The Next Thirty Years: Developments in Mandamus Jurisprudence in the Last Thirty Years and Why the General Rule that Mandamus is Unavailable to Review the Denial of Summary Judgment is Inconsistent with Modern Mandamus Jurisprudence under the in re Prudential Balancing Test

Timothy Delabar

Follow this and additional works at: https://commons.stmarytx.edu/thestmaryslawjournal

Part of the Civil Procedure Commons, Courts Commons, Judges Commons, Jurisprudence Commons, Legal History Commons, and the State and Local Government Law Commons

Recommended Citation
Timothy Delabar, The Next Thirty Years: Developments in Mandamus Jurisprudence in the Last Thirty Years and Why the General Rule that Mandamus is Unavailable to Review the Denial of Summary Judgment is Inconsistent with Modern Mandamus Jurisprudence under the in re Prudential Balancing Test, 55 St. Mary's L.J. 351 (2024).
Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol55/iss2/1

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, egoode@stmarytx.edu.
ARTICLE

THE NEXT THIRTY YEARS:
DEVELOPMENTS IN MANDAMUS
JURISPRUDENCE IN THE LAST THIRTY
YEARS AND WHY THE GENERAL RULE
THAT MANDAMUS IS UNAVAILABLE TO
REVIEW THE DENIAL OF SUMMARY
JUDGMENT IS INCONSISTENT WITH
MODERN MANDAMUS JURISPRUDENCE
UNDER THE IN RE PRUDENTIAL BALANCING
TEST

TIMOTHY P. DELABAR*

*  Associate, Cokinos | Young, PC, Dallas, TX; J.D., Baylor Law School, 2019; B.S., Texas Christian University, 2015. The opinions in this Article are solely my own and do not necessarily represent the views of my firm.

First and foremost, I wish to thank my wife, Morgan Delabar, for her constant support and for the time she spent listening to me talk about this topic, for reviewing the early drafts of this Article, and providing invaluable advice on how to improve the Article. I could not have made it this far without her.

I also wish to thank two mentors who have influenced my appellate interest. First, my former moot court coach, Patricia Wilson of Baylor Law School, for inspiring my passion for appellate law and for her oft repeated refrain that someday we may get “the law according to Tim” but “that day has not yet come.” Second, my former partner, Jennifer Martin of Wilson Elser Moskowitz Edelman & Dicker, LLP, for motivating me to write this Article and for supporting my desire to expand my litigation practice to include appellate work. I owe them both a great deal.
I. A Brief Overview of Mandamus Procedure ........................................ 359

II. The Evolution of Mandamus Procedure in Texas .......................... 363
   A. Early Twentieth-Century Shifts in Mandamus
      Jurisprudence ........................................................................ 364
   B. The Ebb and Flow of an Adequate Appellate Remedy in the
      Twentieth Century .................................................................. 367
      1. Lenient Standards of Cleveland (1926), Crane (1959), and
         Jampole (1984) .................................................................. 368
      2. Stricter Standards of Iley (1958), Abor (1985), and Walker
         (1992) ............................................................................... 370

III. The Historical Intersection of Summary Judgments and Mandamus
     Review ................................................................................... 373
   A. Early Attitudes toward Mandamus Review of Summary
      Judgment ............................................................................... 374
   B. The Introduction of the No-Evidence Rule .............................. 378

IV. Mandamus in the Twenty-First Century ...................................... 380
   A. The Modern Standard for Mandamus Review: The Prudential
      Balancing Test for an Adequate Appellate Remedy ............... 381
   B. Building Off Prudential: The Texas Supreme Court Recognizes
      Legislative Intent Is a Factor in the Balancing Test for an
      Adequate Appellate Remedy ............................................... 384
   C. Applying the Prudential Balancing Test to Rule 91a Reveals
      How Summary Judgment Is Treated Inconsistently ............ 388

V. The “General Rule” that Mandamus Review is not Available for the
   Denial of Summary Judgment is Inconsistent with Modern
   Mandamus Jurisprudence .......................................................... 391
   A. The Differences in No-Evidence and Traditional Summary
      Judgments Warrant Different Treatment ............................. 392
   B. Mandamus Review of No-Evidence Summary Judgments Could
      End the Litigation ................................................................. 393
   C. The Legislature Has Already Performed the Cost-Benefit
      Analysis .............................................................................. 397

Finally, I wish to thank the members of the St. Mary’s Law Journal and, in particular, Rylee Stanley and
Professor Flint, for their tireless work in improving this Article and getting it ready for publication.
D. Response to Concerns That this Would Flood the Appellate Court System .......................................................... 399
   1. Sanctions .................................................................................. 399
   2. Interlocutory Appeals Are Not a Substitute for Mandamus Relief ................................................................. 401

VI. Conclusion ............................................................................................. 404
“I think I’ll take a moment, celebrate my age, the ending of an era, and the turning of a page. Now it’s time to focus in on where I go from here. Lord, have mercy on my next 30 years.”

—Tim McGraw

Tim McGraw’s advice is prudent not just for individuals reflecting on their own mortality, but also for the judicial system to reflect on developments in law. In the past thirty years, Texas has seen a dramatic shift both in mandamus jurisprudence and summary judgment procedure. Twenty years ago, an appellate remedy was inadequate only when a party stood to lose its substantial rights in a way that could not be corrected on appeal, regardless of the cost of exercising those eventual appellate rights. Today, an appellate remedy is inadequate when the benefits of mandamus relief outweigh the detriments. Whereas *Walker v. Packer*’s categorical approach provided a strict formulation for when an appellate remedy was

---

2. As a word of caution, this Article is specific to Texas mandamus procedure. Although the federal and Texas mandamus standards require the same two elements, they are applied very differently. Mandamus remains a disfavored procedure in federal courts. See *Leonard v. Martin*, 38 F.4th 481, 493–95 (5th Cir. 2022) (Haynes, J., dissenting) (criticizing the majority for finding that the nonparty physician had an adequate remedy by appeal for refusal to quash an overly broad subpoena and by refusing to comply with and appealing any contempt order because “forcing Turnipseed to seek sanctions and risk his medical license for relief from that clearly erroneous order is an unacceptable obstacle that renders such relief ‘effectively unobtainable’”); United States v. *Abbott*, No. 23-50632, slip op. at 1, 7 (5th Cir. Feb. 9, 2024) (Willet, J., concurring) (citing cases holding mandamus is only warranted when the district court shows “a ‘persistent disregard of the Rules of Civil Procedure’ or a pattern of noncompliance that could justify mandamus relief”).
3. E.g., *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding) (disapproving of cases that apply a lenient standard for when mandamus is appropriate and holding “an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining the extraordinary writ”). As detailed further below, the party must also show the district court clearly abused its discretion. This prong underwent a significant transformation in the first half of the twentieth century but has remained fairly consistent since the latter half. See infra Section II.A.
4. See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (concluding in *Walker v. Packer*, “the word ‘merely’ carries heavy freight” and “whether an appellate remedy is ‘adequate’ so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules”); see also Marilynn Barnard et al., *Is My Case Mandamusable?: A Guide to the Current State of Texas Mandamus Law*, 45 ST. MARY’S L.J. 143, 145 (2014) (“Like many developments of the common law, the role of a petition for writ of mandamus has evolved over time. Over a decade ago, when attorneys questioned if they were entitled to mandamus relief, the usual answer was never.”).
adequate, *In re Prudential’s*6 balancing test recognizes “rigid rules are necessarily inconsistent with the flexibility that is the remedy’s principal virtue.”

Summary judgment has seen a similar expansion. Thirty years ago, Texas did not recognize a no-evidence summary judgment; parties could only obtain summary judgment by conclusively disproving an essential element of the opposing party’s claim or defense or by conclusively establishing every element of their affirmative defense.8 Today, a party may file a no-evidence motion for summary judgment pointing out that the opposing party lacks any evidence to support an essential element on which it bears the burden of proof.9 The rule’s purpose is to expeditiously resolve claims for which there is insufficient evidence to warrant a trial.10

Both developments were intended to foster efficiency in litigation and avoid unnecessary strains on the judicial system. But as every litigator knows, trial courts are sometimes hesitant to grant summary judgment.11

---

7. *See id.* at 136 (rationalizing the rule for determining when one can seek mandamus relief).
8. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995); *see also Robert W. Clore, Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants*, 29 ST. MARY’S L.J. 813, 820–21 (1998) (providing an example where the defendant obtained summary judgment and the Texas Supreme Court reversed because the defendants failed to negate the existence of proximate causation, only to then affirm a directed verdict for the defendants because the plaintiff failed to establish proximate causation in its case-in-chief).
9. *E.g.*, *B.C. v. Steak n Shake Operations, Inc.*, 598 S.W.3d 256, 259 (Tex. 2020) (per curiam) (contrasting a traditional summary judgment with a no-evidence summary judgment which requires the movant to identify at least one or more elements of their claim or defense “... to which there is no evidence,” and the burden then shifts to the nonmovant to produce “summary judgment evidence raising a genuine issue of material fact” (quoting TEX. R. CIV. P. 166a(i))).
10. *See Jose Fuentes Co. v. Alfaro*, 418 S.W.3d 280, 285 (Tex. App.—Dallas 2013, pet. denied) (recognizing the purpose of a no-evidence summary judgment); *Lattrell v. Chrysler Corp.*, 79 S.W.3d 141, 149 (Tex. App.—Waco 2002, pet. denied) (upholding the purpose of the no-evidence summary judgment rule, expeditiously disposing of claims lacking merit); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (“But also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.”) (emphasis added).
11. *See Kent Rutter & Natasha Becaus, Reasons for Reversal in the Texas Courts of Appeals, 57 Hous. L. REV. 671, 686 (2020) (discussing how in some areas of the state, “trial courts grant summary judgments only rarely, to dispose of the weakest of cases,” yet in other parts of the state, “trial courts more willingly grant summary judgment in closer cases”); see also William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1516 (2000) (“Although the procedure was heralded as a means to reduce costs and to improve judicial economy by piercing unmerited claims and untenable defenses, during most of the time that has elapsed since its adoption, trial and appellate courts have viewed summary judgment practice with hostility.”); *see also In re Kingman Holdings, LLC*, No. 13-21-00217-CV, 2021 WL 4301810, at *4 (Tex. App.—Corpus Christi–Edinburg Sep. 22, 2021) (trial court
Further, the intersection between mandamus and summary judgment has not changed much since 1992. By denying meaningful appellate review of a trial court’s denial of a no-evidence or traditional motion for summary judgment, the efficiency savings of the summary judgment procedure will never be fully realized.

12 Thirty years ago, summary judgment was never reviewable by mandamus. See Akyea v. Hobson, No. 01-91-00229-CV, 1991 WL 63595, at *1 (Tex. App.—Houston [1st Dist.] Apr. 25, 1991, orig. proceeding) (mem. op., not designated for publication) (“Likewise, mandamus is not appropriate to cure the erroneous denial of a motion for summary judgment. While an appellate court has the power to compel a trial court to proceed to judgment, we have no power to control the character of the judgment entered.”). Today, “[m]andamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion.” See In re State Farm Lloyds, No. 13-16-00049-CV, 2016 WL 902864, at *2 (Tex. App.—Corpus Christi–Edinburg Mar. 9, 2016, orig. proceeding). Rather than employ the flexible balancing test of Prudential, courts look for “exceptional circumstances” that would justify the departure from this general rule. Id. at *3 (collecting cases where appellate courts have denied mandamus review of orders denying traditional and no-evidence motions for summary judgment).

13 In the United States, 80–95% of civil cases settle before trial with tort cases more likely to settle than others. Yun-chien Chang & Daniel Klerman, Settlement Around the World: Settlement Rates in the Largest Economies, 14 J. OF LEGAL ANALYSIS 80, 89, 94 (2022); Jeffrey Johnson, Personal Injury Settlement Amounts Examples (2023 Guide), FORBES (Sept. 22, 2022), https://www.forbes.com/advisor/legal/personal-injury/personal-injury-settlement-amounts/#text=It's%20true%2C%20more%20than%2094,reach%20settlements%20at%20some%20stage [https://perma.cc/AS2L-TK99]. These settlement rates are largely driven by the costs of litigation. Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073, 1076 (May 1984) (arguing against the increased focus on settlement and commenting on the costs of litigation may force parties to settle); Judge Frank Easterbrook, Discovery as Abuse, 69 B.U.L. REV. 635, 636–37 (1989) (discussing how one of the primary drivers of settlement is anticipated cost, not merit); Cameron T. Norris, The Future of Discovery: One-Way Fee Shifting After Summary Judgment, 71 VAND. L. REV. 2117, 2123 (2018) (explaining how increases in litigation expenses make parties more likely to settle and, thus, “[i]t means there are cases in which a rational defendant would settle with a rational plaintiff even though the plaintiff’s suit has zero chance of success”); Keith N. Hylton, Agreements to Waive or Arbitrate Legal Claims: An Economic Analysis, 8 SUP. CT. ECON. REV. 209, 227–28 (2000) (“In the settlement context, the plaintiff and defendant will choose to litigate (i.e., bet) rather than settle when the ex ante wealth gain from the decision to litigate, which is measured by the expected judgment differential, exceeds the total litigation costs.”); see Charles Silver, We’re Scared to Death: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1358 (2003) (discussing how the pressure of class certification to settle even meritorious claims led the “[F]ederal Committee on Rules of Practice and Procedure to authorize interlocutory appellate review of certification orders”). As a more concrete example, consider business interruption claims stemming from the COVID-19 pandemic. Despite many insurance policies excluding loss “caused by or resulting from any virus,” many businesses sued their insurers for denying claims stemming from the pandemic. See Terry Black’s Barbecue, LLC v. State Auto. Mut. Ins. Co., 22 F.4th 450, 454 n.3, 456 (5th Cir. 2022) (joining “several other jurisdictions, including the Second, Sixth, Seventh, Eighth, Ninth, Tenth,
Imagine a scenario where Paul Payne files a suit against Don Davis asserting questionable claims in the hopes Davis will settle before the case proceeds to trial.\textsuperscript{14} Davis, confident Payne’s claims lack merit, files a no-evidence motion for summary judgment asserting Payne has no evidence of an essential element of his cause of action. The hearing is scheduled, and six days before the hearing, Payne still has not filed a response.\textsuperscript{15} Davis’s attorney tells her client that unless Payne is granted leave to file his response late, the trial court must grant the motion.\textsuperscript{16} The hearing date arrives, and Payne has neither filed a response nor sought leave to do so. Rule 166a is clear; the trial court “must grant the motion.”\textsuperscript{17} Still, the trial court inexplicably denies the motion. It is of little comfort to Davis that the jury’s verdict will come back in his favor or that the appellate court will correct the trial court’s error after he incurs the expense of a trial.\textsuperscript{18} Yet, that seems
to be the only option presented—for Davis to incur substantial expense and
the judicial system to waste time and resources on a case that should never
have proceeded to trial (or more likely settle before the case makes it to
trial). Although some may argue this scenario is rare, it indisputably
happens.

This Article argues the general rule that mandamus relief is not available
when a trial court erroneously denies a motion for summary judgment is
inconsistent with contemporary mandamus jurisprudence and should be
reconsidered. Section I provides a brief overview of mandamus procedure
in Texas. Section II explores the history of mandamus procedure in Texas,
with a particular focus on the evolution of the adequacy of an appellate
remedy. Section III focuses more specifically on the historical
developments of mandamus procedure as they relate to summary judgments
and the development of a “general rule” which states a party cannot seek
mandamus review of a denied summary judgment. Section IV explores how
developments in mandamus procedure over the past two decades require
reconsideration of the general rule that mandamus relief is unavailable.

19. See generally Major Michael J. Davidson, A Modest Proposal: Permit Interlocutory Appeals of
Summary Judgment Denials, 147 MIL. L. REV. 145, 205 (1995) (discussing how forcing a party to wait until
after trial to appeal a denial of summary judgment forces the party to “suffer the cost, inconvenience,
and risk associated with preparing for and litigating the case,” a result that is “clearly unjust”). This
Article does not go so far as Major Davidson in arguing that any denial of summary judgment should
be subject to immediate appellate review. But in those rare cases where a no-evidence motion is
opposed only by a conclusory affidavit or even no evidence at all, the judicial system and the rights of
litigants would be best served by quick appellate correction.

App.—Corpus Christi–Edinburg Sep. 22, 2021, orig. proceeding) (explaining the trial court denied a
no-evidence motion for summary judgment even though plaintiff did not file response and the trial
court was required to grant the motion). Fortunately, for Kingman, it was able to present exceptional
circumstances that justified mandamus relief—the property’s dwindling value during the pendency of
the title suit. However, if it could not present those exception circumstances, it would have been
forced to continue incurring the expense of litigating the case even though the trial court was required
to grant its motion for summary judgment. This result is directly contrary to the legislative goals that
prompted the Texas Supreme Court to adopt the no-evidence summary judgment procedure.
Finally, Section V argues the Texas Supreme Court should apply the Prudential balancing test to review denied summary judgment motions, or at a minimum, consider a narrow exception to the general rule where the trial court denies a no-evidence motion for summary judgment.

I. A Brief Overview of Mandamus Procedure

Mandamus is an extraordinary remedy. It begins when the party seeking relief, known as the relator, files an original proceeding in the court of appeals seeking a writ of mandamus to compel the respondent, usually the trial court judge, to do something—typically to issue a different ruling on a motion or to enter a ruling on a motion that has been pending for an excessive amount of time. In addition to the petition, the relator must provide a record of the underlying proceedings. Just like a direct appeal, the mandamus petition must be filed in the court of appeals with jurisdiction over the district in which the trial court sits.

Even where the relator satisfies the procedural requirements of Texas Rule of Appellate Procedure 52, the relator must also establish two substantive requirements. First, the relator must show the trial court clearly

21. TEX. R. APP. P. 52.1; TEX. R. APP. P. 52.2; see also O’Connor’s Texas Civil Appeals, Ch. 10–A § 2.1–2.3 (2023) (detailing the parties to an original proceeding).
22. TEX. R. APP. P. 52.7; Barnard et al., supra note 4, at 151 (“The most common reason for a court to deny a petition based on a procedural defect is the failure to provide an adequate record.”).
23. TEX. GOV’T CODE ANN. § 22.221(b). However, as with any appeal, if immediate action is required and the court of appeals cannot take immediate action because it cannot assemble a panel in time due to illness, absence, or unavailability, the nearest court of appeals may take action. TEX. R. APP. P. 17.2. Due to their nature, this rule is most often applied in situations involving writs of mandamus or writs of injunction. See e.g., In re Cortez, 415 S.W.3d 903, 903 (Tex. App.—Texarkana 2013, orig. proceeding). Cortez provides an interesting, albeit unlikely to be repeated, application of this principle wherein the relator sought review of an order from a Dallas County District Judge. Id. All justices on the Dallas Court of Appeals recused themselves from the direct appeal. Id. at 904. As a result, the relator filed a petition for writ of injunction in the Fort Worth Court of Appeals and sought a temporary stay until “jurisdiction over the appeal properly vested in a Court of Appeals and that court had an opportunity to consider and rule on a motion for emergency relief staying the order.” Id. The Texas Supreme Court transferred the appeal to the Texarkana Court of Appeals. Id. The relator then filed his petition for writ of injunction in the Texarkana Court of Appeals. Id. The Texarkana Court of Appeals concluded it lacked jurisdiction to consider the writ of mandamus because Dallas County was not within its the territorial jurisdiction nor was it the nearest court of appeals to Dallas. Id. Because the Fort Worth Court of Appeals had already stayed proceedings and the appeal itself was properly before the Texarkana Court of Appeals, the petition for writ of mandamus was unnecessary for the court to protect the petitioner’s rights and its own jurisdiction. Id.
abused its discretion. Second, the relator must show it has no adequate remedy by appeal. If the relator satisfies both criteria, then the court of appeals or the Texas Supreme Court may issue a writ of mandamus directing the trial court to correct its abuse of discretion.

24 Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (citing Johnson v. Fourth Ct. of Appeals, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)).

25 Id. There is some precedent holding that when the trial court’s error is of a sufficiently grievous nature, the second may prong may be presumed. Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 308–09 (Tex. 1994) (orig. proceeding), superseded by statute, TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7), as recognized in In re AIU Ins. Co., 148 S.W.3d 109 (Tex. 2004). Canadian Helicopters involved the trial court’s denial of a special appearance. The Texas Supreme Court rejected the relator’s argument that because, personal jurisdiction “‘protects the defendant against the burdens of litigating in a distant or inconvenient forum,’ and ‘ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts,’” the harm of having to defend a suit in which personal jurisdiction is lacking could never be remedied on appeal. Id. at 307 (internal citations omitted). Despite concluding a post-judgment appeal is ordinarily an adequate remedy and relying on Walker v. Packer’s formulation for an adequate appellate remedy, the Texas Supreme Court added sometimes the trial court “may act with such disregard for guiding principles of law that the harm to the defendant becomes irreparable . . . . In such a situation, a defendant’s remedy by appeal may be inadequate and mandamus therefore appropriate.” Id. at 308–09. Although the court concluded the case did not fall within the exception, the court employed this exception the following year. See Nat’l Indus. Sand Ass’n v. Gibson, 897 S.W.2d 769, 771, 776 (Tex. 1995) (orig. proceeding) (finding mandamus warranted where the trial court denied a special appearance despite the “total and inarguable absence of jurisdiction”). It is unclear whether this exception survived Prudential’s balancing test and, if so, if it is limited solely to the denial of a special appearance. Because the Texas Legislature superseded Canadian Helicopters by providing for interlocutory appeal as a matter of right from the denial of a special appearance, it seems unlikely we will find out the answers to these questions. Nevertheless, it remains worth noting because in Canadian Helicopters, the Texas Supreme Court also described the general rule as “allowing mandamus review of special appearances only where truly extraordinary circumstances exist . . . .” Canadian Helicopters Ltd., 876 S.W.2d at 309. This general rule followed by an exception for “extraordinary circumstances” is the same formula Texas courts employ today when considering mandamus review of denied summary judgments. Would a trial court’s denial of a no-evidence summary judgment where the plaintiff never files a response be acting “with such disregard for guiding principles of law that the harm to the defendant becomes irreparable”? Gibbons, 897 S.W.2d at 771. Justice Cornyn, joined by Chief Justice Phillips and Justices Gammage and Enoch certainly thought so. Id. at 777 (Cornyn, J., dissenting) (dissenting from the majority’s grant of mandamus because the relator had an adequate remedy by appeal and “[i]f the Court is free to ignore that tenet in this case, it may as well begin issuing extraordinary writs to correct denials of summary judgments”). Although Justice Cornyn was being facetious, there is no reason why mandamus review of the denial of a no-evidence summary judgment for which no response was filed would not be a natural and logical progression of the Canadian Helicopters exception. However, given the types of extraordinary circumstances that have warranted granting mandamus relief for the denial of summary judgment, it seems unlikely; but that could be because the question has never been posed that way.

26 Or, as more commonly occurs, the appellate court describes how the trial court abused its discretion and trusts that the trial court will correct the abuse of discretion on its own. In re United
The first requirement, that the trial court clearly abused its discretion, generally involves establishing the trial court could reasonably have reached only one decision.27 "A trial court has no ‘discretion’ in determining what the law is or applying the law to the facts."28 This is true even where the law is unclear.29 The appellate court, however, may not resolve disputed facts by mandamus nor grant mandamus relief where “the issues before the trial court necessarily require factual determinations.”30 Most mandamus cases involve the application of the law to the facts.31

27. Walker, 827 S.W.2d at 840 (Tex. 1992) (orig. proceeding) (citing Johnson, 700 S.W.2d at 917).
28. Id. at 840.

Admittedly, the line between determination of fact and application of law to fact is not always clear. The party arguing mandamus is warranted will often say the issue is one of application whereas the party opposing mandamus will often say the issue is one of determination. Although not expressly stated, it is most likely a sliding scale where the clearer legal standard, the more likely the court of appeals will conclude it is an issue of application and the less clear the legal standard, the more likely the court of appeals will conclude it is an issue of determination. Regardless, it is best for the relator to make a clear record in the trial court of what facts are essential and how the trial court determined these facts to head off any argument about the presence of disputed facts.

31. As a result, it is especially important to provide the court of appeals with an adequate record when seeking mandamus relief. See TEX. R. APP. P. 52.1 (outlining the steps for filing a writ of...
The second requirement is that the relator has no adequate remedy by appeal. Whether the relator has an adequate remedy by appeal is not always clear.\(^\text{32}\) As Section II further discusses, the adequacy of an appellate remedy has shifted over time, and to some extent, exhibited a yo-yo like trajectory as the Texas Supreme Court has sought to refine its definition.\(^\text{33}\) Most recently, the Texas Supreme Court in \textit{Prudential} adopted a flexible standard that is reminiscent of the early view of an adequate appellate remedy.\(^\text{34}\) Despite some periods of inconsistency in the twentieth century, the Texas Supreme Court has shown no inclination to retreat from the flexible standard set forth in \textit{Prudential}.\(^\text{35}\)

Finally, although not an express requirement for mandamus relief, the relator must also convince the court of appeals that the petition was timely sought.\(^\text{36}\) Unlike a direct appeal, there is no strict deadline for filing a petition for writ of mandamus. Instead, consistent with the equitable nature of the remedy, the court of appeals will employ a \textit{Laches}-esque test for whether the relator delayed seeking relief.\(^\text{37}\)

\(^{32}\) As detailed infra in Section II, both criteria have evolved significantly from their early formulations, with the latter being the subject to much greater evolution. This Section provides a brief overview of the current standards for mandamus relief to provide context for those whose practice does not frequently involve mandamus.

\(^{33}\) \textit{See infra} Section II discussing the evolution of mandamus procedure.

\(^{34}\) \textit{See Prudential Ins. Co.}, 148 S.W.3d at 136 (describing their approach as flexible, not “formulaic”); \textit{see generally} Bradley v. McCrabb, Dallam 504, 506 (Tex. 1843) (orig. proceeding) (describing the historical origins of the writ).

\(^{35}\) \textit{Prudential Ins. Co.}, 148 S.W.3d at 136; \textit{In re Academy, Ltd.}, 625 S.W.3d 19, 36 (Tex. 2021) (orig. proceeding).

\(^{36}\) Rivercenter Assoc. v. Rivera, 858 S.W.2d 366, 367–68 (Tex. 1993) (orig. proceeding) (finding a four-month delay warranted the denial of mandamus relief, because the relator did not show “diligent pursuit”).

\(^{37}\) \textit{Compare In re Int'l Profits Assoc.}, 274 S.W.3d 672, 676 (Tex. 2009) (orig. proceeding) (illustrating multiple delays totaling nearly two years did not warrant denial of mandamus relief), \textit{with Rivercenter Assoc.}, 858 S.W.2d at 367 (finding an inexplicable four-month delay warranted the denial of mandamus relief). As the Texas Supreme Court clarified, the distinction between these two cases rests on the relator’s explanation for the delay. In Rivercenter, the relator did not explain the delay nor appear to have been diligent in seeking relief, but in \textit{International Profit Associates}, the relator “worked diligently to move the case along” and the delay was not the result of the relator’s own inaction. \textit{In re American Airlines, Inc.}, 634 S.W.3d 38, 42–43 (Tex. 2021) (orig. proceeding) (restating the Texas Supreme Court’s stance that “[e]quity aids the diligent and not those who slumber on their rights” (quoting \textit{Rivercenter Assoc.}, 858 S.W.2d at 367)). Although a reasonable explanation for delay may be enough to save a petition, the better practice is not to delay filing unless absolutely necessary.
II. THE EVOLUTION OF MANDAMUS PROCEDURE IN TEXAS

Mandamus is an extraordinary remedy that has long existed in Texas. Indeed, it has long existed at common law. Yet, its present iteration does not resemble its historical analogue. As the Texas Supreme Court has repeatedly stated, mandamus review is available only where there has been a clear abuse of discretion and the relator has no adequate remedy by appeal.

At the start of the twentieth century, mandamus was not available to correct a trial court’s errant ruling; it could be used to compel a trial court to issue a ruling, but not to direct what that ruling should be. During the

38. See Bradley, Dallam 504 at 509 (“The processes in mandamus are of an extraordinary nature . . . .”); see Arberry v. Beavers, 6 Tex. 457, 457 (1851) (orig. proceeding) (“A mandamus is an extraordinary remedy . . . .”); see also Aycock v. Clark, 94 Tex. 375, 377 (1901) (orig. proceeding) (describing mandamus as an “extraordinary remedy”).

39. There is no clear consensus about the origin of mandamus procedure, it is at least clear that it has existed since 1615. See Richard E. Flint, The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More Mile Marker Down the Road of no Return, 39 ST. MARY’S L.J. 3, 10–11 (2007) (“Most academics trace the birth of mandamus to the year 1615 in the opinion by Lord Cote, Chief Justice of King’s Bench, in Bagg’s case.”). But see e.g., Robert H. Howell, An Historical Account of the Rise and Fall of Mandamus, 15 VICTORIA L. REV. 127, 130–31 (1985) (discussing how some scholars have traced the origins of mandamus to as early as the Magna Carta (1215) or the reign of Edward II (1307–1327)). Although it is impossible to definitively identify the origin of this extraordinary writ, it is safe to say that that it existed at common law for half a century, give or take 100 years. While often overshadowed by the discussion of judicial review, this extraordinary writ also lies at the heart of what is arguably the most famous decision handed down by the United States Supreme Court, when William Marbury petitioned for a writ of mandamus directing James Madison to deliver his commission as justice of the peace in Marbury v. Madison, Marbury v. Madison, 5 U.S. 137 (1803).

40. Compare Arberry, 6 Tex. at 472 (“[A] public officer or inferior tribunal may be guilty of so gross an abuse of discretion . . . as to amount to a virtual refusal to perform the duty enjoined . . . and in such a case a mandamus would afford a remedy where there was no other adequate remedy . . . .”), with In re K&L. Auto Crushers, LLC, 627 S.W.3d 239, 247 (Tex. 2021) (orig. proceeding) (discussing how a party can demonstrate that the trial court erred by misapplying the law “even when the law is unsettled” (quoting In re Prudential Ins. Co., 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding))); see also Flint, supra note 39, at 5–6 (“[T]he court has recognized over its history that in certain cases of extraordinary circumstances the remedy by appeal will be deemed inadequate.”).

41. Bradley, Dallam 504 at 506 (Tex. 1843) (“[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.”); Arberry, 6 Tex. at 473–74 (Mandamus is available only when the relator has shown “a clear legal right in himself and a corresponding obligation on the part of the officer” and the relator “has no other adequate means of redress afforded him by law”); Aycock, 94 Tex. at 376–77 (describing the “two insuperable objections to granting [mandamus relief],” that cannot be used to overrule a matter of the trial judge’s discretion and can “never [be] awarded where the law has provided another plain, adequate, and complete remedy”).

42. Aycock, 94 Tex. at 376. In Aycock v. Clark, the Texas Supreme Court stated:
early part of the twentieth century, however, mandamus jurisprudence experienced a shift—both in the types of rulings subject to mandamus and in the standard for determining whether the relator had an adequate appellate remedy. In the latter half of the twentieth century, the adequacy of an appellate remedy ebbed and flowed between lenient and stringent standards. At the start of the twenty-first century, the Texas Supreme Court established the flexible standard we know today.

A. Early Twentieth Century Shifts in Mandamus Jurisprudence

The first shift involved courts refocusing the analysis on whether an action was a purely ministerial act subject to mandamus review, or an exercise of discretion or judicial authority not subject to mandamus review. In *King v. Guerra*, the court of appeals recognized that mandamus could be

A judge may be commanded to proceed to the trial of a case. So, also, he may be compelled to enter a judgment upon the verdict of a jury, where he has refused to enter any judgment whatever. But the determination of what is the proper judgment to be entered upon a verdict calls for the exercise of judicial discretion, and that discretion cannot be controlled by another court by a writ of mandamus.

*Id.*; *Palacios v. Rayburn*, 516 S.W.2d 292, 293–94 (Tex. App.—Houston [1st Dist.] 1974, orig. proceeding) (recognizing although a court possess the power to compel a trial judge to effectuate a judgment, its authority is confined to mistrial acts, including an entry of a default judgment, which requires the judge to ascertain the sufficiency of a party’s petition and process). Modern cases likewise state that mandamus is only available to compel ministerial acts, those “where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *City of Hous. v. Houston Mun. Empls. Pension Sys.*, 549 S.W.3d 566, 576–77 (Tex. 2018). Yet, a party can satisfy the first prong for mandamus review by showing that the trial court erred in determining what the law is “even when the law is unsettled.” *K&L Auto Crushers, LLC*, 627 S.W.3d at 247 (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 135). In direct contrast to *Palacios*, where the First District Court of Appeals held that it could only compel a trial court to enter judgment, not tell it what judgment to enter, the Sixth District Court of Appeals granted mandamus relief and ordered the trial court to vacate its order granting a new trial and reinstate default judgment. *In re Britt*, 529 S.W.3d 93, 97–98 (Tex. App.—Texarkana Nov. 29, 2016, orig. proceeding). Although mandamus is still limited presumably limited to ministerial acts, what qualifies as a ministerial has expanded.

43. See *King v. Guerra*, 1 S.W.2d 373, 376 (Tex. App.—San Antonio 1927, orig. proceeding) (“The distinction has been clearly drawn between a ministerial act, which may be reviewed and directed by the courts, and an act requiring the exercise of judgment or discretion, which the courts will not review or control.”).


45. See *King*, 1 S.W.2d at 376 (clarifying precedent regarding the distinction between ministerial acts and discretionary acts).

46. *Id.* at 373.
used to compel a trial court to perform a ministerial act, but if the act involved the trial judge’s exercise of discretion, then it was not properly the subject of mandamus review. Yet, the court went a step further and recognized an exception to this general rule, holding that when the facts and law were so clear that “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 in determining whether the duty exists, it is not to be deemed ministerial.”

Although previous courts had recognized a judicial decision could be so clearly defined in law that its performance was ministerial, few courts were willing to hold a decision was of such a clear nature that the trial court’s action was an abuse of discretion sufficient to warrant mandamus relief. Thus, although King v. Guerra was soundly based on dicta of prior cases, its application of that dicta marked a shift in mandamus jurisprudence.

The second shift began when courts started to consider how to define whether an appellate remedy was truly adequate. In Gulf, Colorado & Santa Fe Railway Co. v. Muse, the Texas Supreme Court considered mandamus relief where, after the jury returned a verdict, the trial court granted a motion for new trial, then set aside that order on rehearing and entered judgment on the jury’s verdict. The plaintiff sought and was granted mandamus

---

47. Id. at 376 (explaining United States Supreme Court precedent has established mandamus will issue to a government officer only when the duty to be performed is ministerial but not when the duty requires the officer to exercise judgment or discretion (citing Comm’r v. Smith, 5 Tex. 471, 478 (Tex. 1849) (orig. proceeding)).
48. Id. (citing Smith, 5 Tex. at 479).
49. Commissioner of Gen. Land Off. v. Smith, 5 Tex. 471, 480 (Tex. 1849) (orig. proceeding) (“But the right must be clear. For if the right or the obligation be doubtful the court will refuse the writ. Does the record in the present case disclose a right which is clear?”) (internal quotations omitted). Although the Texas Supreme Court espoused this exception in Smith, it concluded the rights were not sufficiently clear.
50. Ultimately, the Guerra Court denied mandamus because under the relevant statutory/regulatory scheme, the commissioners acted more as a jury than a trial judge and so the court reviewed the matter as it would a jury’s verdict. King, 1 S.W.2d at 377. As a result, some commentators do not view King v. Guerra as marking a shift in mandamus jurisprudence. See William E. Barker, The Only Guarantee Is There Are No Guarantees, 44 HOU. L. REV. 703, 706–07 (2007) (“In the 1960’s and 1970’s, however, a lesser standard began to replace the strict standard expressed by the [Little v. Morris, 1 Tex. 263 (1853)] court.”). But see Womack v. Berry, 291 S.W.2d 677, 682 (Tex. 1956) (orig. proceeding) (citing, among others, King v. Guerra for the proposition that “[t]he rule denying mandamus with respect to matters of a discretionary character is not without limitation, however, and the writ may issue in a proper case to correct a clear abuse of discretion.”).
52. Id. at 898.
relief from the court of appeals. The defendant then sought its own mandamus relief from the Texas Supreme Court. The plaintiff argued mandamus relief was not warranted because the defendant could appeal after the case was retried. The Texas Supreme Court emphatically rejected this argument, stating:

For it has been the law of Texas since [Bradley v. McCrabb, Dallam, 507] 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.’ Not only would the remedy to defendant of appeal and writ of error, after another trial, be manifestly tedious, but such remedy would also be inadequate; for it is the very essence of defendant’s right that it is entitled not to have to respond further to plaintiff’s cause of action than by payment of his judgment.

Today, mandamus relief is widely available to correct erroneous discovery rulings, venue rulings, denials of leave to designate a responsible third party, denials of a continuance, and many other interlocutory orders that would previously have been deemed to have an adequate remedy by appeal.

53. Id.
54. Id.
55. Id.
56. Id. at 900.
57. See In re UPS Ground Freight, Inc., 646 S.W.3d 828, 831 (Tex. 2022) (orig. proceeding) (explaining the scope of discovery is typically within the trial court’s discretion, except in cases where overly broad discovery is compelled by the trial court); see also In re Kuraray Am., Inc., 656 S.W.3d 137, 142–44 (Tex. 2022) (orig. proceeding) (per curiam) (discussing when an order forcing production of a person’s cell-phone data is appropriate).
58. See In re Team Rocket, L.P., 256 S.W.3d 257, 258 (Tex. 2008) (orig. proceeding) (granting mandamus relief where the trial court refused to enforce a prior order setting venue in a transferee county).
59. See In re Mobile Mini, Inc., 596 S.W.3d 781, 788 (Tex. 2020) (orig. proceeding) (per curiam) (granting mandamus to correct erroneous denial of motion to designate responsible third party); see also In re Dawson, 550 S.W.3d 625, 631 (Tex. 2018) (orig. proceeding) (granting mandamus to correct erroneous grant of motion to designate responsible third party).
61. O’Connor’s Texas Civil Appeals, Ch. 10–B § 5.1.2 (2023) (listing 29 types of rulings that may be subject to mandamus review, including rulings relating to pro hac vice admissions, attorney disqualification, appointment of guardian ad litem, appointment of special master, order to deposit funds in court registry, temporary restraining order, temporary injunction, special appearances, venue, designation of responsible third party, certain types of dismissal, plea abatement, arbitration, jury
B. *The Ebb and Flow of an Adequate Appellate Remedy in the Twentieth Century*

Throughout the twentieth century, the Texas Supreme Court’s analysis of when a remedy by appeal was adequate has often been inconsistent. At times, a more lenient standard applied. Yet at others, a more stringent standard applied. In many instances, whether a particular issue was subject to mandamus review depended on the prevailing standard for an adequate remedy by appeal when that issue was first considered for mandamus relief. This was the case for summary judgments, which have no history in common law. The first case of mandamus review came at a time when the Texas Supreme Court employed a stringent standard for the adequacy of an appellate remedy.

62. See *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984) ("Moreover, requiring a party to try his lawsuit, debilitated by the denial of proper discovery, only to have that lawsuit rendered a certain nullity on appeal, falls well short of a remedy by appeal that is 'equally convenient, beneficial, and effective as mandamus."). (internal quotations omitted); *see Cleveland v. Ward*, 285 S.W. 1063, 1068 (Tex. 1926) ("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."). (internal citations omitted); *see also Crane v. Tunks*, 328 S.W.2d 434, 438 (Tex. 1959) (trial court abused its discretion in ordering production of tax returns without examining them to determine what portions were material and relevant and ordering only production of those portions).

63. See *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding) ("We therefore disapprove of *Cleveland*, *Crane*, *Jampole* and any other authorities to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus."); *see also Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985) (orig. proceeding) (mandamus was not warranted because there was an adequate remedy by appeal after trial but the court suggested that perhaps, however, should a plea in abatement be refiled, Judge Black will consider his ruling in light of this opinion"); *see generally Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958) (orig. proceeding) ("[T]hat there may be some delay in getting questions decided through the appellate process, or that court costs 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.").

64. The earliest case considering whether the relator had an adequate remedy by appeal was in 1991, when the adequacy of an appellate remedy was determined under the stringent standard of *Abor v. Black*. See *Akyea v. Hobson*, No. 01-91-00229-CV, 1991 WL 63595, at *1 (Tex. App.—Houston [1st Dist.] Apr. 24, 1991, orig. proceeding) (mem. op., not designated for publication) (clarifying mandamus
1. Lenient Standards of Cleveland (1926), Crane (1959), and Jampole (1984)

Representing the more lenient standard for an adequate appellate remedy are the cases of Cleveland v. Ward,55 Crane v. Tunks,66 and Jampole v. Touchy67 decided in 1926, 1959, and 1984 respectively. To start, Cleveland v. Ward involved a tortured history of competing proceedings, writs, and injunctions in the district courts of Dallas and Johnson Counties and the Courts of Civil Appeals for Dallas and Fort Worth.68 In deciding it had the ability to issue the writ of mandamus, the Texas Supreme Court said the ability to appeal from the adverse orders on the pleas in abatement and the injunction was “inadequate and not commensurate with the relief to which the relators . . . are entitled.”69 The court went on to say for an appellate remedy to be adequate, “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.”70 The question is not whether a party has a remedy at law, but rather whether the remedy at law is “adequate to afford the party aggrieved the particular right which the law accords him . . . .”71

is not the proper avenue of relief for denial of a motion for summary judgment). What makes this case particularly interesting is that the appellate court found it “troubling” that the plaintiff could avoid the effect of res judicata when the facts establishing its applicability were admitted yet still denied the writ because “[d]elay, added cost, or inconvenience caused by an otherwise adequate appeal will not justify the use of mandamus.” Id.

58. See generally Cleveland, 285 S.W. at 1066–68 (granting relief after a brief discussion of the procedural history). The procedural posture is not necessary to understand the Texas Supreme Court’s discussion of mandamus procedure except to understand that the Dallas Court of Civil Appeals had issued writs of mandamus and prohibition directing the Dallas district court to proceed to trial and for the Johnson County District Court to refrain from taking any action while the Fort Worth Court of Civil Appeals issued the exact opposite writs. Id. As Chief Justice Cureton wrote, the case describes the procedural history “with as much brevity as the record permits” but due to the competing proceedings and compressed timetable, even the Texas Supreme Court had trouble understanding the procedural history of the cases. Id.
59. Id. at 1068.
60. Id.
61. Id. (quoting Spelling on Extraordinary Relief, Vol. 2, Sec. 1375). The Texas Supreme Court quoted the following passage from Spelling as correctly stating the rule:

In order that the existence of another remedy shall constitute a bar to relief by mandamus, such other remedy must not only be an adequate remedy in the general sense of the term, but it must
Crane v. Trunks, on the other hand, was a more routine discovery dispute involving land conveyed subject to a life estate and the ownership of mineral rights to the same land. As part of that lawsuit, the plaintiff sought various documents relating to both the conveyances of the land and audits as well as to the relator’s finances. After the trial court ordered the documents produced, the relator sought a writ of mandamus. In responding to the argument that the discovery order was within the trial court’s discretion and, therefore, not subject to mandamus, the Texas Supreme Court said the order was incidental to the trial and not subject to appeal. Further, forcing the relator to wait until after trial to complain of an erroneous order to produce her tax returns would deprive her of any remedy. “The question of the legality of the court’s order would become an academic one, and the objection to the order would be moot.” Because an appeal would be ineffective, the Texas Supreme Court had jurisdiction to issue the writ of mandamus.

be specific and appropriate to the circumstances of the particular case. It must be such a remedy as is calculated to afford relief upon the very subject of the controversy. For, if it is not adequate to afford the party aggrieved the particular right which the law accords him, mandamus will lie, notwithstanding the existence of such other remedy. The remedy at law which will operate as a bar to mandamus must generally be such a remedy as will enforce a right or the performance of a duty. A remedy cannot be said to be fully adequate to meet the justice and necessities of a case, unless it reaches the end intended and actually compels a performance of the duty in question, and is not an adequate remedy within the meaning of the rule under consideration. The controlling question is not, ‘Has the party a remedy at law?’ but ‘Is that remedy fully commensurate with the necessities and rights of the party under all the circumstances of the particular case?’ Or, as was said in one case, ‘To supersede the remedy by mandamus, the party must not only have a specific remedy, but one competent to afford relief upon the very subject-matter of his application, and one which is equally convenient, beneficial, and effective as the proceeding by mandamus.’ The court will interfere by mandamus in a proper case, notwithstanding the fact that the form and method of proceeding by mandamus are such as to prevent the judgment of the court from being revised by writ of error.

Id. 1068–69 (internal quotations omitted).
72. Crane v. Trunks, 328 S.W.2d 434, 435 (Tex. 1959) (orig. proceeding).
73. Id. at 436.
74. Id. at 439.
75. Id.
76. Id.
77. Id.
78. Id.
Similarly, *Jampole v. Touchy* involved a discovery dispute—only this time pertaining to an order denying discovery.79 The trial court’s order prevented the relator from “proving the material allegations of his lawsuit” and, by extension, prevented him from making the requested discovery part of the appellate record.80 As a result, the appellate court could not determine whether denying discovery was harmful.81 Even if the court were to dispense with the harmless error rule and resurrect the doctrine of presumed harm when the trial court denies discovery, it still would not be an adequate remedy by appeal because the relator would have to try the case “debilitated by the denial of proper discovery, only to have that lawsuit rendered a certain nullity on appeal . . . .”82 The expense and burden of a trial that would almost certainly be reversed made the remedy by appeal inadequate.83

In each of these cases, the Texas Supreme Court considered not only whether the relator had a remedy by appeal, but also whether the costs or burdens of exercising that remedy made it truly adequate. Although not identical, their analysis bears some similarity to the analysis of whether a party has an adequate remedy by appeal employed today.


Interspersed with the more lenient cases of *Cleveland, Crane*, and *Jampole*, the Texas Supreme Court espoused a more stringent standard for an adequate appellate remedy in *Iley v. Hughes*, 84 *Abor v. Black*, 85 and *Walker v. Packer*, 86 decided in 1958, 1985, and 1992 respectively. In *Iley v. Hughes*, decided one year before *Crane*, the Texas Supreme Court was asked to grant mandamus relief of a trial court’s order permitting separate juries to decide liability and damages in a personal injury case.87 After the jury returned a verdict that the defendant was liable, awarding damages for past medical expenses, but failing to reach a consensus on other elements of damages, the plaintiff moved for entry of an interlocutory judgment on liability while

80. *Id. at 576.
81. *Id.
82. *Id.
83. *Id.
87. *See Iley*, 311 S.W.2d at 649 (recounting the facts of the case which involved an assault on the plaintiff with a .22-caliber rifle).
the relator moved for a mistrial. The trial court denied the motion for mistrial, entered judgment on the liability issues, and empaneled a second jury for a trial on the damage issues. Although the Texas Supreme Court found this was an abuse of discretion, it nonetheless declined to issue the writ of mandamus because the ordinary course of action would be for the trial court to enter judgment on the jury’s verdict and a party appeal if the judgment were incomplete or conflicting. Even though this case presented an “unusual fact situation” where judgment would not be entered until a second trial, necessarily resulting in “delay and additional costs,” the Texas Supreme Court held a traditional appeal was an adequate remedy. In contrast to the Crane analysis of whether a remedy by appeal is as convenient, beneficial, and effective as mandamus, the court said that intervention by mandamus “is justified only when parties stand to lose their substantial rights.”

In Abor v. Black, decided two years after Jampole, the Texas Supreme Court was asked to grant mandamus relief in a race to the courthouse where the potential defendant sought to use the Texas Declaratory Judgment Act to decide the time and forum for trial. The declaratory judgment court declined a plea in abatement. The Texas Supreme Court held the declaratory judgment court “should have declined to exercise such jurisdiction because it deprived the real plaintiff of the traditional right to choose the time and place of suit.” Nevertheless, the Court declined to issue the writ of mandamus, holding that the relator had an adequate remedy by appeal.

---

88. Id.
89. Id.
90. See id. at 651–52 (declining to grant the writ of mandamus because any issue could be corrected on appeal).
91. Id. at 652.
92. Id. (noting the following year the Texas Supreme Court returned to the Cleveland standard for an adequate appellate remedy (citing Womack v. Berry, 291 S.W.2d 677 (Tex. 1956))).
94. Id. at 567.
95. Id. at 566.
96. See id. at 567 (explaining how the Texas Supreme Court also held the trial court’s order was error, however it was not a clear abuse of discretion “because the law in Texas was not settled”). But see In re Houston Specialty Ins. Co., 569 S.W.3d 138, 141–42 (Tex. 2019) (orig. proceeding) (clarifying in Abor, the Texas Supreme Court declined mandamus relief because the law in Texas was not settled and because mandamus was not available “in an abatement case unless one of the trial courts involved had enjoined the other from proceeding,” later cases abrogated this stringent standard because “mandamus relief is appropriate to spare private parties and the public the time and money utterly
Finally, in *Walker v. Packer*, the Texas Supreme Court was asked to grant mandamus relief in a case involving two discovery disputes, documents requested from another party and from a non-party.97 In determining that the relator had an adequate remedy by appeal, the Texas Supreme Court said mandamus is “an extraordinary remedy, available only in limited circumstances,” which involves “manifest and urgent necessity and not for grievances that may be addressed by other remedies.”98 According to the Texas Supreme Court, this principle was “well-settled.”99 Relying on *Iley*, the Court noted “an appellate remedy is not inadequate merely because it may involve more expense or delay” and that “delay in getting questions decided through the appellate process . . . will not justify intervention by appellate courts through the extraordinary writ of mandamus.”100

In these cases, the Texas Supreme Court rejected the more lenient standard where an adequate remedy by appeal must be “equally convenient, beneficial, and effective as mandamus.”101 It based this ruling on the wasted enduring eventual reversal of improperly conducted proceedings” (quoting *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding)).

98. *Id.* at 840 (quoting Holloway v. Fifth Ct. of Appeals, 767 S.W.2d 680, 684 (Tex. 1989)).
99. *Id.*
100. *Id.* at 842 (quoting *Iley v. Hughes*, 311 S.W.2d 649, 652 (Tex. 1958)).
101. See *id.* (disapproving three Texas cases that implied a remedy by an appeal was inadequate merely because of potential cost or delays). The Texas Supreme Court concluded limiting the availability of mandamus review in this way was “strict adherence to traditional mandamus standards . . . .” *Id.* at 843. Interestingly, the view the Texas Supreme Court criticized finds its support in early mandamus jurisprudence. See generally *Bradley v. McCrabb*, Dallam 504 (Tex. 1843) (orig. proceeding) (discussing when issuance of mandamus is appropriate); see also H. G. *W. Wood, A Treatise on the Legal Remedies of Mandamus & Prohibition, Habemus Corpus, Certiorari & Quo Warranto* 35 (2d ed. 1891) (“It must not only appear that there is another remedy, but also, that such other remedy is equally effectual . . . . The mere fact that there is another remedy does not preclude the issue of mandamus, the question always is, whether there is another adequate and efficient remedy.”); see generally 2 *Thomas Carl Spelling, A Treatise on Injunctions and Other Extraordinary Remedies* 1183 (1901) (“The controlling question is not, ‘Has the party a remedy at law?’ but ‘Is that remedy fully commensurate with the necessities and rights of the party under all the circumstances of the particular case?’”). Courts in other states had similarly expressed that to be adequate, an appellate remedy must be as equally beneficial, convenient, and effective as mandamus. See e.g., Hewitt v. Ryan, 356 N.W.2d 230, 233 (Iowa 1984) (internal citations omitted) (“If there is a plain, speedy and adequate remedy at law, mandamus does not lie. When such a remedy is available through certiorari or appeal, mandamus should not be ordered. The other available remedy, however, must be competent to afford relief on the very subject matter in question, and be equally convenient, beneficial and effectual.”); see also Snyder v. Callaghan, 284 S.E.2d 241, 253 (W. Va. 1981) (“The existence of another remedy will not preclude resort to mandamus for relief where such other
conclusion that this lenient standard is “unworkable, both for individual cases and for the system as a whole” because mandamus “disrupts the trial proceedings” and forces 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.”102 In Walker, the ruling at issue was a collateral discovery matter that delayed trial on the merits for more than two years.103 Because the case involved a discovery order, much of the court’s rationale focused on mandamus review of discovery orders.104 Yet, the court announced a rule that applied broadly to any petition for writ of mandamus, that it disapproved of “Cleveland, Crane, Jampole and any other authorities to the extent they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus.”105

Although this strict standard was later overruled by the flexible standard set forth in Prudential, it was the first case where a relator sought a petition for writ of mandamus to compel a trial court to grant summary judgment. It was at this time when the Texas Rules of Civil Procedure were amended to provide the no-evidence procedure employed today. Accordingly, it is against the backdrop of Abor v. Black and Walker v. Packer that the intersection of summary judgment and mandamus finds its genesis.

III. THE HISTORICAL INTERSECTION OF SUMMARY JUDGMENTS AND

We realize that it has been held that the mere fact that an appeal would be ‘slower’ does not in itself make the issuance of the writ of mandamus proper. But it is also true that the remedy by appeal should be equally adequate and effective to prevent the allowance of the writ. We are not here employing the writ of mandamus as a substitute for an appeal. The order complained of is an interlocutory order which is not now appealable. In the present situation relators could only accede to that order, try their case (perhaps being met with objections as to the admissibility of the ordinance and all evidence concerning it) and appeal after a final adverse judgment. Under the circumstances, we feel that it would be unjust to require this.

State ex rel. Wells v. Mayfield, 281 S.W.2d 9, 15 (Mo. 1955) (en banc) (internal citations omitted).

102. Walker, 827 S.W.2d at 842.
103. Id.
104. Id.
105. Id.
MANDAMUS REVIEW

Summary judgment did not exist at common law.\textsuperscript{106} It is a creature of statute that first appeared in this great state with the adoption of the summary judgment rule in 1949.\textsuperscript{107} The Texas Supreme Court adopted the summary judgment rule primarily to reduce costs and increase efficiency by providing an avenue to resolve suits that were groundless or had no issues of fact that could be addressed as a matter of law before they reached a jury.\textsuperscript{108} Because they were considered incidental rulings at the time, they were not reviewable by mandamus.\textsuperscript{109}

\begin{flushright}
\footnotesize
106. See \textit{In re McAllen Med. Ctr., Inc.}, 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding) (noting summary judgment was employed in Texas cases only after the adoption of the summary judgment rule (citing Tobin v. Garcia, 316 S.W.2d 396, 400 (Tex. 1958))).

107. TEX. R. CIV. P. 166; see \textit{McAllen Med. Ctr., Inc.}, 275 S.W.3d at 465 ("Summary judgments were unknown at common law . . . . (citing Tobin v. Garcia, 316 S.W.2d 396, 400 (Tex. 1958)). At its inception, summary judgment was viewed heavily with disfavor in Texas. Dorsaneo, supra note 11, at 1517 ("Not surprisingly, trial judges developed a reluctance to grant summary judgments. Consequently, Civil Procedure Rule 166a was largely ineffective for the next three decades until the rule was rewritten in 1978."); Roy W. McDonald, \textit{The Effective Use of Summary Judgment}, 15 S.W. L. J. 365, 373 (1961) (commenting on how "[s]ome trial judges come to a motion for summary judgment reluctantly, predisposed to its denial"). Professor Dorsaneo's contention is that the Texas Supreme Court's seminal decision in \textit{City of Houston v. Clear Creek Basin Authority} caused summary judgment to be "recognized as a helpful tool, rather than as an invasion of the trial process or some type of snap judgment." Dorsaneo, supra note 11, at 1517 (citing City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671 (Tex. 1979)). Other commentators do not share Professor Dorsaneo's view of \textit{Clear Creek Basin Authority}'s impact on the judiciary's views of summary judgment. See Clore, supra note 8, at 823 (arguing "Texas has traditionally treated summary judgment as a disfavored procedural tool" because of "Texas's long standing affinity with an individual's right to jury trial"). According to Clore, the shift in attitudes came much later, when the Texas Supreme Court directed "its efforts toward the goals of judicial economy" and adopted the no-evidence rule. \textit{Id}. It is more likely that the shift in perceptions of summary judgment occurred on a continuum rather than at one discrete moment.

108. McDonald, supra note 107, at 286; see also Marts v. Transp. Ins. Co., 111 S.W.3d 699, 706 (Tex. App.—Fort Worth 2003, pet. denied) ("The purpose of the summary judgment rule is to provide a method of summarily terminating a case when it clearly appears that only questions of law are involved and that there are no genuine issues of fact."); Sheila A. Leute, \textit{The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards}, 40 BAYLOR L. REV. 617, 619 (1988) (noting the purpose of summary judgment was to reduce "overcrowded court dockets and the high cost of litigation").

109. See e.g., Ratcliff v. Dickson, 495 S.W.2d 35, 36 (Tex. App.—Houston [1st Dist.] 1973, orig. proceeding) (explaining the court lacked jurisdiction to grant mandamus because "courts of civil appeals have power to compel the trial judge to proceed to trial and judgment in a cause . . . but not the power to control the character of the judgment") (internal citations omitted).
\end{flushright}
A. Early Attitudes toward Mandamus Review of Summary Judgment

In the first instance of a party seeking mandamus review of a trial court’s denial of a motion for summary judgment, the court of appeals concluded that under the Texas Revised Civil Statutes, the Texas Supreme Court had jurisdiction to compel a trial court to grant a motion for summary judgment, but the courts of appeals did not. Because the relator’s complaint was “solely with the character of the judgment rendered” and the court of appeals lacked jurisdiction to compel the trial court “to enter any particular character of judgment,” the petition was denied. The Knox court appears to have rested this distinction on the statutory authority vested in the courts of appeals by the Texas state legislature, not on the nature of summary judgment.

Apparently the Texas Supreme Court disagreed with the Knox court’s view of its own mandamus jurisdiction, because in 1969 the Texas Supreme Court stated, “[i]n 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.” That reason was pragmatic; the Texas Supreme Court feared “constant interruption of the trial process by appellate courts would destroy all semblance of orderly trial proceedings” and “the fundamental concept of all American judicial systems of trial and appeal would become outmoded.” The court specifically mentioned pleas to the jurisdiction, pleas of privilege, pleas in abatement, and motions for summary judgment as incidental rulings.
Later, in 1985, the Texas Supreme Court reaffirmed it lacks jurisdiction to issue writs of mandamus to supervise or correct incidental rulings of a trial judge, including on motions for summary judgment.115 Yet, the court added a caveat—a writ of mandamus may be appropriate “to direct a trial judge to enter or set aside a particular judgment when the directed course of action is the only proper course and the petitioner has no other remedy.”116

The first time an appellate court considered the issue of whether a party seeking summary judgment had an adequate appellate remedy to complain of the denial was in 1991.117 In Akyea v. Hobson,118 the defendant filed a motion for summary judgment on the grounds of res judicata and attached as evidence an authenticated copy of judgment from an Illinois court covering the same causes of action and involving the same parties as the Texas trial.119 After the trial court denied the motion, the defendant filed a petition for writ of mandamus in the First District Court of Appeals in proceeding) (granting mandamus review to plea in abatement). Although these other categories of incidental rulings have been the subject of mandamus review (as well as the myriad of other introductory orders identified supra in notes 57–60), courts still begin with the premise that generally there is no mandamus review of summary judgments. Id. at 298.

116. Id. at 567.
117. See generally Akyea v. Hobson, No. 01-91-00229-CV, 1991 WL 63595 (Tex. App.—Houston [1st Dist.] Apr. 25, 1991, orig. proceeding) (mem. op., not designated for publication) (spearheading the legal debate regarding whether a party seeking summary judgment had an adequate appellate remedy). Other cases had addressed the propriety of mandamus review for summary judgment, but listed as the principle reason for denying relief the fact that the relator had never actually requested the trial court hear the motion. See Ratcliff v. Dickson, 495 S.W.2d 35 (Tex. App.—Houston [1st Dist.] 1973, orig. proceeding) (highlighting the relator’s failure to articulate their dissatisfaction with the trial court’s alleged inaction). In Ratcliff, there was no evidence the relator had ever requested the trial court set his motion for hearing and, thus, no evidence that the trial court refused to do so. Id. at 36. As a result, the appellate court could not grant his petition asking that the trial court be compelled to grant the motion. Id. The court went on to add that even if the motion had been heard and denied, it still could not grant mandamus relief because the appellate court’s authority “as concerns ordering the entry of judgment, is limited to the ministerial act of entry of judgment” and “does not extend to the judicial function of determining whether the evidence demonstrates that a judgment should be rendered as a matter of law.” Id. Thus, the Ratcliff court, like the Knox court, concluded mandamus cannot be used to correct the erroneous denial of summary judgment because the relator could never show a clear abuse of discretion. As a result, neither court addressed whether the relator had an adequate remedy by appeal.

119. Id. at *1.
The First Court of Appeals acknowledged the plaintiff had admitted “the existence of this prior judgment, the identity of the parties and the identity of the claims asserted” that res judicata is intended “to expedite justice by putting an end to litigation and to preserve the sanctity of judgments.”

The First Court of Appeals also concluded that despite the doctrine’s clear applicability and that “the stated policy of the rule of res judicata is to bar relitigation of issues finally adjudicated in a prior proceeding,” it had no choice but to deny the petition, force the defendant to relitigate the issues, and then seek traditional appeal. The court reached this conclusion for two reasons. First, the court concluded a party asserting res judicata has an adequate remedy by appeal because “[d]elay, added cost, or inconvenience caused by an otherwise adequate appeal will not justify the use of mandamus.” Second, the court stated as a blanket rule “mandamus is not appropriate to cure the erroneous denial of a motion for summary judgment” because “[w]hile an appellate court has the power to compel a trial court to proceed to judgment, [it has] no power to control the character of the judgment entered.”

Both rationales were consistent with the prevailing philosophy of mandamus jurisprudence of the day. However, the lack of jurisdiction did not prevent the First Court of Appeals from recognizing the absurdity of its position. The court ended its opinion by stating: “It is troubling that a plaintiff can avoid the effect of res judicata until the appellate level when, as here, the subject matter and scope of the prior judgment are admitted. Nevertheless, we have no jurisdiction to intervene in the trial court’s denial of relator’s motions.”

120. Id.
121. Id. (citing Abbott Labs v. Gravis, 470 S.W.2d 639, 642 (Tex. 1971)).
122. Id.
123. Id. (citing Iley v. Hughes, 311 S.W.2d 648, 652 (Tex. 1958)).
124. Id. at *1–2 (citing Ratcliff v. Dickson, 495 S.W.2d 35, 36 (Tex. App.—Houston [1st Dist.] 1973, orig. proceeding)).
125. Id. at *2. The *Akyea Court was not alone in its concerns that *Abor v. Black’s standard was inefficient and wasteful. The San Antonio Court of Appeals stated in *Coastal Oil & Gas Corporation v. *Flores:

The Court is obliged, of course, to follow the holding in *Abor v. Black, as we have done in the past in a case very similar to this one. But we cannot help lamenting the gross and unnecessary waste of economic and judicial resources that will be permitted as a result of our action today. The trial court’s failure to abate the Zapata County case, while not subject to mandamus relief, is nonetheless reversible error. Should the relators not prevail if the case is tried to judgment, all
The rule that mandamus review is unavailable to review the denial of a motion for summary judgment has persisted even though the standard for an adequate appellate remedy has evolved since this rule was first decided.126

B. The Introduction of the No-Evidence Rule

Texas initially did not recognize a no-evidence summary judgment rule. The no-evidence procedure with which we are familiar today was added as part of the 1997 amendments to the Rules of Civil Procedure.127 Prior to the rule’s adoption, less than 1% of cases were disposed of by summary judgment, and even where the trial court granted summary judgment, the appellate court was likely to overturn that ruling.128 The adoption of the no-
evidence rule, like the traditional rule before it, was “to further the expeditious administration of justice at the least expense possible.”

Then Texas Supreme Court Justice John Cornyn observed that the adoption of the no-evidence procedure “marks the end of the previously disfavored status of summary judgments under the Texas Rules of Civil Procedure.” Indeed, even opponents of the new rule recognized it could “ease the burden on court dockets by eliminating those claims brought by plaintiffs who know they do not have a valid claim, yet sue hoping the defendant will choose to settle rather than endure a lengthy and costly lawsuit.”

The no-evidence procedure was added after the legislature concluded the traditional summary judgment procedure failed to relieve the courts and parties of the burden of meritless cases. To remedy this, the legislature signaled its intent to amend the Texas Rules of Civil Procedure. In response, the Texas Supreme Court adopted its own rule to prevent the legislature from adopting its own no-evidence summary judgment rule. Thus, although Rule 166a(i) was not legislatively mandated in a technical sense, its adoption was an extension of the legislative intent to create such a procedure and legislative balancing of the benefits and drawbacks of adopting a no-evidence procedure.

Rule 166a(i) was drafted to resemble the summary judgment practice “of the federal courts and most other states.” Despite being based on the

---

129. Id. at 829.
130. See id. at 823 n.29 (citing Justice John Cornyn, Texas Summary Judgments 3 (Elaine Carlson ed., The Rutter Group 1997)).
131. Id. at 854.
132. Id. at 826.
133. Id.
134. Id.
135. After the Texas Legislature expressed its intent to adopt a no-evidence procedure, the Texas Supreme Court adopted its own. See Thomas R. Phillips, Supreme Court Update, 60 Tex. B.J. 858, 861 (1997) (“[T]he Supreme Court amended Rule 166a . . . to conform our summary judgment practice more closely to that of the federal courts and most other states . . . . [I]mmediate action was necessary because the legislature was seriously contemplating the adoption of its own summary judgment standard.”).
136. Id. at 861–62 (explaining the drafting process of Rule 166(a)); see also Draughon v. Johnson, 631 S.W.3d 81, 88 (Tex. 2021) (“Texas brought its summary judgment practice closer to that of the federal courts by adopting a distinct ‘no evidence’ motion for summary judgment in 1997.”); see generally Huckabee v. Time Warner Ent. Co., L.P., 19 S.W.3d 413, 421 (Tex. 2000). (“Although our recent adoption of the no-evidence summary judgment as an alternate procedure in Texas obviated, to some
federal summary judgment rules, the Texas no-evidence rule was intended to be a supplement to the traditional summary judgment rules. Thus, differences in Texas and federal summary judgment practice trickled down into the no-evidence rule. One significant difference is that parties cannot seek appellate review of a denied summary judgment. The comments to the rule expressly provide that “[t]he denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c).” Texas courts have strictly enforced this rule.

Thus, a party complaining of a trial court’s erroneous denial of a no-evidence summary judgment has no remedy by traditional appeal—the appellate court does not have jurisdiction to hear denied motions for summary judgment. And because the no-evidence rule was adopted during the rigid Walker v. Packer standard for mandamus review, summary judgment at that time was not reviewable by mandamus either. Simply put, no matter the circumstances, an appellate court can never correct a trial court’s erroneous denial of a no-evidence summary judgment.

extent, the differences in summary judgment procedure between the two systems, our holding in Casso was also consistent with practical considerations, which remain valid today.”).  
137. TEX. R. CIV. P. 166a, cmt. to 1997 amendment.  
138. Id.  
139. See Hines v. Comm’n for Law. Discipline, 28 S.W.3d 697, 700 (Tex. App.—Corpus Christi 2000, no pet.) (concluding even though Texas Rule of Civil Procedure 166a(i) is modeled after the federal summary judgment procedure, which allows an appeal of a no-evidence motion for summary judgment, because of the comments to Rule 166a(i), the court lacked jurisdiction); see Dounson v. Bexar Appraisal Dist., No. 04-11-00010-CV, 2011 WL 2473109, at *1–2 (Tex. App.—San Antonio June 22, 2011, no pet.) (“After a trial court has rendered a final judgment, a trial court’s denial of summary judgment is an appealable order only if the trial court grants an opposing motion for summary judgment.”); see In re V.L.K., No. 02-10-00315-CV, 2011 WL 3211245, at *2 (Tex. App.—Fort Worth July 8, 2011, no pet.) (acknowledging “[w]hile a no-evidence motion for summary judgment differs in some respects from the traditional motion for summary judgment,” because the comment to Rule 166a(i) says it is no more reviewable on appeal, “the denial of a no-evidence motion for summary judgment should be treated the same as the denial of a traditional motion for summary judgment”) (internal citations omitted); see also Citizens Nat’l Bank of Tex. v. Dallas ATM Mgmt. Servs., No. 07-08-0011-CV, 2009 WL 2045247, at *1–2 (Tex. App.—Amarillo July 15, 2009, no pet.) (“The rule is the same for no-evidence motions for summary judgment as for traditional motions . . . . [Here,] a final judgment was rendered after a jury trial and the issues . . . were tried on the merits and any order denying Citizens’ motion for summary judgment [was] not subject to review . . . .”) (internal citations omitted).  
140. Hines, 28 S.W.3d at 700.  
141. Although an appellate court can hear a traditional summary judgment when the trial court grants a cross-motion for summary judgment, a no-evidence motion can only be filed by the party that does not have the burden of proof. Therefore, there cannot be cross motions for summary judgment under the no-evidence standard. Although the trial court could theoretically grant a traditional motion
IV. MANDAMUS IN THE TWENTY-FIRST CENTURY

The most frequent use of mandamus relief “involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive rights involved.”\(^{142}\) Over the past two decades, the Texas Supreme Court has increased the availability of mandamus to “spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.”\(^{143}\) Despite the change to our understanding of what constitutes an adequate remedy by appeal, the courts of appeals (and even the Texas Supreme Court) still begin with the presumption that mandamus is generally unavailable when the trial court denies summary judgment unless there are “extraordinary circumstances.”\(^{144}\) This practice is far from an efficient use of judicial

---

\(^{142}\) In re McAllen Med. Ctr., Inc., 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding); see also In re Illinois Nat’l Ins. Co., No. 22-0872, 2024 WL 736751 at *10 (Tex. Feb. 23, 2024) (orig. proceeding) (“When ‘the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved’ or would cause a knowing waste of resources, mandamus relief may be necessary.” (quoting McAllen Med. Ctr., Inc., 275 S.W.3d at 465–66)).


\(^{144}\) See In re State Farm Lloyds, No. 13-16-00049-CV, 2016 WL 902864, at *3 (Tex. App.—Corpus Christi–Edinburg Mar. 9, 2016) (noting how courts following the Texas Supreme Court’s decision in In re United Services Automobile Association have “exemplified the supreme court’s holding that only extraordinary circumstances will justify mandamus review of orders denying summary judgment” and collecting cases); see also In re East Tex. Oilfield Prod. Servs., No. 12-20-00077-CV, 2020 WL 1697428, at *2 (Tex. App.—Tyler Apr. 8, 2020, no pet.) (explaining mandamus is generally unavailable when a trial court denies summary judgment and “the potential for wasted time and money in proceeding to trial without correction of the alleged error at this stage of the proceedings does not, without more, merit mandamus review.”)

Curiously, some courts begin with the presumption that a denial of summary judgment is not reviewable by appeal and, in the same opinion, using the Texas Supreme Court’s guidance that the adequacy of an appellate remedy resists categorical determination, dispose of the argument that granting mandamus relief in that case would provide guidance for thousands of similar cases. E.g., State Farm Lloyds, 2016 WL 902864, at *3 (“We note that the adequacy of an appeal depends on the facts involved in each case, rather than categorical determinations.”).
resources and imposes unnecessary expense on the parties—waste that the no-evidence rule was intended to alleviate. 145

A. The Modern Standard for Mandamus Review: The Prudential Balancing Test for an Adequate Appellate Remedy

As touched on above in Section I, the most significant change in mandamus jurisprudence came in 2004 when the Texas Supreme Court issued its decision in In re Prudential Insurance Company of America. 146 Prudential expressly disavowed both the rigid standard established in Walker v. Packer and the categorical approach taken by some courts of appeals. 147

Although the rule set forth in Walker made sense for ordinary discovery motions like the one at issue in that case, it proved too stringent for other cases. In responding to Walker v. Packer’s statement that a remedy by appeal

145. See generally Clore, supra note 8, at 820–21 (1998) (highlighting a situation in which the Texas Supreme Court reversed the trial court’s grant of summary judgment because the defendant did not adequately negate the existence of proximate causation, only to affirm a directed verdict for the defendant when the plaintiff failed to establish proximate causation in its case-in-chief, rendering the trial nothing more than an “empty formality” (citing Sheila A. Leute, The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards, 40 BAYLOR L. REV. 617, 634 (1988))). For curious readers, the cases cited by Ms. Leute are Prestegord v. Glenn and Glenn v. Prestegord. Prestegord v. Glenn, 441 S.W.2d 185 (Tex. 1969); Glenn v. Prestegord, 456 S.W.2d 901 (Tex. 1970).

146. See Prudential Ins. Co. of Am., 148 S.W.3d at 125 (holding the landlord of two Dallas-area restaurants was entitled to mandamus relief after the trial court denied the landlord’s motion to quash the guarantors’ demand for a jury trial); see also Barnard et al., supra note 4, at 146 (discussing how courts have become more willing to grant mandamus relief and how commentators “surmise this change is attributed, at least in part, to the Supreme Court of Texas’s 2004 expansion of mandamus relief”). Prudential’s balancing test for an adequate remedy by appeal has not been uniformly accepted. However, some commentators have gone beyond saying the adequate remedy by appeal prong is not just unclear, but impossible to correct without overturning Prudential. E.g., Barker, supra note 50, at 703, 716, 718–19 (arguing Prudential’s balancing test has further “muddled mandamus” law because “[t]he fundamental problem with using a balancing test for any analysis is determining which factors the court should balance against each other” and “[i]f the factors cannot be weighed on the same scale, the balancing test will not work”). But balancing tests are frequently found in the law. For example, a temporary injunction requires a showing of four factors: “(1) whether the movant will be irreparably harmed in the absence of an injunction, (2) the movant’s likelihood of success, (3) the balance between the harm to the movant and the harm to the nonmovant, and (4) the public interest.” Bethany M. Bates, Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts, 111 COLUM. L. REV. 1522–23 (2011). Although described as a four-factor test where the movant must satisfy every factor, “[m]any circuits have taken an all-in balancing (or ‘sliding scale’) approach to this four-factor test, allowing a stronger showing on one factor to compensate for a weaker showing on another.” Id. The fact that courts must balance these factors does not make the test for injunctive relief unworkable, it recognizes equitable relief is not always capable of distillation into perfect boxes. As mandamus is equitable in nature, it makes sense that it too is subject to some balancing of the equities.

147. Prudential Ins. Co. of Am., 148 S.W.3d at 136.
is not inadequate “merely because it may involve more expense or delay than obtaining an extraordinary writ,”\(^\text{148}\) the Texas Supreme Court stated “the word ‘merely’ carries heavy freight.”\(^\text{149}\) The court further detailed how the standard from *Walker* was unworkable, stating “*Walker* does not require us to turn a blind eye to blatant injustice” and while an “[a]ppeal may be adequate for a particular party,” it may be “no remedy at all for the irreversible waste of judicial and public resources that would be required if mandamus does not issue.”\(^\text{150}\)

Rather, the court acknowledged that rigid rules are “necessarily inconsistent with the flexibility that is the remedy’s principal virtue” and “whether an appellate remedy is ‘adequate’ so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules.”\(^\text{151}\) In general, “[a]n appellate remedy is ‘adequate’ when any benefits of mandamus reviews are outweighed by the detriments.”\(^\text{152}\) When the benefits outweigh the detriments, however, the appellate courts must look to the case-specific

---

148. *Id.* (citing *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding)).

149. *Id.*

150. *See id.* at 136–37 (articulating how the right to appeal alone is not enough (quoting *In re Masonite Corp.*, 997 S.W.2d 194, 1987 (Tex. 1999) (orig. proceeding)). Later, the Texas Supreme Court further distinguished *Walker v. Packer*, stating “[m]uch of the discussion in *Walker v. Packer* regarding an inadequate remedy by appeal centers around discovery issues” and that the standard from *Walker v. Packer* made sense for what “were truly ‘incidental’ pre-trial rulings.” *See In re AIU Ins. Co.*, 148 S.W.3d 109, 116 (Tex. 2004) (orig. proceeding) (distinguishing the need for methods of review in rulings that are “truly incidental” versus ones that are not). The court went on to explain “[c]lear harassment will not be tolerated under *Walker v. Packer*” and that mandamus relief is warranted to avoid “[s]ubjecting a party to trial in a forum other than that agreed upon” because “requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment.” *Id.* at 117.

There is no benefit to either the individual case or the judicial system as a whole. The only benefit from breach of a forum-selection clause inures to the breaching party. That party hopes that its adversary will weary or avoid the cost of protracted litigation and settle when it would not otherwise have done so. Likewise, in comparing the respective burdens on the parties, the burden on a party seeking to enforce a forum-selection clause of participating in a trial then appealing to vindicate its contractual right is great while there is no legitimate benefit whatsoever to the party who breached the forum-selection agreement.

151. *Id.*

152. *Id.* at 136.
factors to determine if the appellate remedy is adequate.\textsuperscript{153} Another principle guiding the analysis is where “the error [is] clear enough, and correction simple enough, that mandamus review [is] appropriate.”\textsuperscript{154}

Although \textit{Prudential} expressly rejected categorization, it did establish two broad categories of trial rulings that may be the subject of mandamus relief. The first are “incidental” rulings, which “unduly interfere[] with trial court proceedings, distract[] appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and add[] unproductively to the expense and delay of civil litigation.”\textsuperscript{155} Such rulings may include discovery rulings on an issue that is tangentially relevant to the issues in the litigation or sanctions orders that don’t prevent a party from litigating its case. Conversely, the court recognized the existence of “significant rulings,” stating the review of which:

> [M]ay 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.\textsuperscript{156}

Following \textit{Prudential}, the Texas Supreme Court clarified \textit{Walker} was not the seminal case on mandamus jurisprudence and “[t]he seminal case was actually \textit{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.’”\textsuperscript{157} In the nearly two decades since \textit{Prudential}, the Texas Supreme Court has not shown any indication of backing away from its flexible balancing test; it has repeatedly reaffirmed that proposition.\textsuperscript{158}

\textsuperscript{153} Id.
\textsuperscript{154} Id. at 137.
\textsuperscript{155} Id. at 136.
\textsuperscript{156} Id.
\textsuperscript{157} See \textit{In re McAllen Med. Ctr., Inc.}, 275 S.W.3d 458, 467–68 (Tex. 2008) (orig. proceeding) (broadening the applicability of mandamus (quoting \textit{Bradley v. McCrabb}, Dallam 504, 507 (Tex. 1843))).
\textsuperscript{158} See \textit{In re Academy, Ltd.}, 625 S.W.3d 19, 35–36 (Tex. 2021) (orig. proceeding) (While the Texas Supreme Court has held “an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ,” it also “clarified in \textit{Prudential} that a flexible
B. **Building Off Prudential: The Texas Supreme Court Recognizes Legislative Intent Is a Factor in the Balancing Test for an Adequate Appellate Remedy**

Four years after *Prudential*, the Texas Supreme Court issued its opinion in *In re McAllen Medical Center* in which it noted that the legislature’s adoption of an expert report requirement for medical malpractice cases was particularly instructive in the *Prudential* balancing test. Faced with a concern that the “traditional rules of litigation [were] creating an ongoing crisis in the cost and availability of medical care,” the legislature passed Chapter 74 of the Civil Practice and Remedies Code which requires, among other things, that the plaintiff serve an expert report shortly after filing their case. When the plaintiff served a deficient expert report, the hospital moved to dismiss the case. “After sitting on the motion for four years, the trial court finally denied it.” The hospital then sought mandamus relief. The Texas Supreme Court acknowledged that although mandamus is a matter of judicial discretion, the separation of powers upon which our

mandamus standard means that in some circumstances ‘the irreversible waste of judicial and public resources that would be required’ absent mandamus relief justifies granting such relief.”) (internal citations omitted); see also *In re B. Hunt Transp.*, Inc., 492 S.W.3d 287, 299 (Tex. 2016) (“The flexibility of the *Prudential* balancing test differs notably from the rigidity of the *Abor* active-interference standard. Many Texas courts of appeals have split on the question of whether *Prudential* abrogates *Abor* and permits more flexible mandamus review of erroneously denied pleas in abatement in dominant-jurisdiction cases. We now hold that *Prudential* indeed abrogates *Abor’s* inflexible understanding of an adequate remedy by appeal.”); see generally *In re Exxonmobil Prod. Co.*, 340 S.W.3d 852, 858 (Tex. App.—San Antonio 2011, orig. proceeding) (“Limiting mandamus relief as per *Abor* precludes the flexibility of the remedy in plea in abatement cases because *Abor’s* holding fails to account for any case-by-case consideration of the benefits and detriments of mandamus review.”).


160. See generally *In re Exxonmobil Prod. Co.*, 340 S.W.3d 852, 858 (Tex. App.—San Antonio 2011, orig. proceeding) (“Limiting mandamus relief as per *Abor* precludes the flexibility of the remedy in plea in abatement cases because *Abor’s* holding fails to account for any case-by-case consideration of the benefits and detriments of mandamus review.”).


162. *Id.* at 461.

163. *Id.*
government is based “requires [the court] to consider also the priorities of the other branches of Texas government.”164 Applying the Prudential balancing test, the Texas Supreme Court stated “the Legislature has already balanced most of the relevant costs and benefits” and as a coordinate branch of government, it was “in no position to contradict [the] statutory finding.”165 Finally, the court determined that, without mandamus review, the legislative purposes behind the statute might never be realized.166 Thus, mandamus relief was warranted.

Two years later, the Texas Supreme Court relied on McAllen Medical Center’s legislative purpose rationale for mandamus relief in a case arising under the Texas Commission on Human Rights Act (TCHRA).167 The case was initially filed in the county court at law, but after the Texas Supreme Court held the county court at law lacked jurisdiction due to the amount in controversy, the plaintiff refiled in district court.168 Because more than two years had passed since the cause of action accrued, the statute of limitations barred the case unless the TCHRA’s tolling provision applied.169 After determining that the tolling provision did not apply, the Texas Supreme Court was left to decide whether USAA was entitled to mandamus relief. In concluding an appeal provided USAA with an inadequate remedy, the court stated “[d]enying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years (as well as the tolling provision’s inapplicability to suits filed with intentional disregard of proper jurisdiction), and we should not ‘frustrate that purpose by a too-strict application of our own procedural devices.’”170

164. Id. at 461.
165. Id. at 466.
166. See id. (“If (as appears to be the case here) some trial courts are either confused by or simply opposed to the Legislature’s requirement for early expert reports, denying mandamus review would defeat everything the Legislature was trying to accomplish.”).
168. Id. at 304–05.
169. See id. at 305 (discussing TEX. CIV. PRAC. & REMEDIES CODE § 16.064—TCHRA’s tolling provision).
170. Id. at 314 (internal citation omitted). It does bear mentioning that denying summary judgment would have forced USAA to endure a second trial on a meritless case, which is not true for most denials of summary judgment. Id. Yet, the legislative purpose would have remained the same with one or two trials and, as McAllen Medical Center showed, the legislative purpose and balancing test applies even when the party is not facing a second trial.
In *In re Academy*, the Texas Supreme Court once again granted mandamus relief to correct the trial court’s erroneous denial of summary judgment, this time in a suit implicating the Protection of Lawful Commerce in Arms Act (PLCAA). Although it began with the general rule that mandamus is not available to correct the erroneous denial of summary judgment, the Texas Supreme Court clarified “that principle is not, and cannot be, absolute.” It further recognized “[t]he most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved.” Because the purpose of the PLCAA is to prevent the use of litigation to burden interstate commerce involving firearms, the law’s text “suggests that Congress intended courts to weed out, expeditiously, claims the PLCAA bars.” An appeal after trial was not an adequate remedy because the legislative intent was to eliminate meritorious claims with the expense of trial, an appeal after trial was not an adequate remedy. The court ultimately concluded the threat of multiple lawsuits satisfied the exceptional circumstances requirement for the grant of mandamus relief from the denial of summary judgment. However, when

172. *Id.* at 22–23. There is some dispute as to the constitutionality of the PLCAA. Compare Gustafson v. Springfield, Inc., 282 A.3d 739 (Pa. Super. 2022), appeal granted in part, 296 A.3d 560 (Pa. 2023) (finding the PLCAA unconstitutional under the Commerce Clause and Tenth Amendment), with City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008) (finding the PLCAA constitutional under the Commerce Clause, First Amendment, and Tenth Amendment). See Ileto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009) (holding the PLCAA is constitutional under Due Process Clause); see also District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163 (D.C. 2008) (holding the PLCAA is constitutional under the Due Process and Takings Clause). Because the constitutionality of the PLCAA was not raised in *In re Academy* and because it is beyond the scope of this Article, I do not delve further into this dispute. Suffice it to say, for purposes of this Article it is enough to know the PLCAA was intended as a way to provides protection from “not only ‘the effect of civil liability on gun manufacturers,’” but also “‘to weed out, expeditiously, claims the PLCAA bars.’” *Academy, Ltd.*, 625 S.W.3d at 35 (quoting *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 47 (D.D.C. 2013)). Thus, both the PLCAA and the no-evidence summary judgment rule serve to protect defendants from incurring the costs of proceeding to trial on meritless claims; but while the PLCAA does so through a categorical approach, the no-evidence summary judgment rule does so by addressing cases that may appear meritorious at first blush, but which upon further discovery prove to be meritless.
173. *Academy, Ltd.*, 625 S.W.3d at 32.
174. *Id.*
175. *Id.* at 35 (quoting *Jefferies*, 916 F. Supp. 2d at 47).
176. *See id.* (“That intent is not served by allowing an action barred by the PLCAA to proceed to trial only to be inevitably reversed on appeal . . . .”).
177. *Id.* at 36.
considered in the context of the court’s dicta in *McAllen Medical Center, United Services Automobile Association*, and *Essex Insurance Company*, it becomes clear the exceptional circumstances requirement is inconsistent with the flexible balancing test of *Prudential* and should be given a well-deserved retirement.

As these cases show, legislative action designed to decrease the cost of litigation through providing pre-trial procedures to weed out meritless claims can influence an appellate remedy’s adequacy. The judicial system is a “coordinate branch[]” of government and defers to the statutory balancing and legislative intent when considering an appellate remedy. This is true not only of substantive legislative enactments, such as the expert report in medical malpractice cases or the statute of limitations in TCHRA cases, but also of procedural enactments such as the motion to dismiss in Texas Rule of Civil Procedure 91a.

C. Applying the Prudential Balancing Test to Rule 91a Reveals How Summary Judgment Is Treated Inconsistently

Rule 91a of the Texas Rules of Civil Procedure, added in 2013, provides for dismissal of causes of action that have no basis in law or fact. As a result, it did not exist until the liberalization of mandamus procedure following *Prudential* and was not saddled with the baggage of prior decisions restricting its availability. As a result, almost from its inception, the Texas Supreme Court has concluded mandamus review is available when the trial court denies a Rule 91a motion.

The first case seeking mandamus relief for the denial of a Rule 91a motion was *In re Essex Insurance Company*, where the Texas Supreme Court held mandamus relief was warranted. *Essex* was an insurance coverage

---

178. *In re United Servs. Auto. Ass’n*, 307 S.W.3d 299 (Tex. 2010) (orig. proceeding) (an example of how mandamus was available when the trial court refused to apply the statute of limitations).

179. *In re Essex Ins. Co.*, 450 S.W.3d 524 (Tex. 2014) (orig. proceeding) (mandamus available when trial court refuses to dismiss cause of action that has no basis in law or fact). *In re Essex* involves the relatively newly enacted Rule 91a of the Texas Rules of Civil Procedure and is discussed in greater detail in the following section.


183. See, e.g., *Essex Ins. Co.*, 450 S.W.3d at 526 (granting conditional mandamus relief after the trial court denied a party’s Rule 91a motion).

184. See id. (recognizing mandamus review is appropriate when the benefits of mandamus review outweigh the detriment in a given case).
case where the plaintiff in an underlying tort action amended her complaint to include a declaratory judgment claim against the defendant’s insurer.185 Because there was a disagreement about whether the defendant was an employee or an independent contractor, and thus whether the insurance policy provided coverage for his negligence, the plaintiff sought a declaration that the insurer had a duty to indemnify the defendant for any liability the defendant may have to her in the underlying tort action.186 This claim for declaratory judgment violated the “no direct action” rule and the insurer sought dismissal on that ground.187 The plaintiff argued because her suit was for declaratory relief and not a money judgment, the no direct action rule was not implicated.188 Despite the Texas Supreme Court having already rejected this argument, the trial court agreed with the plaintiff and denied the Rule 91a motion.189 The insurer sought mandamus relief from this erroneous denial and the Texas Supreme Court agreed mandamus relief was warranted.190

Nowhere in Essex did the Texas Supreme Court suggest mandamus review is only available in exceptional circumstances.191 Instead, the court focused on whether mandamus relief would “spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.”192 The Texas Supreme Court has also not suggested in any of its other cases that denial of a Rule 91a motion is only reviewable by mandamus in exceptional circumstances.193

186. Id.
187. Id. at 525–26. The “no direct action” rule prohibits a plaintiff from filing suit against the tortfeasor’s insurance company before the tortfeasor’s liability is adjudicated. Id. at 526. The policy rationale behind the rule is two-fold. First, it would “create a conflict of interest” between the tortfeasor and his insurer at a time when they should have similar goals: defense of the tortfeasor against liability. Id. Second, it would “necessarily require the admission of evidence of liability insurance in violation of Texas Rule of Evidence 411.” Id. at 526–27.
188. Id. at 526.
189. Id. at 526.
190. Id. at 525–26.
191. See id. at 528 (recognizing mandamus review is appropriate when the benefits of mandamus review outweigh the detriments in a given case).
192. Id. at 528 (internal quotations omitted).
193. See In re Facebook, Inc., 625 S.W.3d 80, 86 n.2 (Tex. 2021) (orig. proceeding) (emphasizing mandamus relief rests solely on whether it is an “efficient manner of resolving the dispute”) (internal quotations omitted); see also In re Houston Specialty Ins. Co., 569 S.W.3d 138, 140 (Tex. 2019) (orig. proceeding) (outlining how mandamus relief requires a court to abuse its discretion and the affected party to possess no adequate remedy by appeal). In fact, a Lexis search of Texas Supreme Court cases
It does not appear the courts of appeals require exceptional circumstances before concluding mandamus review is appropriate for the denial of a Rule 91a motion.\footnote{194} As one court of appeals put it:

‘In laying the groundwork for a rule mandating the early dismissal of baseless causes of action, the Legislature has effectively already balanced most of the relevant costs and benefits of an appellate remedy, and mandamus review of orders denying Rule 91a motions comports with the Legislature’s requirement for an early and speedy resolution of baseless claims.’\footnote{195}

In Farmer’s Texas County Mutual Insurance Company,\footnote{196} the Texas Supreme Court later partially overruled the court of appeals on the substantive issues involved, namely whether the real party in interest had a viable breach of contract or \textit{Stowers} claims where the insurer refused to settle the underlying litigation, but did not comment on the intermediate court’s discussion of the legislative cost-benefit balancing.\footnote{197} In fact, the only citing Rule 91a and containing the word “exceptional” yielded only two results. The first did not involve mandamus review. \textit{See} Sabre Travel Int’l, Ltd. v. Deutsche Lufthansa AG, 567 S.W.3d 725, 732 (Tex. 2019) (acknowledging exceptional circumstances justify a departure from review after a final judgment). \textit{But see} In re First Reserve Mgmt., L.P., 671 S.W.3d 653, 657–58, 663 (Tex. 2023) (orig. proceeding) (relating the “exceptional circumstances” discussed in the case related to piercing the corporate veil and not the propriety of mandamus relief).

194. The only case suggesting exceptional circumstances are required is In re Gibson, in which the motion to dismiss was not based on a baseless cause of action, but rather failure to exercise due diligence in serving the defendant. \textit{In re} Gibson, 533 S.W.3d 916, 918 (Tex. App.—Texarkana 2017, no pet.). In denying mandamus relief, the Texarkana Court of Appeals noted summary judgment was the more commonly used tool to resolve this issue, not motions to dismiss, and “there is merit in utilizing the traditional and well-established method of resolving this issue by the established procedure outline in Rule 166a.” \textit{Id.} at 921. Conversely, the Austin Court of Appeals said succinctly “an appeal after final judgment is an inadequate remedy because [the relator] should not be required to spend time and money defending against claims that are precluded as a matter of law.” \textit{In re} Springs Condos., LLC, No. 03-21-00493-CV, 2021 WL 5814292, at *4 (Tex. App.—Austin Dec. 8, 2021) (orig. proceeding). That is the rationale employed by most courts in determining that a party does not have an adequate remedy by appeal for the denial of a Rule 91a motion, if the opinion provides any rationale at all.


197. \textit{See} id. at 276–77 (granting conditional mandamus review without discussing the legislative balancing of costs and benefits or the intermediate court’s analysis of an adequate remedy by appeal). Specifically, the insurer agreed to settle for $250,000 but the plaintiff insisted that the case be settled for $350,000. \textit{Id. at} 277. The insured then offered to pay the $100,000 difference and sued the insurer for breach of contract and a \textit{Stowers} claim for negligent failure to settle. \textit{Id.} The San Antonio Court of Appeals concluded the plaintiff had a viable \textit{Stowers} claim but not a viable breach of contract claim. \textit{Id.}
discussion of the propriety of mandamus review was one sentence where
the Texas Supreme Court said “[m]andamus relief is appropriate when the
trial court abuses its discretion in denying a Rule 91a motion to dismiss.”198
Chief Justice Hecht, joined by Justices Boyd and Blacklock, dissented and
argued the trial court should have dismissed the breach of contract claim
that the majority left alive.199 Although the dissent did not discuss the
requirement that the relator lack an adequate appellate remedy, their
proposed dismissal would have directed the trial court to dismiss all claims,
suggesting that they agreed the denial of a Rule 91a motion may be reviewed
by mandamus.200 Thus, though all nine members of the Texas Supreme Court agreed mandamus relief of some form was warranted to
correct the trial court’s denial of the Rule 91a motion, they disagreed about
whether the trial court should have dismissed all or only some claims. At a
minimum, this case implies that all nine members of the court agreed the
legislature had already done the cost-benefit analysis of an adequate
appellate remedy for the denial of a Rule 91a motion.201

V. THE “GENERAL RULE” THAT MANDAMUS REVIEW IS NOT AVAILABLE
FOR THE DENIAL OF SUMMARY JUDGMENT IS INCONSISTENT WITH
MODERN MANDAMUS JURISPRUDENCE

Section I provided an overview of mandamus procedure while
Sections II, III, and IV focused on the evolution and development of both
mandamus procedure and summary judgment in Texas. This final Section
argues the general rule that mandamus is not available to review the denial
of summary judgment—particularly a no-evidence summary judgment—is
inconsistent with the Prudential balancing test, has earned its retirement, and
should be laid to rest as a forgotten relic of mandamus jurisprudence.202
Treating summary judgments the same as any other form of trial court

---

198. Id. at 266 (citing In re Essex Ins. Co., 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding)).
199. Id. at 277–79 (Hecht, C.J., dissenting).
200. Id.
(concluding in the Chapter 74 context, “the Legislature has already balanced most of the relevant costs
and benefits” and the court is “in no position to contradict this statutory finding”).
of facts” language from Conley v. Gibson as having “earned its retirement” and “best forgotten as an
incomplete, negative gloss on an accepted pleading standard . . .”).
action when evaluating the possibility of mandamus review is not contrary to the modern standard of mandamus review: it fully embraces it.

Determining whether an adequate appellate remedy exists involves “weighing the benefits of mandamus review against its detriments.” This balancing test necessarily “resists categorization.” Yet, at the same time, courts routinely acknowledge that mandamus relief is “generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion.” Texas appellate courts should reconsider this starting point. Allowing mandamus review of denied no-evidence summary judgments would further the aims of the no-evidence rule without causing widespread destruction to the appellate courts’ dockets. The differences between traditional and no-evidence summary judgment should be reflected in how courts employ the balancing test of whether an appellate remedy is adequate. Further, the fact that no-evidence summary judgments could end the litigation weighs in favor of making mandamus review available. Finally, the legislature has already conducted a cost-benefit analysis.

A. The Differences in No-Evidence and Traditional Summary Judgments Warrant Different Treatment

Although the comments to the no-evidence rule specify that a no-evidence summary judgment is no more reviewable on appeal than a traditional summary judgment, good reason exists to treat them differently.


204. Id. at 32 (internal quotations omitted). Yet, as the Litigation Section of the State Bar of Texas published last summer, “[i]n theory, the court says that categories are bad” but “[i]n practice, some categories are not quite that bad,” and “[s]ometimes the creation of categories is justified as necessary to protect important policies,” while “[s]ometimes the categories are hard to explain.” David M. Gunn & Hon. Wallace B. Jefferson, Effectively Using Mandamus and Emergency Appellate Relief, 103 THE ADOVOC. (Tex.), Dec. 8–9, 2022, at i, 12–13, 15. In essence, categorization is sometimes inevitable as a judicial shorthand for cases where the benefits of mandamus relief will almost always outweigh the burdens. This Article has sometimes fallen into the trap of suggesting some categorization in whether an appellate remedy is adequate when there has not been a case where the burdens outweigh the benefits (or if there is, the appellate court has issued a cursory, per curiam denial).

205. See In re State Farm Lloyds, No. 13-16-00049-CV, 2016 WL 902864, at *2 (Tex. App.—Corpus Christi–Edinburg Mar. 9, 2016, orig. proceeding) (collecting cases where appellate courts have denied mandamus review of orders denying traditional and no-evidence motions for summary judgment); see also In re Mohawk Rubber Co., 982 S.W.2d 494, 497 (Tex. App.—Texarkana 1998, orig. proceeding) (agreeing the trial court’s denial of summary judgment was not reviewable by mandamus but providing “guidance” for the trial court on the “proper application and interpretation of the no-evidence summary judgment rule in the context of this case”).
These comments were issued at a time when the adequacy of an appellate remedy was controlled by the *Walker v. Packer* standard that viewed mandamus with disfavor. These comments are no longer consistent with the Texas Supreme Court’s jurisprudence that the adequacy of an appellate remedy is judged under a flexible standard rather than a categorical one. Consistent with its pronouncement that mandamus is a flexible remedy, the Texas Supreme Court should recognize that the balancing test for mandamus review of a no-evidence summary judgment and for a traditional summary judgment are, by their very nature, different.

In reviewing an order on a traditional summary judgment, the appellate court considers whether the summary judgment evidence establishes the movant is entitled to judgment as a matter of law. The appellate court must determine if the moving party conclusively disproved at least one element of the non-movant’s claims or conclusively proved each element of its affirmative defense. Conversely, when reviewing an order on a no-evidence summary judgment, the appellate court only determines whether the movant’s motion was procedurally correct and whether the non-moving party produced more than a scintilla of evidence on the challenged elements.

These differences between the types of summary judgment—and the different analysis associated with appellate review of each—inherently means the burden differs. Thus, when performing the “careful balancing” of jurisprudential considerations that *Prudential* mandates, the appellate

206. It is also worth noting that applying the *Prudential* balancing test to both traditional and no-evidence summary judgments does not make no-evidence summary judgment denials any more reviewable by mandamus. The process for both is the same. The outcome differs only because of the balancing of benefits and detriments “in each particular case.” *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 469 (Tex. 2008) (orig. proceeding). In other words, the *Prudential* balancing test and the comment to Rule 166a are not in conflict as much as they appear at first glance.


208. Compare *Walker*, 827 S.W.2d at 843–44 (Tex. 1992) (orig. proceeding) (outlining the elements for an adequate remedy to encompass an appellate court’s inability to cure the trial court’s discovery error and whether the party’s ability is severely compromised by the error but not the expense or burden associated with waiting for a traditional appeal), with *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (balancing jurisprudential considerations encompassing public and private interests to determine whether mandamus review is appropriate).


210. *Id.* at 625.

211. *Id.*

courts must either analyze “the facts involved in each case”\textsuperscript{213} or must apply the comments to the 1997 amendment to the summary judgment rule,\textsuperscript{214} but cannot do both. When faced with a conflict between the commentary to the rule and the Texas Supreme Court’s express statements about the correct standard of review—particularly when those statements occurred after the comments to the rule—the courts of appeals should follow the Texas Supreme Court’s instruction and perform a case-specific balancing of the burdens and benefits of mandamus review. And although the burden may often outweigh the benefits in a traditional summary judgment, the inverse is true of a no-evidence summary judgment; the burden will rarely outweigh the benefits.

B. Mandamus Review of No-Evidence Summary Judgments Could End the Litigation

“Generally, a writ of mandamus is unavailable as a means to review a” no-evidence summary judgment.\textsuperscript{215} “Yet, generally does not mean always.”\textsuperscript{216} As the Texas Supreme Court revealed, “utilizing mandamus to review a decision rendered upon a summary judgment motion may be appropriate when it ends the litigation.”\textsuperscript{217} Permitting appellate review of an erroneously denied no-evidence motion for summary judgment could end the litigation, saving the parties and the judicial system from wasting resources on an unnecessary trial. This is often the reason the Texas Supreme Court gives for its conclusion that an appellate remedy is inadequate. For example, in Jack B. Anglin Company v. Tipps,\textsuperscript{218} the Texas Supreme Court acknowledged that if a party must wait until after trial to complain the trial court refused to compel arbitration, then the party “would be deprived of the benefits of the arbitration clause it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated.”\textsuperscript{219}

\begin{footnotesize}
\textsuperscript{214} TEX. R. CIV. P. 166a cmt. (1997).
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266 (Tex. 1992).
\textsuperscript{219} Id. at 272–73. Similarly in In re AIU Ins. Co., the Texas Supreme Court granted mandamus relief to enforce a forum-selection clause requiring any dispute take place in New York. In re AIU Ins. Co., 148 S.W.3d 109, 115–17 (Tex. 2004) (orig. proceeding). Rejecting the argument that the relator
\end{footnotesize}
Similarly, in *In re Essex*, the Texas Supreme Court concluded the benefits of mandamus review outweigh the costs when the trial court erroneously denies a motion to dismiss under Rule 91a because mandamus review would “spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” In *In re Connor*, the Texas Supreme Court determined “[a] trial court’s erroneous refusal to dismiss a case for want of prosecution cannot effectively be challenged on appeal.”

And in *In re Coppola*, the Texas Supreme Court concluded the benefits of mandamus review outweigh the costs when the trial court erroneously denies a motion to designate a responsible third party because the trial court’s order “impairs—and potentially denies—a litigant’s significant and substantive right to allow the fact finder to determine the proportionate responsibility of all responsible parties.”

In each of these cases, the Texas Supreme Court’s findings that no adequate appellate remedy existed were premised on a party being forced to prepare for and defend a case at trial before it could argue on appeal that it should never have been forced to trial in the first place. In each case, the court concluded this weighs in favor of mandamus review. Although similar logic applies when the trial court denies a traditional or no-evidence motion for summary judgment, the two are treated differently and appellate courts begin with the presumption that there is no mandamus review of an erroneously denied motion for summary judgment.

may prevail at trial, thus making an appellate remedy unnecessary, the Texas Supreme Court held mandamus is appropriate when the failure “would vitiate and render illusory the subject matter of the appeal.” *Id.* at 115 (quoting Tipps, 842 S.W.2d at 272).


222. *Id.* at 535. It appears dismissal for want of prosecution is another instance where the appellate courts have concluded the benefits outweigh the detriments. *See generally In re Borderlon*, 578 S.W.3d 197 (Tex. App.—Tyler 2019, orig. proceeding) (conditionally granting mandamus where the only discussion of an adequate appellate remedy is when the court quoted *Connor*).


224. *Id.* at 509. Interestingly, the Texas Supreme Court made no mention of the fact that the appellate court could order a new trial with the third party appearing on the verdict form.

225. *See e.g., Connor*, 458 S.W.3d at 535 (“A defendant should not be required to incur the delay and expense of appeal to complain of delay in the trial court. To deny relief by mandamus permits the very delay dismissal is intended to prevent.”).
In a recent opinion, the Amarillo Court of Appeals employed this same rationale in distinguishing between mandamus relief when the trial court denies a motion for summary judgment on the entire case and when the trial court denies partial summary judgment. Relying on the Texas Supreme Court's opinions in McAllen Medical Center and United Services Automobile Association, the Amarillo court concluded when summary judgment would end the litigation, the general rule may not apply. Its logic was grounded in two principles.


227. Id. at *2. And in fact, in a recent opinion conditionally granting mandamus relief from the denial of summary judgment—a summary judgment that would not have ended the litigation at that—the Texas Supreme Court said that mandamus relief is “necessary” not only “[w]hen ‘the very act of proceeding to trial—regardless of the outcome—would defeat the substantive rights involved’” but also when proceeding to trial “would cause a knowing waste of resources.” In re Illinois Nat'l Ins. Co., No. 22-0872, 2024 WL 736751 at *10 (Tex. Feb. 23, 2024) (orig. proceeding) (citing In re McAllen Med. Ctr. Inc., 275 S.W.3d 458, 465–66 (Tex. 2008)). Interestingly, the phrase “knowing waste of resources” does not appear in the petition for writ of mandamus nor in any party’s briefs on the merits. Instead, the relators focused on the standing and prejudice arguments, comparing the facts of its case to In re Essex without discussing the different procedural postures of each case. Relators' Pet. for Writ of Mandamus at 32–34, In re Illinois Nat'l Ins. Co., No. 22-0872, 2024 WL 736751 (Tex. Feb. 23, 2024) (orig. proceeding). In response, the real parties in interest raised the general rule against mandamus review of summary judgment, arguing that “[n]one of the circumstances presented in this case suggest that a departure from the general rule that mandamus is not available to correct a trial court’s denial of motions for summary judgment, absent truly extraordinary circumstances, is warranted or appropriate.” Real Parties in Interests' Resp. to Relators' Pet. for Writ of Mandamus at 19, In re Illinois Nat'l Ins. Co., No. 22-0872, 2024 WL 736751 (Tex. Feb. 23, 2024) (orig. proceeding). In reply, the relators repeated their comparisons to In re Essex but added that mandamus was “the only effective way to enforce [the] Court’s prior rulings” and an appeal may not vindicate their rights because “[a]n appeal after a full trial might well result in a victory for Relators on other grounds and this important issue might never be addressed.” Relators' Reply in Support of their Pet. for Writ of Mandamus at 12–13, In re Illinois Nat'l Ins. Co., No. 22-0872, 2024 WL 736751 (Tex. Feb. 23, 2024) (orig. proceeding). In their brief on the merits, relators argued the extraordinary circumstance that the trial would be “irredeemably flawed” and they would be forced to “waste their time and money defending against claims that fail as a matter of law.” Relators' Br. on the Merits at 36, In re Illinois Nat'l Ins. Co., No. 22-0872, 2024 WL 736751 (Tex. Feb. 23, 2024) (orig. proceeding). Perhaps in a signal that the court is reconsidering the strictness of the general rule, the court did not differentiate between the procedural posture of this case (mandamus review of the denial of summary judgment) and the procedural posture of In re Essex (mandamus review of the denial of a Rule 91a motion) but instead said that mandamus may be necessary “when the very act of proceeding to trial—regardless of the outcome . . . would cause a knowing waste of resources.” Illinois Nat'l Ins. Co., 2024 WL 736751, at *10. On the other hand, the court did mention the general rule that “mandamus relief is ‘unavailable when a trial court denies summary judgment, no matter how meritorious the motion’” but concluded this case ‘presents such
First:

[Insisting on a wasted trial simply so that it can be reversed and tried all over again creates the appearance . . . that [courts] don’t know what they are doing” and “[sitting on [its] hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded.]

Second:

[Where the benefits of mandamus relief outweigh the detriments, an appellate court should not allow the hyper-technical application of procedural devices and constructs to thwart the rule of law and the ends of justice.]

Where summary judgment would end the litigation, the benefits of mandamus relief—in the form of cost-savings to the parties, decluttering of the trial court’s docket—would have the effect of promoting resolution of cases “with as great expedition and dispatch and at the least expense both to the litigants and the state as may be practicable.”

Against that great benefit, the burden is no more significant than other types of orders that are already subject to mandamus review, such as the denial of a Rule 91a Motion or motion to dismiss for want of prosecution.

extraordinary circumstances” that mandamus is warranted. Id. (internal citations omitted). And at oral argument, Justice Boyd (the opinion’s author) expressed concern about how the court could grant mandamus relief “without opening the door to the idea that mandamus is always available in every case to challenge the denial of a summary judgment motion[.]” Tr. of Oral Arg. at 5, In re Illinois Nat’l Ins. Co., No. 22-0872, 2024 WL 736751 (Tex. Feb. 23, 2024) (orig. proceeding). Only time will show if In re Illinois is a signal of things to come or just an exceptional case, but it certainly bears mention if for no other reason than because the relators’ counsel provided an outstanding example of how to frame the issues when seeking discretionary review.

229. Id. at *3 (quoting In re Robison, 335 S.W.3d 776, 783 (Tex. App.—Amarillo 2011, orig. proceeding)).
230. TEX. R. CIV. P. 1. Early elimination of non-meritorious claims is not only fair to the defendants who would bear the costs of proceeding to trial on cases that should have been decided on summary judgment, but also to litigants in other cases because it allows the trial court to devote the time and resources it would have spent on this first case ensuring that cases that do have merit receive appropriate levels of judicial attention. Cf. Lonny S. Hoffman, Burn Up the Chaff With Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings, 88 B.U. L. REV. 1217, 1218 (2008) (commenting in the context of the federal pleading rules that the efficient management of cases that lack merit “is not only a matter of fairness to defendants but also of preserving resources for those who do belong so that they may have a meaningful opportunity at relief”).
C. \textit{The Legislature Has Already Performed the Cost-Benefit Analysis}

Denying mandamus review of an erroneously denied traditional or no-evidence motion for summary judgment puts a defendant in an untenable position—it into a Hobson’s choice of deciding whether to settle a case in which it should have been granted judgment or continue to incur the expense of trying a case in which the opposing party has no evidence of one or more essential elements of their cause of action. Faced with such a choice, the defendant’s pressure to settle is not driven by the merits of the plaintiff’s position, but by the defendant’s inability to exercise the procedural tools made available by the legislature.\footnote{An appellate remedy is not adequate if a defendant cannot procedurally access it. See \textit{In re} Gray Law, L.L.P., No. 2-05-379-CV, 2006 WL 1030206, at *2 (Tex. App.—Fort Worth Apr. 20, 2006, orig. proceeding) (mem. op.) (showcasing relator had no adequate remedy by appeal from trial court order in divorce case that he placed all proceeds from his business in the registry of the court because the effect of the order would be that his business would go bankrupt before he could vindicate his rights by appeal); \textit{see also} Coinbase, Inc. v. Bielski, 599 U.S. 736, 758 (2023) (Jackson, J., dissenting) (“With justice delayed while the case is on hold, parties ‘could be forced to settle,’ because they do not wish—or cannot afford—to leave their claims in limbo.”); \textit{In re} AIU Ins. Co., 148 S.W.3d 109, 117–18 (Tex. 2004) (orig. proceeding) (explaining an appellate remedy is inadequate where trial court refuses to enforce forum selection clause because “the breaching party is adding a layer of expense that would otherwise not exist, and the breaching party may be inclined to protract proceedings to encourage a favorable settlement”); Travelers Indem. Co. of Con. v. Mayfield, 923 S.W.2d 590, 595 (Tex. 1996) (holding an appellate remedy was inadequate where trial court ordered insurer to pay worker’s compensation claimant’s attorneys fees because, even though insurer may recover the disputed attorneys’ fees on appeal, the plaintiff “may even be encouraged to deliberately protract the proceedings to encourage a favorable settlement”). Given that defendants who were denied summary judgment to which they were entitled may feel similar pressure to settle, particularly as they will incur great expense in proceeding to trial—which they will not recover under the American rule—it seems obvious the pressure to settle makes an appellate remedy inadequate. \textit{Cf. In re} Colonial Pipeline Co., 968 S.W.2d 938, 942–43 (Tex. 1998) (orig. proceeding) (explaining the relator lacked an adequate remedy by appeal from trial court’s order in mass tort case ordering it to create an inventory of all discovery produced by any party, despite the appellate court’s ability to provide an adequate remedy by ordering the requesting party to pay all costs associated with creating the inventory); \textit{In re} Casey, 589 S.W.3d 850, 855–56 (Tex. 2019) (orig. proceeding) (recognizing although sanctions are not generally reviewable on appeal, where an order requiring sanctions be paid before rendition of final judgment impairs “a party’s willingness or ability to continue the litigation,” sanctions can be ordered (citing \textit{Braden v. Downey}, 811 S.W.2d 922, 929–30 (Tex. 1991) (orig. proceeding))). As these cases recognize, an appellate remedy may be inadequate where the order complained of has the effect of threatening a party’s willingness to continue the litigation. \textit{Cf.} Walker v. Packer, 827 S.W.2d 833, 849 (Tex. 1992) (orig. proceeding) (Doggett, J., dissenting) (criticizing the majority’s limitation on the availability of mandamus because under the majority’s standard, “[a]buses of judicial power will go forever uncorrected when the party disallowed discovery, realizing the difficulty of proving a case with less than full information and the uphill task of maintaining a successful appeal, is either forced to settle or forgoes a costly and extended appeal following defeat on the entire case”).}
Just as with the expert report requirement for healthcare liability\textsuperscript{232} and asbestos claims,\textsuperscript{233} the statute of limitations and tolling rule for TCHRA claims,\textsuperscript{234} the adoption of Rule 91a,\textsuperscript{235} and the PLCAA,\textsuperscript{236} the legislature balanced the relevant costs and burdens in its promotion of the no-evidence summary judgment procedure and determined the Texas Rules of Civil Procedure needed to be amended to provide an avenue to resolve meritless claims short of a trial.\textsuperscript{237} Thus, unlike these other examples of legislative balancing, appellate courts do not defer to this legislative intent when applying the \textit{Prudential} balancing test to no-evidence summary judgment motions.

D. \textit{Response to Concerns that This Would Flood the Appellate Court System}

Opponents of increasing the frequency of mandamus review will likely argue it will flood the appellate courts with mandamus petitions for traditional and no-evidence summary judgments, cause widespread disruptions of the trial court’s docket, and wreak havoc on the judicial system as a whole.\textsuperscript{238} But these arguments are presented every time the Texas Supreme Court has made mandamus more available and, despite the

\begin{itemize}
\item \textsuperscript{232} In re McAllen Med. Ctr., Inc., 275 S.W.3d 458, 466 (Tex. 2008) (orig. proceeding).
\item \textsuperscript{233} See In re Global Santa Fe Corp., 275 S.W.3d 477, 487 (Tex. 2005) (orig. proceeding) (finding “the provisions of Chapter 90 directed at assuring reliable expert confirmation of the existence of one of the medically recognized forms of silica-related illness are not preempted”).
\item \textsuperscript{234} In re United Servs. Auto Ass’n, 307 S.W.3d 299, 314 (Tex. 2010) (orig. proceeding).
\item \textsuperscript{236} In re Academy, Ltd., 625 S.W.3d 19, 30 (Tex. 2021) (orig. proceeding).
\item \textsuperscript{237} It is no answer that it was the Texas Supreme Court, and not the legislature, that promulgated the no-evidence rule. As discussed \textit{supra} in notes 131–134, this rule change was in direct response to the legislature expressing its preference for a no-evidence rule and concern that the legislature would change the rule if the court did not. Thus, even if the amendment to Rule 166a was not technically done through the legislative process, it still reflects the same legislative cost-balancing as the examples cited above.
\item \textsuperscript{238} See \textit{e.g.}, Barker, \textit{supra} note 50, at 720–21 (expressing concern that increased availability of mandamus “will increase the number of mandamus requests granted, which will result in more interruptions in trial court proceedings and increased burden on the judicial system”). But see LISA E. HOBBS, \textit{THE SEVEN YEAR ITCH: PRUDENTIAL & EXPANSION OF MANDAMUS POWER} 4 (2017) (“Despite predictions of an influx of mandamus filings [in the wake of \textit{Prudential}], filings appear to be trending down.”). \textit{Accord} Walker v. Packer, 827 S.W.2d 833, 855–56 (Tex. 1992) (orig. proceeding) (Doggert, J., dissenting) (criticizing the majority’s decision to limit the availability of mandamus relief out of concern for an “explosion” as “wholly unsupportable” by case statistics and nothing more than a “myth.”). It seems every potential increase to the availability of mandamus relief is opposed as disastrous to the orderly administration of justice. Yet, those fears are rarely born out.
fervent protestations of Chicken Little, the sky has yet to fall. Others will likely argue it should be left to the legislature to resolve through providing a statutory interlocutory appeal if that is its intent. Both are misplaced. The specter of appellate sanctions should cause any party seeking mandamus review to pause and reconsider its position. Further, interlocutory appeal would increase the disruption on the trial courts, not lessen it.

1. The Appellate Courts Can Deter the Use of Mandamus for Improper Reasons by Sanctioning Relators Who File Frivolous Cases.

In Texas, “[a]n appeal is frivolous when the record, viewed from the perspective of the advocate, does not provide reasonable grounds for the advocate to believe that the case could be reversed.” Should the appellate courts find themselves with a deluge of meritless petitions seeking mandamus review of denied no-evidence summary judgments, they can carefully apply sanctions to discourage this practice. Earlier this year, the United States Supreme Court reiterated that sanctions are among the “robust tools” an appellate court has “to prevent unwarranted delay and deter frivolous interlocutory appeals.”

Although most cases involving sanctions for appellate conduct involve direct appeals, the appellate court’s authority, under both the Texas Rules

239. In re McAllen Med. Ctr., Inc., 275 S.W.3d 458, 470–75 (Tex. 2008) (orig. proceeding) (Wainwright, J., dissenting) (arguing expansion of interlocutory review of trial court orders should come from the legislature); CSR Ltd. v. Link, 925 S.W.2d 591, 601 (Tex. 1996) (orig. proceeding) (Baker, J., dissenting) (arguing interlocutory appellate review of the denial of a special appearance “should be accomplished through the State Bar Rules Committee and in conjunction with the Court’s rule-making authority, not by case law mandate” or “the legislature could, if it desired, provide a statutory method for interlocutory appeal of the denial of a special appearance.”). But see In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 137 (Tex. 2004) (orig. proceeding) (commenting “[t]he unavailability of mandamus relief increases the pressure for expanded interlocutory appeals”).


241. See Coinbase, Inc. v. Bielski, 599 U.S. 736, 745 (2023) (discussing the appellate court’s ability to summarily affirm, to expedite an appeal, to dismiss the appeal as frivolous, or impose sanctions as tools to prevent parties from using interlocutory appeals for purposes of delay); see also Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 629 (2009) (“And, of course, those inclined to file dilatory appeals must be given pause by courts’ authority to ‘award just damages and single or double costs to the appellee’ whenever an appeal is ‘frivolous.’” (quoting Fed. R. App. P. 38)). Federal Rule 38 is functionally identical to Texas Rules 45 and 62.
of Appellate Procedure and its inherent authority, includes the right to sanction parties for mandamus proceedings. In a mandamus proceeding, the Texas Rules of Appellate Procedure expressly authorize sanctions if the appellate court finds the petition is groundless or brought solely for purposes of delay.

If faced with a surge of unmeritorious mandamus petitions, the appellate courts would likely be more liberal with their use of sanctions as a deterrent. As one Texas Court of Appeals put it:

We will not permit spurious appeals, which unnecessarily burden parties and our already crowded docket, to go unpunished. Such appeals take the court’s attention from appeals filed in good faith, wasting court time that could and should be devoted to those appeals. No litigant has the right to put a party to needless burden and expense or to waste a court’s time that would otherwise be spent on the sacred task of adjudicating the valid disputes of Texas citizens.

If an appellate court determines a party acted in bad faith or lacked a reasonable belief mandamus would be granted, then the appellate court may award just sanctions, including an award of attorneys’ fees incurred in responding to the petition or damages calculated as ten times the taxable costs. The appellate court may also determine an appeal lacks merit but

242. See TEX. R. APP. P. 52.11 (permitting appellate courts to “impose just sanctions on a party or attorney who is not acting in good faith”); see also In re Lerma, 144 S.W.3d 21, 26–27 (Tex. App.—El Paso 2004, orig. proceeding) (considering sanctions under TEX. DISCIPLINARY RULES PROF’L CONDUCT R 3.01 in a mandamus proceeding); see generally In re Cretic Energy Servs., LLC, No. 05-22-01188-CV, 2022 WL 17057609, at *1 (Tex. App.—Dallas Nov. 17, 2022, orig. proceeding) (considering sanctions under TEX. R. APP. P. 45 in a mandamus proceeding).

243. TEX. R. APP. P. 52.11.

244. See Douglas R. Richmond, Appellate Sanctions Against Lawyers, 73 BAYLOR L. REV. 562, 563 (2021) (“[A]ppellate courts, whether because of heavy caseloads and resulting pressures, an erosion of collective patience with poor lawyering, or the addition of fresh faces to the bench, seem to be increasingly willing to impose sanctions for frivolous appeals and other forms of misconduct by lawyers.”). In fact, Chief Justice Phillips used this same rationale to support the adoption of the no evidence summary judgment procedure. Phillips, supra note 135, at 862 (cautioning “parties who invoke [Rule 166a(i)] merely to harass their opponents or increase the cost of litigation should and will be subject to sanctions”).


246. See Riggins v. Hill, 461 S.W.3d 577, 584 (Tex. App.—Houston [14th Dist.], 2015, pet. denied) (collecting cases awarding attorneys’ fees when appeal was frivolous); accord Johnson v. Whitney
the decision to award sanctions is “a determination best left to the trial court’s broad discretion on completion of the entire litigation.” \(^{247}\) In short, the appellate court’s discretion to award or not award sanctions for a meritless appeal leaves ample tools to discourage the filing of meritless petitions for mandamus review of a denied traditional or no-evidence summary judgment.

2. Interlocutory Appeals Are More Disruptive to the Trial Court and Are Not a Substitute for Mandamus Relief

Finally, some may argue the concerns favoring mandamus review are best left to the legislature to decide by allowing (or not) interlocutory appeal of denied no-evidence motions for summary judgment. Certainly, the legislature has that authority if it believes the no-evidence motion for summary judgment warrants such review. \(^{248}\) But, as the Texas Supreme Court recognized in \textit{Prudential}, providing interlocutory review as a matter of right comes with its own set of problems. \(^{249}\)

\begin{footnotesize}


249. See \textit{In re Prudential Ins. Co. of Am.}, 148 S.W.3d 124, 137 (Tex. 2004) (orig. proceeding) (explaining how “prudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals”). This presumes the legislature would establish interlocutory review as a matter of right. Permissive interlocutory review under Section 51 is available only when the order “involves a controlling question of law as to which there is a substantial ground for difference of opinion” and appellate review “may materially advance the ultimate termination of the litigation.” \textsc{Tex. Civ. Prac. & Rem. Code} § 51.014(d). There are few situations in which a no-evidence summary judgment would involve a controlling question of law as to which there is substantial difference of opinion. For example, in \textit{Undavia v. Avant Medical Group, P.A.}, the Houston Fourteenth District Houston Court of Appeals stated:

Generally, if the viability of a claim rests upon the court’s determination of a question of law, the question is controlling . . . . Substantial grounds for disagreement exist when the question presented to the court is novel or difficult, when controlling circuit law is doubtful, when controlling circuit law is in disagreement with other courts of appeals, and when there is little authority on which the district court can rely . . . .


\end{footnotesize}
First, interlocutory appeal as a matter of right does not permit the appellate court to weigh whether that particular case warrants relief. An appellate court would be obligated to review a case where the plaintiff did not respond at all to the motion—a situation where the only question is whether the motion adequately described the elements for which it asserted there was no evidence. This is the same as it would be in a case where the plaintiff produced dozens of exhibits in response and the appellate court would have to determine whether the evidence is sufficient to establish a genuine issue of material fact as to each claim. Under the balancing test for mandamus relief, the appellate court may determine the nature of the evidence produced in response means that the *Prudential* balancing test weighs in favor of finding an appellate remedy adequate under the specific facts of the case.

Second, unlike mandamus, an interlocutory appeal (for the most part) automatically stays proceedings in the trial court until the appellate court issues its ruling. Although it is possible the legislature may create special rules for the interlocutory appeal of a denial of a no-evidence motion for summary judgment, and already has to some extent, there is no guarantee

250. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding) (“Interlocutory appeals lie as of right and must be decided on the merits, increasing the burden on the appellate system. Mandamus, on the other hand, is an extraordinary remedy, not issued as a matter of right but at the discretion of the court.”) (internal quotations omitted); *see also In re First Reserve Mgmt.*, L.P., 671 S.W.3d 653, 663 (Tex. 2023) (orig. proceeding) (“[The parties] urge us to rule. And we have. But we will not direct the MDL court to take action. Mandamus is discretionary and ‘controlled by equitable principles’, and we cannot determine what disruption a directive would have on proceedings that have been stayed during the bankruptcy proceedings . . . .’”) (internal quotations omitted); *In re Reece*, 341 S.W.3d 360, 398 (Tex. 2011) (orig. proceeding) (Johnson, J., dissenting) (“Even if we can issue mandamus here, it is doubly clear that we should not.”) (emphasis in original).

251. *See* *TEX. CIV. PRAC. & REM. CODE* § 51.014(b) (explaining most interlocutory appeals stay only “the commencement of a trial in the trial court” but some interlocutory appeals “stay[] all other proceedings in the trial court pending resolution of that appeal”); *see also id. at* § 51.014(a) (detailing other scenarios where interlocutory appeals are permissible once a traditional motion for summary judgment has been denied).

252. *See e.g.*, id. § 51.014(c) (interlocutory appeal from denial of summary judgment does not automatically stay proceedings unless it is filed and set for hearing or requested for submission before the later of (a) a date set in the trial court’s scheduling order or (b) 180 days after the defendant files an answer or its first other responsive pleading or the plaintiff files an amended petition alleging a cause
the legislature would do so. If the legislature makes the interlocutory appeal of a no-evidence summary judgment subject to the same rules as other summary judgments for which a party may seek interlocutory appeal, then it would likely have no effect on the automatic stay. The exception to the automatic stay currently applies only if the party files its motion for summary judgment and has it set for hearing or submission after the deadline in the trial court’s scheduling order. Most practitioners do not disregard the trial court’s scheduling order in this manner. Thus, the exception to the automatic stay would not apply in most situations. This would create a severe disruption to the trial court’s calendar in a way mandamus review would not.

While interlocutory appeal of no-evidence summary judgments would certainly be an alternative to mandamus relief, it would come at a much higher price to the efficient operation of the civil justice system.

VI. CONCLUSION

In 2004, the Texas Supreme Court held mandamus is a flexible remedy that resists categorization. Despite this, appellate courts begin with the presumption that mandamus review is not available to correct the trial court’s erroneous denial of summary judgment. This presumption is rooted not in the Prudential balancing test or modern mandamus jurisprudence, but in the historical mandamus jurisprudence that Prudential rejected. As mandamus jurisprudence has evolved since Prudential, summary judgments were left behind. Under the Prudential balancing test, the benefits of mandamus review would almost always outweigh the burdens. But because

of action for which the defendant could file a motion raising sovereign immunity, special appearance, or plea to the jurisdiction by a governmental unit).

Id.

Although mandamus review can stay proceedings in the trial court, the grant of temporary relief is discretionary both in whether to grant relief at all and the scope of relief to grant. TEX. R. APP. P. 52.10. As with all aspects of mandamus procedure, the decision to grant temporary relief is, like mandamus procedure generally, subject to equitable principles such as laches. See In re Am. Energy, No. 05-98-02061-CV, 1998 WL 870905, at *1 (Tex. App.—Dallas Dec. 16, 1998) (denying motion for temporary relief and petition for writ of mandamus because they were barred by laches); see also William V. Dorsaneo III, Dorsaneo, Texas Litigation Guide § 152.04(f) (2023) (advising “[a] request for temporary relief should be made as early as possible and with some caution. If the request is not made in due time, laches may prevent the appellate court from granting the relief”). Further, another party may, at any time, move the court to reconsider a grant of temporary relief. TEX. R. APP. P. 52.10(c). Therefore, even though mandamus proceedings may have the effect of staying proceedings in the trial court, they would be far less disruptive than interlocutory appeals.
the appellate courts begin with the presumption that mandamus review is not available unless there is some extraordinary circumstance, the balancing test is rarely employed.

As a result, parties generally won’t seek mandamus review of a denied no-evidence summary judgment unless it is extraordinarily egregious and the full benefits of the no-evidence summary judgment rule cannot be fully realized. The Texas Supreme Court should take the opportunity to set the record straight, that the statement “mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion,” is a pre-Prudential anachronism and that summary judgment is not a “disfavored procedural tool,”255 but instead subject to the same balancing test the court applies to any other relief sought through mandamus.

255. Clore, supra note 8, at 854 (citing JUSTICE JOHN CORNYN, TEXAS SUMMARY JUDGMENTS 3 (Elaine Carlson ed., The Rutter Group 1997)).