

No. 21-0472

**In the
SUPREME COURT OF TEXAS**

**In re Reginald Willis and
Allied Aviation Fueling Company of Houston, Inc.**

Relators.

**Original Proceeding from the
270th Judicial District Court of Harris County, Texas**
Honorable Dedra Davis, Presiding Judge

**RELATORS' RESPONSE TO MOTION TO MODIFY
STAY OF THE UNDERLYING PROCEEDINGS**

To the Honorable Supreme Court of Texas:

On June 8, 2021, the Court requested that the real parties in interest (“Plaintiffs”) respond to Relators’ petition for writ of mandamus by July 8, 2021. Rather than defend the trial court’s decision (at Plaintiffs’ urging) to order a “Full Virtual Jury Trial” over Relators’ objections, Plaintiffs “waive[d] their opportunity to file a response” and sought instead a modification of this Court’s stay order to allow “the trial court to proceed with an in-person jury trial.” (Motion at 2, 4)

But even assuming the trial court is now willing to conduct an “in-person jury trial”—and the trial court has given no indication it will do so without a higher court ordering it (*see* R.519, 769; *see also* Exhibits 1, 2)—that alone will not answer (let

alone moot) all of the important issues Relators raise in their mandamus petition. Nor will it provide the trial court (and the parties in this and other cases) with the clear guidance necessary on what it means to have a “trial by jury” in today’s post-Covid world.

I. Plaintiffs’ inability to defend the trial court’s decision to order a virtual jury trial is understandable.

After this Court stayed all trial court proceedings below, the trial court proceeded to begin another virtual jury trial on June 9, 2021, over the objection of the defendant, in another case—*Andrea Jean Thompson and Mandy Thompson Zorn v. J-M Manufacturing Company, Inc.*, No. 2018-10109, in the 270th Judicial District Court of Harris County, Texas.¹ That remote proceeding has thus far looked nothing like the serious, substantive endeavor expected of jury trials in which significant property interests are at stake. After the trial court refused requests for (a) a court reporter² or (b) at least a video recording of the proceeding, remote voir dire began *during* which prospective jurors:

- drove cars;
- disappeared off camera;

¹ Daily Zoom video links to watch the virtual jury trial in this other case are posted on the trial court’s website: <https://www.justex.net/Courts/Civil/CivilCourt.aspx?crt=20>.

² See *In re Larkin*, 516 S.W.3d 583, 585 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding) (holding that the trial court abused its discretion by denying relator’s “request that the pretrial and trial proceedings be properly recorded” by a court reporter because “[o]nce the request [for a court reporter] was made, the trial court had no discretion to deny it”).

- positioned themselves so their faces could not be seen;
- applied makeup throughout, even while being questioned;
- played video games while wearing a gaming headset;
- prepared meals;
- ate meals;
- failed to answer questions due to communication difficulties;
- turned their cameras off;
- used their cell phones;
- watched television;
- walked around;
- appeared to read a book;
- played with pets;
- typed on a computer;
- lay on a couch and in bed;
- slept;
- appeared to drink alcohol;
- vaped; and
- generally did not pay attention amid engagement in unknown and unviewable activities.

(See Exhibits 1, 2)

II. Plaintiffs' belated desire for an in-person jury trial cannot (and should not) moot this mandamus proceeding.

Because a remote jury trial is indefensible without the parties' consent, Plaintiffs now engage in a transparent attempt to try to moot this original proceeding and evade appellate review of the trial court's unauthorized and arbitrary decision to order a virtual jury trial over Relators' objections. Specifically, Plaintiffs ask this Court to modify its order staying all trial court proceedings in the underlying action because Plaintiffs belatedly "wish to request" an "in-person jury trial." (Motion at 4)

But given the history of this case and the trial court's repeated decisions (at Plaintiffs' insistence) to deny Relators their right to a trial by jury (*see* R.91, 96-106, 265, 269-71, 441-42, 459-60, 500-01, 519, 763-765, 769), there are numerous unanswered questions about the trial court's authority (if any) to alter the traditional, tried-and-true method of conducting jury trials, and what is contemplated by a "trial by jury" in a post-pandemic world. For example:

- Even if the trial court were to allow the attorneys, parties, and jury to be present in the courtroom for the actual trial, can the trial court compel a party to conduct voir dire and jury selection remotely over its objection?
- Can the trial court permit (or even require) one or more trial witnesses to appear remotely and testify by electronic means without the agreement of the parties, as required by TEX. CIV. PRAC. & REM. CODE § 30.012(a)?³

³ Relators' mandamus petition raises this very issue, as well as the related issue of whether doing so violates Relators' rights to due process and the due course of law. (*See* Petition at 12-13, 24); *see also* TEX. CIV. PRAC. & REM. CODE § 30.012(a)-(b) (a trial court may order "witness testimony at trial [to] be conducted by electronic means" *only* "[w]ith the agreement of the parties" and "if the witness is deposed before the commencement of the trial").

- Can the trial court limit the number of attorneys who can be present in the courtroom for a party?
- Can the trial court excuse an otherwise qualified prospective juror for stating a concern about Covid?
- Can the trial court require the jury to conduct jury deliberations remotely?

These and other countless questions are likely to arise if this Court modifies the stay at Plaintiffs' request and allows the trial court to conduct an "in-person jury trial" without any guidance. Relators should not be forced to file yet another mandamus proceeding if the trial court unilaterally attempts to alter what it traditionally means to have a "trial by jury." The issue is not binary; there is significant daylight between full virtual proceedings and traditional in-person jury trials as have been conducted in Texas for more than 100 years. It is important that the Court provide guidance not only on whether a trial court can require a "full virtual jury trial" over a party's objection, but what it means to have a "trial by jury" today and what the Constitution and other authorities require. That is particularly true under the unique circumstances of this case.

In the face of Plaintiffs' persistent efforts in the trial court (and court of appeals) to deny Relators the trial by jury that Relators have repeatedly requested and that Texas law requires (*see* R.91, 244-458, 461-87, 502-17, 562-66, 717, 720-27, 754-63, 767-68), Plaintiffs insinuate that they "have never not agreed to an

in-person jury trial” and now “wish to request” an in-person jury trial. (Motion at 4) But Plaintiffs took the precise opposite position in the trial court.

After the trial court *sua sponte* set this case for a “Full Virtual Jury Trial” without a request by any party (R.519), Plaintiffs urged the trial court to proceed with a virtual jury trial over Relators’ objections. (*See* R.763-65) And just weeks earlier, Plaintiffs persuaded the trial court in April 2021 to erroneously deny Relators a trial by jury altogether despite Relators’ timely jury demand more than 30 days before trial. (*See* R.91, 96-106, 265, 269-71, 441-42, 459-60, 466-73, 500-01) As a result, Relators already have been forced to file three mandamus petitions (No. 21-0472 in this Court and Nos. 01-21-00208-CV and No. 01-21-00289-CV in the First Court of Appeals)—on an emergency basis and at significant expense—in order to protect their constitutional rights to a trial by jury.

Plaintiffs thus had opportunity after opportunity to request an in-person jury trial below. Plaintiffs never did so. Instead, as part of a transparent litigation tactic, they made Relators play “whack-a-mole” by (1) first convincing the trial court to deprive Relators of their inviolate constitutional right to a jury trial (*see* R.96-106, 459-60, 461-89, 500-01), and (2) then, after the court of appeals ordered the trial court to set the case for “trial by jury” (R.502-17), urging the trial court to proceed with a virtual jury trial over Relators’ objections (*see* R.562-66, 763-65).

In any event, Plaintiffs’ recent about-face and after-the-fact effort to moot this original proceeding is unavailing. While Plaintiffs are clearly interested in the outcome of this proceeding, an original proceeding fundamentally seeks extraordinary relief against a judge or court. *See* TEX. R. APP. P. 52.2 (“In original proceedings . . . , the person against whom relief is sought—whether a judge, court, tribunal, officer, or other person—is the respondent.”). Thus, even if Plaintiffs are now willing to belatedly “agree[] to an in-person jury trial” (Motion at 4), it does not resolve the issue, much less offer assurance how the trial court below will implement any such jury trial.

The trial court already has ruled twice that this case will proceed as a virtual jury trial. (R.519, 769) There is no indication that the trial court will honor Plaintiffs’ eleventh-hour “agreement” to an in-person jury trial,⁴ or, even if it did, what exactly any such “trial by jury” would look like here, absent this Court’s guidance, compared to jury trials that have traditionally been conducted in Texas, with all of their important safeguards, procedures, and due process.

⁴ The trial court previously has denied agreed joint motions submitted by Relators and Plaintiffs regarding the date of trial and pre-trial deadlines. (*See, e.g.*, R.46-48, 49-50) And, as the Respondent, the trial court has an opportunity to file a response to the petition and defend its decision. *See* TEX. R. APP. P. 52.4 (“Any party may file a response to the petition.”). Plaintiffs’ apparent present agreement notwithstanding, it ultimately is not their decision to make.

III. The issues raised in this mandamus proceeding are important to the jurisprudence of the State.

Finally, the important issues raised in Relators' mandamus petition—including (1) whether this Court's Thirty-Eighth Emergency Order authorizes a jury trial to be conducted entirely remotely without the consent of all parties, and (2) whether a virtual jury trial violates the Texas or United States Constitution—are not limited to this lawsuit or the litigants to this proceeding. Rather, these are significant issues that affect *all* litigants in the 270th Judicial District Court, *all* litigants in Harris County, and *all* litigants across Texas.

Thus, if this Court were to modify the stay and allow the trial court to try to moot the mandamus petition (and evade appellate review) in this particular action by conducting an “in-person jury trial” without a writing or substantive opinion from this Court, this same issue is likely to recur in the 270th Judicial District Court (or other trial courts in Texas). *Cf. Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999) (“[t]he ‘capable of repetition yet evading review’ exception to the mootness doctrine applies when ‘the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot’” and there is “a reasonable expectation that the same action will occur again if the issue is not considered”). Other litigants, however, may not have the financial resources (or stomach) to file a mandamus petition challenging a trial court order compelling a remote jury trial over their objection.

This case presents a meaningful opportunity to address an issue that is of widespread importance and interest to the Bar and all Texas litigants: post-pandemic jury trials in Texas state courts. The Court’s existing order staying all trial court proceedings below is therefore necessary (and warranted) to protect the Court’s “jurisdiction so that [it can] consider the merits of th[e] mandamus action.” *In re Reed*, 901 S.W.2d 604, 609 (Tex. App.—San Antonio 1995, orig. proceeding); *see In re Bates*, 429 S.W.3d 47, 53 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (an appellate court may stay “all underlying proceedings in the trial court” to “prevent the parties and the respondent trial court from taking action in the case”); *In re Kelleher*, 999 S.W.2d 51, 52 (Tex. App.—Amarillo 1999, orig. proceeding) (Rule 52.10 of the Texas Rules of Appellate Procedure “exists to afford the court [an] opportunity to address the dispute encompassed within a petition for mandamus” by “maintaining the status quo until it can address that dispute”).

PRAYER

For these reasons, the Court should deny Plaintiffs’ Motion to Modify this Court’s Stay of the Underlying Proceedings and continue the stay of all trial court proceedings while Relators’ petition for writ of mandamus remains pending.

Respectfully submitted,

/s/ *Rusty Hardin*

Stuart B. Brown, Jr.

bbrown@jw.com

State Bar No. 24006914

Brett Kutnick

bkutnick@jw.com

State Bar No. 00796913

Justin V. Lee

jlee@jw.com

State Bar No. 24097982

JACKSON WALKER LLP

2323 Ross Avenue, Suite 600

Dallas, Texas 75201

Tel: 214-953-6000

Fax: 214-953-5822

Joseph A. Fischer, III

tfischer@jw.com

State Bar No. 0789292

JACKSON WALKER LLP

1401 McKinney Street, Suite 1900

Houston, Texas 77010

Tel: 713-752-4200

Fax: 713-308-4114

Rusty Hardin

rhardin@rustyhardin.com

State Bar No. 08972800

Joe Roden

jroden@rustyhardin.com

State Bar No. 00794549

Ryan Higgins

rhiggins@rustyhardin.com

State Bar No. 24007362

Daniel R. Dutko

ddutko@rustyhardin.com

State Bar No. 24054206

RUSTY HARDIN & ASSOCIATES LLP

5 Houston Center

1401 McKinney Street, Suite 2250

Houston, Texas 77010

Tel: 713-652-9000

Fax: 713-652-9800

Attorneys for Relators

CERTIFICATE OF COMPLIANCE

Relying on the word count function of the computer software used to prepare this document, the undersigned certifies that this response contains 2,024 words (excluding the sections excepted under TEX. R. APP. P. 9.4(i)(1)) and was typed in 14-point font with footnotes in 12-point font.

/s/ Brett Kutnick
Brett Kutnick

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing response was served in accordance with TEX. R. APP. P. 9.5 upon the Respondent and following counsel of record for Real Parties in Interest on this 10th day of June, 2021:

Via Electronic Service

The Honorable Dedra Davis (c/o [Daiquiri Roy@Justex.net](mailto:Daiquiri_Roy@Justex.net))
270th Judicial District Court
Harris County Civil Courthouse
201 Caroline, 13th Floor
Houston, Texas 77002
(*Respondent*)

Via Electronic Service

Randall O. Sorrels (randy@sorrelslaw.com)
Alexandra Farias-Sorrels (alex@sorrelslaw.com)
Sorrels Law
800 Commerce St.
Houston, Texas 77002
(*Attorneys for Real Parties in Interest/Plaintiffs*)

/s/ Stuart B. Brown, Jr.
Stuart B. Brown, Jr.

EXHIBIT 1

In the
SUPREME COURT OF TEXAS

**In re Reginald Willis and
Allied Aviation Fueling Company of Houston, Inc.**

Relators.

**Original Proceeding from the
270th Judicial District Court of Harris County, Texas**
Honorable Dedra Davis, Presiding Judge

AFFIDAVIT OF CARTER HOLLINGSWORTH
IN SUPPORT OF RELATORS' RESPONSE TO MOTION TO
MODIFY THIS COURT'S STAY OF THE UNDERLYING PROCEEDING

STATE OF TEXAS §
 §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, personally appeared CARTER HOLLINGSWORTH, who being duly sworn by me, deposed as follows:

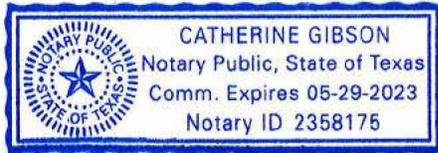
1. "My name is Carter Hollingsworth. I am over the age of eighteen (18), of sound mind and am fully competent to testify to the matters stated in this affidavit. I have personal knowledge of the facts set forth in this Affidavit, and they are true and correct.
2. I am a 2021 summer intern with the law firm of Rusty Hardin & Associates, LLP. On the afternoon of June 9, 2021, I watched the virtual jury trial in Cause No. 2018-10109; *Andrea Jean Thompson, Individually and as Executrix of the Estate of Tracy Dean Thompson, Deceased, and Mandy Thompson Zorn v. Certainteed Corporation, et al.*, pending in the 270th Judicial District Court of Harris County, Texas.

3. I watched the Zoom trial remotely on a computer screen from approximately 3:17pm until 5:15pm.
4. During that time period, I witnessed the trial court deny a request for a court reporter.
5. I also witnessed the following concerning the potential jurors (all times are approximate):
 - 3:17 pm: Juror 25 in car, camera off 3:18, present again 3:23pm
 - 3:18 pm: Juror 27 laying down (face not visible)
 - 3:19 pm: Juror 7 not present, present again 3:25pm
 - 3:22 pm: Juror 27 camera off, face not shown 3:28pm
 - 3:24 pm: Juror 25 disappeared, 3:28pm in car, 4:55pm driving in said car
 - 3:26 pm: Juror 17 face not shown, only hair
 - 3:30 pm: Juror 33 in car
 - 3:35 pm: Juror 5 eating food, 3:38pm noticeably not paying attention
 - 3:37 pm: Juror 1 playing video games (has a gaming headset on, is distracted, not looking at camera), continued to do so throughout the zoom
 - 3:39 pm: Juror 27 walking around the house, noticeably distracted
 - 3:42 pm: Juror 30 cannot see face, dark and hidden
 - 3:43 pm: Juror 23, not looking at camera, relaxed on couch, noticeably not paying attention, continued to do so throughout the zoom until 5:15pm
 - 3:48 pm: Juror 41 walking around house, making food
 - 3:48 pm: Juror 24 left the camera
 - 3:49 pm: Juror 39 unmuted to answer a question about a personal relation to case, unable to hear because the audio could not connect and was spotty, attorney decided to move on and come back (never came back)
 - 3:50 pm: Juror 39 camera off (black screen), present at 3:52pm
 - 3:50 pm: Juror 32 walking around, walking around outside, 3:55pm in car driving, 4:15pm sitting in car, 4:37pm began driving again, not paying attention while doing so, 4:39pm walking out of car into a house
 - 3:55 pm: Juror 41 camera off, profile picture showing
 - 3:54 pm: Juror 4 camera off, profile picture showing, camera back on 3:56pm
 - 3:55 pm: Juror 27 doing her make up, continued doing her makeup while answering a question 4:28pm, finished at 5:15pm
 - 4:17 pm: Juror 12 appears as though she is using her phone
 - 4:17 pm: Juror 45 can barely see face
 - 5:05 pm: Juror 1 sitting in the corner of the room, barely visible to the camera
 - 5:11 pm: Judge Davis realizes juror 27 is doing her makeup and applying fake eyelashes, says to her: "A girl's gotta do what a girl's gotta do."

Further, Affiant sayeth not.”


CARTER HOLLINGSWORTH

SUBSCRIBED AND SWORN TO BEFORE ME on this 10th day of June, 2021.



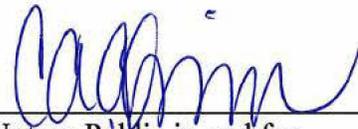

Notary Public in and for
The STATE OF TEXAS

EXHIBIT 2

In the
SUPREME COURT OF TEXAS

In re Reginald Willis and
Allied Aviation Fueling Company of Houston, Inc.

Relators.

Original Proceeding from the
270th Judicial District Court of Harris County, Texas
Honorable Dedra Davis, Presiding Judge

AFFIDAVIT OF NATASHA SAVAS
IN SUPPORT OF RELATORS' RESPONSE TO MOTION TO
MODIFY THIS COURT'S STAY OF THE UNDERLYING PROCEEDING

STATE OF TEXAS §
 §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, personally appeared NATASHA SAVAS, who
being duly sworn by me, deposed as follows:

1. "My name is Natasha Savas. I am over the age of eighteen (18), of sound mind and am fully competent to testify to the matters stated in this affidavit. I have personal knowledge of the facts set forth in this Affidavit, and they are true and correct.
2. I am a 2021 summer intern with the law firm of Rusty Hardin & Associates, LLP. On the afternoon of June 9, 2021, I watched the virtual jury trial in Cause No. 2018-10109; *Andrea Jean Thompson, Individually and as Executrix of the Estate of Tracy Dean Thompson, Deceased, and Mandy Thompson Zorn v. Certaineed Corporation, et al.*, pending in the 270th Judicial District Court of Harris County, Texas.
3. I watched the Zoom trial remotely on a computer screen from approximately 3:18pm until 5:15pm.

4. During that time period, I witnessed the trial court deny a request for a court reporter and deny a request to visually record the proceedings.
5. I also witnessed the following concerning the potential jurors (all times are approximate):

Juror 7

- Left the screen (3:15 – 3:21)

Juror 41

- Asleep (3:32 – 3:30) (4:35 – 4:41)
- Drinking (what appears to be a bottle of alcohol)
- Dancing
- Walking around
- When she speaks, you can hear the TV blasting in the background

Juror 20

- Camera off (3:23 – 3:30)
- Various other times with camera off

Juror 40

- Standing / stretching (2 minutes)

Juror 25

- Missing (10 minutes)
- In car, not driving (3:28)
- Driving (4:51 – 5:20)

Juror 23

- Laying on couch not looking (entire time)

Juror 4

- Eating (3:25 - 3:50)
- In bed with blanket, watching something else with her food
- After eating continued to watch something else
- Never paid attention to screen
- Left bed for office desk, highlighting papers/working on something else

Juror 43

- Dropping in and out
- Impossible to hear or follow him

Juror 24

- Left and came back during questioning (4 times)

Juror 33

- In car (3:33)
- Driving (3:43)

Juror 1

- Looks asleep (3:20 – 3:40) (3:42 – 3:54)
- Stands up stretching
- Talking to someone else

- Looks asleep again (4 times)
- Playing video games with headset on

Juror 8

- Looking down the whole time

Juror 30

- Camera angle so bad we cannot see her face
- Asleep around 4:46

Juror 45, 9, 17

- Can only see forehead entire time

Juror 43

- Not on mute but still unable to hear

Juror 39

- Cannot see him
- Bad connection, attorney missed his answer/story about a personal injury

Juror 32

- Walking out of camera (3:40 – 3:50)
- Walking outside (3:50 – end)
- In car (3:55)
- Driving (4:51)

Juror 27

- Doing makeup entire time (even while speaking to attorneys and judge)
 - “A girl’s gotta do what a girl’s gotta do” – Judge Davis
- Vaping
- In and out of frame
- Possibly changed clothing

Juror 10

- Walking around (5:03)

Juror 2

- Could not see face- in and out of frame entire time

Juror 35

- Looking down the whole time

Juror 3

- Unresponsive to questions until attorney kept pestering, possibly asleep

Juror 21

- Performed yoga stretches on camera

Juror 26

- Eating (4:20)

Juror 10

- Running somewhere for a few minutes

Jurors 7, 6, 1, 26, 32, 4

- Blatantly working on other things

Juror 6

- Camera pointed to where I could see his side profile working on papers across the room

Juror 12

- Asleep

Juror 20

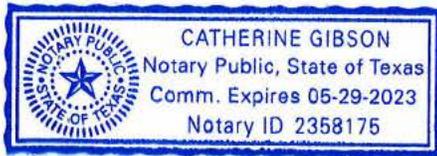
- Asleep

Further, Affiant sayeth not.”



NATASHA SAVAS

SUBSCRIBED AND SWORN TO BEFORE ME on this 10th day of June, 2021.



Notary Public in and for
The STATE OF TEXAS

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Yolanda Lopez on behalf of Stuart Brown
Bar No. 24006914
ylopez@jw.com
Envelope ID: 54290245
Status as of 6/10/2021 11:40 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stuart BradBrown		bbrown@jw.com	6/10/2021 11:34:31 AM	SENT
Brett David Kutnick	796913	bkutnick@jw.com	6/10/2021 11:34:31 AM	SENT
Leah Graham	24073454	lgraham@rustyhardin.com	6/10/2021 11:34:31 AM	SENT
Ryan Kees Higgins	24007362	rhiggins@rustyhardin.com	6/10/2021 11:34:31 AM	SENT
Joseph August Fischer	789292	tfischer@jw.com	6/10/2021 11:34:31 AM	SENT
Justin Lee	24097982	jlee@jw.com	6/10/2021 11:34:31 AM	SENT
Russell Hardin	8972800	rhardin@rustyhardin.com	6/10/2021 11:34:31 AM	SENT
Daniel Dutko	24054206	ddutko@rustyhardin.com	6/10/2021 11:34:31 AM	SENT
Randall Sorrels	10000000	Randy@SorrelsLaw.com	6/10/2021 11:34:31 AM	SENT
Joe Roden	794549	jroden@rustyhardin.com	6/10/2021 11:34:31 AM	SENT
Victoria Reilly	24118679	treilly@rustyhardin.com	6/10/2021 11:34:31 AM	SENT
Alexandria Farias-Sorrels		alex@sorrelslaw.com	6/10/2021 11:34:31 AM	SENT
Honorable Dedra Davis		daiquiri_roy@justex.net	6/10/2021 11:34:31 AM	SENT