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Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available

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COMMENTS

THE EXPANDING USE OF MANDAMUS TO REVIEW TEXAS DISTRICT COURT DISCOVERY ORDERS: AN IMMEDIATE APPEAL IS AVAILABLE

by Tim Gavin

Pursuant to a constitutional grant of power to "confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus,"[1] the Texas Legislature enacted article 1733, which provides:

> The Supreme Court or any Justice thereof, shall have power to issue writs of procedendo, certiorari and all writs of quo warranto or mandamus agreeable to the principles of law regulating such writs, against any district judge, or Court of Civil Appeals or judges thereof, or any officer of the State Government, except the Governor.[2]

This expansive authority to issue writs of mandamus against district judges enables the Texas Supreme Court to review immediately discovery orders that are entered in state district courts. The mandamus power of the courts of civil appeals is much more restricted, being limited to enforcing the court's jurisdiction[3] or compelling a "judge of the District or County Court to proceed to trial and judgment in a cause."[4] Consequently, a party desiring immediate relief from an erroneous discovery order must seek a writ of mandamus from the supreme court rather than from the court of civil appeals.[5]

Principles of law governing writs of mandamus embody common law requirements that the writ will issue only if no adequate remedy at law is available[6] and that the writ will be used only to correct a void, as opposed to a merely erroneous, order.[7] An order is void if it violates the constitu-

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1. TEX. CONST. art. V, § 3.
2. TEX. REV. CIV. STAT. ANN. art. 1733 (Vernon 1962).
3. *Id.* art. 1823 (Vernon 1964).
4. *Id.* art. 1824.
5. Johnson v. Court of Civil Appeals, 162 Tex. 613, 350 S.W.2d 330 (1961) (courts of civil appeals lack the power to issue a writ of mandamus to correct a trial court's abuse of discretion); Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959). The procedure to be followed in seeking a writ of mandamus from the Texas Supreme Court is delineated in TEX. R. CIV. P. 474. The party seeking the writ must present to the clerk a petition setting forth the grounds for relief, a motion for leave to file the petition, and any written argument he desires to submit. The court may require that the opposing party be allowed to reply, or in the alternative, if the court concludes that no reply is necessary, it may act upon the motion immediately. Once the motion is granted, the petition is filed and the cause is placed upon the court's docket.
6. *See* notes 12-35 *infra* and accompanying text.
7. Neville v. Brewster, 163 Tex. 155, 352 S.W.2d 449 (1961). The supreme court in State Bd. of Ins. v. Betts, 158 Tex. 83, 308 S.W.2d 846 (1958), clearly indicated that it would

tional rights of an individual,[8] is issued by a court that is without jurisdiction,[9] or is the result of a clear abuse of discretion.[10] In order to explain the Texas Supreme Court's attitude toward the use of mandamus to control the discretion of trial courts in discovery proceedings, this Comment traces the evolution of the supreme court's refusal to issue the writ when adequate relief is offered by appeal and when the district judge has not been guilty of a clear abuse of discretion. The court's recent applications of these two principles in the discovery context are then examined, and the potential problems posed by the court's current attitude are explored.[11]

I. ADEQUACY OF RELIEF BY APPEAL

The refusal of the Texas Supreme Court to issue writs of mandamus in cases in which a party can obtain adequate relief by appeal is but one example of the well-established bar to the writ's use when the law provides another complete remedy.[12] Although discovery orders are interlocutory and hence not immediately appealable,[13] the trial judge's rulings on discovery motions can be assigned as error in an appeal from the final decison on the merits of the case.[14] In many instances this traditional appellate procedure provides adequate relief from an erroneous ruling on a discovery motion.

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not use its mandamus power to correct every error made by the trial court. In that case the supreme court refused to interfere with the district judge's appointment of an attorney as the statutory receiver of an insurance company, stating: "If an exercise of discretion by the district judge be involved this Court may not assert its original jurisdiction to enforce its own judgment, even though the actions of the district judge may have been improvident or otherwise erroneous." *Id.* at 85, 308 S.W.2d at 848.

8. *Ex parte* Henry, 147 Tex. 315, 215 S.W.2d 588 (1948).

9. State v. Ferguson, 133 Tex. 60, 125 S.W.2d 272 (1939) (district judge had no authority to enter an order interfering with the enforcement of a valid state statute).

10. *See* notes 36-55 *infra* and accompanying text. Pope v. Ferguson, 445 S.W.2d 950 (Tex. 1969), *cert. denied*, 397 U.S. 997 (1970), contains an informative discussion of the "principles and usages of law" concerning writs of mandamus. A detailed analysis of these principles is found in Norvell & Sutton, *The Original Writ of Mandamus in the Supreme Court of Texas*, 1 ST. MARY'S L.J. 177 (1969). *See also* Sales & Cliff, *Jurisdiction in the Texas Supreme Court and Courts of Civil Appeals*, 26 BAYLOR L. REV. 501 (1974).

11. Although this Comment examines only the use of mandamus to control the discretion of district courts in discovery proceedings, standards concerning the use of mandamus are uniformly applied to all factual situations. Accordingly, guidelines set by the Texas Supreme Court concerning the use of mandamus to control the exercise of discretion are applied to proceedings brought in district court and supreme court alike, regardless of whether public officials or lower tribunals are involved. *See* Alice Nat'l Bank v. Edwards, 383 S.W.2d 482 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.) (principles established by the supreme court to govern the use of mandamus against district judges also govern the use of the writ by district courts against county judges).

12. State v. Sewell, 487 S.W.2d 716 (Tex. 1972); Aycock v. Clark, 94 Tex. 375, 60 S.W. 665 (1901); Screwmen's Beneficial Ass'n v. Benson, 76 Tex. 552, 13 S.W. 379 (1890).

13. Southern Bag & Burlap Co. v. Boyd, 120 Tex. 418, 38 S.W.2d 565 (1931). In Thompson v. Republic Small Business Inv. Co., 464 S.W.2d 726 (Tex. Civ. App.—Dallas 1971, no writ), the court held that an order for discovery relating to a pending action is interlocutory and not appealable except as a final appeal of the main action, but that an order for discovery after judgment in an independent suit by a judgment creditor seeking to discover assets upon which to levy execution is final and appealable.

14. Equitable Trust Co. v. Jackson, 129 Tex. 2, 101 S.W.2d 552 (1937); Dallas Joint Stock Land Bank v. Rawlins, 129 S.W.2d 485, 486 (Tex. Civ. App.—Dallas 1939, no writ).

Aycock v. Clark[15] is an early Texas Supreme Court decision holding that the existence of an adequate remedy by way of appeal precluded the use of mandamus. The relator[16] in *Aycock* sought a writ of mandamus ordering the district court to change its decision and enter the judgment that the relator believed to be mandated by the jury's findings.[17] The supreme court refused to issue a mandamus order, concluding that an appeal from the judgment would afford adequate relief. Moreover, the court stated that once "the trial judge has entered a judgment, . . . we are without power in this proceeding to correct that judgment, *even if erroneous*."[18]

Broad dicta in several supreme court opinions, if taken literally, would debilitate the ban on using mandamus when adequate relief is available by way of appeal. In *Cleveland v. Ward* the court stated:

> To supersede the remedy by mandamus authorized by the organic law and specially provided by statute . . . there must exist, not only a remedy by appeal, but the appeal provided for must be competent to afford relief on the very subject matter of the application, *equally convenient, beneficial, and effective as mandamus*.[19]

Requiring the relief available by appeal to be as convenient as mandamus could be interpreted as sanctioning the use of mandamus in all cases in which the judge has entered an erroneous ruling on a discovery motion; a remedy that must await the completion of the trial is clearly less convenient than immediate review. The statement in *Cleveland*, however, was wholly unnecessary to the decision. In that case two courts in different counties assumed jurisdiction of separate causes of action involving the same facts and parties. Injunctions issued by each of the district courts and writs of mandamus from the two separate courts of civil appeals having jurisdiction resulted in a judicial stalemate.[20] The Texas Supreme

15. 94 Tex. 375, 60 S.W. 665 (1901).

16. The party who seeks a writ of mandamus in an original proceeding in an appellate court is referred to as the relator and the opposing party is referred to as the respondent.

17. The plaintiffs brought an action to recover damages and enjoin the further operation of a railroad that carried freight along the streets in San Antonio adjacent to certain lots owned by the plaintiffs. Although the jury awarded the plaintiffs damages, the trial court declined to issue the requested injunction, and the supreme court refused to interfere by way of its mandamus power.

18. 94 Tex. at 378, 60 S.W. at 666 (emphasis added).

19. 116 Tex. 1, 14, 285 S.W. 1063, 1068 (1926) (emphasis added; citation omitted).

20. The initial suit was filed in Johnson County, seeking the cancellation of certain notes so as to remove the cloud that they cast over the title to plaintiffs' land. Six days later the defendants in the Johnson County litigation (hereinafter referred to as defendants) brought suit on the promissory notes in Dallas County. The district judge in Johnson County enjoined the Dallas court from proceeding. The defendants then sought a writ of mandamus from the Dallas court of civil appeals prohibiting the plaintiffs and the district judge from continuing the suit in Johnson County and ordering the Dallas County district judge to proceed to trial and judgment. The Dallas court issued the writ in order to enforce its jurisdiction over the Dallas County litigation. *See* notes 3-4 *supra* and accompanying text. The plaintiffs then obtained a writ of mandamus from the Fort Worth court of civil appeals, which had jurisdiction over Johnson County, prohibiting the defendants and the district judge from continuing the suit in Dallas County and ordering the judge in Johnson County to proceed to trial and judgment. The supreme court ordered the Johnson County judge, in whose court the first suit had been filed, to proceed to trial and judgment and prohibited the Dallas court from taking any further action.

Court issued a writ of mandamus compelling one court to proceed to trial and prohibiting further proceedings in the other court, noting that "[t]he relief which might be granted in any appeal of the defendants in the Dallas county case to the Court of Civil Appeals at Dallas is *wholly inadequate* to grant any substantial relief to anyone, or untangle the instant judicial troubles."[21]

The language in *Cleveland* requiring that appeal be "equally convenient" as mandamus has been quoted by the Texas Supreme Court as authority for the issuance of the writ in only three subsequent cases.[22] *Way v. Coca Cola Bottling Co.*[23] involved a fact situation quite similar to that of *Cleveland*,[24] and *Fulton v. Finch*[25] contained a careful explanation of why relief by appeal was not only inconvenient but wholly inadequate.[26] Moreover, the issuance of the writs in *Way* and *Fulton* were premised on article 1734, a separate statutory provision that authorizes the supreme court to order a district court to proceed to trial and judgment.[27] The supreme court has indicated that writs of mandamus are issued more freely pursuant to article 1734 because its enactment by the Texas Legislature provides a specific remedy for a trial court's refusal to proceed to trial and judgment,[28] a remedy that arguably is intended to replace an appeal.

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21. 116 Tex. at 15-16, 285 S.W. at 1069 (emphasis added).

22. Fulton v. Finch, 162 Tex. 351, 346 S.W.2d 823 (1961); Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959); Way v. Coca Cola Bottling Co., 119 Tex. 419, 29 S.W.2d 1067 (1930).

23. 119 Tex. 419, 29 S.W.2d 1067 (1930).

24. The plaintiffs in *Way* brought an action on a note against an individual believed to be doing business as the Coca Cola Bottling Co. who actually had signed the note on behalf of the corporate Coca Cola Bottling Co. As soon as plaintiffs were notified of the corporation's existence, they amended their petition, adding Coca Cola as a defendant. Coca Cola then instituted an action involving the same controversy in another county. Each party sought an injunction in the district court in which he filed his action, requesting that the judge in the other court be enjoined from continuing with the pending suit. The supreme court quoted extensively from *Cleveland* in deciding that mandamus was the only possible means of settling the controversy.

25. 162 Tex. 351, 346 S.W.2d 823 (1961).

26. The judge in *Fulton* granted plaintiffs' motion for a new trial, but after the forty-five-day period for ruling on original and amended motions for new trials had passed, TEX. R. CIV. P. 329b, he set aside his order. Plaintiffs sought a writ of mandamus in the court of civil appeals ordering the trial judge to proceed to trial and judgment, see note 4 *supra* and accompanying text, but their request was denied. Plaintiffs then obtained a writ from the supreme court pursuant to its art. 1734 power. *See* note 27 *infra*. Although the proceedings in both the court of civil appeals and the supreme court were original mandamus proceedings, by issuing the writ the supreme court, in effect, reversed the decision of the court of civil appeals.

The supreme court held that an appeal would not provide an adequate remedy because the ultimate relief sought was disposal of the lawsuit in the trial court. An appeal would establish that the order on which the judge based his refusal to act was void, but would not guarantee that he would proceed to trial and judgment. Mandamus was required to accomplish this ultimate objective.

27. TEX. REV. CIV. STAT. ANN. art. 1734 (Vernon 1962) provides:

> Said [Supreme]Court or any judge thereof in vacation may issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause agreeably to the principles and usages of law, returnable to the Supreme Court on or before the first day of the term, or during the session of the same, or before any judge of the said court as the nature of the case may require.

28. 162 Tex. at 356-57, 346 S.W.2d at 829-30.

In *Crane v. Tunks*[29] the supreme court quoted the *Cleveland* dictum in connection with the issuance of the writ pursuant to the court's general article 1733[30] mandamus power. Nevertheless, the court discussed the total inadequacy of appellate relief at length rather than relying on the literal *Cleveland* language that would authorize relief by mandamus whenever appellate review is inconvenient.[31]

The supreme court rejected the *Cleveland* "inconvenience" dictum in *Iley v. Hughes*,[32] stating unequivocally that the inconvenience caused by an otherwise adequate appeal would not justify the use of mandamus. The jury in *Iley* determined that the defendant in a civil assault case was liable for the assault, but was unable to agree upon the proper amount of damages. The trial court ordered a separate trial of the damage issue, a ruling that the supreme court considered erroneous. Nevertheless, the supreme court refused to issue the writ because an adequate remedy was available by appeal. Responding to the relator's contention that he would suffer substantial hardship if required to participate in a trial on the issue of damages before the trial court's error was corrected, the supreme court stated that the "delay in getting questions decided through the appellate process, or . . . [the] court costs [that] may thereby be increased, will not justify intervention by appellate courts through the extraordinary writ of mandamus. Interference is justified only when parties stand to lose their *substantial rights*."[33] The supreme court, therefore, will not issue a writ of mandamus if an adequate remedy is available by way of appeal, and under *Iley*, the appellate process is inadequate only when the substantial rights of a party are threatened.[34] This substantial rights requirement, which calls for a much more limited use of mandamus than the *Cleveland* dictum, is consistent with the characterization of mandamus as an extraordinary remedy that is to be used only as a last resort.[35] Since the delay and additional expense incident to every appeal do not deprive a party of any substantial rights, application of the *Iley* analysis would bar the use of mandamus to review most discovery rulings.

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29. 160 Tex. 182, 328 S.W.2d 434 (1959).

30. TEX. REV. CIV. STAT. ANN. art. 1733 (Vernon 1962). This article is quoted in the text accompanying note 2 *supra*.

31. The *Crane* case is discussed in detail in the text accompanying notes 60-66 *infra*.

32. 158 Tex. 362, 311 S.W.2d 648 (1958).

33. *Id.* at 368, 311 S.W.2d at 652 (emphasis added).

34. The substantial rights standard controlled the court's decision in Hamilton v. Gregory, 482 S.W.2d 287 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ), which upheld the district court's refusal to issue a writ of mandamus. The relator sought to compel a probate judge to determine in limine whether the contestant had the requisite interest to contest probate of a will. Although the court of civil appeals agreed that such prior determination was the proper procedure, it held that mandamus should not issue because the relator had an absolute right of appeal from the probate court to the district court, where he would receive a trial de novo. The probate court's wrongful refusal to allow a proper trial in limine on the issue of the contestant's interest could be corrected by the district court without endangering the relator's substantial rights. *Id.* at 289.

35. Manion v. Lockhart, 131 Tex. 175, 180, 114 S.W.2d 216, 219 (1938); Littlejohn v. Carroll, 342 S.W.2d 622, 623 (Tex. Civ. App.—Waco 1961, no writ).

II. CLEAR ABUSE OF DISCRETION

A second limitation on the use of mandamus that is especially relevant to discovery proceedings is the ban on issuing the writ to correct the performance of a discretionary act, as opposed to a ministerial act, unless the actor has been guilty of a clear abuse of discretion.[36] The supreme court formerly was hesitant to use the writ to correct a trial court's interlocutory orders because of this limitation, but it subsequently has become a meaningless standard that is cited perfunctorily, if at all.

At early common law, the use of mandamus was limited solely to correcting a lower tribunal's performance of a ministerial function.[37] Although the writ would issue to compel a court to perform a discretionary act it had completely failed to perform, the issuing court could not dictate the conclusion that the lower court should reach.[38] In *Arberry v. Beavers*,[39] however, the Texas Supreme Court articulated a very subtle exception to this common law rule: mandamus could be used to correct discretionary decisions if an inferior tribunal had been guilty of "so gross an abuse of discretion or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law."[40] This statement as to the propriety of using the writ to correct a trial court's gross abuse of discretion was clearly limited by the requirement that the trial court's conduct amount to a virtual refusal to perform a prescribed duty or to act at all in contemplation of law.

This exception did not mark a significant departure from established precedent, as the *Arberry* court illustrated by discussing the issuance of the

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36. The supreme court initially phrased the standard as being a gross abuse of discretion, but in Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677 (1956), the court adopted the clear abuse test, which is the standard cited today. *See* note 52 *infra* .

37. In Arberry v. Beavers, 6 Tex. 457 (1851), the Texas Supreme Court refused to issue the writ to compel the chief justice of Cass County to tabulate the returns from every precinct in deciding the outcome of an election choosing the county seat. The court believed that it was within the chief justice's discretion to determine whether the returns from the precincts complied with the provisions of the law so as to qualify for inclusion in the final results. The court expressed the standard for distinguishing ministerial acts from discretionary acts as follows:

> [W]here the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial.

Id. at 467 (quoting Commissioner of the Gen. Land Office v. Smith, 5 Tex. 471, 479 (1849)).

Similarly, in Commissioner of the Gen. Land Office v. Smith, 5 Tex. 471 (1849), the court held that a commissioner's evaluation of the validity of a survey presented by an applicant and his determination as to whether the land sought was vacant or was subject to a previous claim were discretionary decisions that would not be overturned by mandamus. Once these matters were resolved favorably to the applicant, however, the actual issuance of the patent was a purely ministerial act that could be compelled by mandamus.

38. In such cases writs were issued upon the theory that it was the clear legal duty of the court to perform its judicial function, which would include making all discretionary decisions properly before it, so that the use of discretion when required was a purely ministerial act.

39. 6 Tex. 457 (1851).

40. *Id.* at 472.

writ in *Manor v. McCall*.[41] The relator in *Manor* complained about a tax that had been levied by the county court at a rate that was too low to achieve its purpose. The Georgia Supreme Court held that although setting a tax rate ordinarily is a purely discretionary matter, the county court was required by law to raise a specific sum of money. By arbitrarily setting a rate that failed to achieve this purpose, the court's action was tantamount to evasion of a positive legal duty or failure to perform a ministerial act, which would be controlled by mandamus under established practices.[42]

This limited right to use mandamus to correct a gross abuse of discretion gradually has been expanded. In *King v. Guerra*[43] the San Antonio court of civil appeals, recognizing that mandamus should not issue to control a lower official's discretionary acts, reversed the district court's decision to issue a writ of mandamus compelling city officials to grant the relator a license to operate an undertaking establishment. Although the court determined that the licensing decision was within the discretion of the Board of Commissioners and was not subject to reversal by mandamus, the court recognized an exception to the ban that would be applicable in instances of gross abuse by a person entrusted with decision making authority. This exception was deemed germane when "in performing the act complained of the officers acted wholly through fraud, caprice, or by a purely arbitrary decision, and without reason."[44] The court limited the scope of this exception by holding that the existence of any controversy as to the facts considered by the official that created any doubt as to the correctness of the conclusion would preclude the issuance of the writ.[45] A trial judge's decision under the *King* analysis, therefore, is arbitrary and a gross abuse of discretion subject to correction by writ of mandamus only if that decision is not supported by any possible finding of fact.[46] The *King* approach shows a more permissive attitude toward the use of mandamus than the view taken by the Texas Supreme Court in *Arberry*.[47] Under the *Arberry* analysis, an official's erroneous decision in a discretionary matter is not subject to reversal by writ of mandamus even if it is wholly unsupported by findings of fact; only decisions that are equivalent to a failure to perform the duty enjoined can be reversed in this manner.

41. 5 Ga. 522 (1848).

42. *See* notes 37-38 *supra* and accompanying text.

43. 1 S.W.2d 373 (Tex. Civ. App.—San Antonio 1927, writ ref'd).

44. *Id.* at 376.

45. *Id.* at 377. As a result, a simple jury finding that the decision had been purely arbitrary and without reason would not support the issuance of a writ if controversy existed as to relevant facts. The court in *King* refused to allow the relator to substitute the discretion of the jury for that of the appointed officials.

46. The *King* view was adopted by the commission of appeals in City of San Antonio v. Zogheib, 129 Tex. 141, 149, 101 S.W.2d 539, 543 (1937), with the comment that the standard was generally accepted in Texas.

47. In *King* the court seized upon the limited exception mentioned in *Arberry*, see text accompanying note 40 *supra*, and some language in Riggins v. City of Waco, 100 Tex. 32, 93 S.W. 426 (1906), to formulate a standard governing the use of mandamus. Although the principles expressed by the *King* court had been contained in these earlier opinions, this was the first time these principles were articulated as a definitive rule.

Womack v. Berry[48] was the first Texas Supreme Court decision to use the *King* exception as a basis for issuing a writ of mandamus to reverse a discretionary decision made by a district judge.[49] The plaintiff in *Womack* sought control of property as trustee under a trust created in his father's will. The beneficiaries of the trust, the grandchildren of the deceased, were to receive their share of the estate upon reaching majority. One of the beneficiaries, who had just reached majority, had been inducted as a naval cadet and moved that the proceedings be stayed until he completed his four years of service.[50] The plaintiff moved for a separate trial of the issues pertaining to the other beneficiaries, but the district judge denied the motion and granted the stay. The supreme court held that the refusal to order a separate trial amounted to a clear abuse of discretion that could be corrected by the use of mandamus.[51]

In reaching the result in *Womack*, the supreme court ostensibly applied the *King* standard,[52] and determined that the trial court had violated its plain legal duty in that no facts or circumstances existed militating against a separate trial.[53] In actuality, however, there was at least some controversy as to whether a separate trial should have been ordered. The dissent, recognizing the broad discretion given a trial court in deciding questions concerning consolidation or separation of causes of action,[54] believed that the district court in this case would not have jurisdiction to issue a final judgment unless all interested parties were joined.[55] Consequently, a valid reason existed for denying the requested severance, and the relator had failed to show a clear, legal right to the issuance of the writ.

The *Womack* decision marked a significant expansion in the use of mandamus. Although the language in the opinion complied literally with established precedent restricting the power to correct discretionary deci-

48. 156 Tex. 44, 291 S.W.2d 677 (Tex. 1956).

49. Other cases prior to *Womack* had cited the exception, but actually had issued the writ due to other considerations. City of Houston v. Adams, 154 Tex. 448, 279 S.W.2d 308 (1955) (mandamus issued because district court's refusal to set bond for property condemnation was failure to perform a ministerial duty); Stakes v. Rogers, 140 Tex. 1, 165 S.W.2d 81 (1942) (mandamus issued because district court's failure to transfer habeas corpus proceeding to county where relator had been indicted was a refusal to perform a clear legal duty). In Southern Bag & Burlap Co. v. Boyd, 120 Tex. 418, 38 S.W.2d 565 (1931), *discussed at* note 60 *infra*, the commission of appeals, relying upon *Womack*, modified, but did not reverse, a district court's decision permitting the inspection of defendant's business records.

50. The beneficiary cited the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, in support of his claim. 156 Tex. at 45, 291 S.W.2d at 679. Under the provisions of that act, any action involving a person in military service shall, on application of such person, be stayed unless, in the opinion of the court, the ability of the person to prosecute the action or conduct his defense is not materially affected by reason of his military service. *Id.* at 49, 291 S.W.2d at 681.

51. *Id.* at 52, 291 S.W.2d at 683.

52. The only modification added by the court in *Womack* was the substitution of "clear" for "gross" in restating the standard. Although this change was made without comment by the court, it is apparent that these words are not synonymous and that the clear abuse of discretion standard would allow for a more liberal use of the writ.

53. 156 Tex. at 51, 291 S.W.2d at 683.

54. *Id.* at 56, 291 S.W.2d at 686 (Griffin, J., dissenting).

55. *Id.* at 60-61, 291 S.W.2d at 688 (Griffin, J., dissenting).

sions through original mandamus proceedings, the facts relevant to the holding flatly contradicted this limiting language. The change in attitude evidenced by the Texas Supreme Court in *Womack* ultimately enabled litigants to seek immediate review of district court discovery orders.

III. THE USE OF MANDAMUS TO CORRECT DISTRICT COURT DISCOVERY ORDERS

The use of mandamus in Texas state court discovery proceedings has evolved through four distinct stages, culminating in the dissolution of the clear abuse of discretion standard and the establishment of immediate review of discovery orders. The first of these stages consisted of the use of the writ to compel the district judge to inspect requested documents before deciding whether they were subject to discovery.[56] The use of mandamus was then expanded to encompass the reversal of trial court decisions concerning the relevancy and materiality of the information sought through discovery.[57] The supreme court continued to espouse the clear abuse of discretion standard, however, exhibiting deference to the trial court decisions and restraint in the writ's use. Subsequently, the court used the writ of mandamus to decide previously unsettled questions of law in cases in which the trial court had erred in determining the proper scope of discovery.[58] Recently, the supreme court used the mandamus procedure to compel the production of information rather than to protect a party from an onerous discovery order.[59] This application of the writ is so far afield of the initial rationale for reviewing discovery orders that the supreme court has, in essence, sanctioned immediate appeal of questionable decisions on discovery motions.

A. *Ordering the District Court to Exercise Its Discretion*

The Texas Supreme Court first used its mandamus power to correct a district judge's discretionary ruling on a discovery motion in *Crane v. Tunks*.[60] Judge Tunks ordered the plaintiff's attorney to produce the plaintiff's 1950 income tax return and, upon his refusal, found him in contempt and sentenced him to jail.[61] The judge stayed the execution of his

56. *See* notes 60-66 *infra* and accompanying text.
57. *See* notes 67-71 *infra* and accompanying text.
58. *See* notes 72-86 *infra* and accompanying text.
59. *See* notes 87-105 *infra* and accompanying text.
60. 160 Tex. 182, 328 S.W.2d 434 (1959). The commission of appeals in Southern Bag & Burlap Co. v. Boyd, 120 Tex. 418, 38 S.W.2d 565 (1931), altered a district judge's ruling allowing discovery of certain business records, ordering that only relevant portions of the books be copied and that they be returned to the defendant immediately after inspection. The commission stated that it could reverse the trial court's decision if there was an abuse of discretion, but did not elaborate as to the appropriate standard for determining whether an abuse had occurred. *Id.* at 192, 328 S.W.2d at 570. The commission apparently believed that its disapproval of the trial court's order was sufficient to authorize the issuance of the writ. Although this opinion was not in line with contemporaneous decisions concerning the use of mandamus to correct abuses of discretion, subsequent developments have shown that it was, in fact, ahead of its time in allowing broad appellate review of discovery orders.
61. 160 Tex. at 187-88, 328 S.W.2d at 438-39.

order pending the outcome of the plaintiff's petition for mandamus.

The supreme court recognized that a discovery order was interlocutory and not appealable and that the usual procedure would be to raise the alleged erroneous ruling in an appeal from the lower court's final judgment.[62] Nevertheless, the court believed that the threatened invasion of the plaintiff's privacy justified immediate review through a mandamus proceeding. The supreme court expressed concern that no appeal could rectify an unauthorized invasion of personal privacy that already had occurred.[63] The trial judge's discretionary order was reversed by writ of mandamus because he had clearly abused his discretion by ordering production of the return without first inspecting it to determine what portions were relevant and material to the suit.[64] Accordingly, the supreme court ordered the judge to inspect the tax return and make the necessary determination of its relevancy before issuing any further orders concerning the documents.

The supreme court's use of the expanded, post-*Womack* mandamus power in *Crane* is analogous to traditional uses of the writ; the court, rather than correcting a discretionary decision of the trial court, was actually ordering the trial court to exercise its discretion, an accepted function of the writ.[65] Implicit in the court's opinion is the deference that the supreme court would have shown had the trial court made any determination as to the materiality of the returns.[66]

B. *Correcting the Trial Court's Discretionary Decisions*

The supreme court took a further step toward the emasculation of the clear abuse of discretion standard by issuing a writ of mandamus in *Ma-*

62. *Id.* at 189, 328 S.W.2d at 438-39; *see* notes 13-14 *supra* and accompanying text.

63. Appeal of the discovery order would have been not only inconvenient but wholly inadequate to give the relator the relief to which she was entitled. The court stated:

> After the returns had been inspected, examined and reproduced by respondent a holding that the court had erroneously issued the order would be of small comfort to relators in protecting their papers. The question of the legality of the court's order would become an academic one, and the objection to the order would be moot.

160 Tex. at 189, 328 S.W.2d at 439.

64. 160 Tex. at 192, 328 S.W.2d at 440-41. The court cited Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677 (Tex. 1956), as authority for issuing the writ in these circumstances. *See* notes 48-55 *supra* and accompanying text. Although the court relied exclusively on the abuse of discretion by the trial court to authorize the issuance of the writ, a claim could be made that the trial court's order was void because it violated Mrs. Crane's constitutional right of privacy. *See* note 8 *supra* and accompanying text.

65. *See* note 38 *supra* and accompanying text. The court did not actually issue the writ in *Crane*, but as is frequently done, merely authorized the clerk to issue the writ in the event that the trial judge did not comply with the opinion. The practical effect is the same, and the discussion of the following cases will not distinguish between instances in which the court actually issued the writ and those in which it merely threatened to do so.

66. This deference was manifested in a slightly different context in Meyer v. Tunks, 360 S.W.2d 518 (Tex. 1962), in which the supreme court refused to issue the writ to correct the trial court's decision allowing the state to take the deposition of a sheriff in a civil removal action when criminal charges were pending. Great restraint was shown even though the federal courts apparently had interpreted a substantially similar federal statute as requiring a trial judge to stay the taking of a deposition under like circumstances.

resca v. Marks,[67] a case similar to *Crane*. Unlike *Crane*, however, in *Maresca* the district judge examined Maresca's tax returns and found them to be material and relevant in their entirety prior to ordering their production.[68] Nevertheless, the supreme court examined the returns, decided that the district judge erred in his conclusion, and ordered him to reverse his decision. The court thus used a mandamus proceeding to impose its judgment as to the relevancy of the requested documents.[69]

Maresca, however, did not signal a radical departure from the traditional role of the writ. The trial judge had clearly abused his discretion by failing to excise any portion of the return,[70] and the threatened invasion of privacy negated the effectiveness of appellate relief.[71] The distinction between *Maresca* and *Crane*, although one of degree, assumed significance nonetheless. The opinion and result in *Maresca* indicated an increasing willingness on the part of the supreme court to grant relief through mandamus.

C. *Deciding Unsettled Questions of Law*

The next stage in the development of the use of mandamus in discovery proceedings involved the use of the writ to decide previously unsettled questions as to the appropriate scope of discovery.[72] In these cases the

67. 362 S.W.2d 299 (Tex. 1962).

68. *Id.* at 300.

69. This use of the writ was sharply criticized in Justice Smith's dissent on the ground that the court was without power to substitute its judgment for that of the trial court. He characterized this use of the writ as an attempt to control the trial court's discretion. *Id.* at 302-03.

70. The supreme court unconvincingly characterized this as a failure by the court to exercise its discretion. "We can, and should, however, afford extra ordinary relief when no discretion has been exercised, i.e., when the order of the trial judge does not separate for protection against discovery those portions of income tax returns plainly irrelevant and immaterial to the matters in controversy." *Id.* at 301.

71. *See* note 63 *supra* and accompanying text. In addition to requiring the relator to show that an appeal would be inadequate, the court in Neville v. Brewster, 163 Tex. 155, 352 S.W.2d 449 (1962), required the relator first to seek a protective order from the trial court before applying for a writ of mandamus.

The supreme court has also reviewed district court discovery orders compelling the disclosure of trade secrets. This, of course, is highly analagous to the area of income tax returns because once the information has been disclosed, any appeal becomes moot. Automatic Drilling Machs., Inc. v. Miller, 515 S.W.2d 256 (Tex. 1974) (trial judge's order for party to produce documents containing trade secrets without first determining how necessary they were for the moving party was an abuse of discretion); Lehnhard v. Moore, 401 S.W.2d 232 (Tex. 1966) (court refused to issue the writ because the secret information was relevant and necessary to the plaintiff's cause of action and could not be obtained from any other source, even though the relator was a nonparty and was not going to testify in the case).

72. The resolution of issues of first impression through writs of mandamus was sanctioned in the federal courts by the Supreme Court's decision in Schlagenhauf v. Holder, 379 U.S. 104 (1964). The district judge ordered the defendant to submit to nine physical and mental examinations, and the defendant petitioned the court of appeals for a writ of mandamus directing the judge to vacate his order. The court of appeals denied the writ, but on certiorari the Supreme Court held that mandamus was an appropriate remedy. The right to order a defendant to submit to examinations had not previously been established, and the Court believed that the resolution of this question warranted the issuance of the writ. The Supreme Court thus authorized the use of mandamus as a means of advising the district courts on previously undecided questions of law. For an analysis of the use of mandamus in

supreme court had more difficulty finding that the trial court had abused its discretion, since the trial court had been traversing uncharted waters, so the court merely issued the writ without discussing the basis of its action.[73]

Mandamus proceedings have been used on three occasions to resolve questions concerning the discovery of documents belonging to expert witnesses expected to testify at trial.[74] *Russell v. Young*[75] concerned the business records of a doctor scheduled to testify on behalf of a workmen's compensation claimant. The insurance company sought discovery of the records to determine how many times the doctor had testified in lawsuits and how heavily he depended upon such testimony as a source of income. The supreme court noted that the bias and prejudice of an expert medical witness could be elicited on cross-examination, but held that the law governing cross-examination does not govern the discovery of records.[76] The court stated that the records had no impeachment value prior to trial because at that time there was no testimony to impeach, and depending upon what was actually introduced during the trial, there might never be anything to impeach.[77]

The issue in *Russell* was clearly unsettled; not only was there an absence of any Texas authority on the propriety of using discovery solely for impeachment purposes, but there was also a split of authority in other jurisdictions.[78] Under these circumstances it would have been difficult to find that the trial judge had clearly abused his discretion, and the supreme court did not attempt to justify the issuance of the writ on that basis. The court simply concluded that the records were not subject to discovery and authorized the issuance of the writ.[79]

In *State v. Ashworth*[80] the trial court ordered the discovery of documents

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the federal courts, see Comment, *The Use of Extraordinary Writs for Interlocutory Appeals*, 44 TENN. L. REV. 137 (1976); Note, *Civil Procedure—Mandamus— Review of a Discovery Order Under Federal Rule of Civil Procedure 30(b)(4)*, 22 WAYNE L. REV. 179 (1975).

73. The supreme court followed this procedure in all three of the cases discussed in notes 74-84 *infra* and accompanying text.

74. Houdaille Indus., Inc. v. Cunningham, 502 S.W.2d 544 (Tex. 1973); State v. Ashworth, 484 S.W.2d 565 (Tex. 1972); Russell v. Young, 452 S.W.2d 434 (Tex. 1970).

75. 452 S.W.2d 434 (Tex. 1970).

76. *Id.* at 436.

77. *Id.* at 437. In *Ex parte* Shepperd, 513 S.W.2d 813 (Tex. 1974), the supreme court limited the *Russell* holding by deciding that discovery could be used to uncover evidence solely for the purpose of impeaching a prospective expert witness. *Shepperd* concerned a condemnation proceeding in which the condemnees sought to discover information relating to the prices paid for surrounding tracts of land. The purpose was solely to enable the condemnees to discredit the condemnation expert when he testified as to the value of their land. The court held that the documents were discoverable, unless they related to pending litigation concerning the other tracts and were protected from discovery in that litigation. The court distinguished *Russell* because it concerned (1) reports of a private or personal nature, (2) reports that were not prepared specifically for a party to the lawsuit, and (3) an expert whose credibility had not been put in issue. Due to the central role that appraisal witnesses play in condemnation proceedings, the court held that their credibility is automatically at issue.

78. The court cited Annot., 18 A.L.R.3d 922 (1968), which reveals a split of authority on the propriety of using discovery solely for impeachment purposes. 452 S.W.2d at 436.

79. 452 S.W.2d at 437.

80. 484 S.W.2d 565 (Tex. 1972).

prepared by state experts in a condemnation proceeding. The supreme court issued a writ of mandamus reversing the trial court order, holding that the expert's appraisal reports were immune from discovery, even though the expert himself could be compelled to testify as to the land's value.[81] The court again neglected to refer to the circumstances that rendered the trial court's order void, but proceeded as if immediate review of discovery orders was an accepted practice.

Houdaille Industries, Inc. v. Cunningham[82] was the third case in which the supreme court granted a party leave to file a petition for writ of mandamus in order to set guidelines for the discovery of reports prepared by expert witnesses. The court held that such reports were discoverable if a party reserved the right to call the experts to testify, even if they would be called only for purposes of rebuttal or impeachment.[83] The court, however, failed to discuss any alleged abuse of discretion on the part of the trial court that prompted the issuance of the writ.

The court justified its rulings in *Russell, Ashworth*, and *Houdaille* by citation to previous cases in which the writ had issued to correct a trial court's discovery order; the opinions did not analyze general principles governing the use of mandamus in other contexts. By merely citing previous decisions without further elaboration, the court treated discovery orders as if they were a separate class of interlocutory orders.[84] In referring to past uses of the writ to correct discovery orders as authority for its continued use, the court avoided any serious consideration of either the adequacy of appellate relief or of whether the trial court had abused its discretion.

The writ's use in *Ashworth* and *Houdaille* is distinguishable from earlier uses in which the right to privacy was involved.[85] The only potential injury caused by the disclosure of expert's reports prepared for use in litigation is the loss of the advantage that the party who hired the expert would otherwise enjoy in the ensuing trial. On the other hand, disclosure of tax

81. *Id.* at 566-67. The *Ashworth* decision is analogous to *Russell*, in which the supreme court recognized that a doctor could be compelled to disclose how often he had been employed as an expert witness, but held that the records that verified his business activities were immune from discovery. Russell v. Young, 452 S.W.2d 434, 436-37 (1970). *Ashworth* was decided prior to the 1973 amendment of rule 167 of the Texas Rules of Civil Procedure, which provides for discovery of reports of experts who are to be called as witnesses in the case. The current status of the discovery of documents in condemnation proceedings is discussed in note 77 *supra*.

82. 502 S.W.2d 544 (Tex. 1973). *Houdaille* was decided after the effective date of the 1973 amendment of rule 167 of the Texas Rules of Civil Procedure.

83. *Id.* at 548. The court further held that pictures were not written communications, and hence, were not protected by the provisions of rule 167. Although rule 167 permits the discovery of the reports of an expert who will be called as a witness, the provision does not include "other communications" between any party and his employee made subsequent to the occurrence upon which the suit is based and made in connection with the circumstances out of which the claim arose. TEX. R. CIV. P. 167.

84. The supreme court followed this same approach in Commercial Travelers Life Ins. Co. v. Spears, 484 S.W.2d 577, 578 (Tex. 1972), in which the court stated: "If the information sought is not discoverable, a mandamus will issue to set aside the order."

85. *See, e.g.*, notes 63 & 71 *supra* and cases discussed therein.

returns and trade secrets results in injury to the party that is wholly independent of the pending suit.[86]

D. *Reversing a Trial Court's Denial of Discovery Motions*

The recent Texas Supreme Court decision in *Barker v. Dunham*[87] signals a significant advance toward recognizing that trial court discovery orders are subject to immediate review. The court issued a writ of mandamus correcting an order of a trial judge that denied the discovery of relevant information. The plaintiff in *Barker* was the widow of a man who was killed in an accident involving a boom-crane manufactured by the defendant. The plaintiff filed a motion requesting that an officer of the defendant corporation produce all of his calculations, memoranda, and other writings relating to the cause of the accident. The trial judge denied the request, based upon his belief that an officer of a defendant corporation did not qualify as an expert under rule 167 of the Texas Rules of Civil Procedure.[88] The supreme court held that the rules draw no distinction between an expert who is a regular employee and one who is temporarily employed to aid in the preparation of a claim or defense.[89] Since the corporation had not disclaimed any intention to call the officer as a witness, his calculations and reports were subject to discovery under rule 167.

Although the court held that the writ could issue only if the decision of the trial court amounted to a clear abuse of discretion,[90] it failed to discuss the significant difference between this case and earlier uses of the writ. In this case the trial court had erred by denying the discovery of relevant materials, rather than by ordering the discovery of privileged information. An order of a trial court compelling disclosure of information that is not properly subject to discovery cannot be rectified on appeal; once the opposing party is given access to the information, it is impossible to "wipe the

86. In Texarkana Memorial Hosp., Inc. v. Jones, 551 S.W.2d 33 (Tex. 1977), the Texas Supreme Court used a mandamus proceeding in order to decide a previously unsettled question of law in a situation in which privacy was an important issue. The hospital was sued by the parents of a child allegedly blinded by the negligence of two staff physicians. The trial court ordered the hospital to produce minutes from the meetings of various hospital committees that might have discussed the circumstances surrounding the accident and from the meetings of the hospital's board of directors. The supreme court found that the order violated TEX. REV. CIV. STAT. ANN. art. 4447d, § 3 (Vernon 1976), which provides that "[t]he records and proceedings of any hospital committee . . . shall be confidential . . . and shall not be available for court subpoena . . . ." The trial court erred in holding that the minutes were "records made or maintained by the hospital in the regular course of business," and were thus discoverable under the exception contained in art. 4447d. The supreme court believed that any intrusion into the privacy of these meetings would impede the uninhibited discussion of events that is so essential to the improvement of medical treatment. 551 S.W.2d at 35.

87. 551 S.W.2d 41 (Tex. 1977).

88. Rule 167 provides that "any party may be required to produce and permit the inspection and copying of the reports, including factual observations and opinions, of an expert who will be called as a witness." TEX. R. CIV. P. 167.

89. 551 S.W.2d at 43.

90. *Id.* at 42. Although the supreme court did cite the appropriate standard, it found the requisite "clear" abuse without displaying appropriate deference to the trial court's ruling.

slate clean" in order to begin a new trial,[91] and protective orders issued in a subsequent trial are meaningless. Since an appeal does not afford an adequate remedy in such instances, a writ of mandamus is warranted in cases in which the trial court has clearly abused its discretion.[92]

In contrast, an order of the trial court denying access to materials and documents, such as the order in *Barker*, does not cause irreparable harm. If the denial is deemed significant enough to constitute reversible error, the court of civil appeals can order a new trial, giving the parties a fresh start. The trial judge then can correct his earlier ruling without injury to either party. The supreme court previously acknowledged this fundamental difference between the two types of cases, noting that "[t]he reasoning in *Crane v. Tunks* does not necessarily apply where a bill of discovery has been denied."[93] Granted, immediate review of the discovery order by the supreme court might have spared the parties the expense of two complete trials,[94] but the supreme court has already stated that the additional expense and delay incident to an appeal do not justify the issuance of a writ of mandamus.[95] In *Barker* the supreme court failed to evaluate the adequacy of relief by appeal, a traditional and firmly established restraint on the use of the writ.[96]

Any lingering doubt as to whether the supreme court would subsequently take cognizance of the crucial difference between a trial court's ordering and refusing to order discovery was dispelled in *Allen v. Humphreys*.[97] The plaintiff alleged that she contracted lung cancer as a result of her employment in the meat department of a Safeway store, contending that polyvinyl chloride particles, which were released into the air when meat wrapping film was cut with a hot wire, contaminated her lungs and caused her cancer. She sought discovery of any studies, reports, or surveys dealing with the possibility of such an occurrence.

The trial judge denied plaintiff's motion, and she sought a writ of mandamus to reverse his decision. The Texas Supreme Court rejected the defendant's argument that the plaintiff had an adequate remedy by appeal, citing *Barker*.[98] The court perfunctorily quoted the appropriate standard of a "clear abuse of discretion," but the hollowness of this phrase was

91. *See* note 63 *supra* and accompanying text.

92. An alternative to seeking a writ of mandamus lies in refusing to comply with the judge's order, being sentenced to jail for contempt, and seeking a writ of habeas corpus. Although mandamus would appear to be a far superior means of seeking review, the habeas corpus route was utilized in *Ex parte* Shepperd, 513 S.W.2d 813 (Tex. 1974).

93. Morris v. Hoerster, 370 S.W.2d 451 (Tex. 1963), *cert. denied*, 376 U.S. 919 (1964). The *Crane* case is discussed in notes 60-66 *supra* and accompanying text.

94. There is no guarantee, however, that the supreme court saved the parties any expense. Only in the event that the party who had been denied access to relevant information lost the trial and then convinced the court that the denial was reversible error would a second trial be necessary.

95. *See* notes 32-34 *supra* and accompanying text.

96. *See* notes 12-35 *supra* and accompanying text.

97. 559 S.W.2d 798 (Tex. 1977).

98. The court's reference to previous uses of the writ in a discovery context as authorizing continued usages of the writ reaffirms the fact that discovery orders are being treated as a special subset of interlocutory orders that are immediately reviewable by way of mandamus.

clearly indicated by the court's explanation of *Barker*: "In a more recent case, *Barker v. Dunham*, . . . we held a trial judge had abused his discretion in denying discovery of certain properly discoverable information."[99] This statement implies that all erroneous trial court discovery orders are the product of an abuse of discretion, an implication that directly contradicts earlier cases holding the supreme court powerless to use mandamus to correct merely erroneous orders.[100]

The *Allen* opinion suggests that any time a district judge denies discovery of information that the supreme court believes to be properly discoverable, he is guilty of an abuse of discretion and his decision can be corrected by a writ of mandamus. If the trial court errs in the other direction and orders the disclosure of information that is not properly discoverable, the relator's case for intervention by writ of mandamus should be even stronger, since an erroneous order compelling discovery cannot be effectively corrected on appeal.[101]

West v. Solito[102] contains the supreme court's most recent pronouncements concerning the use of mandamus to review district court discovery orders. Although the court in *West* reviewed an order compelling rather than denying discovery, the light that the decision sheds on *Barker* and *Allen* requires that it be considered at this point. The relator in *West* was the plaintiff in an action to cancel various deeds and to recover damages based on the allegedly fraudulent conduct of the defendants. The plaintiff moved to quash a subpoena duces tecum on the ground that the information sought was protected by the attorney-client privilege. The trial court denied the motion, but the supreme court used its mandamus power to reverse that decision. In discussing whether mandamus was the appropriate remedy, the court stated that "a writ of mandamus may issue in a proper case to correct a clear abuse of discretion, *particularly where* the remedy by way of appeal is inadequate."[103] This statement may be an oblique way of stating that the existence of an adequate remedy by way of appeal no longer automatically precludes the issuance of a writ of mandamus. The traditional statement of this restraint on the writ's use would require that the words "particularly where" be replaced by the phrase "but only if." By using the former wording, the court intimates that there are certain instances in which appellate review would be adequate and yet mandamus properly could be used. Apparently, *Barker* and *Allen* are two examples of this new class of cases that are reviewable by writ of mandamus.[104] Unfortunately, the supreme court has given no indication as to the circumstances under which this expedited review will be granted. The

Id. at 801. For instances in which the court first treated discovery orders in this fashion, see note 84 *supra* and accompanying text.

99. 559 S.W.2d at 801 (citation omitted).

100. *See* notes 7 & 18 *supra* and accompanying text.

101. *See* notes 63 & 91-92 *supra* and accompanying text.

102. 563 S.W.2d 240 (Tex. 1978).

103. *Id.* at 244 (emphasis added).

104. The court in *West*, however, did not cite *Allen* or *Barker* in support of its statement.

most obvious common characteristic of *Barker* and *Allen* is that they both involved erroneous rulings on discovery motions. If that common link defines the class of orders that are reviewable by mandamus regardless of the adequacy of appellate review, all erroneous discovery orders entered by district judges are now subject to immediate reversal by the supreme court.

IV. POTENTIAL PROBLEMS CAUSED BY CURRENT TRENDS

The Texas Supreme Court has gradually expanded its power to correct district court discovery orders through the use of mandamus. The initial expansion was motivated by a desire to protect the privacy rights of individuals when trial courts had clearly abused their discretion. The supreme court has subsequently issued the writ more freely and has displayed a willingness to grant immediate relief from any erroneous trial court ruling compelling discovery. This erosion of the deference that is inherent in the clear abuse of discretion standard for reviewing trial court decisions is justified by the inadequacy of appellate relief when exposure of private papers is threatened.

The most recent stage in the evolving use of mandamus as a means of controlling judicial discretion in discovery proceedings has created potential problems. On two separate occasions the supreme court has issued a writ of mandamus to correct a trial court's refusal to allow discovery of relevant documents, even though an appeal apparently would have provided adequate relief. In keeping with these decisions, the supreme court subsequently has intimated that an adequate appellate remedy does not necessarily bar the use of mandamus. Once it becomes known that an immediate appeal of discovery orders is available, the supreme court will be deluged with petitions for writs of mandamus. In addition to the onerous burden this will place on the court, the immediate review of interlocutory orders also threatens to impede the orderly disposition of trials. This potential problem was recognized by the Texas Supreme Court in *Pope v. Ferguson*:

> There is sound reason why appellate courts should not have jurisdiction to issue writs of mandamus to control or to correct incidental rulings of a trial judge when there is an adequate remedy by appeal. Trials must be orderly; and constant interruption of the trial process by appellate courts would destroy all semblance of orderly trial proceedings. Moreover, with this type of intervention, the fundamental concept of all American judicial systems of trial and appeal would become outmoded. Having entered the thicket to control or correct one such trial court ruling, the appellate courts would soon be asked in direct proceedings to require by writs of mandamus that trial judges enter orders, or set aside orders, sustaining or overruling . . . a myriad of interlocutory orders and judgments; and, as to each, it might logically be argued that the petitioner for the writ was entitled, as a matter of law, to the action sought to be compelled.[105]

105. 445 S.W.2d 950, 954 (Tex. 1969).

The supreme court has taken the first step into the "thicket" by granting immediate review of discovery orders.

V. CONCLUSION

In the future the court must retreat from the implication in *Barker* that any erroneous ruling by a trial judge on a discovery motion amounts to an abuse of discretion. The court must recognize the significant difference that exists between erroneous orders that compel and those that deny discovery of information. When discovery has been denied, the court should seriously consider the adequacy of relief that is available by way of appeal. In almost all of these cases, forcing a party to await the completion of the trial in order to seek appellate review will not endanger his substantial rights, and consequently, the court should deny the party's rule 474 motion.[106] When the trial court has improperly ordered a party to reveal privileged or irrelevant information, the supreme court should inquire as to the nature of the interest that is to be adversely affected by the ruling before deciding whether to issue the writ. If a significant privacy interest is threatened, precluding the effectiveness of relief by way of appeal, the supreme court should be reluctant to impose restraints on the use of the writ. Greater deference should be shown to the discretionary decisions made by trial courts in those instances where no such right is threatened. Something more than a mere difference of opinion as to the proper resolution of an undecided question of law should be required to constitute a clear abuse of discretion. By analyzing the adequacy of appellate relief and by revitalizing the clear abuse of discretion standard, the supreme court can return the writ of mandamus to its traditional role as a useful but extraordinary means of reviewing a trial court's orders. If the court fails to take these steps, however, in the court's own words, "the fundamental concept of all American judicial systems of trial and appeal [could] become outmoded."[107]

106. TEX. R. CIV. P. 474; *see* note 5 *supra*.
107. Pope v. Ferguson, 445 S.W.2d 950, 954 (Tex. 1969).