Mandamus—Discovery—Mandamus May Issue To Compel A District Judge To Order Discovery. *Barker v. Dunham,* 551 S.W.2d 41 (Tex. 1977).

Gale Barker was killed in an accident involving the failure of a crane boom designed and manufactured by American Hoist and Derrick Company. His wife, Mrs. Leora Kay Barker, sued American Hoist to recover damages for the death of her husband.[1] In discovery proceedings Mrs. Barker took the deposition of James Montgomery as an expert on the structural capacity of the boom. Montgomery was the Vice President in charge of engineering of American Hoist.[2] Upon direction of counsel for American Hoist, Montgomery refused to answer several questions concerning his opinions, mental impressions, and conclusions relating to the cause of the failure of the crane boom.[3] Mrs. Barker then filed a motion with the district court to require Montgomery to answer the questions and to force the production of writings and other items used by Montgomery in analyzing the causes of the accident.[4] The Honorable Walter Dunham, Jr., presiding judge of the district court, denied the motions for discovery. Mrs. Barker then filed with the Supreme Court of Texas a petition for writ of mandamus to compel Judge Dunham to order the discovery.[5] The supreme court granted the petition[6] and held that a writ of mandamus may issue to compel discovery if a district court has erroneously denied discovery.[7]

In *Barker v. Dunham,*[8] the Supreme Court of Texas began by summarily stating that a writ of mandamus may issue to correct a clear abuse of discretion by a trial judge in a discovery proceeding.[9] The court then examined Texas Civil Procedure 167[10] and 186a.[11]

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1. Barker v. Dunham, 551 S.W.2d 41, 42 (Tex. 1977).
2. *Id.*
3. *Id.* at 42, 44-45. The denial was based on the assertion that the answer would relate to the investigation of the accident by an employee. *Id.* at 45.
4. *Id.* at 42.
5. *Id.*
6. *Id.* at 46.
7. *Id.* at 42, 46. The court also held that a regular employee may be an "expert" under TEX. R. CIV. P. 167 and 186a. If a party does not clearly state that the expert in question will be "used solely for consultation" and not as a witness, the expert's reports, observations and opinions are discoverable. Barker v. Dunham, 551 S.W.2d 41, 44 (Tex. 1977).
8. 551 S.W.2d 41 (Tex. 1977).
9. *Id.* at 42, *citing* Houdaille Indus., Inc. v. Cunningham, 502 S.W.2d 544 (Tex. 1973); Maresca v. Marks, 362 S.W.2d 299 (Tex. 1962); Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959).
10. TEX. R. CIV. P. 167 provides in part:

Because those rules draw no distinction between an expert who is a regular employee of one of the parties, as Montgomery was, and one who is temporarily employed to aid in the preparation of a case, the court held that rules 167 and 186a apply in either situation.[12] After reviewing Montgomery's deposition testimony, the court concluded that Montgomery was subject to being deposed as an expert under the language of rules 167 and 186a.[13] Thus, because Judge Dunham refused to order him to answer the questions, the court concluded that Judge Dunham had abused the discretion given a district judge to order and deny discovery. Consequently, the court held that the writ of mandamus would issue.[14]

In support of its holding in *Barker v. Dunham*[15] that mandamus will issue after a district court has *denied* discovery the Supreme Court of Texas cited three cases.[16] None of these cases are directly in point with *Barker*. In *Houdaille Industries, Inc. v. Cunningham*[17] the district court had *ordered* an expert to furnish certain materials and reports for inspection.[18] Similarly, the courts in *Maresca v.*

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to such limitations of the kind provided in Rule 186b as the court may impose, the court in which an action is pending may order any party:

(1) To produce and permit the inspection and copying or photographing by or on behalf of the moving party of any of the following which are in his possession, custody or control: (a) any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain, or are reasonably calculated to lead to the discovery of, evidence material to any matter involved in the action . . . .

. . . .

. . . [A]ny party may be required to produce and permit the inspection and copying of the reports, including factual observations and opinions, of an expert who will be called as a witness.

11. TEX. R. CIV. P. 186a provides in part:

Any party may take the testimony of any person, including a party, by deposition upon oral examination or written questions for the purpose of discovery . . . . Provided, however, . . . the rights herein granted shall not extend to the work product of an attorney or to communications passing between agents or representatives . . . . Provided, further, that information relating to the identity and location of any potential party and of persons, including experts, having knowledge of relevant facts, and the reports, factual observations and opinions of an expert who will be called as a witness, are discoverable.

12. Barker v. Dunham, 551 S.W.2d 41, 43 (Tex. 1977), *citing* TEX. R. CIV. P. 167, 186a.

13. Barker v. Dunham, 551 S.W.2d 41, 44-46 (Tex. 1977), *citing* TEX. R. CIV. P. 167, 186a.

14. Barker v. Dunham, 551 S.W.2d 41, 46 (Tex. 1977).

15. 551 S.W.2d 41 (Tex. 1977).

16. See note 9 *supra*.

17. 502 S.W.2d 544 (Tex. 1973).

18. *Id.* at 545.

Marks[19] and *Crane v. Tunks*[20] were dealing with the district court *ordering* a party to submit income tax returns for inspection and copying. Mandamus was a proper remedy in each of those cases because the right of appeal from a final judgment was an inadequate remedy. This is true because once a party is forced to produce such documents, the damage is already done and later appeal cannot relieve the invasion of privacy that has taken place.[21] In the situation in which the district court has *denied* discovery, however, the aggrieved party can usually get a remand for a new trial and an order to allow discovery by an appeal from a final judgment.[22] The fact that the remedy of appeal might cause some delay or added cost is insufficient justification for supreme court intervention by writ of mandamus.[23] Mandamus, after all, should not be a substitute for appeal. Thus, the rule that mandamus can issue only if there is no adequate remedy at law is a necessary part of the rule allowing appeal only after a final judgment except when specially allowed by statute. If parties are allowed to make interlocutory appeal or to apply for writs of mandamus whenever a court refuses to order the production of some evidence a party deems relevant, there will surely be a significant increase in the already overloaded supreme court docket.[24]

Because the Supreme Court of Texas in *Barker v. Dunham*[25] did

19. 362 S.W.2d 299, 300 (Tex. 1962).

20. 160 Tex. 182, 328 S.W.2d 434, 437-38 (1959).

21. 328 S.W.2d at 439. For other Texas cases granting mandamus after the district court had *ordered* discovery *see* Automatic Drilling Machs., Inc. v. Miller, 515 S.W.2d 256 (Tex. 1974); Commercial Travelers Life Ins. Co. v. Spears, 484 S.W.2d 577, 578 (Tex. 1972); State v. Ashworth, 484 S.W.2d 565, 567 (Tex. 1972); Russell v. Young, 452 S.W.2d 434 (Tex. 1970); Southern Bag & Burlap Co. v. Boyd, 120 Tex. 418, 38 S.W.2d 565 (1931).

22. . Certainly there may be extraordinary circumstances in which the denial of discovery may not adequately be remedied by appeal from final judgment. An example of this is found in Investment Properties Int'l, Ltd. v. IOS, Ltd., 459 F.2d 705 (2d Cir. 1972), in which the discovery was necessary to find the facts on which jurisdiction and standing turned. However, in most fact situations, including the fact situation in Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977), the right of appeal from final judgment is an adequate remedy. The supreme court of Texas seemed to realize this when it stated in Morris v. Hoerster, 370 S.W.2d 451 (Tex. 1963) that the reasoning in Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959) does not necessarily apply when discovery has been denied. *See generally* G. HODGES, A. JONES, & G. ELLIOTT, TEXAS JUDICIAL PROCESS 645 (2d ed. 1977).

23. Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648, 652 (1958).

24. *See generally* Arkansas Motor Coaches v. Taylor, 234 Ark. 803, 354 S.W.2d 731 (1962); Byrd v. Maddox, 313 Ky. 815, 233 S.W.2d 990 (1950); Ketchum Coal Co. v. District Court, 48 Utah 342, 159 P. 737 (1916). *But cf.* McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 159 P.2d 944 (1954) (remedy of appeal from final judgment is inadequate when a trial court has denied discovery).

25. 551 S.W.2d 41 (Tex. 1977).

not mention the issue of adequacy of appeal as a remedy when a lower court denied discovery, it was hoped that the court merely inadvertently overlooked the issue and that *Barker* would eventually be reversed. However, in *Allen v. Humphreys*[26] the supreme court destroyed that hope. In *Allen* the court reconsidered its holding in *Barker* and rejected the argument that remedy via appeal is adequate when the trial court has denied discovery. Thus, the court held that the only issue is whether a clear abuse of trial court discretion has been shown, thereby indicating its intention to rely on the holding in *Barker v. Dunham*[27] in the future.

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26. 559 S.W.2d 798 (Tex. 1977).
27. 551 S.W.2d 41 (Tex. 1977).