

(“Allstate”) establish an inadequate appellate remedy to obtain mandamus relief, I dissent.

I. ADEQUATE REMEDY AT LAW – APPEAL

A writ of mandamus will issue “only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.” *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985). This Court has long recognized that we may not issue mandamus relief when the law provides another plain, adequate, and complete remedy. *See Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958). The requirement that a person seeking mandamus relief establish the lack of an adequate appellate remedy is a “fundamental tenet” of mandamus practice. *Walker*, 827 S.W.2d at 840. As the Court has repeatedly stated, mandamus is intended to be an extraordinary remedy, available only in limited circumstances. *Walker*, 827 S.W.2d at 840. An appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining mandamus relief. *See CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996); *Walker*, 827 S.W.2d at 842. Because mandamus is an extraordinary remedy, this Court may not issue mandamus to supervise or correct a trial court’s incidental rulings when there is an adequate remedy at law, such as a normal appeal. *See Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994); *Walker*, 827 S.W.2d at 839-40.

II. ANALYSIS

Missing from the Court’s opinion is an accurate description of the plaintiffs’ claims in this case. The

plaintiffs have sued Allstate for fraud, fraudulent concealment, violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code, breach of the duty of good faith and fair dealing, civil conspiracy, and breach of contract. The plaintiffs' allegations underlying all these claims — including the breach of contract claim that the Court solely relies upon for granting mandamus — relate to how Allstate and the appraisal company it employs, CCC Information Services, value cars before Allstate initially offers a cash settlement for a covered loss. The plaintiffs' pleadings contend that Allstate, in concert with CCC Information Services, systematically undervalues cars at the initial valuation stage and offers this low amount knowing that the initial valuations “are inaccurate, unreliable, and biased toward generating valuation reports well below the actual cash value or replacement cost” and anticipating that claimants will not bother disputing the offer. The plaintiffs argue that Allstate's conduct is fraudulent and constitutes a breach of its agreement to pay cash value for covered losses at the initial valuation stage.

Refusing to acknowledge the nature of the plaintiffs' claims, in a remarkably terse discussion, the Court holds that Allstate does not have an adequate appellate remedy from the trial court's erroneous decision that the appraisal clause is an unenforceable arbitration provision. The Court concludes that the trial court's order is analogous to an order denying discovery “going to the heart of a party's case.” ___ S.W.3d at ___ (quoting *Walker*, 827 S.W.2d at 843). The Court explains that this is because “the parties have agreed in the contracts' appraisal clause to the method by which to determine whether a breach has occurred.” ___ S.W.3d at ___. According to the Court, the trial court's refusal to enforce the appraisal provision will vitiate Allstate's defenses, because it prevents Allstate from “obtaining the independent valuations that could counter at least the plaintiffs' breach of contract claim.” ___ S.W.3d at ___.

In determining that the trial court's order denying the appraisals would vitiate or severely compromise Allstate's defenses, the Court relies on *Walker*. ___ S.W.3d at ___. In *Walker*, we held that, in the discovery context, "an appeal will not be an adequate remedy where the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error." *Walker*, 827 S.W.2d at 843. Thus, whether the excluded discovery goes to the heart of the party's case so that appellate relief is inadequate is pertinent. See *Walker*, 827 S.W.2d at 843; *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984). But, still, the relator must "establish the effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources." *Walker*, 827 S.W.2d at 843. Otherwise, the relator has not shown that the trial court's error vitiated a viable claim or defense so that no adequate appellate remedy exists. *Walker*, 827 S.W.2d at 843.

Here, the Court's position is that no adequate appellate remedy exists, because Allstate's defenses to the plaintiffs' breach of contract allegations turn on whether Allstate did in fact undervalue the plaintiffs' cars at the initial valuation stage. According to the Court, "if the appraisal determines that the vehicle's full value is what the insurance company [initially] offered, there would be no breach of contract." ___ S.W.3d at ___. But the Court's analysis entirely ignores that the plaintiffs do not simply seek to recover the value for their particular losses, which is all that the appraisal process will produce. Rather, the plaintiffs seek damages arising from Allstate's alleged fraud, statutory violations, and breach of contract. And, as discussed above, all these claims relate to how Allstate values car losses or damages at the initial valuation and offer stage. In other words, the plaintiffs challenge the initial valuation process — that is, how Allstate

values cars at that stage and whether Allstate breaches its obligation to pay cash value at that stage.

Moreover, the Court's unfounded belief that the appraisal valuations will finally resolve whether Allstate breached its contractual obligation to pay cash value for losses or damage at the initial valuation stage demonstrates a fundamental misunderstanding not only about our case law involving insurance contract appraisal provisions, but also about when the Court has authority to issue mandamus relief. First, long ago, this Court rejected the position that an appraisal's outcome establishes liability when we held that, unlike an arbitration provision, an appraisal provision "only binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts." *Scottish Union & Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888); *see also Hennessey v. Vanguard Ins. Co.*, 895 S.W.2d 794, 797-98 (Tex. App.–Amarillo 1995, writ denied). Thus, the Court's writing impermissibly and incorrectly advises Allstate about how it may successfully defend against the breach of contract claim.

Second, the Court's cursory conclusion that the appraisal valuations are dispositive of the plaintiffs' breach of contract claim disregards that Allstate can otherwise develop defenses to the plaintiffs' breach of contract allegations. The Court simply assumes, without analysis or explanation, that the trial court's order refusing to enforce the appraisal provision vitiates or severely compromises Allstate's ability to defend itself against the plaintiffs' breach of contract claim. However, other than the Court's wholly advisory writing, there is absolutely no indication that the appraisal process' outcome is the only means by which Allstate can develop its contractual defenses. Allstate has not demonstrated that it lacks other reasonable opportunities to develop evidence about the cars' values to counter the plaintiffs' allegations

about Allstate's breach of its obligation to pay cash value at the initial valuation process. *See Walker*, 827 S.W.2d at 843. Indeed, even if appraisals would provide evidence to refute the plaintiffs' claim that Allstate breached its obligation to pay cash value or replacement cost, as the Court asserts, the Court wholly ignores that Allstate can obtain information about the initial valuation process and the cars' values through other means.

For example, Allstate can obtain expert testimony about the valuation process and about the actual losses to counter the plaintiffs' allegations. Thus, the trial court's order is nothing more than an incidental ruling that does not deny Allstate a reasonable opportunity to develop its defenses against the plaintiffs' claims. Moreover, because the cars' values can be established through other means, the appraisal process is certainly not dispositive on whether Allstate breached its agreement to pay actual value for covered losses or whether Allstate systematically acted fraudulently during the initial valuation process.

Furthermore, in granting mandamus relief because the appraisal valuations will counter at least one of the plaintiffs' claims, the Court parses the breach of contract claim from the plaintiffs' other claims. In doing so, the Court recognizes that the erroneous order does not compromise Allstate's defenses to the fraud-based claims. However, even assuming the Court has authority to grant mandamus relief based on an order's purported effect on one of the several underlying claims, the Court's decision to do so here is based on its faulty assumption that the breach of contract claim necessitates the appraisal process. Instead, the plaintiffs' pleadings demonstrate that the plaintiffs' breach of contract claim is that Allstate breached its agreement to pay cash value for covered losses during the initial valuation stage; no allegations underlying the breach of contract claim refer to Allstate's duty under the appraisal provision. The Court cites no

authority — and I find none that exists — for its conclusion that the appraisal process’ outcome is entirely dispositive of the breach of contract claim here. Further, there is no authority for the Court’s assumption that Allstate cannot defend itself against the breach of contract claim through other means. Because Allstate has not established that the trial court’s order vitiates its defenses so that trial would be a waste of judicial resources, an adequate appellate remedy exists. *See Walker*, 827 S.W.2d at 843. Therefore, the Court must deny mandamus relief.

Ultimately, the trial court’s order refusing to enforce the appraisal provisions is, in light of the plaintiffs’ claims against Allstate, an incidental ruling. As the Court acknowledges, it is well settled in Texas that insurance contract appraisal provisions are typically enforceable. *Clancy*, 8 S.W. at 631. Since 1888, when we decided *Clancy*, our courts of appeals have consistently and correctly applied Texas law on appraisal clauses on ordinary appeal.¹ Consequently, well-established Texas authority demonstrates that the trial court’s refusal to enforce the appraisal clause can be readily corrected, if necessary, on appeal.

III. THE ROAD OF NO RETURN . . . ONCE AGAIN

¹ *See, e.g., Glen Falls Ins. Co. v. Peters*, 386 S.W.2d 529, 532 (Tex. 1965); *Export Ins. Co. v. Axe*, 58 S.W.2d 39, 40 (Tex. Com. App. 1933, holding approved); *Pennsylvania Fire Ins. Co. v. W.T. Waggoner Estate*, 39 S.W.2d 593, 595 (Tex. Com. App. 1931); *American Cent. Ins. Co. v. Terry*, 26 S.W.2d 162, 166 (Tex. Com. App. 1930, holding approved); *In re Terra Nova Ins. Co.*, 992 S.W.2d 741, 742 (Tex. App.—Texarkana 1999) (orig. proceeding); *Hennessey v. Vanguard Ins. Co.*, 895 S.W.2d 794, 799 (Tex. App.—Amarillo 1995, writ denied); *Providence Lloyd’s Ins. Co. v. Crystal City Indep. Sch. Dist.*, 877 S.W.2d 872, 878-79 (Tex. App.—San Antonio 1994, no writ); *Barnes v. Western Alliance Ins. Co.*, 844 S.W.2d 264, 268-69 (Tex. App.—Fort Worth 1992, writ dismissed by agr.); *American Cent. Ins. Co. v. Terry*, 298 S.W. 658, 659-660 (Tex. Civ. App.—Texarkana 1927, no writ); *Boston Ins. Co. v. Kirby*, 281 S.W. 275, 276 (Tex. Civ. App.—1926, no writ); *Aetna Ins. Co. v. Shacklett*, 57 S.W. 583, 583 (Tex. Civ. App.—1900, no writ); *American Fire Ins. Co. v. Stuart*, 38 S.W. 395, 395 (Tex. Civ. App. 1898, no writ); *Manchester Fire Ins. Co. v. Simmons*, 35 S.W. 722, 724 (Tex. Civ. App.—1896, writ refused); *see also Hartford Lloyd’s Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062 (5th Cir. 1990).

“Yesterday . . . I believe in yesterday.”
Lennon/McCartney

The Court obviously believes in yesterday, because its opinion revives a concept we expressly disapproved in *Walker v. Packer*. The law clearly establishes that appraisal clauses are not analogous to unenforceable arbitration provisions. Thus, this case involves a trial court’s erroneous decision about a settled legal question for which an appeal is readily available. In order to justify mandamus here, the Court, while skillfully avoiding saying so, revives the more lenient mandamus standard first articulated in *Cleveland v. Ward*, 285 S.W. 1063, 1068 (Tex. 1926), that the remedy by appeal must be “equally convenient, beneficial, and effective as mandamus.” Therefore, the Court’s real purpose is to avoid making the parties go through the time and expense of a trial on its merits and then appeal the trial court’s decision. In *Walker*, we expressly held that this is no longer a valid reason for concluding appellate relief is inadequate. *Walker*, 827 S.W.2d at 842 (disapproving *Cleveland*, *Jampole*, and any other authority to the extent they implied that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus).

Today, the Court’s opinion returns us to this disfavored doctrine and will cause appellate courts to “embroil themselves unnecessarily in incidental pre-trial rulings of the trial courts.” *Walker*, 827 S.W.2d at 842 (quoting *Braden v. Downey*, 811 S.W.2d 922, 928 (Tex. 1991)). Because the Court continues to lead us down this Road of No Return, I dissent.

James A. Baker, Justice

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