INTERLOCUTORY APPEALS, WRITS OF MANDAMUS, AND EXTRAORDINARY WRITS: RECENT DEVELOPMENTS IN TEXAS STATE COURTS RELEVANT TO PERSONAL INJURY PRACTICE

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State Bar of Texas
29th ANNUAL
ADVANCED PERSONAL INJURY COURSE
Dallas – July 10-12, 2013
San Antonio – August 7-9, 2013
Houston – August 28-30, 2013

CHAPTER 18

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Martin Siegel handles state and federal appeals for plaintiffs and defendants in commercial, product liability, civil rights, constitutional, and many other kinds of cases. Recent matters include briefing before and after international arbitration on behalf of a foreign commodities brokerage firm; representation of a Fortune 500 company arbitrating contractual claims; representation of claimants in § 1983 excessive force cases in the U.S. Supreme Court and the Fifth Circuit; representation of a California energy company in a multi-million dollar contract dispute in the Fifth Circuit; a constitutional challenge in the Fifth Circuit to a Houston ordinance allocating new taxi permits; *pro bono* representation of centers on criminal law and legal ethics at NYU, Stanford and other law schools as *amici* in a § 1983 wrongful imprisonment case in the U.S. Supreme Court; and briefing and argument in the Fifth Circuit's *en banc* decision establishing the standards governing motions to transfer and the appellate reviewability of transfer orders.

Siegel has written law review articles, Op-ed pieces, and articles for *Texas Lawyer* and *Litigation*, the magazine of the ABA's Section on Litigation, where he also serves as the Executive Editor. He has taught as an adjunct professor and frequently speaks at CLE programs. He has repeatedly been named a "Texas Super Lawyer" for his appellate work.

Before opening his own practice, Siegel was a partner at Watts Law Firm. Notable cases included assisting in the recovery of a $43 million award for the founder of a securities trading firm after his ejection from the partnership (cited in the *National Law Journal*'s "Plaintiff's Hot List"), and recovery of an eight-figure settlement on behalf of Texas beer distributors wrongfully denied the right to sell their distributorship.

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Southern District of New York. Major cases included a suit under the Voting Rights Act following racial discrimination in a Bronx school board election and the successful defense of federal laws intended to preempt state and local "sanctuary city" policies. In 1999, Siegel received DOJ's Director's Award for his trial defense of the CIA. In 2000-01, DOJ detailed him to serve as Special Counsel on the Senate Judiciary Committee.

From 1992 to 1994, Siegel was an associate in the Washington, D.C. office of Jenner & Block. He handled appellate, commercial, intellectual property and environmental cases. He also helped present a *habeas corpus* petition to a Maryland state court in a case that, on reaching the U.S. Supreme Court, set new standards for effective capital defense.

Siegel earned a B.A., Highest Honors, from The University of Texas at Austin in 1988, and his J.D., *cum laude*, from Harvard Law School in 1991. Following law school, he served as law clerk to the Hon. Irving R. Kaufman on the U.S. Court of Appeals for the Second Circuit.

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A. Basic Legal Principles

1. Clear Abuse of Discretion

The trial court ruling being challenged must constitute a "clear abuse of discretion." *See In re Frank Motor Co.*, 361 S.W.3d 628, 630 (Tex. 2012); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W. 2d 833, 839 (Tex. 1992). This usually consists of a mistake of law: "A trial court has no discretion in applying the law to the facts or determining what the law is." *Frank Motor Co.*, 361 S.W.3d at 630-31 (quoting *Prudential*, 148 S.W.3d at 135). A decision based on conflicting evidence is usually not a clear abuse of discretion: "In reviewing findings of fact in a mandamus proceeding, we cannot substitute our judgment for that of the trial court. Instead, the relator 'must establish that the trial court could reasonably have reached only one decision,' and that its finding to the contrary is 'arbitrary and unreasonable.'" *In re Dillard Department Stores, Inc.*, 198 S.W.3d 778, 780 (Tex. 2006) (citing and quoting in part *Walker*, 827 S.W.3d at 839-40); *see also Brady v. Fourteenth Ct. of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990) ("It is well established Texas law that an appellate court may not deal with disputed areas of fact in an original mandamus proceeding").

2. No Adequate Remedy Through Appeal

The Texas Supreme Court set the standard for adequacy in *Prudential*:

> The operative word, "adequate", has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with 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 civil litigation. Mandamus review of significant rulings in exceptional cases may be essential 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. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

148 S.W.3d at 136; *see also In re McAllen Med. Ctr. Inc.*, 275 S.W.3d 458, 464 (Tex. 2008).

Usually, appellate remedies are inadequate where the relator would lose some right or privilege that cannot be recaptured later, such as the disclosure of privileged information: "The most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial – regardless of

the outcome – would defeat the substantive right involved." *McAllen Med. Ctr.*, 275 S.W.3d at 465. While having to endure trial and risk retrial if the error is not corrected until direct appeal is ordinarily insufficient to warrant mandamus, *see Walker,* 827 S.W.2d at 842, that concern is not irrelevant either. *See McAllen Med. Ctr.*, 275 S.W.3d at 465. In *McAllen Med. Ctr.*, the Texas Supreme Court provided examples of specific situations warranting mandamus review. *See* 275 S.W.3d at 465-69. Other decisions apply somewhat different formulations, such as the reference to "exceptional circumstances." *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 208-10 (Tex. 2009).

3. Equitable Principles Apply: Laches

"Issuance of mandamus relief 'is largely controlled by equitable principles,' and equity 'aids the diligent and not those who slumber on their rights.'" *In re Laibe Corp.*, 307 S.W.3d 314, 318 (Tex. 2010) (*quoting Rivercenter Assocs. v. Rivera*, 858 S.W.3d 366, 367 (Tex. 1993)). There is no deadline for seeking mandamus relief, but the doctrine of laches requires denial of the writ in cases of excessive delay. *See id.* The party opposing mandamus based on laches "ordinarily must show an unreasonable delay by the [relator] in asserting it rights, and also… good faith and detrimental change in position because of the delay." *Id.*

4. Mandamus and Later Review

A denial of mandamus without consideration of the merits does not affect later appeals. *See Perry Homes v. Cull*, 258 S.W.3d 580, 585-86 (Tex. 2008), *cert. denied*, 129 S. Ct. 952 (2009). "[A]s mandamus is a discretionary writ, 'its denial, without comment on the merits, cannot deprive another appellate court from considering the matter in a subsequent appeal.'" *Id.* at 585-86. (*quoting Chambers v. O'Quinn*, 242 S.W.3d 30, 32 (Tex. 2007)).

Failure to petition for mandamus will not bar later appellate review. *See City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 756 (Tex. 2003) ("filing a request for an extraordinary writ is not a prerequisite to an appeal"); *Pope v. Stephenson*, 787 S.W.3d 953, 954 (Tex. 1990).

B. Mandamus Procedure

TEX. R. APP. P. 52 governs the form of mandamus petitions. "The party seeking the relief is the relator. In original proceedings other than habeas corpus, the person against whom relief is sought – whether a judge, court, tribunal, officer, or other person – is the respondent. A person whose interest would be directly affected by the relief sought is a real party in interest and a party to the case." TEX. R. APP. P. 52.2.

"The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record." TEX. R. APP. P. 52.3(j).

The relator must file with the petition: "(1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding; and (2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained." TEX. R. APP. P. 52.7.

Relators may seek a stay or temporary relief pending decision on the petition, but the court may require a bond. TEX. R. APP. P. 52.10.

The real party in interest need not respond to a mandamus petition. Courts will not grant the petition without first requesting a response. TEX. R. APP. P. 52.4. Replies are permitted, but the court will not wait for one. TEX. R. APP. P. 52.5.

Parties can attempt to obtain consideration of mandamus petitions in the Texas Supreme Court in the first instance if the matter is of "statewide application," and "the urgency of the time constraints" necessitates immediate high court review. *Sears v. Bayoud*, 786 S.W.2d 248, 249-50 (Tex. 1990). These have primarily consisted of election cases.

*** **For a comprehensive overview of mandamus, *see* Warren W. Harris, Jeffrey L. Oldham, Yvonne Y. Ho, *Mandamus Trends*, presented at State Bar of Texas 35th Annual Advanced Civil Trial Course 2012 (July 2012).**

C. Recent Mandamus Developments

1. Mandamus Challenging Decisions Granting Motions for New Trial

a. Mandamus May Be Used to Attack Grants of New Trials Made Without Sufficient Explanation

In 2009, the Texas Supreme Court for the first time permitted parties to challenge the grant of new trials via mandamus if no reasons were given for the trial court's decision beyond "in the interests of justice and fairness." *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204 (Tex. 2009). The court acknowledged that "[o]ur decisions have approved the practice of trial courts failing to specify reasons for setting aside jury verdicts. And our decisions preclude, for the most part, appellate review of orders granting new trials." *Id.* at 208 (citations omitted). But the court decided that protecting the right to jury trials merits mandamus review: "On balance, the significance of the issue – protection of the right to jury trial – convinces us that the circumstances are exceptional and mandamus review is justified. *See In re Prudential,* 148 S.W.3d at 136. Further, we disagree with both Creech and the dissent that granting relief will expand the use of mandamus review. The standards we employ do not expand mandamus principles nor go beyond principles we have previously identified as justifying mandamus review. And, mandamus review remains discretionary, not of right." *Id.* at 209.

The court held that it is an abuse of discretion to fail to provide reasons for granting a new trial:

> Parties to a dispute who choose to have the dispute resolved by a jury and endure the personal and financial inconvenience of such a trial are entitled to know why the verdict was disregarded, regardless of whether the verdict was disregarded by one judge or a panel of judges. So are the jurors whose lives were interrupted so they could serve, and the public that finances the judicial system and depends on its open operations to assure fair processes for dispute resolution. We require appellate courts to explain by written opinion their analyses and conclusions as to the issues necessary for final disposition of an appeal. *See* TEX. R. APP. P. 47.1, 63. If a court of appeals affirms a challenged jury verdict as being supported by factually sufficient evidence, the court need not detail all the evidence in support of the verdict. *Ellis County State Bank v. Keever,* 888 S.W.2d 790, 794 (Tex.1994). But if the court holds that the verdict is not supported by factually sufficient evidence and effectively sets aside the jury verdict by reversing the trial court's judgment, the court must detail all the relevant evidence and explain how it outweighs evidence supporting the verdict or how the verdict is so against the great weight and preponderance of the evidence that it is manifestly unjust.

* * * *

> We are of the opinion that such reasoning is applicable to the issue presented. We do not retreat from the position that trial courts have significant discretion in granting new trials. *Johnson,* 700 S.W.2d at 917. However, such discretion should not, and does not, permit a trial judge to substitute his or her own views for that of the jury without a valid basis. A trial court's actions in refusing to disclose the reasons it set aside or disregarded a jury verdict is no less arbitrary to the parties and public than if an appellate court did so. *See Scott,* 195 S.W.3d at 96; *Gonzalez v. McAllen Med. Ctr., Inc.,* 195 S.W.3d 680, 682 (Tex.2006) (noting that plaintiffs were entitled to a written opinion from the court of appeals stating why the jury's verdict can or cannot be set aside). The trial court's action in failing to give its reasons for disregarding the jury verdict as to Columbia was arbitrary and an abuse of discretion.

Id. at 211-13.

The *Columbia Med. Ctr.* court also held that there is no adequate appellate remedy for unexplained grants of new trials. Traditionally, there has been no appellate review of decisions granting new trials except where the trial court's order was void or where the jury gave conflicting answers to special issues. *See id.* at 209. Bt even were direct appellate review available, it would be inadequate:

> If Columbia suffered an unfavorable verdict, it could not obtain reversal unless it convinced an appellate court that the granting of the new trial was error and that the error either prevented Columbia from properly presenting its case on appeal or probably caused entry of an improper judgment. *See In re Prudential,* 148 S.W.3d at 138. And even if an unfavorable verdict were reversed and rendered in Columbia's favor, Columbia would have lost the benefit of a final judgment based on the first jury verdict without ever knowing why, and would have endured the time, trouble, and expense of the second trial. Under the circumstances, Columbia does not have an adequate appellate remedy.

Id. at 209-10.

b. Minimal Explanatory Detail is Also Insufficient

In *In re United Scaffolding*, the Supreme Court considered an order granting a new trial that provided:

> [T]he Court GRANTS the motion and orders New Trial based upon:
>
> A. The jury's answer to question number three (3) is against the great weight and preponderance of the evidence; *and/or*
>
> B. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant was a proximate cause of injury in the past to Plaintiff, James Levine; *and/or*
>
> C. The great weight and preponderance of the evidence supports a finding that the determined negligence of Defendant supports an award of past damages; *and/or*
>
> D. In the interest of justice and fairness.

377 S.W.3d 685, 687 (Tex. 2012). The court began by noting that, "in considering how detailed a trial court's new-trial order must be, as well as what level of review it is subject to, we must both afford jury verdicts appropriate regard and respect trial courts' significant discretion in these matters." *Id.* It then described the necessary level of specificity:

> A trial court need not provide a detailed catalog of the evidence to ensure that, however subject to differences of opinion its reasoning may be, it was not a mere substitution of the trial court's judgment for the jury's. That purpose will be satisfied so long as the order provides a cogent and reasonably specific explanation of the reasoning that led the court to conclude that a new trial was warranted. Furthermore, in most cases a new trial will be granted for reasons stated in a motion for new trial, so that such an explanation will alert the parties to the reason the judge found persuasive, further illuminating the substantive basis for the order.
>
> In light of these considerations, we hold that a trial court does not abuse its discretion so long as its stated reason for granting a new trial (1) is a reason for which a new trial is legally appropriate (such as a well-defined legal standard or a defect that probably resulted in an improper verdict); and (2) is specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand.
>
> For example, an order granting a new trial may amount to a clear abuse of discretion if the given reason, specific or not, is not one for which a new trial is legally valid. Or, mandamus would lie if the articulated reasons plainly state that the trial court merely substituted its own judgment for the jury's; or that the trial court simply disliked one party's lawyer; or that the reason is based on invidious discrimination.
>
> Moreover, mandamus may lie if the order, though rubber-stamped with a valid new-trial rationale, provides little or no insight into the judge's reasoning. Usually, the mere recitation of a legal standard, such as a statement that a finding is against the great weight and preponderance of the evidence, will not suffice. The order must indicate that the trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings. A trial court abuses its discretion if its new-trial order provides no more than a pro forma template rather than the trial judge's analysis. This two-part test adequately ensures that jury verdicts are not overturned without specific and proper reasons, while still maintaining trial courts' discretion in granting new trials.

Id. at 688-89 (citations omitted). The court reversed the new trial order because the district court's use of "and/or" signified that the "in the interest of justice and fairness" rationale might have been the sole basis for the new trial grant, and because the remaining reasons required elaboration with citation of evidence establishing how the jury's answers contradicted the great weight and preponderance of the evidence. *See id.* at 689-90.

c. The Next Frontier: Will New Trial Grants Be Substantively Reviewed on Mandamus?

Courts of Appeals have disagreed on whether *Columbia Med. Ctr.* and *United Scaffolding* permit them to review whether trial courts have properly granted new trials even though they may have adequately stated the reasons for doing so. Most have denied substantive review: