacturer or non-manufacturing seller under the Texas Products Liability Act and alleges specific jurisdiction under a stream-of-commerce-plus theory.” The supreme court continued, saying, in that situation, “[T]he plaintiff must show that the defendant placed a product in the stream of commerce to satisfy elements of both the jurisdictional theory and the statutory standard for liability on the merits.” Such discovery “about placement of the product in the stream of commerce, if disputed, should not be disallowed merely because that discovery is also relevant to whether the defendant qualifies as a statutory seller.”

The supreme court stated that a trial court must “tailor” the discovery topics so they focus on jurisdiction. However, the supreme court also issued mandamus relief to the Court of Appeals for the Third District of Texas at Austin. It said the court of appeal’s decision was based upon a “legally incorrect understanding of the available scope of discovery” when it held that the trial court abused its discretion by compelling discovery on certain topics that touched both jurisdictional and merits issues and that

60. See id. at 674–75.
61. See id. at 674.
62. See id.
63. See id. at 675.
64. See id. at 674.
65. See id. at 676–78.
66. Id. at 676; see Tex. R. Civ. P. 120a(3) (“Should it appear from the affidavits of a party opposing the motion that he cannot . . . present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”).
67. In re Christianson, 639 S.W.3d at 677.
68. Id. (citing TEX. CIV. PRAC. & REM. CODE ANN. § 82.001 and Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987) (plurality opinion)).
69. Id.
70. Id. at 678.
71. Id. at 681.
72. Id.
“discovery must relate exclusively to the jurisdictional question.”73 The supreme court cited In re Turner as mandamus authority.74

C. MEDICAL LIABILITY DISCOVERY

1. In re LCS SP, LLC75

This case defined the scope of discovery permitted by the Texas Medical Liability Act during the period before the plaintiff serves the required expert report.76 Initially, the trial court did not allow pre-report discovery of a nursing facility’s general policies and procedures.77 However, the court of appeals granted mandamus relief, requiring the trial court to order the facility to produce these policies before the plaintiff had served an expert report.78 The Texas Supreme Court granted mandamus relief respecting the court of appeals decision, concluding that the facility’s general policies and procedures fall outside the narrow scope of pre-report discovery permitted in medical liability cases.79

The supreme court concluded that while general operating policies can be relevant to health-care liability claims, the defendant must produce only that information particularly “related to the patient’s health care” before the plaintiff serves an expert report.80 Accordingly, the supreme court said it is compelled to apply the strict bar of discovery required by “Section 74.351(s)” until the plaintiff serves an expert report.81 The supreme court found that the trial court acted within its discretion when it declined to compel the requested discovery and that the court of appeals was in error when it compelled that discovery, so mandamus relief was issued conditionally.82 The supreme court cited In re Turner as mandamus authority.83

D. NEGLIGENCE-RESPONSIBLE THIRD-PARTY DESIGNATIONS IN NEGLIGENCE CASES

1. In re Eagleridge Operating, LLC84

This is a premises defect case.85 The issue before the Texas Supreme Court was whether the trial court abused its discretion in granting the plaintiff’s motion to strike defendant Eagleridge Operating, LLC’s

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73. Id. at 675 (citing In re JANA Corp., 628 S.W.3d 526, 528, 530 (Tex. App.—Austin 2020, orig. proceeding)).
74. See id. at 681 (citing In re Turner, 591 S.W.3d 121, 124 (Tex. 2019)).
75. 640 S.W.3d 848 (Tex. 2022).
76. See id. at 850.
77. See id.
78. See id.
79. See id.
80. Id. at 851.
81. Id.
82. See id. at 855.
83. See id. at 852 (citing In re Turner, 591 S.W.3d 121, 124 (Tex. 2019)).
84. 642 S.W.3d 518 (Tex. 2022).
85. See id. at 520.
Eagleridge sought mandamus relief in the court of appeals to declare the trial court abused its discretion in striking the third-party designation. After the court of appeals denied that relief, the supreme court considered and denied Eagleridge’s petition that sought the same relief.

The case was brought by Earmon Lovern, who was injured on a well site when a pipe burst. He sued Eagleridge, the well’s operator of record, and USG Properties, the majority working interest owner, asserting claims for negligence and gross negligence regarding the construction, installation, and maintenance of the well’s pipeline. Eagleridge became an operator a few months before the plaintiff’s injury occurred. Aruba Petroleum, Inc., the designated responsible third party, preceded Eagleridge as operator and also owned a minority working interest in the well. However, when Aruba sold its working interest to the USG, it ceased acting as an operator.

Eagleridge claimed it properly designated Aruba because of (1) Aruba’s previous ownership of a working interest; (2) its status as the operator; and (3) its status as an independent contractor in constructing, installing, and maintaining the pipeline. According to Eagleridge, Aruba, as a prior owner-operator, caused or contributed to causing the injuries because it was responsible for installing the gas line.

The supreme court pondered its prior decision in *Occidental Chemical Corp. v. Jenkins*, where it:

> “reject[ed] the notion that a property owner acts as both owner and independent contractor when improving its own property” and held that, after the creator of a dangerous premises condition has conveyed ownership of real property, the property’s new owner “ordinarily assumes responsibility for the property’s condition with the conveyance.”

In deciding not to grant mandamus relief, the supreme court concluded that the *Occidental* decision is controlling and the responsibility of Aruba, as the former owner, for premises defects “did not survive conveyance of its ownership interest.”

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86. See id. at 520–21.
87. See id. at 520.
88. See id. at 519–20.
89. See id. at 522.
90. See id.
91. See id.
92. See id. at 521.
93. See id. at 521–22.
94. See id. at 522–23.
95. See id. at 522.
96. 478 S.W.3d 640 (Tex. 2016).
97. In re Eagleridge, 642 S.W.3d at 521.
98. Id.
As the supreme court closed its opinion, it remarked that Eagleridge had raised issues in its mandamus petition that had not been asserted in the trial court. In declining to address those “new issues,” the supreme court relied upon established precedent that a request for mandamus relief “generally requires a predicate request for action by the [trial court] and the [trial court’s] erroneous refusal to act” and Eagleridge made no such showing. The supreme court cited *In re Coppola* as mandamus authority.

2. *In re YRC, Inc.*

As indicated above, § 33.004 of the Texas Civil Practice and Remedies Code provides that a defendant in a tort action may designate a responsible third party by filing a motion for leave on or before the sixtieth day before the trial date. However, the defendant may not designate a third party after the limitations period on the plaintiff’s cause of action against the third party has expired.

This case involved a workplace injury. Defendants sought to designate the plaintiff’s employer as a responsible third party sixty-two days before the suit’s third trial setting and more than five years after the injury. The trial court denied the motion because “it was untimely and did not plead sufficient facts regarding the third party’s responsibility.” One defendant in the case “filed a mandamus petition in the court of appeals, which denied relief in a non-substantive opinion.”

The Texas Supreme Court conditionally granted mandamus relief based on its recent decision in *In re Coppola*, which made it clear that a motion to designate a responsible third party was timely if “filed more than sixty days before the then-pending trial date . . . .” The supreme court concluded that the filing of the motion in sixty-two days was obviously sufficient, and it construed the pleadings to be sufficient.

The determination of whether the applicable limitations period barred the plaintiff’s claim was more complex. The supreme court reasoned that Eaton, the employer, “was a subscriber to workers’ compensation insurance, and [the plaintiff’s] negligence cause of action seeks recovery for [a] work-related injury. As a matter of law, therefore, recovery of workers’ compensation is [plaintiff’s] exclusive remedy against Eaton.”

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99. *See id.* at 524.
100. *Id.*
101. *See id.* (citing *In re Coppola*, 535 S.W.3d 506, 508 (Tex. 2017) (per curiam)).
102. 646 S.W.3d 805 (Tex. 2022) (per curiam).
104. *See id.* § 33.004(c).
105. *See In re YRC Inc.*, 646 S.W.3d at 807.
106. *See id.*
107. *Id.*
108. *Id.*
109. *Id.* (citing *In re Coppola*, 535 S.W.3d at 508).
110. *See id.* at 810.
111. *Id.* at 808–09.
Accordingly, the supreme court concluded there was no applicable limitations period for the plaintiff to join the third-party employer as a defendant in this tort action because the plaintiff employee’s exclusive remedy was workers’ compensation.\textsuperscript{112} Further, the plaintiff had already successfully secured relief in the action.\textsuperscript{113} Citing \textit{Prudential}, the supreme court determined that the motion to designate a responsible third party should have been granted, the trial court’s ruling was a clear abuse of discretion, and the defendant lacks an adequate remedy by appeal.\textsuperscript{114}

\section*{E. Pre-Trial Discovery}

1. \textit{In re Central Oregon Truck Co.}\textsuperscript{115}

Christina Broussard sued the relators, David Hupp and Central Oregon Truck Company, “for personal injuries and economic losses following a 2017 rear[ ]end collision.”\textsuperscript{116} In the trial court, Hupp and Central sought discovery of “(1) post-accident medical-billing information from Broussard’s medical providers and (2) third-party production of Broussard’s pre-accident medical, education, employment, and insurance records.”\textsuperscript{117} The relators contended that the “requested discovery [wa]s relevant to the existence and extent of damages causally attributable to the accident.”\textsuperscript{118} The trial court granted “Broussard’s motion to quash” the request for information on both topics.\textsuperscript{119} In an interesting twist, the Texas Supreme Court acknowledged the relevance of the information sought, but denied mandamus relief so that the trial court could consider its ruling in light of the supreme court’s decision in the case of \textit{In re K&L Auto Crushers, LLC}.\textsuperscript{120} The supreme court reasoned: “\textit{In re K&L Auto} provides extensive guidance on how a trial court should resolve such disputes. Because the scope of discovery is largely within the trial court’s discretion, the trial court and the parties should have an opportunity to revisit the discovery requests with this guidance in mind.”\textsuperscript{121} The supreme court’s decision raises a question about judicial housekeeping. In this case, the supreme court acknowledged that the discovery requests “seek relevant information,” but it remanded the case to the trial court only with directions to utilize \textit{K&L Auto}’s “extensive

\begin{footnotesize}
\begin{enumerate}
\item[112.] See id.
\item[113.] See id. at 809.
\item[114.] See id. at 808, 809 (citing \textit{In re Prudential Ins. Co. of Am.}, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)).
\item[115.] 644 S.W.3d 668 (Tex. 2022) (per curiam).
\item[116.] Id. at 669.
\item[117.] Id.
\item[118.] Id.
\item[119.] Id.
\item[120.] See id. at 670–71 (citing \textit{In re K&L Auto Crushers, LLC}, 627 S.W.3d 239, 248, 251–56 (Tex. 2021)).
\item[121.] Id. at 671 (internal citations omitted). In \textit{In re K&L Auto}, the Court determined that the information requested was relevant, the trial court abused its discretion by denying the discovery, and there was no adequate remedy available by appeal. See \textit{In re K&L Auto}, 667 S.W.3d at 257.
\end{enumerate}
\end{footnotesize}
guidance on how a trial court should resolve such disputes.”

In significant contrast, the supreme court in In re Christianson Air Conditioning & Plumbing provided detailed directions for the trial court and the parties on remand respecting “tailoring” the proposed discovery.

2. In re UPS Ground Freight, Inc.

The plaintiff in a wrongful death suit sought discovery of the “results of all alcohol and drug tests conducted on all current and former drivers” of UPS at “its Irving, Texas, facility for stated time periods preceding a fatal multivehicle accident.” This request was made in light of the “[p]ost-accident drug testing for UPS’s employee” that showed the presence of THC. However, UPS disputed any alleged “impairment was a causative factor in the accident.”

According to the plaintiff, the discovery requests were made for the purpose of “establish[ing] a pattern and practice of failing to adequately drug test at the Irving facility over a period of years.” The trial court “overruled UPS’s objection[]” of overbreadth, irrelevance, and the requests being in violation of federal and common law privacy rights of the drivers. On two occasions the court of appeals granted mandamus relief. On the first occasion, it held that the requests were overly broad for not being “appropriately limited in time.” On the second occasion, it partially granted relief prohibiting all the requested discovery. In evaluating the request, the Texas Supreme Court observed, “The information [the plaintiff] seeks is tantamount to a fishing expedition.” Accordingly, mandamus relief was granted.

Apparently, the plaintiff did not argue the discovery regarding when and how the driver in question was tested and whether that testing comported with the company policies should be allowed. Had plaintiff done so, and assuming some irregularities were revealed, the plaintiff might have been able to show the relevance of the other drivers having been tested in accordance

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122. In re Central Or. Truck Co., 644 S.W.3d at 669, 671 (citing In re K&L Auto, 667 S.W.3d at 251–56).
123. Compare id., with In re Christianson Air Conditioning & Plumbing, LLC, 639 S.W.3d 671, 680–82 (Tex. 2022) (“[W]e instruct the trial court to apply the standards explained above to the six deposition topics that remain in dispute.”).
124. 646 S.W.3d 828 (Tex. 2022) (per curiam).
125. Id. at 830.
126. Id. at 830.
127. Id.
128. Id. at 830.
129. Id. at 830–31.
130. See id. at 831.
131. Id.
132. Id.
133. Id. at 832.
134. See id. at 832–33.
135. See id.
with company policies.\textsuperscript{136} In that way, the plaintiff might have been able to obtain discovery and work toward an award of punitive damages.\textsuperscript{137}

3. \textit{In re Contract Freighters, Inc.}\textsuperscript{138}

This is a motor vehicle collision case.\textsuperscript{139} Plaintiffs alleged they were injured by the negligent conduct of Contract Freighters and its driver.\textsuperscript{140} In pretrial discovery, plaintiffs propounded a request for records of any accidents in which Contract Freighters had been involved in the past five years.\textsuperscript{141} Contract Freighters objected and moved to quash, but the trial court and the court of appeals denied that relief.\textsuperscript{142}

When requested to file a response, after Contract Freighters filed a petition for mandamus relief with the Texas Supreme Court, the plaintiffs notified Contract Freighters that they were withdrawing the requests for accident records, but it did not inform the trial court nor did the trial court set aside its order.\textsuperscript{143} Then, the plaintiffs moved to dismiss the mandamus petition, claiming the issues were moot.\textsuperscript{144}

The supreme court concluded the issue was not moot since (1) no action was taken by the plaintiffs until it had requested a response; (2) they did not advise the trial court and ask the discovery order be set aside; and (3) they did not seek to provide “enforceable assurances via a Rule 11 agreement, a binding covenant, or anything else that would provide sufficient certainty that they would not refile the same or similar requests if the Court dismissed CFI’s petition.”\textsuperscript{145} The supreme court rendered a decision stating discovery propounded “without appropriate limits as to ‘time, place or subject matter,’ are ‘not merely an impermissible fishing expedition; [they are] an effort to dredge the lake in hopes of finding a fish.’”\textsuperscript{146}

It should be noted, in this case as well as in the \textit{In re Whataburger} case, the supreme court appeared to be warning that it is well aware of and will not tolerate sharp practices.\textsuperscript{147} In this case, the supreme court opined, “Unilateral and unenforceable withdrawal of discovery, without any assurances that the withdrawal is definite, and at the very hour ‘appellate courts are looking,’ does not moot a discovery dispute.”\textsuperscript{148} Likewise, in the \textit{In re Whataburger} case, the supreme court remarked, “[W]ithholding mandamus relief here could encourage counsel who learn of a ruling

\textsuperscript{136} See id.
\textsuperscript{137} See id.
\textsuperscript{138} 646 S.W.3d 810 (Tex. 2022) (orig. proceeding) (per curiam).
\textsuperscript{139} See id. at 812.
\textsuperscript{140} See id.
\textsuperscript{141} See id.
\textsuperscript{142} See id.
\textsuperscript{143} See id. at 812–13.
\textsuperscript{144} See id. at 813.
\textsuperscript{145} Id. at 814.
\textsuperscript{146} Id. at 815 (quoting Texaco, Inc. v. Sanderson, 898 S.W.2d 813, 815 (Tex. 1995)).
\textsuperscript{147} See id. at 814; \textit{In re Whataburger Restaurants, LLC}, 645 S.W.3d 188, 198 (Tex. 2022).
\textsuperscript{148} \textit{In re Contract Freighters}, 646 S.W.3d at 814.
denying arbitration, despite the clerk’s failure to give notice, to wait to inform opposing counsel until after the [ninety]-day deadline for seeking relief has passed.”

The supreme court cited In re National Lloyds Ins. Co. as the mandamus authority in In re Contract Freighters.

F. FAMILY LAW

1. In re Abbott

The mandamus petition filed in this case by the State of Texas seeks relief from a court of appeals order that reinstated a temporary injunction after that injunction was automatically superseded by an interlocutory appeal. The court of appeals acted pursuant to Rule 29.3, which authorizes courts of appeals, during an interlocutory appeal, to “make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal.”

This case involves the intricate interplay between (1) an attorney general’s opinion that concludes certain “‘sex change’ procedures and treatments . . . when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code”; (2) the Governor’s directive to the Commissioner of the Department of Family and Protective Services (DFPS) that the opinion be followed; and (3) the DFPS’s statement to the media that it would comply with the opinion.

This underlying lawsuit was brought to enjoin and declare unlawful investigative actions into the plaintiffs’ use of medical treatments by the DFPS pursuant to the Governor’s letter.

The plaintiffs consist of “a married couple who are the parents of a child diagnosed with gender dysphoria and a doctor who treats such children.” They claimed the Governor’s “directive” and the statement made by DFPS to the media “improperly announced a new agency rule without the notice-and-comment procedure required by law.” They also challenged “DFPS’s authority to investigate their use of medical treatments” that the Governor’s letter identified as unlawful. The injunction sought by the plaintiffs was granted.

investigating reports in the State of Texas against any and all persons based solely on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to

149. In re Whataburger, 645 S.W.3d at 194.
150. In re Contract Freighters, 646 S.W.3d at 814 (citing In re Nat’l Lloyds Ins. Co., 449 S.W.3d 486, 488 (Tex. 2014) (per curiam)).
151. 645 S.W.3d 276 (Tex. 2022) (orig. proceeding).
154. Id. at 279.
155. See id.
156. Id.
157. Id.
158. Id.
159. Id.
transgender minors where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment; [ ] prosecuting or referring for prosecution such reports; and [ ] imposing reporting requirements on persons in the State of Texas who are aware of others who facilitate or provide gender-affirming care to transgender minors solely based on the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment.160

While affirming the court of appeals has general authority “to preserve the status quo and prevent irreparable harm to the parties during the pendency of an appeal,” the Texas Supreme Court determined the court of appeals had no authority to issue a state-wide order enjoining the investigation of “any and all persons,” that is, nonparties.161 Also, the court of appeals had no authority to order that the Governor could not “investigate reports” of abuse, “prosecute reports,” or “impose reporting requirements” because the Governor has no authority “to do any of those things with respect to these plaintiffs. Nor have the plaintiffs alleged that the Governor is engaging or threatening to engage in such conduct.”162 Finally, the supreme court denied mandamus relief as to the order’s application to the Commissioner of the DFPS and the DFPS conduct with respect to these plaintiffs while the appeal is pending.163 The supreme court’s partial grant of mandamus relief “left” the following intact:

(1) a court of appeals order that protects only the plaintiffs as against DFPS and its Commissioner’s actions, and not as against the Governor;
(2) a nonbinding Attorney General Opinion; (3) a nonbinding statement by the Governor; and (4) a state agency, DFPS, with the same discretion to investigate reports of child abuse that it had before issuance of OAG Opinion No. KP-0401 and the Governor’s letter.164

The supreme court cited In re Geomet Recycling LLC as mandamus authority.165

2. In re Younger166

A pro se relator sought mandamus relief from the Texas Supreme Court respecting a “child custody dispute involving twin boys . . . .”167 The supreme court denied relief without opinion, but Justice Blacklock, joined

160. Id. at 279–80 (emphasis added).
161. Id. at 279, 282–83.
162. Id. at 283.
163. See id.
164. Id. at 284.
165. See id. at 282 (citing In re Geomet Recycling LLC, 578 S.W.3d 82, 91 (Tex. 2019) (orig. proceeding)).
166. 659 S.W.3d 453 (Tex. 2022) (orig. proceeding) (mem. op.).
167. Id. at 453.
by Justice Boyd, filed a concurring opinion. That opinion supplied the factual context of the case.

The controversy was about one of those children who “exhibited confusion about his gender.” The mother had custody of the children and she moved to California, which was authorized under the trial court’s order. The father, as the relator, claimed the “mother’s move to California will bring about the medical ‘transitioning’ of his son.”

Relator contended the move to California was of concern because of “California’s enactment of Senate Bill 107 which was scheduled to go into effect on January 1, 2023.” According to the concurrence, that new statute was described by one of its lead authors as a “‘trans refuge’ bill designed in part to respond to ‘executive and legislative action in Texas’” that purports to bar “enforcement in California of ‘a law of another state’ or ‘another state’s law’ that prohibits ‘gender-affirming health care.’” However, the concurring justices opined that the trial court’s order is not what the California legislature calls “the law of another state.” Rather, that provision does not alter the enforceability of a court order from another state. Accordingly, the concurrence noted that the supreme court “cannot intervene based on tenuous speculation about what other courts might do in the future at the request of a party who may never ask.” Further, the concurrence presented a hypothetical case scenario and signaled that “[t]hat case might raise important questions about whether medically or surgically ‘transitioning’ a child against the wishes of a fit parent can ever be in the child’s best interests.”

Although the supreme court did not say so, the fact that the relator waited to file his petition until three months after the district court authorized the move to California must have demonstrated the absence of urgency to his claims. The concurrence did not address the elements of mandamus relief.

G. Elections

1. Ballot Qualifications

   a. In re Anthony

   The city secretary for the City of West Lake Hills rejected Linda Anthony’s application for a place on the ballot for mayor of the city

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168. See id.
169. See id. at 453–54.
170. Id. at 453.
171. Id.
172. Id.
173. Id.
174. Id. at 453–54.
175. Id. at 454.
176. See id.
177. Id. at 455–56.
178. Id. at 456.
179. 642 S.W.3d 588 (Tex. 2022) (per curiam).
because it left blank the “occupation box.” The city secretary’s rejection of Anthony’s application was based on a challenge by Anthony’s opponent in the election that claimed Anthony’s application did not comply with Texas Election Code § 141.031(4)(B), which requires a candidate for public office to “include . . . the candidate’s occupation” in the application for a place on the ballot. According to the city secretary, she had no discretion in the matter since the “occupation box” was left blank.

Anthony filed a petition for writ of mandamus claiming she had complied with § 141.031(4)(B) because she is retired, she is currently serves as the unpaid mayor of West Lake Hills, and leaving the “occupation box” blank complies with the Election Code. Anthony’s opponent, Taylor, as real party in interest, responded to Anthony’s claim by arguing that accurate occupation information assists voters in researching and assessing a candidate’s qualifications and its disclosure promotes campaign finance transparency. Further, Taylor claimed leaving the box blank requires voters to guess the candidate’s occupation and may confuse them. Also, Taylor asserted Anthony understood the requirement because when she filed responses to the occupation question on her earlier applications for office, she filled in the blank with the word “retired.” Finally, accordingly to Taylor, Anthony could not cure the defect by amending after the deadline since recent Election Code amendments clarify that defective ballot applications cannot be cured after the filing deadline and the Texas Supreme Court’s authority allowing such amendments predates the code amendments.

In its analysis of the law, the Texas Supreme Court noted, “The Election Code does not define ‘occupation,’ and thus we interpret the term according to its ordinary meaning.” According to the supreme court, the common understanding of the term is compensated work. However, the supreme court cited two dictionary sources, but interestingly, only one supports their interpretation. On the one hand, the supreme court cited the American Heritage Dictionary, which defines occupation as “[a]n activity that serves as one’s regular source of livelihood; a vocation.” On the other hand, the supreme court cited the New Oxford American Dictionary, which does not define “occupation” as compensated work. As the supreme

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180. See id. at 588–89.
181. See id. at 589; TEX. ELEC. CODE ANN. § 141.031(4)(B).
182. In re Anthony, 642 S.W.3d at 589.
183. See id. at 590 (quoting TEX. ELEC. CODE ANN. § 141.031(4)(B)).
184. See id.
185. See id.
186. See id.
187. See id. at 589.
188. In re Anthony, 642 S.W.3d at 590 (citing Tex Dep’t of Crim. Just. v. Rangel, 595 S.W.3d 198, 208 (Tex. 2020)).
189. See id.
190. See id.
191. Id. (quoting Occupation, American Heritage Dictionary (5th ed. 2022)).
192. See id. (quoting Occupation, New Oxford American Dictionary (3d ed. 2010)).
court said, “[t]he New Oxford American Dictionary definition is blunt: ‘a job or profession.’”\textsuperscript{193} Certainly, that latter definition does not support the supreme court’s conclusion that the box would not require a statement respecting an uncompensated mayoral position.

Nevertheless, the supreme court granted mandamus relief reasoning that, if Anthony had “compensated work” and she left the box blank, then the application would not comply.\textsuperscript{194} However, Anthony’s earlier application that included the word “retired” in the box does “not bind her to supply an occupation that she does not have.”\textsuperscript{195} Further, the supreme court concluded, “Failure to comply with an application form’s request does not automatically translate into failure to comply with a statutory mandate. For an applicant with no occupation, leaving the occupation box blank is not the ideal way to convey that information, but it does not violate any statutory command.”\textsuperscript{196}

The supreme court noted that, in the past, it has granted equitable relief to allow a candidate to cure a deficient application after the deadline.\textsuperscript{197} However, in light of the statutory amendments prohibiting such a cure, the supreme court simply held that Anthony’s application is not defective.\textsuperscript{198} No traditional mandamus authority was cited.\textsuperscript{199}

2. Redistricting

\textit{a. In re Khanoyan}\textsuperscript{200}

The Texas Supreme Court denied mandamus relief on January 6, 2022, in this redistricting case.\textsuperscript{201} The relators claimed the majority of the Harris County Commissioners Court voted to redraw their own precincts and stagger elections of commissioners in order to increase the chances that one party will retain control of the court for the next decade.\textsuperscript{202} According to the supreme court, “[r]elators appear to argue that the Texas Constitution imposes an absolute duty, in the context of staggered elections, to eliminate or minimize the extent to which any voter must wait two years before again voting for a county commissioners.”\textsuperscript{203} However, the supreme court did

\begin{itemize}
\item \textsuperscript{193} Id. (quoting Occupation, New Oxford American Dictionary (3d ed. 2010)).
\item \textsuperscript{194} Id. at 591.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} See id. (citing In re Francis, 186 S.W.3d 534, 543 (Tex. 2006)).
\item \textsuperscript{198} See id.
\item \textsuperscript{199} The supreme court did cite other law on mandamus authority, stating, “We ‘may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election.”’ Id. at 589 (quoting TEX. ELEC. CODE ANN. § 273.061(a)). The supreme court also stated, “In a mandamus relating to an election proceeding, we must be careful to avoid undue interference with the electoral process and the people’s right to self-governance, including their choice of candidates.” Id. (citing In re Khanoyan, 637 S.W.3d 762, 763–65 (Tex. 2022) (orig. proceeding)).
\item \textsuperscript{200} 637 S.W.3d 762 (Tex. 2022) (orig. proceeding).
\item \textsuperscript{201} See id. at 762.
\item \textsuperscript{202} See id. at 763–64.
\item \textsuperscript{203} Id. at 767.
\end{itemize}
not directly explain whether the relators claimed that the Harris County Commissioner’s Court had an actual, nondiscretionary ministerial duty that the supreme court was being asked to enforce.\textsuperscript{204} Respondents claimed the commissioner’s court has substantial discretion in drawing the precinct lines, that “the reasons for drawing the lines as they did reflect rational considerations (like unifying rather than dividing ‘communities of interest’ within common precincts) and that, in any event, the supreme court lacks jurisdiction because no Relator has standing . . . .”\textsuperscript{205} In its opinion, the supreme court mused about the constitutional issues and advised that, while the issues raised have not been decided in Texas, other courts have rejected the claim that the temporary deferral of a voter’s ability to vote due to the redistricting of a staggered-term legislative body violates the voter’s constitutional rights.\textsuperscript{206} Further, the supreme court noted several reasons for not granting mandamus relief.\textsuperscript{207} Among them were that the primary election process was well underway when the petition was filed and that the filing period for candidates had ended on December 13, just twenty-four days before the Court issued its opinion on January 6.\textsuperscript{208} Also, the supreme court was concerned that any intervention in the redistricting process at this point would necessarily be disruptive of the election process.\textsuperscript{209} Finally, while stopping short of stating it had no authority to intervene in this case, the supreme court concluded that its authority to intervene in ongoing elections is sharply limited.\textsuperscript{210} It appears the supreme court’s musings about the issues involved in redistricting and staggering of elections were intended to leave open the issues for future litigation since it said:

Our decision implies no endorsement, affirmation, or other view of the redrawn map of precincts challenged here. Nor do we suggest that mandamus would never be an appropriate vehicle to resolve this question or ones like it. Our narrow holding is that this mandamus petition, under the circumstances we describe below, cannot go forward under settled precedents that sharply limit judicial authority to intervene in ongoing elections.\textsuperscript{211} However, it is unclear why the supreme court did not simply address the elements of mandamus when it denied relief. The classic elements of a mandamus claim respecting what the supreme court alluded to as a ministerial duty are threefold: (1) there exists a legal duty to perform a

\begin{flushright}
\textsuperscript{204} See id. \\
\textsuperscript{205} Id. at 764. \\
\textsuperscript{206} See id. at 766–67. \\
\textsuperscript{207} See id. \\
\textsuperscript{208} See id. at 766. \\
\textsuperscript{209} See id. at 766–67. \\
\textsuperscript{210} See id. at 769. \\
\textsuperscript{211} Id. at 764.
\end{flushright}
non-discretionary act; (2) a demand for performance has been made; and (3) there has been a refusal to perform.  

In this case, the supreme court expressed concern (1) that the law did not support the claims being made by the relator—that the commissioners had a ministerial duty to conduct redistricting in a certain fashion; (2) that any action by the supreme court would disrupt the upcoming elections; and (3) that the record brought to the supreme court was “a bare record that contains only allegations—some of which are not disputed, but many of which are.”  

The supreme court concluded by saying, “Ordering the requested relief on the paltry record before this Court would be an irresponsible shot in the dark.”  

The holding in this case is more lucidly explained in subsequent cases. In Chief Justice Hecht’s dissent in Abbott v. Mexican American Legislative Caucus, Texas House of Representatives, he explained:

There we held that “for a court to resolve an election dispute, the court must receive the case early enough to order relief that would not disrupt the larger election.” The restraint in Khanoyan was not jurisdictional but prudential. The claims were justiciable, and the Court had power to intervene in the election but declined to exercise that power, lest the judicial relief do more harm than good.

The supreme court in that case did not address elements of mandamus respecting ministerial duties or discretionary duties.

3. Ballot Qualification

a. In re Self

Republican Party candidates brought an emergency mandamus action in August 2022 respecting the November 2022 general election wherein they sought to remove Libertarian Party candidates from the ballot because they did not pay the statutory filing fee in April when they filed. The Republicans contended that the Texas Election Code “requires [the] exclusion of the Libertarian candidates from the ballot.” The Libertarians responded saying the remedy “at this stage of the election process” was not to remove them from the ballot. However, the Texas

212. See Stoner v. Massey, 586 S.W.2d 843, 846 (Tex. 1979); Wortham v. Walker, 128 S.W.2d 1138, 1150 (Tex. 1939) (orig. proceeding) (“The law is well settled that mandamus will not lie to compel the performance of an act by an official unless his duty to perform the same is so clear and free from doubt as not to require the exercise of discretion on his part, and so that its performance amounts to a mere ministerial act.”), abrogated by Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).
213. In re Khanoyan, 637 S.W.3d at 766.
214. Id.
216. 652 S.W.3d 829 (Tex. 2022) (orig. proceeding) (per curiam).
217. See id. at 829.
218. Id.
219. Id.
Supreme Court denied the petition without resolving that dispute because “the Republicans’ petition [ ] does not comport with [its] recent instruction that ‘invoking judicial authority in the election context requires unusual dispatch.’”

What the supreme court appeared to mean by that statement was, since the relators were aware of the Libertarians’ failure to pay their filing fees since April, waiting until August—a few days before a deadline the relators claimed determined eligibility—would not merit equitable treatment since relators sought “at a late hour, to constrain the choices available to voters in an election.”

The supreme court concluded that “the emergency timeframe is entirely the product of avoidable delay in bringing the matter to the courts.” Accordingly, the “precedent is clear that judicial relief altering the conduct of an election is disfavored.”

In summary, based upon the holdings in In re Khanoyan, Mexican American Legislative Caucus, and In re Self: it is clear the supreme court will abstain from performing major reconstructive action in election processes without a party having sought relief with substantial time available in advance of an election.

4. Mail-In Ballots

a. In re Hotze

The Texas Supreme Court denied mandamus relief without an opinion. The controversy was about the Harris County Elections Administrator, Isabel Longoria, having mass-mailed unsolicited vote-by-mail applications to registered voters in advance of Harris County’s November 2021 municipal elections. Justice Blacklock, joined by Justice Young, filed a concurring opinion. Justice Devine dissented.

The concurring and dissenting opinions supplied the factual context of the case. However, Justice Devine contends that mandamus relief is in order “because (1)
our opinion in State v. Hollins is controlling; (2) Longoria’s standing and mootness arguments lack merit; and (3) the repeated pattern of noncompliance with the law by Harris County’s election officials affects local, state, and national elections.” Justice Devine continued, saying, “The integrity of the election process—both in fact and in appearance—is critical to ensuring public confidence in the results of an election.” He concluded by contending that even though the 2021 election was long over with, relief was necessary in this cases since, in his view, “this ultra vires action is capable of recurrence.”

H. Required Review of Mandamus Arguments by Courts of Appeals

1. In re Brown

Zack Brown sued FedEx for injuries sustained when his motorcycle collided with a FedEx delivery truck. Brown caused a subpoena to be issued for trial to compel the trial appearance “of ‘a] Corporate Representative for FedEx Ground Package System, Inc.’ living within 150 miles of the Harris County Courthouse,” FedEx moved to quash the subpoena[,]” asserting that “[t]here is no legal authority for compelling a corporate representative of a party to attend trial and testify,” other than through taking a representative’s oral deposition under Texas Rule of Civil Procedure 199.” Brown argued Rule 176.2(a) permits the service of a trial subpoena upon a corporate representative. The trial court denied FedEx’s motion to quash. FedEx sought mandamus relief, which was granted by the court of appeals. That court agreed with FedEx’s position that Rule 199 did not authorize compelling a corporate representative to appear at trial. The court of appeals analogized Rule 199 with Federal Rule of Civil Procedure 30(b)(6), which it believed was widely interpreted by federal courts to exclude the power to subpoena a corporate representative for trial. However, the court did not address Brown’s argument that Rule 176 confers that authority.

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232. Id. at 415 (Devine, J., dissenting) (citing State v. Hollins, 620 S.W.3d 400, 410 (Tex. 2020) (per curiam) (holding that the Texas Election Code does not authorize an “early-voting” county clerk to send an application to vote by mail to a voter who has not requested one)).
233. Id.
234. Id. at 420.
235. 653 S.W.3d 721 (Tex. 2022) (per curiam).
236. See id.
237. Id. at 721.
238. Id.
239. See id.
240. Id.
241. See id. at 721–22.
242. See id. at 722.
243. See id. at 721–22.
244. See id. at 722.
Without deciding whether the court of appeals decided correctly as to its interpretation of Rule 199, the Texas Supreme Court held the court of appeals erred in quashing a corporate-representative trial subpoena as lacking authority under Rule 199 “without addressing whether Rule 176 applies and examining the proper scope of that rule in the trial context.” Accordingly, without hearing oral argument, the supreme court conditionally granted the petition for a writ of mandamus in part and directed the court of appeals to vacate its order granting relief quashing Brown’s trial subpoena. The basis for the supreme court’s decision was that the court of appeals must hand down an opinion, as in any other case, by addressing “every issue raised and necessary to final disposition of the appeal.”

It is somewhat perplexing that the supreme court directed the court of appeals to analyze Rule 176 as opposed to simply disposing of that issue itself. By sidestepping the issue, the supreme court likely constructed a path for one of the parties to again visit it. The cases are legion wherein the supreme court decided to dispose of issues that could have been sent back to the court of appeals or trial court.

I. The Tim Cole Act

1. In re G.S.

This Tim Cole Act case addresses whether an applicant for compensation established his “actual innocence.” The Texas Supreme Court denied the petition for writ of mandamus whereby G.S. claimed he had made a meritorious submission to the Comptroller of Public for compensation as a person who has proven his actual innocence. There are three different means by which one can prove entitlement to compensation under the Tim Cole Act:

(1) the claimant “has received a full pardon on the basis of innocence for the crime for which the person was sentenced,” (2) the claimant “has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced,” or (3) the trial court dismissed the charge against the claimant “based

245. Id. at 722.
246. See id.
247. Id. (citing TEX. R. APP. P. 471 and Cardwell v. Whataburger Rests. LLC, 484 S.W.3d 426, 428 (Tex. 2016) (per curiam)).
248. See, e.g., In re Whataburger Restaurants LLC, 645 S.W.3d 188 (Tex. 2022); In re Contract Freighters, Inc., 646 S.W.3d 810 (Tex. 2022) (orig. proceeding) (per curiam).
250. 644 S.W.3d 160 (Tex. 2022) (orig. proceeding).
251. Id. at 162; see also TEX. CIV. PRAC. & REM. CODE ANN. § 103.001.
252. See id.
on a motion to dismiss in which the state’s attorney states that no
credible evidence exists that inculpates the defendant and . . . the
state’s attorney believes that the defendant is actually innocent of the
crime for which the person was sentenced.”253

The supreme court concluded the first means of proof—a pardon—was
not presented.254 As to the second means, the supreme court concluded
G.S. did not qualify because, although the Court of Criminal Appeals
granted his petition for writ of habeas corpus, the basis of that decision
was solely ineffective assistance of counsel.255 G.S. did not claim “actual
innocence.”256 Hence, he did not satisfy that requirement.257 The third
means of qualifying was not met either.258 The district court dismissed
G.S.’s case based on the district attorney’s motion, but “the motion
stated only that the district attorney wished to dismiss ‘pending further
investigation.”259 Rather, in order to meet the requirements of the Tim Cole
Act, “the district attorney must both acknowledge the lack of evidence and
state his own belief that the claimant is actually innocent.”260

It is obvious that the supreme court was not sanguine with the result,
but it denied relief based on the clear language of the statute.261 In Justice
Lehrmann’s concurrence, she urged the legislature to revisit the Tim Cole
Act since, in her opinion, the statutory language is insufficient to allow
compensation for all those who are wrongfully imprisoned for a crime in
which those people did not commit.262

In a footnote, the supreme court did identify a path whereby G.S. might
obtain compensation.263 Although it said it expressed no opinion on whether
G.S. can prove his eligibility, the supreme court cited the Comptroller’s
suggestion that G.S. could yet qualify for compensation:

by convincing the district attorney to file a motion to amend the trial
court’s dismissal order in which the district attorney satisfies the third
eligibility method,. . .by petitioning the legislature for a private bill,. . .or
by seeking an amendment to the Act. None of these alternatives are
relevant to our disposition in this case, and we do not pass judgment on
their viability [to compensate those wrongfully imprisoned].264

Of course, the full story of G.S.’s efforts will unfold in the future.

254. See id. at 164.
255. See id. at 165–66.
256. Id. at 166.
257. See id.
258. See id. at 166–67.
259. Id. at 166 (quoting Tex. Civ. Prac. & Rem. Code § 103.001(a)(2)(C)(ii)).
260. Id.
261. See id. at 166–67.
262. See id. at 167 (Lehrmann, J., concurrence).
263. See id. at 167 n.5.
264. Id. (citing Act of May 23, 1957, 55th Leg., R.S., ch. 496, § 1, 1957 Tex. Gen. Laws
1429, 1438).
V. MANDAMUS AUTHORITIES CITED BY THE TEXAS SUPREME COURT

As indicated above, the supreme court’s approach to the analysis of the merits of mandamus petitions appears to give little attention to the foundational In re Prudential case. While some of the cases cited as mandamus authority may be based in substantial part on In re Prudential, it would be reassuring to practitioners, and perhaps intermediate court of appeals, if the case’s analytical parameters were strongly reaffirmed. As of now, 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.

266. See id.
### APPENDIX B

<table>
<thead>
<tr>
<th>Mandamus Authority Cited</th>
<th>Opinion</th>
<th>Subject Matter of Case &amp; Trial Court Action Addressed</th>
<th>Mandamus Disposition</th>
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<tr>
<td><strong>Walker v. Packer,</strong> 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); Proffer v. Yates, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (per curiam) (“Justice demands a speedy resolution of child custody and child support issues.”).</td>
<td>In re Ayad, 655 S.W.3d 285 (Tex. 2022) (per curiam).</td>
<td>Relator sought to compel trial court to address his defenses to arbitration pursuant to “Islamic Pre-Nuptial Agreement.”</td>
<td>Supreme Court (SCOTUS) granted relief holding the trial court abused its discretion by failing to address defenses raised by relator. The trial court concluded it could not consider defenses to arbitration because of Family Code §§ 6.6015(a), 153.00715 (a). However, SCOTX disagreed.</td>
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<td><strong>In re Allstate Indem. Co.,</strong> 622 S.W.3d 870, 875 (Tex. 2021) (citing In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)).</td>
<td>In re Whataburger Restaurants LLC, 645 S.W.3d 188 (Tex. 2022).</td>
<td>Because district clerk failed to send notice of the trial court’s denial of motion to compel arbitration, relator sought relief allowing it to pursue an interlocutory appeal out of time or for SCOTX to determine the trial court erred in deciding the arbitration policy was illusory.</td>
<td>Mandamus granted. SCOTX determined the district clerk violated its ministerial duty to timely send notice, so relator had no adequate remedy by appeals since the twenty-day period for filing notice of interlocutory appeal had lapsed. Accordingly, SCOTX addressed the merits of the trial court decision, concluding the trial court erred when it found the arbitration policy was illusory.</td>
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<td><em>In re</em> Christianson Air Conditioning &amp; Plumbing, LLC, 639 S.W.3d 671 (Tex. 2022) (citing <em>In re</em> Turner, 591 S.W.3d 121, 124 (Tex. 2019)).</td>
<td><em>In re</em> Breviloba, LLC, 650 S.W.3d 508, 513 (Tex. 2022) (per curiam).</td>
<td>In a condemnation case, relator claimed the court of appeals erred when it determined the trial court should have granted a motion to transfer a counter-claim filed in a condemnation case. SCOTX determined the trial court did not abuse its discretion, but the court of appeals erred.</td>
<td>Mandamus granted.</td>
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<td><em>In re</em> Prudential Ins. Co. of Am., 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding)).</td>
<td><em>In re</em> YRC, Inc., 646 S.W.3d 805 (Tex. 2022) (orig. proceeding) (per curiam)</td>
<td>Responsible third-party designation denied by trial court. Tex. Civ. Prac. &amp; Rem. Code Ann. § 33.004.</td>
<td>Mandamus granted. After the trial court denied the motion, one of the defendants filed a mandamus petition in the court of appeals, which denied relief in a non-substantive opinion. SCOTX ruled the motion to designate was timely filed more than sixty days before the then-pending trial date, and concluded the pleadings sufficiently stated the facts. In addition, SCOTX held there was no applicable limitations period to join the third-party employer as a defendant because plaintiff’s exclusive remedy—which he successfully pursued—was workers’ compensation.</td>
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<td><em>In re</em> Nat’l Lloyds Ins. Co., 449 S.W.3d 486, 488 (Tex. 2014) (per curiam) (citing <em>In re</em> Deere &amp; Co., 299 S.W.3d 819, 820 (Tex. 2009) (per curiam)).</td>
<td><em>In re</em> Contract Freighters, Inc., 646 S.W.3d 810, 814 (Tex. 2022) (orig. proceeding) (per curiam).</td>
<td>Plaintiffs requested records of any accidents in which the defendant had been involved in the past five years. Request withdrawn at SCOTX. Plaintiff said was moot.</td>
<td>SCOTX decided case was not moot even though request was withdrawn because the plaintiff could repeat the request later. The request was too broad. Mandamus granted.</td>
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<td>In re Geomet Recycling LLC, 578 S.W.3d 82, 91 (Tex. 2019) (orig. proceeding) (citing In re Ford Motor Co., 988 S.W.2d 714, 718 (Tex. 1998); Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding)).</td>
<td>In re Abbott, 645 S.W.3d 276 (Tex. 2022) (orig. proceeding).</td>
<td>Injunction granted by court of appeals to maintain the status quo during appeal as to Texas investigations of “gender-affirming” care.</td>
<td>Mandamus partially granted. Court of appeals had no authority to enjoin governor and “any and all persons.” Denied as to the injunction maintaining the status quo during the appeal.</td>
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<td>Tex. Elec. Code Ann. § 273.061(a) (mandamus to compel duty under code); Tex. Dep’t of Crim. Just. v. Rangel, 595 S.W.3d 198, 208 (Tex. 2020) (interpreting statute terms by ordinary meaning).</td>
<td>In re Anthony, 642 S.W.3d 588 (Tex. 2022) (per curiam).</td>
<td>Compliance with candidate election application requirement. Tex. Elec. Code Ann. § 141.031(4) (B) (must include applicant’s occupation). City secretary rejected application.</td>
<td>SCOTX issued mandamus relief holding that, because applicant was retired, she could comply by leaving the “occupation box” blank even though she currently served as mayor of the city which was an unpaid position.</td>
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<td><em>In re</em> Hotze, 627 S.W.3d 642, 645–46 (Tex. 2020) (mem. op.) (‘[C]ourt changes of election laws close in time to the election are strongly disfa-vored.’) (lacking discussion of the elements of ministerial duty or discretionary duty not addressed).</td>
<td><em>In re</em> Khanoyan, 637 S.W.3d 762, 765 (Tex. 2022) (orig. proceeding).</td>
<td>Redistrict-ing. Rela-tor claimed County Com-missioners gerryman-dered district lines to assure Democrat control.</td>
<td>SCOTX denied relief holding Commissioners’ Court had “discretion” to redraw lines. The redrawing reflected rational considera-tions “like unifying rather than dividing ‘communities of inter-est’ within common precincts.”</td>
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<td><em>In re</em> Khanoyan, 637 S.W.3d 762, 764-67 (Tex. 2022) (orig. pro-ceeding) (lacking any citation to traditional mandamus cases)</td>
<td><em>In re</em> Self, 652 S.W.3d 829, 829-30 (Tex. 2022) (orig. pro-ceeding) (per cu-riam).</td>
<td>Action to remove Lib-ertarian candi-dates from ballot for failure to pay filing fees.</td>
<td>Mandamus denied. SCOTX held relators waited too long, until the eve of deadline for filing, because “invoking judicial authority in the election context requires unusual dis-patch.”</td>
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<td>State v. Hollins, 620 S.W.3d 400, 410 (Tex. 2020) (per curiam) (lacking any citation to tradi-tional mandamus cases).</td>
<td><em>In re</em> Hotze, 643 S.W.3d 413, 413–19 (Tex. 2022) (mem. op.).</td>
<td>Relators claimed send-ing of unso-licited mail-in ballots was illegal.</td>
<td>Mandamus denied. Justices Blacklock and Justice Boyd concurred stating SCOTX was not requested to expedited consideration. The de-cision was too late to affect the final result of the 2021 election. Justice Devine dissented arguing the issue of lega-lity must be decided since it is likely those actions of election clerks will reoccur.</td>
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<td>TEX. R. APP. P. 471; Cardwell v. Whataburger Rests, LLC, 484 S.W.3d 426, 428 (Tex. 2016) (per curiam) (lacking citation to traditional mandamus cases).</td>
<td><em>In re</em> Brown, 653 S.W.3d 721, 722 (Tex. 2022) (per curiam).</td>
<td>Relator claimed trial subpoena to compel appearance of designated corporate representative of defendant was not authorized by Rule 176.</td>
<td>Denied and remanded to court of appeals to consider applicability of Rule 176 which it failed to address in its earlier review. A court of appeals “must address ‘every issue raised and necessary to final disposition[.]’”</td>
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<td>TEX. CIV. PRAC. &amp; REM. CODE ANN. § 103.051(c); TEX. GOV’T CODE ANN. § 22.002(c).</td>
<td><em>In re</em> G.S., 644 S.W.3d 160 (Tex. 2022) (orig. proceeding).</td>
<td>Relator claimed entitlement to compensation for “actual innocence” under the Tim Cole Act.</td>
<td>Mandamus denied. Disposition of relator’s earlier wrongful conviction did not meet the standards for compensation under Act. SCOTX cited an alternative means for compensation by a special legislature appropriation. Justice Lehrmann concurred, suggesting the legislature amend the statute to assure compensation for those who have been wrongfully convicted.</td>
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<td>No mandamus authorities cited.</td>
<td>In re Younger, 659 S.W.3d 453 (Tex. 2022) (orig. proceeding) (mem. op.).</td>
<td>Pro se relator sought mandamus to compel the trial court to order a child’s return to Texas after the child exhibited gender confusion and the mother moved the child to California.</td>
<td>Mandamus denied. The concurrence considers scenarios that might warrant mandamus relief.</td>
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VI. CONCLUSION

In the recent past, and even now, it has become common for the Texas Supreme Court to cite mandamus authorities other than In re Prudential or, as in two cases during this Survey period, not cite any mandamus authorities.\textsuperscript{267} While the supreme court has demonstrated its flexibility in determining whether mandamus relief should be granted, the above-described practice has created some uncertainty about which authorities should guide counsel. What is clear, however, is the rubric stated in the Prudential case. Although not “abstract or formulistic,” the Prudential standard “is practical and prudential” and it offers “flexibility” which is “the remedy’s principal virtue.”\textsuperscript{268}

Clear guidance by our appellate courts with citations to settled authorities is always needed. Without such guidance, counsel—and perhaps the intermediate appellate courts of Texas—may face some uncertainty when considering arguments on appeal.\textsuperscript{269}


\textsuperscript{269} 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).