

No. 08-1076

IN THE SUPREME COURT OF TEXAS

IN RE JOHN DEERE COMPANY D/B/A JOHN DEERE COMPANY AND JOHN DEERE
CONSTRUCTION & FORESTRY COMPANY

RELATORS

Original Mandamus Proceeding
From the 18th Judicial District Court of Johnson County, Texas
Honorable John Neill, Presiding Judge

REAL PARTY IN INTEREST'S BRIEF ON THE MERITS IN
OPPOSITION TO PETITION FOR MANDAMUS

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RECORD REFERENCES

References to the record filed by Relator will be cited as [Tab] Rel. R. [page].

References to the appendix attached to Relator's petition for mandamus will be cited as [tab] Rel. App. [page].

STATEMENT OF THE ISSUES

1. Whether a relator is entitled to mandamus relief when a trial court enters an order compelling discovery in the absence of any evidence from the relator to support its objection to the discovery.
2. Whether a relator may rely on affidavit testimony that was never presented to the trial court to support a petition for mandamus in which the relator attempts to establish that the trial court clearly abused its discretion by compelling discovery that allegedly "constitutes harassment and far exceeds any benefit Plaintiff may receive."

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Real Party in Interest, Francesca Martinez, individually and as next friend to Arturo Martinez, files this Response to Relator's Petition for Mandamus. Because the trial court did not abuse its discretion in limiting its order to produce documents related to lawsuits, problems, or complaints with respect to only bolt-on steps and handles and with respect to only equipment models that have steps and handles substantially similar to those on the equipment at issue, Relator's petition and motion for temporary relief should be denied.

SUMMARY OF THE ARGUMENT

The crux of John Deere's petition is the contention that the trial court entered an overly broad order to produce irrelevant documents related to products that are not similar to the piece of construction equipment that injured Arturo Martinez. John Deere argues that Ms. Martinez bore the burden of establishing that the products for which discovery was ordered were similar to the product that injured Mr. Martinez, and that the affidavit of Daniel Griswold, which was never presented to the trial court, establishes that the products included in the production order were beyond the scope of permissible discovery. John Deere's position is founded on multiple fallacies.

For one, it is simply wrong for John Deere to assert that the trial court abused its discretion simply because the order encompasses a wide range of models and years. That John Deere used these bolt-on steps and handles on multiple models only increases the relevance of the discovery. The more problems John Deere has experienced with these steps and handles, and the longer these problems have existed, the more likely it is that

this incident occurred as a result of a product defect and John Deere's conscious indifference to the danger posed by these products, exactly as Ms. Martinez alleges.

John Deere is also incorrect in the assumption that Ms. Martinez bore the burden of proving that the discovery sought was relevant. It is well established that the party seeking to avoid discovery bears the burden of proving that the discovery sought is irrelevant. *Templeton v. Dreiss*, 961 S.W.2d 645, 663 (Tex. App.—San Antonio 1998, pet. denied).

Additionally, the primary issue in a mandamus proceeding is whether the trial court abused its discretion. John Deere attempts to establish that the trial court abused its discretion by entering an overly broad discovery order, but this effort is based entirely on the affidavit of Mr. Griswold that John Deere failed to provide to the trial court. It is unclear how a trial court can abuse its discretion by failing to account for testimony that was never provided.

As is demonstrated below, the trial court repeatedly attempted to narrowly tailor the discovery order in this case, but John Deere provided no information to the Court by which it could tailor the order as John Deere desired. Instead, John Deere chose to sandbag the trial court by producing affidavit testimony for the first time in its mandamus petitions. John Deere should not be afforded mandamus relief to cure its own failure to meet its burden of proof.

STATEMENT OF FACTS

This suit arises out of the severe injuries suffered by Arturo Martinez while working on the Nolan River Road Project in Johnson County, Texas. 12 Rel. R. 3-4. On

April 1, 2004, Arturo Martinez was riding on a John Deere 410D backhoe when the bolt-on step on which he was standing failed, causing him to fall under the backhoe. *Id.* Mr. Martinez was run over by the backhoe and suffered massive brain injuries, as well as other injuries. *Id.* Prior to the accident, this particular backhoe model had been recalled to repair the steps and bolts supporting the step. *Id.*

On March 21, 2006, Francesca Martinez, Mr. Martinez's mother, filed suit in her individual capacity and as next friend of Mr. Martinez against Relator (referred to herein as "John Deere"), as well as other defendants. 13 Rel. R. 1. Ms. Martinez alleged that John Deere is liable for her son's injuries under various theories, including product liability, breach of warranty, misrepresentation, and negligence. *Id.* at 4-11. During the course of discovery, Ms. Martinez served requests for production of documents to John Deere, which included the following request:

Please attach all other documents of customer complaints received by Defendant relative to the sidestep on any model backhoe.

See 10 Rel. R. 9, Request No. 18. John Deere objected to the request, in part, because the request was "irrelevant to the extent it is not reasonably limited to the product model or timeframe associated with the incident." 11 Rel. R. 7. John Deere never objected on the grounds that the request was unduly burdensome or harassing. *See id.* Subject to this objection, John Deere stated that it had not identified any responsive documents. *Id.*

In March 2008, Ms. Martinez filed a motion to compel John Deere to provide more thorough responses to several requests for production, including Request 18, and the trial court held a hearing on this motion on May 8, 2008. 3 Rel. R. 1; 5 Rel. R. 1.

From the outset of the hearing, the trial court expressed concern that any order granting Ms. Martinez's motion to compel had to be narrowly tailored to ensure that John Deere was not forced to produce voluminous irrelevant information.

For one, the trial court expressed concern that Ms. Martinez's request might force John Deere to produce documents related to every item bolted on to the exterior of John Deere's commercial tractor. 5 Rel. R. 6-9. As a compromise, Ms. Martinez counsel suggested that the order be limited to items such as handles and steps to which people apply their weight. *Id.* at 7-9. The trial court agreed to this limitation, and counsel for John Deere represented that complying with this request would not be overly burdensome.¹ *Id.* at 9, 12, 14.

The trial court also expressed concern that any order compelling production must be limited to models with the same or similar steps and handles at issue in this case. *Id.* at 14-18. As the trial court explained, it was concerned with compelling production with respect to numerous makes and models of John Deere construction equipment and asked Ms. Martinez to provide John Deere with a list of model numbers with steps and handles that are actually similar to the 410D at issue in this case. *Id.* at 16. If the parties were unable to agree on which models were similar to the 410D, or if there were dozens of models, then the trial court invited the parties to schedule another hearing to resolve any remaining disputes. *Id.* at 17. The trial court also clarified that whether a model was

¹ Despite this concession, John Deere now contends that the trial court's order was overly burdensome because it included information concerning handles as well as steps. *See* Petition for Mandamus at 14.

similar to the 410D turned on whether the handle and step were similar to the 410D, not whether the equipment as a whole was similar. *Id.* at 18.

Because the parties could not reach an agreement regarding which models of equipment were similar with regard to the bolt-on handle and step at issue, the trial court held a subsequent hearing on September 4, 2008. 6 Rel. R. 1. At this hearing, the trial court asked Ms. Martinez's counsel, Clay Jenkins, to justify why he believed that 35 different models of John Deere equipment listed in Ms. Martinez's proposed order were similar to the 410D. *Id.* at 5. Mr. Jenkins explained that Ms. Martinez's expert researched John Deere's various equipment models and determined that all 35 of the requested models had the bolt-on step. *Id.* at 5, 16-17. John Deere responded by arguing that Ms. Martinez's list of similar models was too long and that it was contrary to the trial court's initial determination that the list should be limited to a "handful" of additional models. *Id.* at 11-15. John Deere did not argue or present any evidence that the models at issue were not, in fact, similar to the 410D with respect to the bolt-on side step. *Id.* Instead, in a post-submission letter brief, John Deere asserted that any order compelling the production of documents should be limited to five models, including the 410D, that were part of a 1996 recall program because these were the only models that had been modified in a manner similar to the 410D. 8 Rel. R. 1-2.

In the absence of any suggestion by John Deere that documents related to the bolt-on steps and handles on the models of construction equipment listed in Ms. Martinez's proposed order were irrelevant, the trial court entered Ms. Martinez's proposed order on December 5, 2008. 1 Rel. R. 1. Originally, this order compelled John Deere to produce

responsive documents on or before December 26, 2008. 1 Rel. R. 3. The trial court, however, extended this deadline upon John Deere's concern that it could not comply with the court's order given the intervening holidays.

On December 18, 2008, John Deere filed a petition for mandamus with the Tenth Court of Appeals at Waco. In this petition, for the first time, John Deere included an affidavit of Daniel Griswold ("Griswold Affidavit") containing various factual assertions, including unsupported assertions that the trial court's order encompasses 78 different models of equipment, that the order encompasses events unrelated to bolt-on steps and handles from nearly 40 years ago, and that some of the models in the order allegedly never existed.² This same affidavit was presented by John Deere to this Court in support of its petition for mandamus. See 2 Rel. R. 1-3. The trial court, however, was never presented with this affidavit and never provided with any argument that any the models listed in the trial court's order were irrelevant because the steps and handles were not similar to those used on the 410D at issue in this case.

ARGUMENT AND AUTHORITIES

I. Standard of Review

To be entitled to mandamus, John Deere must establish that the trial court committed a clear abuse of discretion and that it has no adequate remedy on appeal. *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding). John Deere's

² Even though Ms. Martinez established that this assertion is false in their response to the petition for mandamus, Deere continues to assert this position in its brief on the merits. Again, as the photograph and sales advertisement attached at Tab A to Ms. Martinez's response to the petition for mandamus demonstrates, the model 1140 exists and has a bolt-on step. This photo and this ad were obtained from a simple Google search for "John Deere 1140." The only error is that the court's order lists this model as a four-wheel drive vehicle, but it is actually a two-wheel drive vehicle.

burden is a heavy one and is met only if the trial court “reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law’ or if it clearly fails to correctly analyze or apply the law.” *In re Ford Motor Co.*, 165 S.W.3d at 317 (quoting *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992)); *see also In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003). Whether an adequate remedy on appeal exists “has no comprehensive definition.” *In re Prudential*, 148 S.W.3d 124, 135-36 (Tex. 2004). Instead, this Court has determined that whether a party has an adequate remedy by appeal requires “careful balance of jurisprudential considerations” that “implicate both public and private interests.” *Id.* at 136. “When the benefits [of mandamus review] outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.” *Id.*

II. The Trial Court’s Order is not Overly Broad.

As an initial matter, it is readily evident that the trial court’s order is not overly broad. Texas courts have approved the admission of incidents occurring over a number of years and involving numerous models of equipment. John Deere is well aware of this, given that it was a party to one of the longest standing opinions on this subject. As the Tenth Court of Appeals recognized nearly 20 years ago, “substantially similar” incidents *admissible before a jury* are not limited to identical incidents, but may include incidents involving numerous types of equipment as long as the circumstance surrounding the incident is reasonably similar. *John Deere Co. v. May*, 773 S.W.2d 369, 372-73 (Tex. App.—Waco 1989, writ denied). Certainly, if information involving various models of equipment is admissible, the same information must be discoverable.

Moreover, it is little consequence that the number of substantially similar models of equipment might be large. As the *May* Court noted:

What type of evidence was more vital to the plaintiffs' case, and thus more relevant and probative, than proof that John Deere dozers had [similar incidents] on numerous other occasions and that the company knew of this dangerous propensity? In fact, the relevance of such proof would be correspondingly heightened by proving the largest number of extraneous incidents possible. Proving one-hundred other occurrences, rather than thirty-four, only would have increased the probability that May's death occurred as the plaintiffs alleged.

Id. at 373-74. Therefore, regardless of the number of models or length of time at issue, the trial court does not abuse its discretion in ordering production of documents as long as the order is narrowly tailored to encompass substantially similar incidents and, as per the holding in *May*, “may include incidents involving numerous types of equipment”. *John Deere Co. v. May*, 773 S.W.2d 369, 372-73 (Tex. App.—Waco 1989, writ denied). The relevance of any incident responsive to the order is only heightened by the number and length of time over which the incidents occurred.

The trial court also did not abuse its discretion by ordering the production of documents concerning bolt-on handles. As discussed above, this portion of the order was part of a compromise that resulted at the May 8, 2008 hearing. 5 Rel. R. R. 6-9. At this hearing, Ms. Martinez’s counsel suggested that the order be limited to items such as handles and steps to which people apply their weight, and John Deere’s counsel stated that complying with this request would not be overly burdensome. *Id.* at. 7-9, 12, 14. It is disingenuous for John Deere to now argue that the trial court abused its discretion by

including in the order matters the compromise with which John Deere stated it could comply.

III. The Trial Court Did Not Abuse its Discretion Because John Deere Failed to Meet its Burden of Proving Which, If Any Models Subject to the Court's Order Were Irrelevant to this Case.

A. John Deere Bore the Burden of Establishing That the Requested Documents were Irrelevant.

The fundamental flaw in John Deere's petition is that John Deere assumes that Ms. Martinez bore the burden of proving that the discovery sought was relevant. John Deere makes this assertion no less than three times in its petition and repeats this assertion in its brief on the merits. *See* Relator's Brief at 3, 5, and 16; Brief on the Merits at 20-21. Not surprisingly, though, John Deere is still unable to provide the Court with a single case citation to support this proposition. Most likely, this failure is because John Deere's assumption is wrong.

Texas law is well settled the party resisting discovery bears the burden of proving the basis for any objection to the requested production. *Templeton v. Dreiss*, 961 S.W.2d 645, 663 (Tex. App.—San Antonio 1998, pet. denied).³ In fact, the Texas Rules of Civil Procedure specifically provide with respect to hearings on objections to written discovery that:

The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege

³ *See also Weisel Enterprises, Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proceeding); *Peeples v. Honorable Fourth Supreme Judicial District*, 701 S.W.2d 635, 637 (Tex. 1985); *In re Rogers*, 200 S.W.3d 318, 321-22 (Tex. App.—Dallas 2006) (orig. proceeding); *In re Kemper Lloyds Ins. Co.*, 2006 WL 475436 at *3 (Tex. App.—Tyler Feb. 28, 2006) (orig. proceeding); *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d 871, 874 (Tex. App.—Corpus Christi 2000) (orig. proceeding); *In re El Paso Healthcare System*, 969 S.W.2d 68, 73 (Tex. App.—El Paso 1998) (orig. proceeding); *Tjernagel v. Roberts*, 928 S.W.2d 297, 302 (Tex. App.—1996) (orig. proceeding).

TEX. R. CIV. P. 193.4(a). Obviously, this includes objections that the information sought is irrelevant. *See, e.g., In re Continental Ins. Co.*, 994 S.W.2d 423, 428-29 (Tex. App.—Waco 1999) (orig. proceeding). As the court explained in *In re Continental Ins. Co.*, because the party resisting discovery is in possession of the information, the resisting party is in the best position to show a lack of relevance. *Id.*

John Deere’s only response to this authority is tepid at best. John Deere argues that the cases cited by Ms. Martinez are inapplicable because they only apply to the assertion of a privilege, not the assertion of an objection to discovery. Interestingly, John Deere fails to analyze the plain language of Rule 193.4(a), which places the burden of proof on “[t]he party making the objection or asserting the privilege . . .” *See* TEX. R. CIV. P. 193.4(a) (emphasis added). John Deere also apparently failed to consider the cases cited by Ms. Martinez, which include:

- *Peeples v. Honorable Fourth Supreme Judicial District*, 701 S.W.2d 635, 637 (Tex. 1985) (orig. proceeding) (holding that, in the context of relevance objections and privacy concerns, the party asserting the objections to discovery bear the burden of proving the basis for the objection);
- *Templeton v. Dreiss*, 961 S.W.2d 645, 663 (Tex. App.—San Antonio 1998, pet. denied) (holding that the party resisting discovery had the burden of proving why the requesting party should not be allowed to conduct a survey on the property);
- *In re Continental Ins. Co.*, 994 S.W.2d 423, 428-29 (Tex. App.—Waco 1999) (orig. proceeding) (holding that the party resisting discovery bore the burden of proving that the requested information was irrelevant);
- *In re El Paso Healthcare System*, 969 S.W.2d 68, 73 (Tex. App.—El Paso 1998) (orig. proceeding) (holding that the party resisting an “apex” deposition bears the burden of proving that the proposed high-level corporate deponent lacks knowledge of relevant facts);

- *In re Kemper Lloyds Ins. Co.*, 2006 WL 475436 at *3 (Tex. App.—Tyler Feb. 28, 2006) (orig. proceeding) (holding that the party objecting to discovery based on relevancy and privacy concerns bore the burden of proving the bases for these objections);
- *In re Rogers*, 200 S.W.3d 318, 321-22 (Tex. App.—Dallas 2006) (orig. proceeding) (noting that, in the context of a relevance objection, the party asserting the objection bears the burden of proving that “the request lies outside the guidelines described by the rules and the supreme court.”); and
- *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d 871, 874 (Tex. App.—Corpus Christi 2000) (orig. proceeding) (holding that the party asserting a relevance objection bore the burden of proving that the requested information was irrelevant);

Clearly, John Deere is simply wrong in its assertion that the burden of proof lies with party resisting discovery only when the basis for resisting discovery is privilege.

Additionally, in this case, the relevance of the information sought is readily apparent. This Court has repeatedly recognized that evidence of reasonably similar incidents is admissible for various reasons. *Nissan Motor Co., v. Armstrong*, 145 S.W.3d 131, 138 (Tex. 2004).⁴ Evidence of such incidents is relevant to prove that a design defect exists, that the manufacturer knew of the defect, the magnitude of the danger posed by the defect, the adequacy of a warning, and whether the manufacturer displayed conscious indifference to a known danger. *See Firestone Tire & Rubber Co. v. Battle*, 745 S.W.2d 909, 912 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

In light of this precedence, the trial court endeavored to limit its order compelling production to “reasonably similar” incidents involving models with steps and handles similar to those on the 410D that injured Mr. Martinez. By doing this, the trial court

⁴See also *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 340-41 (Tex. 1998); *Missouri Pac. R.R. Co. v. Cooper*, 563 S.W.2d 233, 236 (Tex.1978); see also Ferdinand S. Tinio, Annotation, *Products liability: admissibility of evidence of other accidents to prove hazardous nature of product*, 42 A.L.R.3d 780, 783 (1972) (noting “evidence of other accidents involving the same product is generally admissible to show its dangerous or hazardous nature, if the accidents occurred under the same or substantially similar conditions as that involving the plaintiff, and with reasonable proximity in time”).

tailored its order to result in the production of only information “reasonably calculated to lead to the discovery of admissible evidence.” TEX. R. CIV. P. 192.3. In fact, the trial court specifically stated that it intended to avoid ordering production of documents related to equipment that did not have the bolt-on steps and handles at issue in this case. 5 Rel. R. 14-18. This is why the trial court asked Ms. Martinez to provide a list of model numbers that she thought were substantially similar and why the trial court provided John Deere with an opportunity to object to this list and demonstrate which models were not reasonably similar to the 410D that injured Mr. Martinez. *Id.* at 16-18; 6 Rel. R. 11-15.

Despite the obvious relevance of the information requested and the efforts of the trial court to narrowly tailor its order to encompass only models using the steps and handles similar to those on the 410D, John Deere failed to produce any evidence that documents concerning the models listed in Ms. Martinez’s proposed order were irrelevant. To meet its burden, John Deere merely needed to provide some evidence showing why the steps and handles on the models listed on Ms. Martinez’s proposed order were not similar to those on the 410D. TEX. R. CIV. P. 193.4(a). John Deere claims that it could not have anticipated what models would be at issue, but this is incorrect. John Deere undeniably had a copy of the proposed order before the September 4, 2008 hearing because that was the subject matter of the hearing. In fact, John Deere argued at the hearing that the proposed order encompassed more than just the 35 models listed in the proposed order, but extended to over a hundred such models. John Deere simply failed to produce any evidence that this argument was true. *See* 7 Rel. R. at 13.

Consequently, there is no rational dispute that John Deere knew exactly which models would be at issue at the September 4, 2008 hearing. Nevertheless, John Deere failed to produce any evidence to carry its burden of establishing that any of these models were irrelevant. Instead, John Deere chose to argue only that Ms. Martinez request encompassed too many models. 6 Rel. R. 11-15. This hardly qualifies as meeting the burden to establish that the requested information is irrelevant. For this reason, John Deere failed to establish before the trial court that the models listed in Ms. Martinez's proposed order were irrelevant to this case.

B. The Trial Court Did Not Abuse its Discretion Because its Order is Consistent with the Information Presented by the Parties.

It is a matter of common sense that the trial court cannot be charged with knowing the technical aspects of John Deere's various types of construction equipment. It is equally beyond dispute that the trial court could not have abused its discretion by entering an order tailored to encompass only relevant information and consistent with the only information before the court. For this reason, it is specious for John Deere to argue that the trial court's decision was arbitrary and unreasonable when John Deere failed to meet its burden of demonstrating why the trial court's order encompassed irrelevant material. *In re Ford Motor Co.*, 165 S.W.3d at 317.

John Deere's reliance on the Griswold Affidavit to establish that the trial court's order was overly broad is not only inappropriate, but wholly ineffective. Even if Mr. Griswold's testimony is true, it does not establish that the trial court abused its discretion. In fact, given the anemic presentation provided by John Deere, **the trial court would**

have abused its discretion had it denied Ms. Martinez request for production because a trial judge abuses its discretion when it denies discovery in the absence of evidence supporting an objection to discovery. *See, e.g., Weisel Enterprises Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1989); *Lindsey v. O'Neill*, 689 S.W.2d 400 (Tex.1985); *Giffin v. Smith*, 688 S.W.2d 112 (Tex.1985).

Here, the trial court was never provided with the information that, according to John Deere, demonstrates that the trial court's order encompasses the production of irrelevant information. Plaintiff's request for production number 18 sought "all [non-governmental] documents of customer complaints received by Defendant relative to the sidestep on any model backhoe." The record further demonstrates, the trial court endeavored to, and did, limit its discovery order to only John Deere models with steps and handles similar to those on the 410D. 5 Rel. R. 14-18. Chief Justice Gray of the Tenth Court of Appeal's concern that the Order requiring production is even more overbroad than the request is unfounded. The original request sought information on all steps on all models. The trial court has narrowly tailored the Order to require production on only substantially similar incidents and only models using the steps and handles similar to those on the 410D.

Even though John Deere bore the burden of establishing for the trial court that the discovery sought and compelled was irrelevant, it did nothing toward this end, incorrectly assuming that Ms. Martinez bore the burden of proving that the discovery sought was relevant. Now, John Deere claims that the trial court abused its discretion by failing to account for information that John Deere failed to provide. Because the trial

court's ruling in this case was both correct and consistent with the only information provided by the parties, the trial court did not abuse its discretion.

C. The Cases Relied on by John Deere are Distinguishable.

In support of its petition, John Deere cites three cases: *In re Graco Children's Products, Inc.*, 210 S.W.3d 598 (Tex. 2006) (orig. proceeding); *In re American Optical Corp.*, 988 S.W.2d 711 (Tex. 1998) (orig. proceeding); and *General Motors Corp. v. Lawrence*, 651 S.W.2d 732 (Tex. 1983). All of these cases are readily distinguishable for the same reason.

The distinguishing factor in these cases is most readily evident in *In re Graco Children's Products, Inc.* At issue in that case was the claim that a child was killed because the 5-point harness in her car seat failed during an accident. *In re Graco Children's Products, Inc.*, 210 S.W.3d at 600. On the eve of trial, the plaintiff's requested discovery concerning a settlement between Graco and the Consumer Products Safety Commission ("CPSC") concerning dozens of different products, none of which had a 5-point harness. *Id.* Graco objected, pointed out that the products at issue in the settlement with the CPSC had nothing to do with the allegations in the suit and complained that this discovery request would involve 20,000 pages of documents located in three different states. *Id.* Despite these complaints, the trial court ordered the requested discovery. *Id.* Not surprisingly, this Court determined that the discovery order was an abuse of discretion and granted Graco's petition for mandamus because *Graco demonstrated* that the discovery ordered had no bearing on the lawsuit. *Id.*

Unlike *In re Graco Children's Products Inc.*, this case does not involve a situation in which a trial court ignored evidence that its order would compel the production of voluminous irrelevant material. In this case, the trial court limited its order to only those models of equipment that contain the same or similar bolt-on steps and handles at issue in this case. 5 Rel. R. 14-18. The trial court even gave John Deere an opportunity to object and to be heard on Ms. Martinez's proposed list of equipment models, but John Deere failed to make any showing that any of the proposed models were, in fact, different. 6 Rel. R. 11-15. The trial court merely ordered John Deere to produce the requested documents that were not subject to any showing of irrelevance. Therefore, unlike *In re Graco Children's Products Inc.*, this case does not involve a trial court brazenly compelling the production of voluminous irrelevant documents, but simply a case in which the trial court limited the scope of its order given the information provided by the parties.

The other cases relied on by John Deere are similarly distinguishable. At issue in *General Motors Corp.* was an effort by a plaintiff to obtain discovery concerning vehicles that did not contain a particular fuel filter-neck that the plaintiff alleged was defective. *General Motors Corp.*, 651 S.W.2d at 734. In *In re American Optical Corp.*, the trial court compelled discovery concerning respiratory equipment that the plaintiff never used. *In re American Optical Corp.*, 988 S.W.2d at 711. Again, in both of these cases, the trial court compelled discovery *despite* evidence that the discovery order encompassed irrelevant material.

Unlike these cases, the discovery order at issue here was narrowly tailored to apply only to the models of John Deere equipment that used the bolt-on step and handles that Ms. Martinez contends caused Mr. Martinez's injury. John Deere never attempted to provide any guidance to the trial court in further limiting the trial court's order to exclude the three models it now claims do not have similar steps and handles. Instead, John Deere chose to "lie behind the log," and for the first time before the appellate court, attempt to make a showing that the order encompassed models of equipment that did not have the same or similar steps and handles. Again, John Deere cannot establish that the trial court's ruling is arbitrary and unreasonable when the order was properly limited and consistent with the information given to the trial court.

IV. John Deere Does Not Lack an Adequate Remedy by Appeal.

John Deere's petition for mandamus should also fail because it cannot establish that it lacks an adequate remedy by appeal. Whether there is an "adequate" remedy on appeal turns on a "careful balance of jurisprudential considerations" implicating "both public and private interests." *In re Prudential*, 148 S.W.3d at 36. Mandamus review of "incidental, interlocutory rulings" should be denied because to do so "unduly interferes with the trial court proceedings, distracts 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 adds unproductively to the expense and delay of litigation." *Id.* By contrast, mandamus review of "significant rulings" may be necessary in "exceptional cases" "to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the

law that would otherwise prove elusive in appeals from final judgments and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” *Id.* If the benefits of mandamus review outweigh the detriments, the Court must consider whether an adequate appellate remedy exists. *Id.*

John Deere’s argument that it lacks an adequate remedy on appeal rests solely on its private interests that it claims will be harmed if mandamus relief is not granted. John Deere claims that the trial court’s order will cost it to incur hundreds of hours and thousands of dollars in expenses. *See* Brief on the Merits at 23. Not once does John Deere argue, nor could it argue, that any issue present in this dispute concerns any public interest. This is not an “exceptional case” involving “significant rulings,” and there are no elusive issues requiring helpful direction from the Court. Moreover, there can be no “waste” of public funds in requiring John Deere to produce documents.

Moreover, any private burden incurred by John Deere is its own making. John Deere argues that the trial court’s order deprives it of an adequate remedy by appeal because the order is overly burdensome. However, John Deere’s arguments that the order is overly broad and that it is unduly burdensome are based entirely on the information in the Griswold Affidavit, which was never presented to the trial court. John Deere never presented this evidence to the trial court. Consequently, any burden of producing purportedly irrelevant information suffered by John Deere was caused by its own failure to present the trial court with information that would have alleviated that burden. John Deere should not be permitted to obtain a writ of mandamus to relieve it of

the burden created by its own failure to prove its objection to Ms. Martinez's discovery requests

Next John Deere argues that this order deprives it of a viable defense at trial because the trial court *might* admit some irrelevant evidence related to dissimilar equipment at trial, which might result in a reversal. According to John Deere, if such evidence were admitted and the jury successfully distracted, the error would "undoubtedly lead to an appeal, reversal, and remand of the case." See Brief on the Merits at p. 25. John Deere's prophesies of future error do not meet its burden of proff. Not only is John Deere unable to foretell the trial court's evidentiary rulings on documents that have not been produced, much less offered into evidence, but John Deere is unable to divine that this ruling that has not yet occurred would be error, that the error would be harmful, and that a new trial would result if the Court does not preclude discovery of these documents. Not only is John Deere's argument misguided, but it actually establishes that John Deere would have an adequate remedy on appeal if such an error occurred given that John Deere admits that it could obtain a new trial on appeal if the trial court admitted improper evidence.

John Deere's argument is wholly without merit and fails to meet John Deere's burden of proving that it lacks any remedy on appeal. Nothing in John Deere's argument establishes that the careful balance of jurisprudential considerations establish that the benefit of mandamus review outweigh the detriments. *In re Prudential*, 148 S.W.3d at 36. In fact, the balance of jurisprudential considerations should counsel against granting a writ of mandamus to correct a party's failure to meet its burden of proving the bases for

its discovery objections to the trial court. Because John Deere cannot establish that it lacks an adequate remedy on appeal, John Deere's petition should be denied.

PRAYER

For the forgoing reasons, Ms. Martinez respectfully requests that the Court deny John Deere's Motion for Temporary Relief and its Petition for Mandamus. Ms. Martinez also requests all other relief to which she is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response to Petition for Mandamus and Response to Motion for Temporary Relief were delivered to the following counsel of record by regular mail (unless otherwise noted) on April 3, 2009.

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