MANDAMUS:
THE EVOLVING STANDARD FOR NO ADEQUATE REMEDY BY APPEAL PRONG

NICHOLAS M. BRUNO, *Houston*
Beck Redden LLP

State Bar of Texas
HANDLING YOUR FIRST (OR NEXT) MANDAMUS
November 5, 2026
Austin

CHAPTER 4



Beck | Redden LLP

The Trial and Appellate Law Firm

Nicholas Bruno

Partner

Houston

Direct: 713.951.6232 Fax: 713.951.3720

Email: nbruno@beckredden.com

Nicholas Bruno helps corporate clients and trial lawyers with strategy, legal briefing, and oral argument in both the trial and appellate courts with an eye toward obtaining a favorable result that can withstand appellate scrutiny.

As lead appellate counsel, he practices in all levels of the Texas appellate system. Through this experience, combined with his experience clerking for Justice Harvey Brown of the First Court of Appeals of Texas, he understands the importance of providing the court with clear, concise, and well-researched arguments. His ability to construct a plan of action from the outset coupled with his talent for articulating legal positions with clarity and precision make the difference for his clients.

Nicholas has successfully represented clients in a wide range of litigation, including catastrophic personal injury cases, complex discovery mandamus proceedings, and various health care and commercial litigation matters. In addition, he remains active in the bar, including, among other activities, serving as a member of the Houston Bar Association's Appellate Section Committee and regularly contributing to the HBA *Appellate Lawyer*.

His familiarity with the Texas appellate system began in law school. During law school, Nicholas gained appellate experience serving as an intern for Texas Supreme Court Justice Jeff Boyd and as an intern in the appellate division of the Travis County Attorney's Office. He was also a member of the University of Texas School of Law's Supreme Court Clinic, in which time he helped research and draft briefs and petitions for writ of certiorari in the U.S. Supreme Court.

TABLE OF CONTNENTS

I. ABUSE OF DISCRETION. 1
A. Resolution of disputed facts does not typically constitute an abuse of discretion. 1
B. Errors in applying the law is a more promising avenue to show an abuse of discretion. 1

II. LACK OF AN ADEQUATE REMEDY BY APPEAL 2
A. The adequate remedy prong has been around since early Texas jurisprudence. 2
1. The mandamus explosion of the 1980s. 3
2. The 1992 retrenchment in *Walker v. Packer*. 4
3. The 2004 expansion in *Prudential* and *AIU*. 5
4. The trilogy of mandamus cases involving grants of a new trial. 6
B. Categories vs. circumstances of a particular case. 10
1. In theory, the court says that categories are bad. 10
2. In practice, sometimes categories are not quite that bad. 12
3. Sometimes the creation of categories is justified as necessary to protect important policies. 13
4. Sometimes, the categories are hard to explain. 14
5. Yet, keeping with the theoretical approach purportedly adopted by the court, a case-by-case approach is sometimes applied. 15

MANDAMUS: THE EVOLVING STANDARD FOR NO ADEQUATE REMEDY BY APPEAL PRONG

Mandamus practice has existed in Texas for as long as the state has had courts. This should not be surprising, because mandamus jurisdiction has roots in the Texas Constitution. *See* TEX. CONST. art. V, § 3 ("The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State."); TEX. CONST. art. V, § 6 (the courts of appeals "shall have such other jurisdiction, ***original*** and appellate, as may be prescribed by law") (emphasis added). Nevertheless, the reality of mandamus practice has changed enormously over the past several decades.

Over the last decades, it has become more difficult to know when courts will grant relief on the merits. Perhaps the easier part is the abuse of discretion prong. Mandamus relief is only granted if the respondent abused its discretion. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). The first section of this paper will discuss that part of the mandamus test.

The second section of the paper involves the adequate-remedy-by-appeal prong of the mandamus test—especially as it has played out after the groundbreaking decisions of *In re AIU Insurance Co.*, 148 S.W.3d 109 (Tex. 2004), and *In re Prudential Insurance Co. of. America*, 148 S.W.3d 124 (Tex. 2004). Very few orders nowadays are categorically off-limits to mandamus review. As a practical matter, mandamus has morphed into a parallel form of interlocutory appeal. If the case looks sufficiently compelling—or if the error looks clear enough—mandamus might well be available. So be cautious about telling a client that the odds of mandamus are zero.

The paper builds on much literature that has developed in the last decades. Since those decisions in 2004, many authors have addressed this topic. *See, e.g.*, Karen S. Precella, *Mandamus Update*, in State Bar of Texas, 36th Annual Litigation Update Institute (2020); Lisa E. Hobbs, *The Seven Year Itch:* Prudential *& Expansion of Mandamus Powers*, in State Bar of Texas, 31st Annual Advanced Civil Appellate Practice (2017); Don R. Willett, *What Kind of Mandamuses Get Our Attention?*, in State Bar of Texas, Practice Before the Texas Supreme Court (2013); Jane M.N. Webre & Sara M. Wilder, *Mandamus: When is There an Adequate Remedy at Law?*, in State Bar of Texas, Practice Before the Texas Supreme Court (2007); *see also, e.g.*, David M. Gunn, *Mandamus*, in State Bar of Texas, 30th Annual Advanced Evidence & Discovery Course (2017); David M. Gunn & Nicholas Bruno, *Mandamus: A Look Behind the Curtain & the Adequate Remedy Prong*, in University of Texas Advance Appellate CLE (2022); David M. Gunn & Wallace B. Jefferson, *Effectively Using Mandamus & Emergency Appellate Relief*, in State Bar of Texas, 39th Annual Litigation Update Institute (2022).

I. ABUSE OF DISCRETION.

The person seeking mandamus relief—the "Relator"—must show that the "Respondent," the person against who mandamus relief is sought (usually the judge) clearly abused its discretion. The definitive case setting forth the applicable standard is *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992).

A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Walker*, 827 S.W.2d at 839 (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)).

The appellate court determines whether "the trial court's error is so arbitrary, unreasonable, or based on so gross and prejudicial an error of law as to establish abuse of discretion. A mere error in judgment is not an abuse of discretion." *Johnson*, 700 S.W.2d at 918. An abuse of discretion typically turns on legal errors—not factual ones.

A. Resolution of disputed facts does not typically constitute an abuse of discretion.

When the trial court's decision rests upon the resolution of factual issues (or other matters committed to the trial court's discretion), "[t]he relator must establish that the trial court could reasonably have reached only one decision." *In re China Oil & Gas Pipeline Bureau*, 94 S.W.3d 50, 56 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) (quoting *Walker*, 827 S.W.2d at 839-40). If the trial court has held an evidentiary hearing and has resolved disputed factual issues, the appellate court cannot substitute its judgment on the facts for that of the trial court. *Id.* (citing *Dall. Morning News v. Fifth Court of Appeals*, 842 S.W.2d 655, 660 (Tex. 1992)). In other words, an appellate court may not overturn a determination of disputed matters of fact in an original mandamus proceeding. *Id.*; *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991); *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990).

B. Errors in applying the law is a more promising avenue to show an abuse of discretion.

The reviewing court's review of a trial court's order is much less deferential with respect to legal questions because a trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker*, 827 S.W.2d at 840; *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex. 1997). A failure by the trial court to analyze the

law correctly constitutes an abuse of discretion. *Id.*

The trial court's erroneous legal conclusions, even in an unsettled area of law are subject to mandamus as an abuse of discretion. *Huie v. DeShazio*, 922 S.W.2d 920, 927-28 (Tex. 1996) (unsettled law does not foreclose mandamus relief). Even a legal conclusion accurately based upon existing precedent can be an abuse of discretion if the reviewing court decides to reconsider or clarify the precedent. *In re Smith Barney, Inc.*, 975 S.W.2d 593, 598-99 (Tex. 1998).

II. LACK OF AN ADEQUATE REMEDY BY APPEAL

The second element required to obtain mandamus relief turns on whether an adequate remedy by appeal exists. While the nuances of this element have underwent some transformation, this part of the mandamus test has been around since early Texas jurisprudence. This part of the paper will discuss some of that history as well as one of the debates in modern Texas jurisprudence related to this mandamus prong.

A. The adequate remedy prong has been around since early Texas jurisprudence.

For a sense of how far mandamus has come over the years, go back a century and look at the supreme court's mandamus decisions from 1922. The court wrote opinions in eleven mandamus proceedings, and only one of those opinions said much of anything about limitations on the writ: "There is no principle of law regulating the issuance of a writ of mandamus longer or better established in this state than that mandamus never lies to control official discretion or to correct mere errors in the exercise of judicial power." *See McDowell v. Hightower*, 111 Tex. 585, 587, 242 S.W. 743, 754 (1922). The supreme court said literally nothing about the adequate remedy prong that year.

Now look at the decisions from 2022. In the first half of 2022, the supreme court addressed the adequate remedy prong at least five times. *See In re Abbott*, 645 S.W.3d 276, 283 (Tex. 2022) ("The State lacks an adequate appellate remedy by which to avoid this invalid aspect of the court of appeals' order"); *In re Whataburger Restaurants LLC*, 645 S.W.3d 188, 194 (Tex. 2022) ("We hold that Whataburger has demonstrated that it lacks an adequate appellate remedy because the clerk's failure to give notice of the trial court's order deprived it of that remedy"); *In re LCS SP, LLC*, 640 S.W.3d 848, 852 (Tex. 2022) ("We determine whether the trial court abused its discretion and, if so, whether the appellate court correctly determined that no adequate appellate remedy exists"); *In re Christianson Air Conditioning & Plumbing, LLC*, 639 S.W.3d 671, 681 (Tex. 2022) ("A court of appeals may issue a writ of mandamus only if the trial court abused its discretion and there is no adequate remedy by appeal.").

How did we get from so few mandamus cases in 1922 to so many in 2022?

The expansion certainly did not come in the nineteenth century. At that time, Texas law relating to mandamus looked very similar to the law of mandamus in the federal courts and in other states. *See Arberry v. Beavers*, 6 Tex. 457, 464 (1851) (mandamus "is regarded as an action by the party on whose relation it is granted to enforce a private right, when the law affords no other adequate means of redress"); *see also id*. at 472 ("I do not doubt that a public officer or inferior tribunal may be 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, and in such a case a mandamus would afford a remedy where there was no other adequate remedy provided by law.").

The supreme court consistently adhered to the adequate remedy prong:

- "It is clear that a mandamus will not issue where the party has another legal and specific remedy." *Board of Land Comm'rs of Milam Cnty. v. Bell*, Dallam 366, 366 (Tex. 1840).
- "It is universally held that if a party have an adequate common-law or statutory remedy he cannot resort to this writ, and the rule has been repeatedly announced in this court." *Screwmen's Ben. Ass'n v. Benson*, 76 Tex. 552, 555, 13 S.W. 379, 380 (1890).
- "[I]t is elementary law that a mandamus is never awarded where the law has provided another plain, adequate, and complete remedy." *Aycock v. Clark*, 94 Tex. 375, 377, 60 S.W. 665, 666 (1901).

The court did not often define adequacy, and perhaps defining it in a meaningful way is impossible. But the court did indicate that a remedy is inadequate if it is "tedious": "For it has been the law of Texas since *Bradley v. McCrabb*, Dallam,[504,]507[(1843)], that the writ of mandamus "will not only issue, in cases where the party having a specific legal right has no other legal operative remedy, but, where the other modes of redress are inadequate or tedious, the writ will be awarded." *Gulf, C. & S.F. Ry. Co. v. Muse*, 109 Tex. 352, 362, 207 S.W. 897, 900 (1919). For more discussion of the history of mandamus in Texas practice, see Richard E. Flint, *The Evolving Standard for the Granting of Mandamus Relief in the Texas Supreme Court: One More Mile Marker down the Road of No Return*, 39 ST. MARY'S L.J. 1 (2007).

1. The mandamus explosion of the 1980s.

The most conspicuous change started in the 1980s, when the Texas Supreme Court decided to use mandamus as a tool to give plaintiffs more discovery. Historically, the Texas courts had shown a strong distaste for getting into discovery disputes. They viewed the abuse of discretion standard as making most discovery rulings untouchable.

Thus, at the end of the 1960s, the traditional view held sway: Appellate courts would leave almost all trial management rulings to the trial courts. The best statement of the rule came in *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969). Chief Justice Calvert looked back over a century of jurisprudence and explained that mandamus came with familiar and settled limits. He pointed to the positive law underpinning the supreme court's mandamus power. "This court was created by the Constitution of the State of Texas and has only such jurisdiction as is conferred upon it by the Constitution and statutes of the State." *Id.* at 952.

He spelled out the traditional view: "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 (1) pleas to the jurisdiction, (2) pleas of privilege, (3) pleas in abatement, (4) motions for summary judgment, (5) motions for instructed verdict, (6) motions for judgment non obstante veredicto, (7) motions for new trial and 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." *Id.* at 954; *see also Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 861 (Tex. 1995) (similar); *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990) (similar).

But Chief Justice Calvert left the supreme court in the 1970s. By the early 1980s the court experienced more turnover in its membership, and with that turnover came a shift in attitudes.

The sea change in mandamus doctrine arrived in *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984). The case presented a dispute about discovery in a product liability lawsuit involving an automobile. The plaintiff wanted the auto manufacturer to answer more discovery, but the trial court declined to order that additional discovery. The supreme court granted relief to the plaintiff, reasoning that the trial court's decision "effectively prevent[ed] [the plaintiff] from proving the material allegations of his lawsuit." *Id.* at 576. Any appellate remedy was inadequate: "Because the evidence exempted from discovery would not appear in the record, the appellate courts would find it impossible to determine whether denying the discovery was harmful." *Id.* Forcing the plaintiff to try the lawsuit—"debilitated by the denial of proper discovery"—and then have it rendered pointless on appeal would not be "equally convenient, beneficial, and effective as mandamus." *Id.*

A lone dissenter—Justice Charles Barrow—pointed back to *Pope* and insisted that the majority had abandoned the traditional rule. He ended his dissent by stating that the court should have stayed out:

> Less than one year ago this court observed that over the past twenty-five years it had been flooded with mandamus actions to either compel or deny discovery. *General Motors Corp. v. Lawrence*, 651 S.W.2d at 734. Today's decision effectively insures that this flood will continue and increase into a rampage. The majority has failed to heed the warning echoed by our predecessors against "entering the thicket" by constant interruptions of the trial process. *See Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969), cert. denied, 397 U.S. 997, 90 S.Ct. 1138, 25 L.Ed.2d 405 (1970); *see also State Bar of Texas v. Heard*, 603 S.W.2d at 836. We have now not only "entered the thicket," we have become totally enshrouded in that thicket. I respectfully dissent.

Jampole, 673 S.W.2d at 578 (Barrow, J., dissenting).

After *Jampole*, litigants began to pursue mandamus relief in cases that they previously would never have pursued. Supreme court Justice C.L. Ray chronicled some of this trend a few years later in an article. *See* C.L. Ray & Yogi McKelvey, *The Mandamus "Explosion"*, 28 S. TEX. L. REV. 413 (1987).

Calls to return to the traditional rule were often unheeded. *See Joachim v. Chambers*, 815 S.W.2d 234, 241 (Tex. 1991) (Gonzalez, J., dissenting). Some bemoaned this explosion of mandamus proceedings as one of the "greatest" problems of Texas law:

> Mandamus and sanctions are two of the greatest problems in our legal system in Texas today. *See* Herring, *The Rise of the 'Sanctions' Tort, Texas Lawyer*, Jan. 28, 1991 at 22-23; Jacks, 25 Tex. Trial Law Ass'n Forum 3 (1991). Since *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984), there has been a veritable explosion in the number of mandamus filed in our courts. Today's opinion exacerbates this problem. On what rational basis are we to deny mandamus regarding nonjudge expert witnesses? The lesson of this opinion is that writ of mandamus is the appropriate vehicle to contest a trial judge's decision whether a witness may testify in a particular case. If this is not an incidental trial ruling, I am not sure what is. Surely, tomorrow we will be asked to issue mandamus regarding other witnesses and thereafter regarding the admission or exclusion of evidence at trial. Is there no end? The better question, the question which had always been the basis for granting mandamus relief, is 'does relator have an adequate remedy by appeal?' It is imperative that we not yield to temptation to interrupt trials to correct incidental trial rulings.

Id. at 244 (Gonzalez, J., dissenting).

By 1992, the supreme court decided to step on the brakes.

2. The 1992 retrenchment in *Walker v. Packer*.

The court's 6-to-3 decision in *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992), marked a significant step back from the mandamus explosion of the previous decade.

The dispute involved pre-trial discovery requests in a malpractice lawsuit where the plaintiffs sought documents from a nonparty to use for impeachment. *Id.* at 837-38. The trial court denied the discovery, which the supreme court held was error. *Id.* at 839. But it declined to grant mandamus relief because it concluded there was an adequate remedy by appeal.

Chief Justice Phillips, writing for the majority, began by examining whether the trial court had clearly abused its discretion. *Id.* Historically, mandamus relief was proper "only to compel the performance of a ministerial act or duty," but the court acknowledged mandamus could now issue to correct a "clear abuse of discretion." *Id.* The trial court's resolution of fact issues requires great deference; indeed, the "reviewing court may not substitute its judgment for that of the trial court." *Id.* at 839. But because the trial court "has no 'discretion' in determining what the law is or applying the law to the facts," a "clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *Id.* at 840. Because the trial court's reason for denying discovery was a legal issue, the Court concluded it clearly abused its discretion. *Id.*

But a clear abuse of discretion is not enough to warrant mandamus relief. The court held there was an adequate remedy by appeal for the denial of discovery. The court criticized past decisions for either ignoring the no-adequate-remedy-by-appeal requirement or else significantly watering it down. *Id.* at 841-42. And it criticized *Jampole v. Touchy* for stating that an appellate remedy need only be "equally convenient, beneficial, and effective as mandamus." *Id.* at 842 (quoting *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984)). The standard is higher, and the question is not simply whether appeal would "involve more cost or delay than mandamus." *Id.* Allowing mandamus relief anytime it is more convenient would be "unworkable, both for individual cases and for the system as a whole." *Id.*

Thus, the court expressly rejected the idea "that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus." *Id.* Mandamus, after all, will itself create substantial delays and expense, disrupting trial proceedings and "forcing the parties to address in an appellate court issues that otherwise might have been resolved as discovery progressed and the evidence was developed at trial." *Id.* at 842.

Despite these restrictions, the court acknowledged there remained "many situations where a party will not have an adequate appellate remedy from a clearly erroneous [discovery] ruling." *Id.* at 843. For example, if appellate review comes too late to cure the error in granting discovery, then mandamus may be proper. There is no adequate remedy by appeal from an order mandating disclosure of privileged information or trade secrets. *Id.* The same holds true for forced production of "patently irrelevant or duplicative documents" such that it is harassing. *Id.*

Similarly, there is no appellate remedy when the trial court's discovery error "vitiate[s] or severely compromise[s]" the party's "ability to present a viable claim or defense." *Id.* It is not enough that the error would result in delay, inconvenience, and expense on appeal; rather, error must result in "the effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of resources." *Id.* This could happen if discovery sanctions preclude a decision on the merits (for example, by striking pleadings or dismissing an action) or discovery going to the heart of a party's case is denied. *Id.* Last, an appellate remedy may be inadequate "where the trial court disallows discovery and the missing discovery cannot be made part of the appellate record, or the trial court after proper request refuses to make it part of the record, and the reviewing court is unable to evaluate the effect of the trial court's error on the record before it." *Id.* at 843-44.

Applying these rules to the case at hand, the court concluded the discovery sought did not fall into any of the categories where mandamus relief is proper for discovery disputes. *Id.* at 844. Justice Gonzalez concurred, agreeing with the court's explanation of mandamus standards. *Id.* at 846 (Gonzalez, J., concurring).

Justice Doggett (joined by Justice Mauzy) and Justice Gammage both penned dissents. Justice Doggett argued that the court's decision limited mandamus relief in discovery disputes to cases where information was incorrectly ordered disclosed, but not when it was incorrectly withheld. *Id.* at 847-48 (Doggett, J., dissenting). Under the majority's standard, he reasoned, "questions of importance concerning judicially-approved concealment of facts will never be considered." *Id.* at 849. This was a startling departure from *Jampole v. Touchy* and its progeny. *Id.* at 851.

In a (shorter) dissent, Justice Gammage argued that refusing to compel disclosure of information going to the credibility of a key expert witness "materially affect[ed] the right of [the] aggrieved parties to adequately present their case[]," so he would have granted mandamus relief. *Id.* at 857 (Gammage, J., dissenting). He also emphasized that mandamus relief "should be readily available when a court allows *either* too much *or* too little discovery." *Id.*

3. The 2004 expansion in *Prudential* and *AIU*.

As the composition of the Court again changed, its tolerance of creative and ambitious mandamus petitions returned. In 2004, only two members of the Court who had been present for *Walker v. Packer* still remained—Chief Justice Phillips and Justice Hecht. The two took opposing sides in a duo of mandamus decisions: *In re Prudential Insurance Co. of America*, 148 S.W.3d 124 (Tex. 2004), and *In re AIU Insurance Co*., 148 S.W.3d 109 (Tex. 2004).

The *Prudential* opinion, authored by Justice Hecht, concerned whether mandamus relief was proper to direct a trial court to enforce parties' contractual jury waiver. 148 S.W.3d at 127. After determining the trial court abused its discretion when it improperly concluded the jury waiver was unenforceable, the court held there was no adequate remedy by appeal. *Id.* at 135, 138. First, the court discussed the background principles. There is "no comprehensive definition" of "adequate," the court held, and "it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts." *Id.* at 136. Whether an appellate remedy is "adequate" depends on a balancing test of the benefits and detriments of mandamus. *Id.* "When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate." *Id.*

The balancing "implicate[s] both public and private interests," taking into account how mandamus review interrupts trial court proceedings and distracts appellate courts from final issues, as well as adding "to the expense and delay of civil litigation." *Id.* But, in exceptional cases, it "may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *Id.*

The court rejected a categorical, bright-line approach to deciding when appellate relief is adequate. It acknowledged that although "mere" expense and delay associated with an appellate remedy is not enough to justify mandamus, significant expenses, delays, or injustice may be enough to trigger the remedy. *See id.* at 136-37. Thus, even if an appellate remedy could technically correct an improper venue order, simply "putting the civil justice system itself to the trouble of grinding through proceedings that were certain to be 'little more than a fiction'" justified mandamus relief. *Id.* at 137. Restricting mandamus review has encouraged the Legislature to multiply the number of permissible interlocutory appeals—flooding courts with interlocutory decisions that must be decided as a matter of right, instead of as a discretionary matter. *Id.* at 137-38.

Thus, the court concluded mandamus relief was proper for the errant refusal to enforce a pre-suit jury waiver. *Id.* at 138. An appeal would not change that the relator had to go through a jury trial when it had a right not to. *Id.*

The court's opinion in *In re AIU Insurance Co.*—written by Justice Owen—employed similar reasoning in deciding there was no adequate remedy by appeal when the trial court declined to enforce a forum-selection clause. 148 S.W.3d at 115. Although mere expense and delay does not make an appellate remedy "inadequate," the failure to enforce a contractual forum-selection clause would "vitiate and render illusory the subject matter of an appeal." *Id.*

The court distinguished *Walker v. Packer* by suggesting its primary concern was avoiding mandamus review of all incidental discovery rulings, *id.* at 116, noting that since then, the court had "granted mandamus relief in many instances to remedy overly broad discovery," *id.* at 117. "Clear harassment will not be tolerated," and "[s]ubjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment. There is no benefit to either the individual case or the judicial system as a whole." *Id.* In other words, "a trial in a forum other than that contractually agreed upon will be a meaningless waste of judicial resources." *Id.* at 118.

Thus, both opinions changed the focus merely from whether an appeal could ***technically*** address the subject matter of the complained-of-ruling to whether (even if an appeal could repair the legal error) ***a cost-benefit analysis*** favored mandamus or not.

Chief Justice Phillips—author of *Walker v. Packer*—dissented in both cases, joined by three other justices. He argued that mandamus should not issue to enforce contractual rights—whether a contractual forum-selection clause or a jury waiver. *Id.* at 123 (Phillips, C.J., dissenting); *see Prudential*, 148 S.W.3d at 141 (Phillips, C.J., dissenting). The test, he argued, should be whether waiting for appeal would "permanently deprive" the relator of its substantial rights, not whether it would save judicial resources and time and money. *AIU*, 148 S.W.3d at 123-24; *Prudential*, 148 S.W.3d at 141. He warned that broadening the use of mandamus would disrupt "orderly" trial proceedings and allow continued interruptions by appellate courts. *AIU* at 124; *Prudential*, 148 S.W.3d at 142. And he criticized the Court for holding that having an "adequate remedy" has no fixed meaning. *Prudential*, 148 S.W.3d at 142-43.

The flexible approach—if it can be called an approach—of *Prudential* and *AIU* now reigns supreme. Mandamus relief would now be granted in cases where the courts would not even have considered it in the past. In walking away from the strict attitude that held sway a century earlier, Texas had departed not only from its own tradition, but also from the strictness that one still finds in federal court.

4. The trilogy of mandamus cases involving grants of a new trial.

But in some areas, the federal courts were more accommodating to appellate review. One such area involves the reviewability of an order granting a new trial. In federal court, such an order is reviewable by ordinary appeal—after the new trial. Texas flirted with a scheme of interlocutory appeal for such orders, but lawmakers abandoned the scheme after only two years of experience with the scheme during the 1920s. *See* Acts 1925, 39th Leg., R.S., ch. 18, 1925 Tex. Gen. Laws 45, repealed by Acts of 1927, 40th Leg., R.S., ch. 52, 1927 Tex. Gen. Laws 75; *Plummer v. Van Arsdell*, 117 Tex. 200, 202, 299 S.W. 869, 870 (1927) ("No party to a civil action has a constitutional right of appeal from an order of the trial court granting a new trial. The privilege of appeal from an order of that kind was rooted exclusively in the statutory provision granting that privilege, as contained in article 2249 of the Revised Statutes of 1925. The amendment that was made of that article in February, 1927, effected a repeal of the provision in question.").

Texas firmly refused to review such orders by appeal or mandamus, with only a pair of narrow exceptions. *See, e.g.*, *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985); *Goss v. McClaren*, 17 Tex. 107, 115 (1856).

This wall of resistance to mandamus review of new trial grants came under assault in 2000. *See In re Volkswagen of Am., Inc.*, 22 S.W.3d 462, 462 (Tex. 2000) (Hecht and Owen, JJ., dissenting); *In re Bayerische Motoren Werke*, 8 S.W.3d 326, 329 (Tex. 2000) (Hecht and Owen, JJ., dissenting). The wall tumbled down in a series of cases that started in 2009.

a. *In re Columbia Medical Center.*

Orders granting a new trial are now subject to mandamus review. It was not always so. The supreme court's journey in this direction began with its 5-to-4 decision in *In re Columbia Medical Center*, 290 S.W.3d 204 (Tex. 2009). The court examined whether a trial court may disregard a verdict, "grant a new trial, and explain its action only as being 'in the interests of justice and fairness.'" *Id.* at 205. The answer is that the trial court may not. The "interests of justice"—without further elaboration—are not reason enough for a new trial. *Id.*

Why? As Justice Johnson's majority opinion explained, the "protection of the right to jury trial" means that trial courts must be specific when granting a new trial. *Id.* at 209. Although (with a couple minor exceptions) past cases generally precluded "appellate review of orders granting new trials," the court willingly flexed its mandamus power to "correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of an interlocutory appeal." *Id.* at 207.

Thus, the court held the no-adequate-remedy-by-appeal test is easily met when there is an erroneous grant of a new trial. An appeal after the fact cannot change that a party had to go through the "time, trouble, and expense" of a second trial that it should not have endured. *Id.* at 210.

The abuse of discretion standard, however, required more elaboration. This makes sense, for "Texas trial courts have historically been afforded broad discretion in granting new trials." *Id.* at 210. "[N]ew trials may be granted to a party for sufficiency or weight of the evidence, when damages are 'manifestly' too small or too large, and for 'good cause.'" *Id.*

Still, the trial court's "discretion is not limitless." *Id.* Neither appellate courts nor trial courts are free to simply substitute [their] judgment for that of the jury." *Id.* Jury trials are, after all, "essential to our constitutionally provided method for resolving disputes when parties themselves are unable to do so." *Id.* at 211.

Thus, the court explained that "[p]arties to a dispute who choose to have the dispute resolved by a jury and endure the personal and financial inconvenience of such a trial are entitled to know why the verdict was disregarded, regardless of whether the verdict was disregarded by one judge or a panel of judges." *Id.* The standards "by which trial judges and appellate judges may set aside or overturn a jury verdict are different." *Id.* "And, of course there are differences between the review that can be accomplished by appellate judges who have only the record to consider and trial judges

who have seen the parties and witnesses and sensed the affect [*sic*] of certain evidence or occurrences on the trial. Nevertheless, there is no meaningful difference to the parties between an appellate court reversing a judgment based on a jury verdict and a trial court setting the verdict aside or disregarding it. The end result is that the prevailing party loses the jury verdict and the judgment, or potential judgment, based on it." *Id.* at 211-12. Thus, a trial judge's discretion does not permit him or her "to substitute his or her own views for that of the jury without a valid basis." *Id.* at 212. The "trial court's action in failing to give its reasons for disregarding the jury verdict . . . was arbitrary and an abuse of discretion." *Id.* at 213.

Justice O'Neill, joined by Chief Justice Jefferson, Justice Medina, and Justice Green, dissented. *Id.* at 215 (O'Neill, J., dissenting). The dissent urged that the grant of a new trial "presents neither exceptional circumstances nor a departure from controlling law," and mandamus relief was improper. *Id.* Based on the trial judge's "unique position to observe the proceedings and participants first hand," they must have broad discretion to grant new trials, and granting one "in the interests of justice and fairness" is good enough. *Id.* at 216 (O'Neill, J., dissenting). In the process, the dissent complained that mandamus review of new trial orders would delay trial proceedings, and lead to murky rules about when new trials are or are not an abuse of discretion. *Id.* at 219-20 (O'Neill, J., dissenting).

b. *In re United Scaffolding, Inc*.

In re Columbia was soon followed by other decisions expanding its reach. In 2012, Justice Lehrmann delivered an opinion joined by the three *Columbia* dissenters who still remained on the Court (i.e., Chief Justice Jefferson, Justice Medina, and Justice Green). *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012). The opinion tracked *Columbia's* reasoning, rejecting a new trial order that listed alternative rationales for the new trial (all joined by "and/or")—one of them being "the interest of justice and fairness." *Id.* at 689. "[I]f an order based solely on 'the interest of justice' is insufficient, so too is one that, though it contains alternative reasons, could just as well be construed as relying solely on 'the interest of justice and fairness'" because it was written in the alternative. *Id.* The court directed the trial court to issue a new order that "elaborate[s], with reference to the evidence adduced at trial, how the jury's answers are contrary to the great weight and preponderance of the evidence." *Id.* at 690.

In the process, the court explained in more detail the requirements for a new trial order. It need not contain as much detail as an appellate opinion explaining why a new trial is necessary. *Id.* at 687. That appellate courts have a reporter's record but trial courts have only their own observations explains why trial court's decisions should receive both "substantial deference," but also need not have the same level of detail. *Id.* at 688. Thus, a "trial court need not provide a detailed catalog of evidence to ensure that, however subject to differences of opinion its reasoning may be, it was not a mere substitution of the trial court's judgment for the jury's. That purpose will be satisfied so long as the order provides a cogent and reasonably specific explanation of the reasoning that led the court to conclude that a new trial was warranted." *Id.*

Importantly, the court laid out a more specific standard for just what the new trial order must contain:

> [W]e hold that a trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.

Id. at 689-90.

As a result, mandamus may be proper if:

- The reason given for a new trial, "specific or not, is not one for which a new trial is legally valid." *Id.* at 689.
- The "articulated reasons plainly state that the trial court merely substituted its own judgment for the jury's, or that the trial court simply disliked one party's lawyer, or that the reason is based on invidious discrimination." *Id.*
- The order merely recites "a legal standard" without applying it to the facts. *Id.* In other words, "a statement that a finding is against the great weight and preponderance of the evidence" is not enough." *Id.* "The order must indicate that the trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings." *Id*

What about an order that states a reason that looks valid on its face but lacks a foundation to support it? In other words, can the appellate court evaluate the record support for the stated reason? This question did not take long to produce an answer.

c. *In re Toyota Motor Sales*.

Then—a year later (in 2013)—Chief Justice Jefferson (one of the original dissenters in *In re Columbia*) penned the court's opinion in *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746 (Tex. 2013). There the court decided that mandamus review of new trial orders will not merely be confined to the order's face, but can also look to the record to determine whether the record "support[s] the trial court's rationale for ordering a new trial." *Id.* at 749. In other words, even if the trial court's order complies with the *In re United Scaffolding* criteria, "an appellate court may, in an original proceeding, determine whether the reasonably specific and legally sound rationale" in the order "is actually true." *Id.* "If, despite conformity with the procedural requirements of our precedent, a trial court's articulated reasons are not supported by the underlying record, the new trial order cannot stand." *Id.* at 758.

"Simply articulating understandable, reasonably specific, and legally appropriate reasons is not enough; the reasons must be valid and correct." *Id.* at 759. Thus, when the trial court's assertion that the attorneys "willfully disregarded, brazenly and intentionally violated" certain *limine* orders was not supported by the record, it was proper to grant mandamus relief because the trial court abused its discretion by granting a new trial for that reason. *Id.* at 761.

d. *In re Bent.*

In re Toyota left open an important question. New trial orders receive deference by appellate courts. To conclude that the trial court's stated reasons for granting a new trial simply have no support in the record is one thing. It is another to conclude that the trial court correctly recited the facts, but improperly weighed them when deciding whether a new trial was proper. How should an appellate court handle such review?

The court's decision in *In re Bent*, 487 S.W.3d 170 (Tex. 2016), does not directly answer the question—but it sheds light on the court's thoughts. In that case, the parties "inquired as to the court of appeals' authority, within the context of an abuse-of-discretion standard of review, to re-weigh the evidence considered by the trial court in determining whether there is insufficient evidence to support a jury's finding or that a finding is against the great weight and preponderance of the evidence." *Id.* at 173.

The dispute in *Bent* contrasted with *Toyota* because in *Toyota* the record squarely contradicted "the basis for the new-trial order." *Id.* at 177. "But here, several of the trial court's rulings are based on a conclusion that the jury's findings were against the great weight and preponderance of the evidence—a conclusion implicating the shades of gray inherent in weighing evidence and the appropriate level of deference afforded a trial court's estimate of that evidence." *Id.*

Instead of addressing the issue, the court side-stepped it and concluded the new trial order was facially inadequate. *Id.* at 179. One of the order's stated reasons for granting a new trial would have supported a judgment notwithstanding the verdict—but not a new trial. *Id.* The court's other reasons for granting a new trial were not specific enough. *Id.* The order "must [have] specific reference to the evidence and explain why the trial court granted a new trial." *Id.* at 183.

The court did, however, briefly touch on how a trial court should weigh the merits when they are reached. "[M]erits review is not unchartered territory," the court explained, because federal courts routinely "review new-trial orders based on factual-sufficiency analyses." *Id.* at 177. The court "has never suggested merits review of new-trial orders should be conducted under anything other than the abuse-of-discretion standard that is familiar and inherent to mandamus proceedings." *Id.* at 177-78. And though the trial court "should be granted deference in concluding a jury finding was against the great weight and preponderance of the evidence or insufficiently supported by the evidence," an "appellate court does not necessarily re-weigh the evidence presented at trial simply by conducting a merits review of a factual-sufficiency-based new-trial order." *Id.* at 180.

To understand *In re Bent* fully, the discerning reader must go back in time to a 2-to-1 decision from the Fourteenth Court of Appeals. *See In re Wyatt Field Serv. Co.*, 454 S.W.3d 145, 150-51 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding). When the supreme court wrote *Bent*, it was looking at the majority and dissent from the *Wyatt* case, which later settled and thus could not be reached directly by the supreme court. A word about *Wyatt* is, therefore, in order.

Multiple courts of appeals have directly wrestled with how to evaluate a trial court's order granting a new trial because the verdict was "against the great weight and preponderance of the evidence." *Id.* Applying a factual sufficiency standard of review would require the appellate court to "consider[] and weigh[] all the evidence, both supporting and contradicting the finding," to determine "that the adverse finding is against the great weight and preponderance of the evidence." *Id.* at 151.

But this against-the-great-weight-and-preponderance-of-the-evidence standard is precisely the standard used by the trial court in deciding whether to grant a new trial. If both courts apply the same standard, then what deference does the trial court receive?

The Fourteenth Court of Appeals implicitly concluded that the answer is "none" by embracing the factual-sufficiency standard of review. *Id.* at 152. The "method for ensuring that the trial court does not substitute its judgment for that of the jury, is to confirm that the court's reasons for granting a new trial are valid and correct, i.e., supported

by the trial record." *Id.*

"Thus, by using a factual sufficiency standard, we will engage in a review of the entire trial record to determine whether it supports the trial court's reasons for granting a new trial. If the record does not support the trial court's stated reasons, then the trial court will have abused its discretion in granting a new trial." *Id.* at 152-53. After reviewing the record and finding "conflicting evidence and the jury's apparent resolution of credibility witnesses and giving greater weight to evidence favoring" the defendant, the Fourteenth Court held the trial court "abused its discretion by finding that the jury's answer . . . is against the great weight and preponderance of the evidence." *Id.* at 159.

Justice McCally dissented, urging a more deferential standard of review based on Fifth Circuit precedent. *Id.* at 166 (McCally, J., dissenting). Her proposed standard would probe "(1) the simplicity of the issues, (2) the extent to which the evidence is in dispute, and (3) the absence of any pernicious or undesirable occurrence at trial." *Id.* at 166. These factors inform whether it would be better to affirm the trial court's decision. *Id.*

It is important to note, however, that multiple other courts of appeals have adopted the same traditional factual-sufficiency standard of review as the panel majority in *Wyatt*. *See In re State Farm Mut. Auto. Ins. Co.*, 483 S.W.3d 249, 262 (Tex. App.—Fort Worth 2016, orig. proceeding); *In re E.I. duPont de Nemours and Co.*, 463 S.W.3d 80, 96 (Tex. App.—Beaumont 2015, orig. proceeding) (applying factual-sufficiency review); *In re Zimmer, Inc.*, 451 S.W.3d 893, 905 (Tex. App.—Dallas 2014, orig. proceeding); *In re Baker*, 420 S.W.3d 397, 402-04 (Tex. App.—Texarkana 2014, orig. proceeding).

Now return to the supreme court decision in *Bent*. If you view it through the lens of the *Wyatt* decision, you may come away with the sense that the supreme court had more sympathy for Justice McCally's dissent. Mandamus review means using an abuse of discretion standard, and there will be cases where the trial judge may have made an error in perceiving a great weight problem, but the judge nonetheless acted within his or her discretion by employing the right process for evaluating the issue.

(i) Summary

Looking back at *Prudential* and *AIU* a couple decades of hindsight, one can confidently say that the adequate remedy requirement has continued to deteriorate. But the trend has made it difficult for practitioners to know when mandamus would be available and when it would not. An early article by Jane Webre and Sara Wilder collected about 35 cases from the courts of appeals applying and discussing the *Prudential* balancing test. *See* Jane M.N. Webre & Sara M. Wilder, *Mandamus: When Is There An Adequate Remedy At Law?*, in State Bar of Texas, Practice Before the Texas Supreme Court (2007), at 5-7.

The article found no consistency: "The rulings are all over the map. Chief Justice Phillips' prediction that the new balancing test would 'inject even greater uncertainty into an already difficult and frequently subjective process' appears to have been prescient." *Id.* at 4 (citing *Prudential*, 148 S.W.3d at 143 (Phillips, C.J., dissenting)). The article described the challenge for a practitioner in advising clients: "When deciding whether to pursue a mandamus petition, clients always want a prediction as to whether mandamus will be successful. What are the odds? Handicapping such a decision has always been difficult, but in the wake of *Prudential* the question is now wide open. Almost any erroneous trial court ruling can win mandamus relief if packaged properly." *Id.*

By 2013, with practitioners remaining uncertain about the availability of mandamus, then-Justice Don Willett presented a paper to highlight how mandamus petitions played in the supreme court. *See* Don R. Willett, *What Kind of Mandamuses Get Our Attention?*, in State Bar of Texas, Practice Before the Texas Supreme Court (2013). He stated that, in general, the supreme court was interested in cases "involved unresolved or recurring issues," or cases "whether TC or CA erred." *Id*. at 2; *see also id.* at 3 ("Unresolved or recurring issues" . . . "Cases where TC or CA was potentially wrong" . . . "Issues involving important State policies").

Although this formulation may sound sensible enough, asking whether a lower court was "potentially wrong" goes more to the abuse of discretion prong and less to the adequate remedy prong. If error is all it takes, why bother with the adequate remedy prong at all?

In the pre-*Prudential* era of *Walker v. Packer*, the bench and bar quickly began creating categories of cases that qualified as sufficiently "exceptional" to satisfy the adequate remedy prong. *See, e.g.*, *CSR Ltd. v. Link*, 925 S.W.3d 591, 597 (Tex. 1996); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 771 (Tex. 1995). In the spirit of Garrison Keillor's Lake Wobegone, where all the children are above average, Texas lawyers learned how to call every mandamus case an exception. Justice Willett made this point in his mandamus presentation: "Frequently, counsel tries to make cases extraordinary." Willett, *What Kinds of Mandamuses Get Our Attention?*, *supra*, at 4. He went on to list a few truly extraordinary situations, such as election cases with strict timelines, or cases involving child custody. *See id.* at 5-7. But we lawyers are a creative lot, and we can dress up even the most mundane case as out of the ordinary.

A few years later, Lisa Hobbs tried to make some sense of things in the post-*Prudential* world. *See* Lisa E. Hobbs, *The Seven Year Itch:* Prudential *& Expansion of Mandamus Power*, in State Bar of Texas, 31st Annual Advanced Civil Appellate Practice Course (2017). She noted that the pure number of mandamus filings in the supreme court had not

undergone a permanent increase: "As previously reported, there is a significant and undeniable spike in grant rate around the time of *Prudential*. The average grant rate before *Prudential* (2000-2004) was only 1.8%. The six years following *Prudential* (2004-2010), the grant rate jumped to 8.8% (which is close to the historical 10% grant rate for petitions for review). In the last seven years (2011-2017), the grant rate has dropped a bit, down to 5.4%. But, still, that rate is nowhere near as low as the 1.8% grant rate before *Prudential*." *Id.* at 4. "Interestingly, though, despite predictions of an influx of mandamus filings, filings appear to be trending down." *Id.*

She also concluded that the *Prudential* balancing test had not received much attention from the supreme court in its newest opinions: "the *Prudential* cost-benefit analysis has been mostly a non-issue in the Court's mandamus jurisprudence the last seven years." *Id.* at 5. "In roughly 50 opinions issue in mandamus proceedings over the last 7 years, there has been hardly any written analysis from the court on the adequacy prong." *Id.*

The only case on her list where the supreme court discussed the test at length was *In re J.B. Hunt Transport, Inc.*, 492 S.W.3d 287 (Tex. 2016). There, the supreme court revisited its decision in *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985). The court explained that *Prudential* overruled the *Abor* approach: "We now hold that *Prudential* indeed abrogates *Abor*'s inflexible understanding of an adequate remedy by appeal. Permitting a case to proceed in the wrong court necessarily costs 'private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.' That was often the vice of *Abor*'s strict standard. But *Prudential*'s virtue is that it spares private parties and the public those costs. *Abor* is therefore at odds with *Prudential* and no longer provides the governing standard for an adequate remedy by appeal." *In re J.B. Hunt*, 492 S.W.3d at 299 (footnotes omitted).

The numbers have not seemed to change much since. From September 2022 through August 2023) the Supreme Court considered 217 original proceedings, granting review of 15 petitions (6%), denying 171 (78%), and dismissing, abating, or striking the rest. COLLEEN M. SULLIVAN & STEVEN D. SEYBOLD, PROCEDURES FOR ORIGINAL PROCEEDINGS AND EMERGENCY RELIEF IN THE SUPREME COURT OF TEXAS 9-10 (2024).

B. Categories vs. circumstances of a particular case.

Another issue that has raised itself repeatedly with regard to the second element of the mandamus test is whether the adequate remedy by appeal prong should be examined on a categorical basis or on a case-specific basis. The case law is somewhat inconsistent in this regard.

1. In theory, the court says that categories are bad.

A strong signal that the supreme court would continue to resist categorization came with *In re McAllen Medical Center*, 275 S.W.3d 458 (Tex. 2008). *McAllen* granted mandamus relief in a health care case where the defendant wanted mandamus relief from a trial court ruling about the plaintiff's expert report. The court tried to make clear that a careful balancing was appropriate:

> Four years ago, this Court denied several petitions seeking mandamus relief when the statutorily required reports were allegedly inadequate.
>
> The courts of appeals have disagreed since then whether this action means that mandamus review is never available in such cases—several concluding that it does, and several concluding that it does not. We granted the petition here to settle the question. We now hold that mandamus relief is available when the purposes of the health care statute would otherwise be defeated.

Id. at 461-62.

McAllen offers as beautiful an anti-category statement as you will ever find: "Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review. As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories." *Id.* at 464.

Thus, suppose the mandamus petition come too much later in the process. Might the *Prudential* balancing of costs and benefits have come out the other way? The opinion indicates yes: "The statute was intended to preclude extensive discovery and prolonged litigation in frivolous cases; review by mandamus may actually defeat those goals if discovery is complete, trial is imminent, or the existing expert reports show a case is not frivolous. But if the legislative purposes behind the statute are still attainable through mandamus review, Texas courts should not frustrate those purposes by a too-strict application of our own procedural devices." *Id*. at 467.

The dissenters maintained that the majority had gone too far in relaxing the adequate remedy prong, but the majority saw things differently:

> This holding is not (as the dissent argues) a sudden departure from *Walker v. Packer*. That case was not 'seminal' as it represented not the seed of Texas mandamus jurisprudence (which stretches back almost two centuries) but an effort in 1992 to prune some of its branches. The seminal case was actually *Bradley v. McCrabb*, issued while Texas was still a republic, which held that mandamus was not limited to cases where there was 'no other legal operative remedy,' but would issue when 'other modes of redress are inadequate or tedious' or when mandamus affords 'a more complete and effectual remedy.'

Id. at 467-68.

The resistance to categorization also surfaced in *In re Union Carbide Corp.*, 273 S.W.3d 152, 157 (Tex. 2008):

> Regardless of the other benefits claimed by Union Carbide, there is significant benefit from mandamus relief in regard to the random-assignment-of-cases question. Random assignment of cases is designed to prevent forum-shopping. Practices that subvert random assignment procedures breed "disrespect for and [threaten] the integrity of our judicial system." *See In re Bennett,* 960 S.W.2d 35, 40 (Tex.1997). We need not consider whether the intervention was intended to circumvent Galveston County's local rule requiring random assignment of cases because regardless of the Halls' intent, the intervention and the trial court's abuse of discretion in failing to rule on and grant the motion to strike resulted in circumvention of the random assignment rule. In regard to any detriment to the parties, the Halls' claims have now been filed as a separate lawsuit that is pending in Galveston County. There will be insignificant detriment to either party or the judicial system if mandamus relief is granted. On balance, mandamus review is warranted because the benefits of establishing the priority that trial courts must give to ruling on motions to strike interventions and re-emphasizing the importance of both appearance and practice in maintaining integrity of random assignment rules outweigh any detriment to mandamus review in this instance. Thus, Union Carbide does not have an adequate remedy by appeal.

Id.

But for every reported opinion that shuns categories, another decision or line of decisions would seem to create categories. *See In re Cerberus Cap. Mgmt., L.P.*, 164 S.W.3d 379, 383 (Tex. 2005) ("Mandamus is appropriate to correct an erroneous order disqualifying counsel because there is no adequate remedy by appeal."); *see also In re Guar. Ins. Servs., Inc.*, 343 S.W.3d 130, 132 (Tex. 2011); *In re Turner*, 542 S.W.3d 553, 555 (Tex. 2017); *In re RSR Corp.*, 475 S.W.3d 775, 778 (Tex. 2015); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004).

There is a category of cases for the legislative continuance. *See In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005) **(**"To give full effect to the Legislature's policy decision regarding legislative continuances, we conclude that a party has no adequate remedy by appeal when a trial court abuses its discretion by denying a motion for legislative continuance.").

There seems to be a category of cases for rulings about designation of a responsible third party. *See In re Dawson*, 550 S.W.3d 625, 631 (Tex. 2018). According to the court, "'ordinarily,' a defendant is entitled to mandamus relief when a trial court erroneously prevents it from designating a responsible third party." *Id.* Why? Because "it seems equitable and right—at least under these facts—that a plaintiff get the same relief when a trial court erroneously grants a defendant leave to so designate." *Id.*; *see also In re Gonzales*, 619 S.W.3d 259, 265 (Tex. 2021); *In re Coppola*, 535 S.W.3d 506, 509 (Tex. 2017).

But since when is the yardstick for adequacy a question of what is "equitable and right"? This sort of goose-gander approach seems conceptually unsound. Sins of commission and omission are not created equal. Yes, a wrongful refusal to designate a responsible third party may well justify mandamus in nearly all cases. But that does not make the converse true. A wrongful designation of a responsible third party is perfectly easy to fix on appeal, at least in the typical case.

Unfortunately, and perhaps inevitably, many other mandamus opinions failed to go into as much detail in addressing the adequacy of the remedy. Try as we may, we cannot organize the cases into any coherent set of predictable results. The most likely result appears to be that, despite the avowed rejection of a categorical approach to the adequate remedy prong, the supreme court will announce categories from time to time.

2. In practice, sometimes categories are not quite that bad.

Other decisions seem equally inclined to create categories, regardless of what *Prudential* may have said. Consider the following categories that the supreme court has created:

- ***Pleas to the jurisdiction***. *See In re Sw. Bell Tel. Co., L.P.*, 226 S.W.3d 400, 403 (Tex. 2007) ("An adequate remedy by appeal does not exist under circumstances such as those presented by this matter if trial is erroneously permitted to go forward because allowing the trial to proceed would interfere with the important legislatively mandated function and purpose of the PUC."); *see also In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 623 (Tex. 2007) ("mandamus should lie to correct a trial court's denial of a plea to the jurisdiction based on an agency's exclusive jurisdiction").
- ***Failure to enter judgment on an MSA.*** *See In re Lee*, 411 S.W.3d 445, 450 n.7 (Tex. 2013) ("Mandamus relief is available to remedy a trial court's erroneous refusal to enter judgment on an MSA.").
- ***Parental rights issues***. *See In re C.J.C.*, 603 S.W.3d 804, 811 (Tex. 2020) ("we previously have granted relief to require a trial court to vacate orders erroneously permitting nonparents access to a child over a fit parent's objection."); *see also In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007); *In re Dep't of Fam. & Prot. Servs.*, 273 S.W.3d 637, 645 (Tex. 2009) (other parental rights issues).
- ***Election issues***. *See In re Francis*, 186 S.W.3d 534, 538 (Tex. 2006) ("Section 273.061 of the Texas Election Code gives the Court jurisdiction to issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election."); *see also In re Williams*, 470 S.W.3d 819, 823 (Tex. 2015); *In re Woodfill*, 470 S.W.3d 473, 480 (Tex. 2015).
- ***Discovery of confidential documents.*** *See In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 256 (Tex. 2005) ("Mandamus is appropriate to protect confidential documents from discovery."); *see also In re USAA Gen. Indem. Co.*, 624 S.W.3d 782, 795 (Tex. 2021) ("discovery of irrelevant information"); *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009); *In re Am. Airlines, Inc.*, 634 S.W.3d 38, 43 (Tex. 2021); *In re Shipman*, 540 S.W.3d 562, 565 (Tex. 2018); *In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009); *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 279 (Tex. 2016); *In re Millwork*, 631 S.W.3d 706, 714 (Tex. 2021).
- ***Refusal to dismiss for want of prosecution.*** *See In re Conner*, 458 S.W.3d 532, 535 (Tex. 2015) (Mandamus is available to a "trial court's erroneous refusal to dismiss a case for want of prosecution.").
- ***Forum non conveniens.*** *See In re Gen. Elec. Co.*, 271 S.W.3d 681, 685 (Tex. 2008) ("After the parties submitted briefs in this case, we held that an adequate remedy by appeal does not exist when a motion to dismiss for forum non conveniens is erroneously denied."); *see also In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007); *In re Ford Motor Co.*, 442 S.W.3d 265, 269 (Tex. 2014).
- ***Pre-arbitration discovery.*** *See In re Copart, Inc.*, 619 S.W.3d 710, 713 (Tex. 2021) ("We have held that mandamus relief is appropriate when a trial court erroneously orders pre-arbitration discovery.").
- ***Bifurcated trial.*** *See In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866, 878 (Tex. 2021) ("When a bifurcated trial is denied in these circumstances, the insurer lacks an adequate appellate remedy for the 'time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'").
- ***Mandatory venue.*** *See In re Fisher*, 433 S.W.3d 523, 528--29 (Tex. 2014) ("Mandamus relief is specifically authorized to enforce a statutory mandatory venue provision.").
- ***Forum selection clauses.*** *See In re AutoNation, Inc.*, 228 S.W.3d 663, 667 (Tex. 2007) ("Mandamus relief is available to enforce forum-selection clauses."); *see also In re Lopez*, 372 S.W.3d 174, 176 (Tex. 2012); *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010); *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 558 (Tex. 2004); *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231 (Tex. 2008); *In re ADM Inv'r Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010); *In re AIU Ins. Co.*, 148 S.W.3d 109, 110 (Tex. 2004).
- ***Failure to compel arbitration.*** *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 888 (Tex. 2010) (A party lacks an adequate remedy by appeal when there is a failure to compel arbitration); *see also In re Dall. Peterbilt, Ltd., L.L.P.*, 196 S.W.3d 161, 163 (Tex. 2006); *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006); *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642 (Tex. 2009); *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 422 (Tex. 2010); *CMH Homes v. Perez*, 340 S.W.3d 444, 452 (Tex. 2011); *In re 24R, Inc.*, 324 S.W.3d 564, 566 (Tex. 2010); *In re Wood*, 140 S.W.3d 367, 370 (Tex. 2004); *In re Golden Peanut Co., LLC*, 298 S.W.3d 629, 631 (Tex. 2009); *In re Serv. Corp. Intern.*, 355 S.W.3d 655, 658 (Tex. 2011); *In re Jindal Saw Ltd.*, 289 S.W.3d 827, 828 (Tex. 2009).

NOTE: This seems to be a one-way ratchet. That is, mandamus seems generally unavailable when the error is the exact opposite, namely when an order erroneously sends a litigant to arbitration instead of erroneously keeping a litigant out of arbitration. *See In re Gulf Expl., LLC*, 289 S.W.3d 836, 843 (Tex. 2009) ("But even assuming that is correct (an issue we do not reach), Great Western has not shown that its appellate remedy following arbitration is inadequate. Because it did not, the court of appeals erred in reviewing this order anyway."); *In re Palacios*, 221 S.W.3d 564, 566 (Tex. 2006) ("We recognize there is some one-sidedness in reviewing only orders that deny arbitration, but not orders that compel it.").

- ***Pre-suit jury waiver.*** *See In re Frank Kent Motor Co.*, 361 S.W.3d 628, 631 (Tex. 2012) ("Mandamus review is appropriate and necessary to determine whether a pre-suit jury waiver is enforceable.").
- ***Appointment of an arbitrator.*** *In re Serv. Corp. Intern.*, 355 S.W.3d 662, 663 (Tex. 2011).
- ***Reasons for new trial.*** *In re E.I. du Pont de Nemours & Co.*, 289 S.W.3d 861, 862 (Tex. 2009) (Mandamus is available to review a trial court's failure to list in its order granting a new trial "its reasons for disregarding the jury verdict."); *see also In re Cook*, 356 S.W.3d 493, 495 (Tex. 2011).
- ***Ignore an order granting a new trial.*** *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 831 (Tex. 2005) ("[T]here is no adequate remedy by appeal when a trial court ignores its earlier order granting a new trial. There is also no adequate remedy by appeal for allowing execution to issue before a final judgment has been entered.").
- ***Plea in abatement.*** *See In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 299-300 (Tex. 2016) ("[A] relator need only establish a trial court's abuse of discretion to demonstrate entitlement to mandamus relief with regard to a plea in abatement in a dominant-jurisdiction case.").
- ***Lifting a stay.*** *See In re Geomet Recycling LLC*, 578 S.W.3d 82, 92 (Tex. 2019) ("There is generally no adequate remedy by appeal for an erroneous court order purporting to lift the stay.").

This isn't to say that all categories are bad. Surely, some of these categories make considerable sense. Protecting a party's confidential documents, for example, would seem to provide a classic case of ordinary appeal being inadequate. The cost-benefit analysis of losing the attorney-client privilege, for example, will always come out in favor of protecting that privilege. The loss—even if temporary—of parental rights in a way inconsistent with the law warrants immediate review.

So perhaps it is simply inevitable that, no matter how vigorous a commitment to eschewing a categorical approach to the inadequate remedy prong, some categorization will occur. But perhaps not all of the court's adoption of a categorical approach in some areas are necessary.

3. Sometimes the creation of categories is justified as necessary to protect important policies.

Consider, for example, the impact of the influence of policy considerations over the adoption of a categorical approach to the inadequate remedy prong in some situations. The adequate remedy analysis can be heavily influenced by statutes or comparable sources of public policy.

For instance, mandamus will lie in cases involving the Wrongful Imprisonment Act. *See, e.g.*, *In re Phillips*, 496 S.W.3d 786 (Tex. 2016); *In re Allen*, 366 S.W.3d 696 (Tex. 2012); *In re Smith*, 333 S.W.3d 582 (Tex. 2011). It will also lie in cases that disrupt grievance proceedings under the State Bar Act. *See State Bar v. Jefferson*, 942 S.W2d 575 (Tex. 1997); *State v. Sewell*, 487 S.W3d 716 (Tex. 1972); *see also In re State Bar*, 113 S.W.3d 730 (Tex. 2003) (involving the Board of Disciplinary Appeals); *State Bar v. Heard*, 603 S.W.3d 829 (Tex. 1980).

In fact, in some cases the court expressly references "important public policies" as demonstrating that there is no adequate remedy by appeal. *See In re Collins*, 286 S.W.3d 911, 920 (Tex. 2009) ("If the Legislature intended to provide health care liability defendants with an informal, expedited means of evaluating the merits of a health care claimant's claims, then the order here undermines that purpose. Consequently, we hold that Collins has no adequate remedy by appeal.").

The "important" policies announced by the Legislature are not the only public policies the court considers. Sometimes the court considers "public policy" not necessarily linked to a particular statute. *See In re BP Products N. Am., Inc.*, 244 S.W.3d 840, 848-49 (Tex. 2008) ("Delaying review until appeal, under these circumstances, would defeat not only the purpose of the discovery agreement, but also the strong public policy encouraging parties to resolve their discovery disputes without court intervention.").

A few recent decisions demonstrate the continued debate over the scope of mandamus relief. For example, the Supreme Court recently noted that "mandamus is generally unavailable when a trial court denies summary judgment." *In re Bell Helicopter Servs. Inc.*, --- S.W.3d ----, 2026 WL 1108684, at *7 (Tex. 2026). But this rule is not "absolute"; "in "exceptional cases," mandamus relief may "be 'essential to preserve important substantive and procedural rights

from impairment or loss' and to 'spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" *Id.* (citations omitted). So mandamus was available to review the denial of a summary judgment motion based upon the 18-year statute of repose under the General Aviation Revitalization Act of 1994. *See id.*

The intermediate courts are facing another iteration of the "utterly wasted" and "important substantive and procedural rights" issue. *See id.* For example, the Fourteenth Court of Appeals was faced with the question of what the workers' compensation system's "exclusive-remedy feature provides an 'important substantive right' because it grants 'immunity from common-law tort claims.'" *In re ExxonMobil Corp.*, No. 14-25-00446-CV, 2025 WL 3672143, at *11 (Tex. App.—Houston [14th Dist.] Dec. 18, 2025, orig. proceeding). That Court "conclude[d] that the Act's exclusive-remedy defense (i.e., immunity from tort claims except for certain intentional conduct) is an important substantive right held by [an employer] for providing workers' compensation insurance[.]" *Id.* at *12. Mandamus review was available for the denial of a summary judgment motion that raised an exclusive remedies defense because "requiring [the employer] to proceed to trial and await the error's correction on appeal would not only defeat [the employer's] substantive right but also undermine the ultimate purpose of our state's workers' compensation scheme." *Id.* (At the time this paper was written, this issue remains pending before First Court of Appeals in Nos. 01-25-01099-CV and 01-26-00513-CV).

The fact that the adequacy-by-appeal prong is influenced by policy considerations isn't a criticism of the court. Surely, most would agree that the policy considerations in addressing wrongful imprisonments warrant the immediate consideration a mandamus proceeding would provide. But the influence of policy considerations over the adoption of a categorical approach to the inadequate remedy prong demonstrates that not all of the court's rejection of a case-by-case approach to that prong is necessitated by circumstances—it is often a conscious choice made by the court.

4. Sometimes, the categories are hard to explain.

Try telling this to your client: Mandamus is not justified to prevent your money from being spent, but it is justified to prevent your money from being wasted.

One area in which categories have been created in a way that evades easy prediction of the inadequate remedy prong is the consideration of money. Everyone agrees that courts will not grant mandamus to spare a party from ***spending time and money***. Instead, they will grant it to spare a party from an ***utter waste*** of resources. This standard comes straight from *Prudential* and remains valid today:

> Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money ***utterly wasted*** enduring eventual reversal of improperly conducted proceedings.

In re Acad., Ltd., 625 S.W.3d 19 (Tex. 2021) (quoting *Prudential*, 148 S.W.3d at 136) (emphasis added). Try advising a client on when spending money on proceedings required by, what you believe, is a wrong ruling is not wasting money. No non-lawyer whose money is on the line would find this distinction meaningful. When one is merely spending money versus when one is wasting money is surely in the eye of the beholder. It is no meaningful test.

Consider the following cases. Try to discern a meaningful predictor for when one is merely spending money versus when one is wasting money:

a. *Spending* money is not enough to justify mandamus.

The court often chastises parties for "only" complaining about spending money—a normal part of litigation:

- ***In re Kan. City S. Indus., Inc.*, 139 S.W.3d 669, 670 (Tex. 2004):** Relator argues that "the trial court has improperly deprived it of the 'valuable use' of its own money. That is not the permanent loss of substantial rights; it is really only a complaint that the normal appellate remedy is too slow."
- ***Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 641 (Tex. 2021):** "Because Panda II is fully briefed and argued in the court of appeals—and has been abated pending only an order from this Court on these petitions—we cannot say that the parties lack an adequate appellate remedy here. Although this 'Court may consider whether mandamus can spare the litigants and public 'the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings,' *In re Keenan*, 501 S.W.3d 74, 76 (Tex. 2016) (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004)), the time and money has already been expended here."

- ***In re Tex. Dep't of Fam. & Prot. Servs.*, 210 S.W.3d 609, 614 (Tex. 2006):** "[A]n accelerated appeal provided an adequate remedy in this case. We do not hold that a party complaining of a trial court's failure to dismiss a SAPCR within the statutory deadline could never be entitled to mandamus relief, but under the facts of this case, we cannot conclude that an accelerated appeal was not an adequate remedy."

b. *Wasting* money will justify mandamus.
On the other hand, wasting money is unacceptable. Consider these situations:

- ***In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014):** "Turning to the second requirement for mandamus relief, we also agree with Essex that it has no adequate remedy by appeal. . . . [W]e have previously held that 'mandamus relief is appropriate to "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings."' *In re John G. & Marie Stella Kenedy Mem'l Found.,* 315 S.W.3d 519, 523 (Tex. 2010) (quoting *In re Prudential*, 148 S.W.3d at 136). In light of the conflict of interest and prejudice that we have noted above, we conclude that mandamus relief is appropriate to spare the parties and the public the time and money spent on fatally flawed proceedings."
- ***In re State*, 355 S.W.3d 611, 615 (Tex. 2011):** "We believe that the circumstances of this case also make the appellate remedy inadequate because of the enormous waste of judicial and public resources that compliance with the trial court's order would entail. Requiring eight separate suits here, when only one is proper, would be a clear waste of the resources of the State, the landowners, and the courts."
- ***In re Hous. Specialty Ins. Co.*, 569 S.W.3d 138, 141-42 (Tex. 2019)** (internal quotations omitted): "We eventually . . . confirmed that mandamus relief is appropriate to "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. A legally invalid lawsuit that deprive[s] the real plaintiff of the traditional right to choose the time and place of suit, satisfies this test."

Perhaps there is a meaningful way to distinguish between merely spending money and wasting money. An uncontroversial method isn't immediately apparent. Yet—again despite in theory eschewing a categorical approach to the inadequate remedy prong—the court has appeared to distinguish between the categories of spending money and wasting money.

5. Yet, keeping with the theoretical approach purportedly adopted by the court, a case-by-case approach is sometimes applied.

Despite adopting a categorical approach to the inadequate remedy by appeal prong in many cases, there are several cases in which the court analyzes the specific circumstances of the particular case before it.

Consider the facts. Consider the discussions in the following cases, referencing relevant, case-specific factual circumstances impacting the adequate remedy by appeal prong:

- ***In re K&L Auto Crushers, LLC*, 627 S.W.3d 239, 256 (Tex. 2021):** "We conclude that K & L Auto has no adequate remedy by appeal both because it has effectively been denied a reasonable opportunity to develop a defense that goes to the heart of its case, and because a reviewing court will be unable to evaluate the effect of the trial court's denial of discovery from the third-party providers."
- ***In re Allstate Indem. Co.*, 622 S.W.3d 870, 883 & n.9 (Tex. 2021):** "Alaniz contends that Allstate still has a viable defense because it can challenge other elements of Alaniz's claims, including liability. But the mere fact that Allstate could present different, possibly less compelling, arguments does not minimize the crippling effect the trial court's order would have on Allstate's ability to challenge the reasonableness of Alaniz's medical expenses, a central component of her claimed damages. We conclude that an appeal provides an inadequate remedy from the trial court's order; therefore, mandamus relief is appropriate. . . . We do not hold that mandamus relief is appropriate in every case in which a trial court erroneously strikes a counteraffidavit under section 18.001. But under the particular set of facts here, and given the expansive relief granted by the trial court's order, Allstate has established its entitlement to mandamus relief in this proceeding."
- ***In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 305 (Tex. 2016):** "A benefit-and-detriment analysis of the circumstances in this case leads us to conclude that mandamus is appropriate. Again, HEB's defense hinges in large part on its challenges to the nature, extent, and cause of Rodriguez's injuries. As noted, these issues will in turn depend significantly on competing expert testimony. HEB seeks to allow its expert the same opportunity as Rodriguez's expert to fully develop and present his opinion, ensuring a fair trial. Without that opportunity, HEB lacks an adequate appellate remedy."

Consider the law. In some situations, the Court does apply a case-by-case approach to considering the inadequate remedy prong by considering the practical reality of the law as applied to a particular case. For example:

- A particular juvenile, due to his age, may lose the right to ever obtain a juvenile adjudication. *See In re B.T.*, 323 S.W.3d 158, 162 (Tex. 2010) ("B.T. has no plausible appellate remedy.").
- A defendant may lose the entire purpose of the immunity conferred by a particular federal statute if it had to wait for an appellate remedy. *See In re Facebook, Inc.*, 625 S.W.3d 80, 86 (Tex. 2021) ("Although mandamus relief is often unavailable to correct the erroneous denial of a motion to dismiss, it may nevertheless be warranted if a litigant would suffer 'impairment or loss' of 'important substantive ... rights' while awaiting the error's correction on appeal. . . . Among the rights that can only be vindicated by dismissal are those conferred by 'federal statutes [that] provid[e] covered defendants with immunity from suit.'"); *see also In re Jorden*, 249 S.W.3d 416, 420 (Tex. 2008) ("If (as relators claim) Texas law prohibits presuit depositions until an expert report is served, those depositions cannot be 'untaken' and thus an appellate court will not be able to cure the error and enforce the statutory scheme after trial.").

The right to a determination by an administrative agency would be lost, thus, "[t]his disruption, coupled with the hardship imposed on Entergy by a postponed appellate review, warrants an exception to our general proscription against using mandamus to correct incidental trial court rulings." *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004).

Consider the realities of an appeal. Finally, the court sometimes considers the realities of the appellate process—such as whether an appeal is even available or the practical ability of a party to present an issue in an appeal. For example:

- The court compared habeas relief to mandamus, concluding that mandamus relief is available in a contempt proceeding in certain circumstances. "Because the Court of Criminal Appeals declines to exercise jurisdiction over this civil case, Reece is left without a procedure for challenging his confinement in our state appellate courts. Accordingly, we hold Reece has no adequate remedy by appeal. We note that our holding is limited to situations where the underlying dispute is civil in nature, and the Court of Criminal Appeals declines to exercise its habeas jurisdiction." *In re Reece*, 341 S.W.3d 360, 376 (Tex. 2011).

"A relator does not lack an adequate remedy by appeal when the Court of Criminal Appeals entertains the merits of a habeas petition but dismisses with prejudice or denies relief. In other words, a relator is not entitled to a 'second bite at the apple' by virtue of our holding." *Id.*

- The court held mandamus relief was available because complaints about juror confusion could not be addressed under typical appellate standards: "Such extraordinary circumstances are present in this case because an appellate court could not remedy the likely juror confusion in a consolidated trial of these twenty plaintiffs' claims." *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004).

* * *

The adequacy of an appellate remedy can be a nuanced discussion with many areas of potential development of the law. Appellate practitioners should be aware of these doctrinal issues and, whether opposing mandamus relief or seeking it, should carefully consider the best arguments to raise on this part of the mandamus test.