COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN RE	§	No. 08-20-00191-CV
WALMART, INC. and WAL-MART STORES TEXAS, LLC,	§	AN ORIGINAL PROCEEDING
	§	IN MANDAMUS
Relators.	§	

OPINION

Patrick Wood Crusius is alleged to have perpetrated a mass shooting at the Cielo Vista Walmart store in El Paso, Texas. This discovery mandamus proceeding arises from a civil suit in which several of the victims of that shooting asserted premises liability allegations against Relators Walmart, Inc., and Wal-Mart Stores Texas, L.L.C. ("Walmart"). Specifically, Walmart filed this writ of mandamus against the Honorable Sergio Enriquez, Judge of the 448th District Court, contending that the trial court erred by ordering Walmart to disclose documents related to: (1) a hostage incident in Amarillo, Texas; (2) store security budgets in El Paso and San Antonio; (3) policy changes occasioned by crime information; (4) selected sales data and security measures for the relevant store at three specific occasions; (5) bonus information for some store employees; (6) corporate minutes germane to security; and (7) third-party standards regarding security. We

conclude that mandamus relief is not warranted regarding many of these subjects, but conditionally grant mandamus relief as to some others.

I. BACKGROUND

The disputed discovery order arises out of the following allegations gleaned from the real parties in interest's last amended petition.

A. The Allegations

On August 3, 2019, Patrick Wood Crusius entered the Walmart Supercenter #2201 located in El Paso, Texas ("the Cielo Vista Walmart"), looked around, then returned to his car to retrieve a semi-automatic rifle. He then proceeded to open fire, killing and injuring multiple persons, both outside and inside the store. Almost immediately he surrendered to the police and he now faces both federal and state criminal charges.[1]

Following the August 3rd tragedy, a group of plaintiffs consisting of shooting victims and their families ("the Families") sued Crusius, Walmart, and the First National Bank (which had a branch inside the Cielo Vista Walmart). In their live petition, the Families brought claims against Walmart for negligence, gross negligence, and premises liability, alleging that Walmart failed to provide adequate security for the Cielo Vista Walmart. They allege that Walmart had actual, subjective awareness of the risk of violence to patrons but acted with conscious indifference to the rights, safety, and welfare of others by failing to guard against that risk.

The Families specifically allege that Walmart assigns each store location a numerical risk score based on community demographics, local housing values, crime statistics, and internal company records. A score of 0 indicates that crime is 10 times less likely to occur at a particular

[1] *See*, *Federal Grand Jury in El Paso Returns Superseding Indictment Against Patrick Crusius*, 2020 WL 3869638, at *1 (D.O.J.) (July 9, 2020); *State of Texas v. Crusius*, No. 2019OD04878, 2019 WL 4508011 (Tex. Dist. El Paso County, Sept. 12, 2019).

store than would be expected in that area, whereas a score of 500 indicates that crime is 5 times more likely to occur at a particular store. Despite having this risk matrix, the Families contend that in allocating security resources, Walmart provides more security and staffing at their stores in higher-income, majority-white neighborhoods at the expense of low-income communities of color. The Families allege that Walmart's internal risk scores demonstrate its subjective awareness of the risk for in-store violence. The live petition also referenced three prior violent incidents at other Walmart stores involving armed individuals: a 2016 standoff in which two employees were taken hostage at a store in Amarillo, Texas; a November 2017 shooting in Thornton, Colorado, where a gunman shot and killed three shoppers; and a shooting a few days before the August 3rd attack in which an armed man shot and killed two people and injured another person in Southaven, Mississippi.

Walmart challenges all these allegations.

B. The Discovery at Issue

This mandamus focuses on whether the trial court abused its discretion by ordering Walmart to respond to several requests for production. Following several hearings, the trial court issued an order that granted in part and denied in part a motion to compel responses to discrete discovery requests made by the Families. Walmart has winnowed down its discovery objections to the following seven categories of documents that it is being compelled to disclose:

1. **Prior Hostage Incident:** the "store file" relating to a 2016 hostage incident at a Walmart in Amarillo, Texas;

2. **Store Security Budgets for El Paso and San Antonio:** documents relating to the security budgets for all stores in El Paso County and within the city limits of the City of San Antonio for the period between August 3, 2014 and August 3, 2019;

3. **Crime-Driven Policy Changes at Texas Stores:** documents regarding changes in policies that were implemented as a result of any crimes (other than shoplifting) at Walmart Supercenters in Texas from June 14, 2016 to the present;

4. **Black Friday and Tax-Free-Weekend Security Information and Transaction Counts for the Cielo Vista Walmart:** documents relating to "security measures" and the "transaction count" for the Cielo Vista Walmart for all Black Fridays, Tax Free Weekends, and all weekends before Tax Free Weekends between 2014 and 2019;

5. **Employee Incentive Programs:** documents relating to bonus, incentive, or other compensation programs for Walmart employees in which the bonus, incentive, or other compensation depended, in whole or in part, on revenue, income, profits, or loss-prevention performance at the Cielo Vista Walmart for the previous five years (limited to managers and employees who had authority over store security);

6. **Cielo Vista Walmart Corporate Minutes**: corporate minutes for the previous five years regarding security at the Cielo Vista Walmart, excluding slip-and-fall incidents;

7. **Third-Party Safety Assessments in Walmart's Possession:** documents in Walmart's possession, if any, from third-party entities on how to handle active shooter responses.

At the hearings below, the trial court entertained objections based on the geographic and temporal scope of the requests. The seven categories at issue generally reflect a narrowed version from the original requests. In this mandamus, Walmart principally urges that even as narrowed, the requests seek documents which are not relevant under the Texas standard for determining whether a landowner owes a duty to guard against the criminal acts of third parties. *See Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) (establishing factorial test for determining whether criminal conduct is foreseeable to property owner). We stayed trial court proceedings pending resolution of this mandamus action.

II. Standard of Review

To obtain mandamus relief, a relator must show that a trial court has (1) clearly abused its discretion, and (2) the relator has no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).

A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or if it clearly fails to analyze or apply the law

correctly. *Id.* at 840; *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding) (per curiam); *In re ReadyOne Industries, Inc.*, 394 S.W.3d 697, 700 (Tex.App.--El Paso 2012, no pet.). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). We also explain the standard this way: the question is whether the trial court acted without reference to any guiding rules and principles. *Id.*

Germane here, those guiding rules and principles are found in our discovery rules, and a trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure. *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding) (per curiam). "In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." TEX.R.CIV.P. 192.3. Evidence is "relevant" if "it has any tendency to make a fact [of consequence to the action] more or less probable than it would be without the evidence." TEX.R.EVID. 401; *In re N. Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128, 131 (Tex. 2018). Moreover, relevance for purposes of discovery is broader than relevance under the Texas Rules of Evidence. *In re N. Cypress*, 559 S.W.3d at 131 (it is not a ground for objection that the information sought will be inadmissible at trial if the information sought "appears reasonably calculated to lead to the discovery of admissible evidence."). The phrase "relevant to the subject matter" is "liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009).

While, the scope of discovery is generally within the trial court's discretion, *In re CSX Corp.*, 124 S.W.3d at 152, the trial court must make efforts to impose reasonable discovery limits. *In re American Optical, Corp.*, 988 S.W.2d 711, 713 (Tex. 1998). For instance, a discovery order that requires document production over an unreasonably long time-period or from distant and unrelated locales is impermissibly overbroad and subject to mandamus correction. *In re CSX Corp.*, 124 S.W.3d at 152.

The second burden on the movant for mandamus relief is to show the lack of adequate remedy by appeal. *Walker*, 827 S.W.2d at 843. If a discovery order compels production of "patently irrelevant or duplicative documents," there is no adequate remedy by appeal when the order "clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party." *Id.*; *see also In re CSX Corp.*, 124 S.W.3d at 153.

III. CONTROLLING LAW

To determine the subject matter of the action, and the claims and defenses urged, we logically start with the parties' pleadings. *See In re Plains Pipeline, L.P.*, No. 08-19-00224-CV, 2020 WL 6375332, at *6 (Tex.App.--El Paso Oct. 30, 2020) (orig. proceeding) (stating that discovery is based on matters relevant to the claims pleaded); *In re Citizens Supporting Metro Sols., Inc.*, No. 14-07-00190-CV, 2007 WL 4277850, at *3 (Tex.App.--Houston [14th Dist.] Oct. 18, 2007) (mem. op.) (orig. proceeding) ("A discovery mandamus cannot be used to obtain an advance adjudication of the merits. If, as here, the trial court does not rule on the merits of any of the claims, then the scope of discovery in the mandamus proceeding will be based on the pleadings.").

In the case below, the Families allege that Walmart owned the premises where they were injured, or their family members were killed. They allege that Walmart owed a duty to them as invitees "to provide security to patrol and monitor the entrances and common areas[.]" Of course, as a general rule, "a person has no legal duty to protect another from the criminal acts of a third person[.]" *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). But Walmart acknowledges that our Supreme Court recognizes an exception to that rule when a plaintiff can show that the criminal acts of third parties were foreseeable and the risk of crime unreasonable. *Timberwalk*, 972 S.W.2d at 756 (a premises-holder owes "a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee.").

Walmart focuses on the foreseeability analysis laid out in *Timberwalk* which identifies five factors used to assess whether prior crimes would alert a property owner to the likelihood of future criminal activity. "Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable," though when the "general danger" is the risk of injury from criminal activity, the evidence must show "specific previous crimes on or near the premises" in order to establish foreseeability. *Id*. The *Timberwalk* court articulated five factors to use in determining whether the risk of harm from a third-party crime is foreseeable:

- ***Proximity*****:** "[T]here must be evidence that other crimes have occurred on the property or in its immediate vicinity";

- ***Recency*** and ***Frequency*****:** "[H]ow recently and how often criminal conduct has occurred in the past are factors in determining foreseeability";

- ***Similarity*****:** "[T]he previous crimes must be sufficiently similar to the crime in question as to place the landowner on notice of the specific danger";

- ***Publicity*****:** "The publicity surrounding the previous crimes helps determine whether a landowner knew or should have known of a foreseeable danger. Actual notice of past incidents strengthens the claim that the future crime was foreseeable."

Id. at 757-59.

In *Timberwalk*, a woman was raped inside of her apartment by a home invader; she claimed the apartment complex was responsible based on a lack of security. *Id*. at 751. In applying its five-factor test, the court rendered a take-nothing judgment, finding that the apartment complex had no duty to provide additional security beyond that required by statute and its lease. The court reasoned that the risk that a tenant would be sexually assaulted was in no way foreseeable, as there had not been violent crime in the area in approximately ten years. *Id*. at 759.[2]

But *Timberwalk* identifies *two* critical inquires in any duty analysis: foreseeability and the unreasonableness of the risk. That second part of the duty analysis was highlighted in the court's later opinion in *UDR Texas Properties, L.P. v. Petrie*, 517 S.W.3d 98, 102 (Tex. 2017). In *UDR*, a guest at an apartment complex was assaulted and robbed in the complex's parking lot. The trial court conducted a two-day hearing on the duty issue and concluded the complex owed no duty. The court of appeals reversed that decision based exclusively on its assessment of the five factors laid out in *Timberwalk*, but the Texas Supreme Court reinstated the trial court's decision. *Id.* at 100. The supreme court reasoned that even if there was evidence of foreseeability, the plaintiff failed to argue or present any evidence on the second prong of the duty analysis: the unreasonableness of the risk. *Id*. at 99-100 ("We reverse the court of appeals because it failed to properly consider whether the risk of harm was unreasonable; we render judgment for Gallery because Petrie offered no evidence of the burden that preventing such a crime would impose on Gallery.").

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[2] The five factors are not the only means to show foreseeability. In *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010), for instance, the plaintiff cleared the foreseeability hurdle by showing that a bar knew or should have known of a feud between patrons that had brewed for some ninety minutes and which then erupted into a fight seriously injuring the plaintiff. The claim was premised on the failure to call for available security guards in that ninety-minute window. No analogous claim is presently asserted in this case.

The opinion in *UDR* makes clear that the duty analysis has always involved two distinct inquiries. The court highlighted its several past cases that identified both aspects of the duty inquiry. *See Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 655 (Tex. 1999) (reciting that the risk of a crime must be "*both* unreasonable and foreseeable") (emphasis added); *Trammell Crow Central Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9, 18 (Tex. 2008) (Jefferson, C.J., concurring) (in agreeing that the owners of a shopping mall owed no duty to the victim of a parking-lot shooting, a four justice concurrence agreed that "the risk of its occurrence was not unreasonable, and that the consequences of requiring premises owners to prevent this type of crime would require a measure of deterrence that is neither feasible nor desirable."); *Timberwalk*, 972 S.W.2d at 756 ("[f]oreseeability is the beginning, not the end, of the analysis in determining the extent of the duty to protect against criminal acts of third parties.").

The unreasonableness inquiry "turns on the risk and likelihood of injury to the plaintiff, . . . as well as the magnitude and consequences of placing a duty on the defendant." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010), *citing Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). "A risk is unreasonable when the risk of a foreseeable crime outweighs the burden placed on property owners—and society at large—to prevent the risk." *UDR*, 517 S.W.3d at 102-03. Bound up in this second question is "the social utility of the actor's conduct, the consequences of imposing the burden on the actor, and any other relevant competing individual and social interests implicated by the facts of the case." *Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 33 (Tex. 2002).[3] While there may be some overlap between

[3] *UDR* quotes former Chief Justice Jefferson's observation on the competing societal interests:

> The question is the extent to which we should require premises owners—even those who have experienced crime in the past—to provide the same level of security that airports enlist to prevent terrorism. Life in a free society carries a degree of risk. That risk can be virtually eliminated by a

the five *Timberwalk* foreseeability factors and the unreasonableness inquiry, the *Timberwalk* factors do not address the burdens a property owner might face to prevent or reduce the risk of a crime, nor "whether, as a matter of public policy, it is preferable to impose such burdens or, instead, accept the risk that a crime will occur." *UDR*, 517 S.W.3d at 102-03 ("We designed the *Timberwalk* factors to measure foreseeability; their application cannot, without more, determine the reasonableness of a risk of harm.").

The other elements that the Families will ultimately have to prove based on their pleadings are breach of a duty (if one is in fact owed), causation, and damages. Breach would address whether Walmart failed to either adequately warn of a dangerous condition or failed to make the condition reasonably safe. *Del Lago Partners*, 307 S.W.3d at 771. Causation includes two elements: cause in fact and foreseeability. "As to causation in fact, generally the test for this element is whether the defendant's act or omission was a substantial factor in causing the injury and without which the injury would not have occurred." *Id.* Causation's foreseeability analysis would overlap with the same question under duty. *Id.* at 774.

And for their gross negligence claim, the Families carry the burden to show Walmart's actual subjective knowledge about the type of danger at issue in this case. *See* TEX.CIV.PRAC.& REM.CODE ANN. 41.001(11)(B).

It is against all these elements that we consider whether the information sought is reasonably calculated to lead to admissible evidence.

> pervasive military presence, but the burdens—both in terms of the economic cost to premises owners and in the oppressive climate a police state spawns—would be prohibitive.

UDR, 517 S.W.3d at 103, *quoting Trammell Crow*, 267 S.W.3d at 19 (Jefferson, C.J., concurring).

IV. Application

Applying our mandamus standard, and the scope of discovery as dictated by the pleadings in the case, we arrive at differing conclusions regarding the seven categories of documents at issue.

A. The Amarillo Hostage Incident

The Families sought documents pertaining to a hostage incident at a Walmart in Amarillo, Texas. The trial court's order with respect to the Amarillo incident reads:

> Walmart must produce all contents of the Store #3383 file concerning the June 14, 2016 incident at Store #3383 in Amarillo, Texas. Walmart must also produce any documents relating to any changes in security policies, practices, or training at Store #2201 in El Paso as a result of the June 14, 2016 incident at Store #3383 in Amarillo.

This order actually contains two directives: first to produce the Amarillo Walmart's "store file" as to the hostage incident, and second to produce documents from the El Paso Cielo Vista Walmart detailing changes to security policies, practices, or training based on that Amarillo incident.

We conclude that the trial court did not abuse its discretion in requiring production of this material. The "store file" on the Amarillo incident would not fit into the *Timberwalk* factors, if for no other reason than the obvious lack of proximity between Amarillo and El Paso. But the information on the event might address other elements of the Families' case, beyond just foreseeability. As in *UDR*, the Families must make a showing of the unreasonableness of the risk to sustain the duty they seek to impose. The degree of risk to invitees is one part of the unreasonable risk calculus. The details of the Amarillo event might show the risk to patrons or store personnel from an armed person, harboring evil intent, who is on the store's premises. Additionally, as part of the unreasonable risk inquiry, the Families will eventually have to advocate for the feasibility of security measures that they contend would have prevented the events at the Cielo Vista Walmart. Whatever security measures the store in Amarillo had in place, and their

relative effectiveness or ineffectiveness at the time of the hostage incident, might inform the court on that aspect of the duty analysis.

Walmart additionally argues that the August 3rd mass shooting was so unique and unprecedented that the Amarillo incident is an inappropriate analogue. The Amarillo incident may not be a perfect match, but information surrounding Walmart's response to that incident is also not "patently irrelevant" such that mandamus correction is warranted. *See In re ReadyOne Indus.*, 394 S.W.3d at 700. The trial court could have concluded that the request is reasonably calculated to lead to the discovery of information related to Walmart policies and procedures related to active shooter-type situations involving armed criminals posing a direct threat to human life. By limiting discovery to only documents contained in the "store file," the trial court acted to narrow the scope of a broader request.[4] Nor is there any indication that the production of the "store file" "clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party." *Walker*, 827 S.W.2d at 843.

The second portion of the request seeks documents on what changes the El Paso store took in response to the Amarillo incident. To the extent any such documents exist, they would potentially inform the court on the kind of measures, if any, that might be used to avoid an armed intruder incident like this, and the costs and burdens associated with such measures. That information could be germane to the unreasonable risk portion of the duty analysis.

The trial court did not abuse its discretion as to this particular discovery item.

B. Security Budgets for Walmart Supercenters in El Paso and San Antonio

The trial court also ordered the disclosure of security budget information for stores in both El Paso and San Antonio. In that regard, the discovery order reads as follows:

[4] The Families RFPs No. 11 and 12 initially asked for the disclosure of "any and all documents" relating to the Amarillo Hostage Incident.

> Walmart must produce the security budgets for Walmart Supercenter stores in El Paso County and within the city limits of the City of San Antonio for the period between August 3, 2014 and August 3, 2019.

Walmart urges in its mandamus petition that the request fails the proximity, recency, and similarity factors from *Timberwalk*, for all but the Cielo Vista Walmart (and a Sam's store that is next door). As we explain above, the *Timberwalk* foreseeability factors are not the sole criteria for measuring the scope of discovery. The Families, for instance, urge that the security budgets are relevant to the cost for different security measures, the industry practice for large stores, and how the Cielo Vista Walmart compares to other comparable stores. This information could inform the court on the unreasonable dangerousness portion of the duty analysis in considering the economic consequence of different security measures. *See UDR*, 517 S.W.3d at 101 (relative benefits and detriments of security measures relevant to the issue of duty). We find no abuse as to the El Paso Supercenters.

Less clear is whether the trial court abused its discretion in extending the request to San Antonio Supercenter stores. At the hearing, the trial court reasoned that "this is a case where we're not going to have any situation similar and close to our area" but then stated that it believed that Walmart stores in San Antonio could serve as an adequate analogue for El Paso Walmart stores because of the "Hispanic population there. I think that's the closest we would get to El Paso." One pleaded theory of the case is that Walmart underserves minority communities in favor of wealthier Anglo areas. Including one other comparable metropolitan area is not so far outside the bounds of reason so as to evidence a clear abuse of discretion. *See In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (while noting that the latitude is not unlimited, a "reasonably tailored discovery request is not overbroad merely because it may include some

information of doubtful relevance" as litigants have latitude in fashioning proper discovery requests).

Walmart also argues the request as to the San Antonio stores amounts to an impermissible "fishing expedition." *See In re CSX Corp*., 124 S.W.3d at 152-53; *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996). Walmart calls our attention particularly to *K Mart Corp. v. Sanderson*, which it views as dispositive of the issue. In *K Mart Corp*., the plaintiff was abducted from a K Mart parking lot and raped. The plaintiff alleged that K Mart, along with a real estate management company, were responsible as premises owners for the event. On a discovery mandamus, the Texas Supreme Court reviewed two interrogatories that ask the defendants to (1) list all criminal activity at their Texas properties during the last seven years that relate in any way to an alleged failure to provide adequate security; and (2) identify within the last ten years any incident where a person was abducted and raped from their property anywhere in the country. A corresponding request for production asked for all documents related to the Texas incidents. *Id.* at 431. The court concluded the trial court erred in enforcing those requests because the likelihood that criminal conduct over that time-period, and over that requested geographic area, "will have even a minuscule bearing on this case is far too small to justify discovery." *Id., citing Dillard Department Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995) (orig. proceeding) (per curiam) (request for every claim file involving false arrest, civil rights violation, and excessive use of force for 227 stores in 20 states was overbroad). The *K Mart Corp* court granted mandamus relief, concluding the defendants had no adequate remedy by appeal. *Id.* at 432.

One lesson we draw from *K Mart Corp*., however, is how to gauge our second mandamus element--no adequate remedy by appeal. *K Mart Corp* cites to *Walker v. Packer* where the court said lacking a remedy by appeal (in situations where the trial court compels production of "patently

irrelevant or duplicative documents") occurs when the order "clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party." *Walker*, 827 S.W.2d at 843. And the two cases that *Walker* cites for this proposition give some insight into the requirement. A party lacks an adequate remedy if the request is clearly harassing. *Sears, Roebuck & Co. v. Ramirez*, 824 S.W.2d 558, 559 (Tex. 1992) (disclosure of federal tax returns was a clear abuse of discretion when entity had already produced its annual report, noting the court's "reluctance to allow uncontrolled and unnecessary discovery of federal income tax returns."). A party also lacks an adequate remedy on appeal when the "burden" to comply is far out of proportion to the benefit of the material. *Gen. Motors Corp. v. Lawrence*, 651 S.W.2d 732, 733 (Tex. 1983) (granting mandamus relief striking request for documents for all fuel spills from filler neck on gas tank, without limit on models, because "the time and money would already have been expended in producing information not relevant to the Smiths' suit."). Stated otherwise, in a case where the objection is relevance (versus privilege), the second requirement for mandamus relief--the lack of appellate review--means more than the material is irrelevant. In the prior cases where the Texas Supreme Court has granted mandamus relief, the harassment or the burden component of the discovery was proven or was facially self-evident.[5]

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[5] In each of these cases, the court granted some or all of the mandamus relief sought. *See, e.g.*, *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding) (per curiam) (request for all benzene safety and toxicology documents written by the corporate safety director, including those documents regarding other employees' exposure and plants where the plaintiffs never worked); *Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995) (orig. proceeding) (per curiam) (requiring Dillards to produce every incident report of false arrest, excessive force, and civil rights violations filed between 1985 and 1990 in all 227 Dillard stores nationwide); *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam) (221 requests that collectively ordered a defendant to produce virtually all documents regarding its products for a fifty-year period); *In re CSX Corp.*, 124 S.W.3d 149, 152-53 (Tex. 2003) (orig. proceeding) (per curiam) (request for names of safety and industrial hygiene employees for a 30 year period); *In re Graco Children's Products, Inc.*, 210 S.W.3d 598, 600 (Tex. 2006) (orig. proceeding) (per curiam) (request for complaints on a dozen products other than the one sued on, which would involve about 20,000 pages of documents located in Pennsylvania, Ohio, and Illinois); *In re Allstate County Mut. Ins. Co.*, 227 S.W.3d 667, 669 (Tex. 2007) (orig. proceeding) (per curiam) (213 discovery requests that among other things

Conversely, we have no insight from the record or the briefing as to what burden is involved in producing security budgets for however many Walmart Supercenters are located within the San Antonio city limits. We do not know, for instance, if the request seeks what might be no more than a single spreadsheet for those stores, or whether there is truly some undue burden in teasing out that data. Nor does the request on its face rise to the level of clear harassment like demanding tax returns when the relevant information sought was already available as with *Sears, Roebuck & Co.*, 824 S.W.2d at 559. For this reason alone, we deny mandamus relief as to this request.

C. Crime-Related Policy Changes Across Texas

The trial court also ordered the disclosure of certain crime-related policy changes made by Walmart. Specifically:

> Walmart must produce all responsive documents regarding changes in policies that were implemented as a result of any crimes (other than shoplifting) at Walmart Supercenters in Texas for the time period from June 14, 2016 to present.

We agree with Walmart that this discovery order, as written, is overbroad. While it is conceivable that some policy changes could be relevant to determining Walmart's security response, Walmart's argument as to the request's vagueness is well-taken. The breadth of the "any crime" language takes this discovery order outside the scope of theoretically permissible discovery

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sought transcripts of all testimony ever given by any Allstate agent on the topic of insurance; every court order finding Allstate wrongfully adjusted the value of a damaged vehicle; personnel files of every Allstate employee a Texas court has determined wrongfully assessed the value of a damaged vehicle; and legal instruments documenting Allstate's status as a corporation and its net worth); *In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d 486, 487 (Tex. 2014) (orig. proceeding) (per curiam) (request for all claim files from the previous six years involving three individual adjusters; all claim files from the past year for properties in Dallas and Tarrant Counties involving the two adjusting firms; and the names, addresses, phone numbers, policy numbers, and claim numbers associated with the requested claim files); *In re Nat'l Lloyds Ins. Co*., 507 S.W.3d 219, 225 (Tex. 2016) (orig. proceeding) (per curiam) ("all emails, reports attached to emails, and any follow-up correspondence and information related to [fifteen reports] which were sent or received by a National Lloyds employee or any affiliated adjusting company employees."--the reports encompass claims in different counties, experiencing different causes of loss, on different dates from the Hidalgo County storms at issue).

and instead has the practical effect of authorizing a fishing expedition. *See In re CSX Corp.*, 124 S.W.3d at 152 (collecting cases on impermissibly broad discovery requests).

The only "crime" excluded from discovery was shoplifting. As written, the request still reaches well beyond violent crimes such as shootings, and could also encompass any number of presumptively irrelevant crimes including white-collar offenses, fraud or embezzlement, passing hot-checks or counterfeit currency, or gift card scams. None of these kinds of offenses bear any resemblance to the conduct at issue in this case. Because the scope of the language here permits the discovery of information that is irrelevant under the Families' pleaded theories and is not reasonably limited in scope, the trial court abused its discretion by allowing for overbroad discovery and essentially authorized a fishing expedition. Mandamus will be conditionally granted to strike this item from the discovery order without prejudice to the Families' right to refile a more narrowly scoped discovery request.

D. Tax-Free Weekend and Black Friday Information

The fourth area of dispute deals with the trial court's order regarding sales and security measures undertaken on Black Friday, and before and during Tax Free Weekend:

> Walmart must produce the requested security measures and "transaction count" for Store #2201 for the dates comprising (a) Tax Free Weekend; (b) the weekend before Tax Free Weekend; and (c) Black Fridays from 2014 to 2019.

Walmart initially objected to providing any of this information whatsoever. In its mandamus petition, Walmart does not contest producing documents germane to security measures and transaction counts relating to Tax Free Weekend and the weekend before Tax Free Weekend (the August 3rd shooting took place the weekend before Tax Free Weekend in 2019). And while Walmart "believes that production over two years before the date of the shooting is overbroad, it

is willing to comply with that part of the Order." Accordingly, we focus our attention only the security measure and transaction count information for all Black Fridays from 2014 to 2019.

The Families assert that the Black Friday security information is relevant because it shows what Walmart's security capabilities are under various circumstances. Walmart counters that its security capabilities are not a relevant area of inquiry under the five *Timberwalk* factors. Again, *Timberwalk* does not define the universe of discoverable issues, it only provides a guide for determining relevance as to the discrete issue of foreseeability. Nor is it unreasonable to anticipate that Black Friday is a high traffic event, potentially rife with frayed tempers that could lead to conflict. How this store handles the security on that day might potentially inform the court on the unreasonableness of the risk element in the duty analysis. If for instance, the store increases its security force on Black Friday to avoid potential customer conflicts, the cost and feasibility of that measure could be compared to whatever security measure the Families contend Walmart should have implemented on the day of this event. At least how those costs and measures compare could potentially be relevant to assessing "the magnitude and consequences of placing a duty on the defendant." *Del Lago Partners*, 307 S.W.3d at 770. Moreover, the data is limited to five specific days over a five-year period at one store. On this record, we are not persuaded the request rises to the level of clear harassment or burdensomeness that is far beyond its potential usefulness. *Walker*, 827 S.W.2d at 843.

We conclude that mandamus relief is not warranted for the request for Black Friday information.

E. Bonus Incentives

The Families' request for production No. 65 stated:

> Produce any and all documents relating to any and all bonus, incentive, or other compensation programs for your employees in which the bonus, incentive, or other

> compensation depended, in whole or in part, on the revenue, income profits, or loss-prevention performance at Wal-Mart Supercenter, Store #2201, for the previous 5 years.

The trial court sustained in part and overruled in part Walmart's objection to this request. The trial court ultimately ordering the disclosure of the following information:

> The scope of Garcia RFP No. 65 is limited to (1) managers of Store #2201 and (2) employees who had authority over store security at Store #2201. Aside from those limitations, Walmart must produce the requested information. However, Walmart may assert or re-urge objections to Garcia RFP No. 65 on confidentiality grounds to the Court or as provided in the Protective Order.

Walmart again objects that this information falls outside the scope of the *Timberwalk* factors, and we again reiterate that *Timberwalk* marks the beginning and not the end of the inquiry into the question of duty.

But before addressing questions of relevance and overbreadth, we face a procedural issue. The Families assert that Walmart's challenge is premature because this portion of the order is conditional and may be changed. Stated otherwise, the challenge is not presently ripe. *See In re Watson*, 259 S.W.3d 390, 392-93 (Tex.App.--Eastland 2008, orig. proceeding) (trial court's order conditioning further discovery on the occurrence of events after the fact meant that mandamus could not be granted because the conditional nature of the order meant the trial court had not "fully exercised its discretion" and thus presented nothing for the court of appeals to review). We agree.

In *In re Watson*, the Eastland court held that a mandamus challenge to a discovery order was premature because the parties still had the opportunity "to ask the court to modify or reconsider any of its prior rulings." *Id*. at 393. Here, although this portion of the trial court's order is definite, the trial court also left the door open to reconsidering its ruling based on either (1) confidentiality grounds, or (2) violation of the scope of the protective order that the trial court had entered. The trial court's ruling on this issue was effectively a preliminary ruling with a specific invitation to

Walmart to raise additional privilege issues if Walmart wished. By choosing not to issue a complete and unconditional ruling on this item, the trial court did not fully exercise its discretion, and in the absence of an unconsummated exercise of discretion, this Court lacks the ability to grant mandamus relief on the merits. *See id.*

As such, this portion of the mandamus petition is denied on ripeness grounds.

F. Corporate Minutes

The order to compel requires Walmart to disclose copies of certain corporate minutes:

> Walmart must produce the corporate minutes for the previous five years regarding security at Store #2201.

Walmart asserts that as with the phrase "any crime" in the previous discovery request, the word "security" here is vague and overbroad. However, when read contextually, this request is significantly narrower in scope than the "any crime" discovery item. Unlike the request for crime-related policy changes made at stores across the State of Texas, the request here is targeted at the specific Walmart store where the shooting occurred. The timeframe is also defined and limited, and unlike the broad requests for "policies" which could include various types of documents, the request here was for a specific type of document--the corporate minutes--dealing specifically with security issues that were presumably serious enough to warrant inclusion in the corporate minutes. These restrictions bring the item outside the realm of a fishing expedition and into the realm of a search from a defined universe of specific documents--the production of which should not be particularly onerous--related to the specific store at which the shooting occurred.

This information is relevant to the Families claims regarding security measures taken at the Cielo Vista Walmart, and Walmart has not shown that the trial court failed to reasonably limit the scope of this portion of the order. We conclude the trial court did not abuse its discretion as to this discovery item.

G. Third-Party Reports

Finally, Walmart asserts that the trial court abused its discretion by ordering the disclosure of the third-party information held in Walmart's possession. At the hearing below, the trial court framed the dispute as a request to produce documents "from third-party entities and organizations." Looking specifically at the requests, one set of requests seeks very specific documents from those third-party organizations: National Retail Federation's Active Shooter Guidelines as of August 1, 2019; American Society of Safety Professionals TR-Z590.5-2019; ANSI/ASIS Standard PAP.1-2012; ASIS Standard WVPI.1; and NFPA 3000 (PS): Standard for an Active Shooter/Hostile Event Response (ASHER) Program). Another set of production requests seeks any research reports authored in whole or in part by the "Loss Prevention Research Council" related to premises safety, crime prevention, and active shooter situations.

Walmart objected based on relevance and undue burden. When Walmart argued that it was being tasked with simply finding specific documents authored by third parties, the Families responded that their true inquiry was to show that Walmart had these documents somewhere in their possession ("What did they know and when did they know it . . .. Did they have those standards?"). The trial court noted that the specific documents were easily accessed on the internet but agreed with the Families that the "main issue" is whether Walmart actually saw them. The trial court contemplated that Walmart would have to respond to the requests with something like, "We don't have them on file, or we got certain copies, or this is the only copy that we have." Before this Court, Walmart contends that if the Families were willing to limit the scope of their request to "only documents in Walmart's possession, custody, and control that relate to the Cielo Vista Walmart and its immediate vicinity for a discrete period of time, such as two years prior to the Cielo Vista Walmart shooting," such a request would be permissible.

As the trial court framed the issue, we conclude that the requests are overbroad in time and scope. Without a time limitation, the request would require Walmart to search all of its corporate records, past and present, to comply. And a guideline drafted by the Loss Prevention Research Council in the remote past, for instance, might have limited application in 2019. *See In re Deere & Co.*, 299 S.W.3d 819, 821 (Tex. 2009) (request for production for complaints over product defect while relevant, was improper because it lacked any time limit and would require party to produce documents going back decades). Further, without some limitation as to location, the request would literally require the search of every store in Walmart's system, if for instance, any of the specified standards or papers were shared to all store locations. *See In re MHCB (USA) Leasing & Finance Corporation*, No. 01-06-00075-CV, 2006 WL 1098922, at *8 (Tex.App--Houston [1st Dist.] Apr. 27, 2006, orig. proceeding) (mem. op.) (request for industry reports and third-party studies were relevant but the request was overbroad and subject to mandamus correction because the item was "without any limitation geographically or as to time frame[.]"). "A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information." *In re CSX Corp.*, 124 S.W.3d at 153. We are confident that this request can be more narrowly drawn, or accomplished by a more focused discovery procedure, such a request for admission. While we conditionally grant Walmart's requested relief as to the order as currently written, we do so without prejudice to the trial court more appropriately limiting the order as to time and scope.

V. CONCLUSION

The trial court did not clearly abuse its discretion, or Walmart is not denied an adequate remedy by appeal, by the trial court's order pertaining to the Amarillo Hostage Incident, the

security budgets for El Paso and San Antonio stores, the Tax-Free/Black Friday Weekend transaction and security information for the Cielo Vista Walmart, and the corporate minutes. Mandamus will be denied as to these items.

The trial court did abuse its discretion by ordering the disclosure of crime-driven policy changes made at Texas stores, and third-party information. Mandamus is conditionally granted as to those items. The writ of mandamus will issue should the trial court fail to withdraw the relevant portions of its order.

Mandamus relief cannot be granted as to the bonus incentive item because the trial court's ruling is conditional and has not been fully consummated, making this dispute unripe for mandamus action.

JEFF ALLEY, Justice

March 26, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.