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

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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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I. MANDAMUS

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:

> In the case at hand, Discount Tire contends the trial court abused its discretion by ordering a new trial when it merely substituted its own judgment for that of the jury. We disagree. The trial court's articulated reasons did not plainly state the trial court merely substituted its own judgment for that of the jury's. The trial court's order provides a reasonably specific explanation of the reasoning that led the trial court to conclude that a new trial was warranted. Accordingly, we conclude the trial court's order satisfies the requirements set out in *In re Columbia* and further articulated in *In re United Scaffolding. Id.* At this time, the Texas Supreme Court has not indicated that any further substantive review of a trial court's order granting of a new trial is appropriate in a mandamus proceeding.

In re Discount Tire Co. of Tex., 2013 WL 241953 at * 1 (Tex. App. – San Antonio 2013); *accord, e.g., In re Skurka*, 2013 WL 865426 at * 4 (Tex. App. – Corpus Christi 2013); *In re Toyota Motor Sales, U.S.A., Inc.*, 327 S.W.3d 302, 305 (Tex. App. – El Paso 2010).

> One court appeared to endorse substantive review:
>
> By stating that the trial court must have a "valid basis" for granting a new trial, the Court is, in effect, authorizing appellate review of the reasons given. Otherwise, who is to say whether the reasons given are "valid"?...
>
> The law does not require a vain or useless act. If we were to determine that the trial court's reasons for granting a new trial were not reviewable on appeal, we would be saying that the court's requirement that a trial court give reasons for its ruling was a useless requirement.

In re Lufkin Indus., 317 S.W.3d 516, 520 (Tex. App. – Texarkana 2010). The court proceeded to analyze the record and reasons given by the trial court for granting the new trial and upheld the grant. In *In re Smith*, however, the Texarkana court backtracked and denied a mandamus petition attacking a new trial grant, holding that the trial court's statement of reasons was sufficient:

> Never in *Lufkin* did we state the proposition that relator now argues: that the appellate court should review the entire record, as in an ordinary appeal, in our mandamus review. If our statements were construed in that manner, we take this opportunity to clarify them. We cannot, in a mandamus proceeding, explore every nook and cranny of the evidence as if we were reviewing an ordinary appeal. In this proceeding, the relator is requesting this Court to review all of the evidence and make a determination of whether it supports the trial court's stated reasons just as if we were reviewing an ordinary appeal on the merits. We do not believe this is the procedure the Texas Supreme Court intended in a mandamus proceeding and we decline the invitation to do so.

332 S.W.3d 704, 708-09 (Tex. App. – Texarkana 2011).

The Texas Supreme Court has now heard argument in a case that will decide whether courts of appeals can use mandamus to review the substance of a trial court's decision granting a new trial, not just whether the court sufficiently stated its reasons for the grant. *See In re Toyota Motor Sales, U.S.A., Inc.*, No. 10-0933 (Tex., argued January 8, 2013). Relators argue:

- The rationales of *Columbia Med. Ctr.* support permitting review: "if the right to know why a new trial has been ordered is important enough to require mandamus correction, then it is even more important to allow mandamus correction when a jury verdict has been set aside for invalid,

insignificant, or improper reasons. Otherwise *Columbia*'s requirement will be an empty formality." Relators' Brf. on the Merits at 28.

- The factors supporting mandamus relief are present in this situation: preserving important rights (here the right to decision from a jury), providing guidance on issues likely to recur but which evade appellate review, and sparing parties from time and expense of retrials. *Id.* at 39.

- Appellate courts are capable of conducting substantive review using the abuse of discretion standard. *Id.* at 45-47.

The Supreme Court will decide whether these grounds justify substantive review or new trial orders.

2. Mandamus Challenging Denials of Leave to Designate Responsible Third Parties

Under TEX. CIV. PRAC & REM. CODE § 33.004, defendants may move for leave to designate responsible third parties who may be liable to the plaintiff for the claim asserted. Section 33.004 also sets forth circumstances requiring the trial court to grant the motion, but courts have disagreed whether there is an adequate appellate remedy for an erroneous denial of leave, and thus whether such a denial can be corrected through mandamus.

Some courts hold that appeal is an inadequate remedy for an erroneous denial of leave under § 33.004. In *In re Brokers Logistics, Ltd.*, the trial court first permitted designation of a doctor as a responsible third party but then granted a motion to strike the designation apparently because the court also dismissed the plaintiff's claims against the doctor and because the designation could affect the doctor's medical license. 320 S.W.3d 402, 404-05 (Tex. App. – El Paso 2010). The court of appeals held that this was an abuse of discretion because the sole allowable basis for denying or withdrawing the designation is lack of evidence of the third party's responsibility. *See id.* at 406-08.

The court also held that the error is not adequately addressed on appeal. First, it held that relators would lose the "valuable right" to demonstrate the third party's liability at trial, since relators had presented some evidence of the doctor's fault. *Id.* at 408. Second, the court held that proving the error caused rendition of an improper judgment in a direct appeal would be difficult: "The denial of Relators' right to designate Dr. Pollet as a responsible third party would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of Relators' defense in ways unlikely to be apparent in the appellate record." *Id.* Finally, failure to address the error through mandamus would waste the parties' and the public's time and resources:

> Finally, we must also consider whether mandamus will spare litigants and the public "the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *In re Team Rocket,* 256 S.W.3d at 262, *quoting Prudential,* 148 S.W.3d at 136. It is beyond dispute that there will be a substantial waste of the litigants' time and money if they to proceed to trial without the error being corrected, proceed through the appellate process only to have the judgment reversed, and then retry the entire case with Dr. Pollet as a designated responsible third party. The additional expense and effort of preparing for and participating in those trials does not, standing alone, justify the issuance of a writ of mandamus. *See Walker,* 827 S.W.2d at 842 (remedy by appeal not inadequate merely because it may involve more delay or cost than mandamus). Where, however, a trial court's error will cause a waste of judicial resources, an appellate court may properly consider that factor in determining the adequacy of an appeal to remedy the error in question. *See id.* at 843.

Id. at 409. Other courts have followed *Brokers Logistics* and permit mandamus review of denials of designations of responsible third parties. *See In re Smith*, 366 S.W.3d 282, 289 (Tex. App. – Dallas 2012); *In re Oncor Elec. Delivery Co., LLC*, 355 S.W.3d 304, 305 (Tex. App. – Dallas 2011).

On the other hand, some courts have found that failures to designate responsible third parties is not correctable through mandamus because direct appeal provides an adequate remedy. In *In re Unitec Elevator Serv. Co.*, the court recognized that denial of the petition would condemn relator to a potentially unnecessary and wasteful second trial. 178 S.W.3d 53, 65 (Tex. App. – Houston [14th Dist.] 2005). "However, we also have to recognize that, in spite of any error committed by the trial court, it is entirely possible that relators, and not the plaintiffs and intervenors, may ultimately prevail at trial. Moreover, it is entirely possible that other errors presented on appeal may necessitate the order of a new trial. Thus, while we may consider the additional expense and effort of preparing for and participating in another subsequent trial, this factor does not, standing alone, justify mandamus relief if there is an adequate remedy by appeal." *Id.* Permitting mandamus review in this situation, the court of appeals held, "would encourage litigants to seek mandamus review of all trial court rulings under chapter 33, even in cases, like here, that do not present extraordinary circumstances… This would have the effect of adding unproductively to the expense and delay of civil litigation by enabling parties to seek extraordinary relief from appellate courts on rulings related to a trial court's management of all kinds of cases, whether exceptional or not." *Id.*; *see also In re Invest. Capital Corp.*, 2009 WL 310899 at * 2 (Tex. App. – Houston [14th Dist.] 2009).

3. Mandamus to Correct Decisions Granting Depositions Under TEX. R. CIV. P. 202

Parties may for petition and trial courts may order pre-suit depositions to perpetuate testimony for use in a future case or to investigate potential claims. TEX. R. CIV. P. 202.1 The court must order the deposition if it would prevent a failure or delay of justice in the anticipated case, and if the deposition's likely benefit outweighs its burden or expense. TEX. R. CIV. P. 202.4.

In *In re Jorden*, the Texas Supreme Court held that a doctor against whom suit is anticipated can use mandamus to challenge a Rule 202 deposition on the ground that it is not allowed under TEX. CIV. PRAC & REM. CODE § 74.351(s), which prohibits discovery against defendant doctors in health care liability cases until expert reports are served. *See* 249 S.W.3d 416 (Tex. 2008). (Orders compelling persons not anticipated to become defendants are appealable as final orders. *See Ross Stores v. Redken Labs, Inc.*, 810 S.W.2d 741, 742 (Tex. 1991)). The court emphasized the legislative judgment that the state suffers from a health care crisis and that doctors therefore deserve exemption from the burdens of discovery prior to service of a qualifying expert report. *See id.* at 420, 424. In light of this legislative judgment, waiting for an appeal would be an inadequate remedy:

> Correcting whichever view is wrong after final judgment seems very unlikely, as it is hard to imagine how allowing discovery a little too early could ever be harmful error—either by causing rendition of an improper judgment or preventing the presentation of an appeal. If (as relators claim) Texas law prohibits presuit depositions until an expert report is served, those depositions cannot be "untaken" and thus an appellate court will not be able to cure the error and enforce the statutory scheme after trial. As a result, relators unquestionably may lose substantive and procedural rights if review is postponed, rights the Legislature believed (as discussed below) are critical to ensuring access to affordable medical care in the state. In the unique circumstances presented here, we hold mandamus relief should be available if the relators can show a clear abuse of discretion.

Id. at 419-20.

Despite *Jorden's* very specific context, the decision has come to stand for the general proposition that any order granting presuit depositions under Rule 202 can be addressed through mandamus. Thus, in *In re Wolfe,* where the trial court erroneously permitted a pre-suit deposition requested by petitioners who could not serve as proper plaintiffs in a subsequent lawsuit, the court found an abuse of discretion and no adequate remedy by appeal. *See* 341 S.W.3d 932, 933 (Tex. 2011). On the appealability point, the Court cited *Jorden* and noted simply: "An improper order under Rule 202 may be set aside by mandamus." *Id.* at 933; *see also In re Anand,* 2013 WL 1316436 at * 2 (Tex. App. – Houston [1st Dist] 2013) ("A writ of mandamus may be appropriate to challenge a trial court's order for pre-suit depositions," citing *Wolfe*).

Yet a Rule 202 petitioner could persuasively argue that *Jorden* does not rationalize mandamus relief for deponents in ordinary, non-health care cases. Where the legislature has not specially protected a class of people from discovery, as with health care providers in § 74.351, the right to avoid a deposition before suit is weaker and more generalized, especially where the deponents are likely to be named as defendants and would therefore be subject to discovery anyway. *See, e.g., Univ. of Texas M.D. Anderson Cancer Ctr. v. Tcholakian,* 2012 WL 4465349 at * 5 (Tex. App. – Houston [1st Dist.] 2012) (permitting presuit deposition against governmental entity despite claims of immunity: "Unlike *In re Jorden,* this case does not involve a comprehensive statutory scheme delineating allowable types of discovery against non-parties; nor does it involve an express legislative prohibition on other types of discovery").

4. Mandamus and Forum Non Conveniens

The defense of forum non conveniens in personal injury lawsuits is governed by TEX. CIV. PRAC & REM. CODE § 71.051. The Texas Supreme Court continues to use mandamus to review trial courts' forum non conveniens decisions, including:

- *In re Perelli Tire, LLC*, 247 S.W.3d 670 (Tex. 2007). In *Perelli Tire*, the court granted mandamus to reverse trial court denial of forum non conveniens motion. The Court held that appeal did not provide an adequate remedy for the same reasons it is inadequate when it comes to enforcing forum selection clauses. *See* id. at 679 (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004), though *Prudential* involved jury waivers rather than forum selection agreements).

- *In re General Electric Co.,* 271 S.W.3d 681 (Tex. 2008). In *General Electric*, the court construed 2003 amendments to § 71.051 intended to reduce the discretion available to trial judges considering forum no conveniens motions. *See id.* at 686. The court held that the legislature's change of "may" to "shall" when setting forth the requirements to dismiss cases "requires dismissal of the claim or action if the statutory factors weigh in favor of the claim or action being more properly heard in a forum outside Texas." *Id.* The court also held that the defendant does not bear the burden of proof in establishing that the statutory factors favor dismissal; rather, "[t]he statute simply requires the trial court to consider the factors, and it must do so to the extent the factors apply. To the extent evidence is necessary to support the positions of the parties, the trial court must base its findings and decision on the weight of the evidence, and certainly is entitled to take into account the presence or absence of evidence as to some issue or position of a party." *Id.* at 687. Finally, the Court held that delay in the time to disposition in the proposed alternate forum – an asbestos MDL – did not require denial of the motion and retention of the case in Texas. "[C]omparative analyses of procedures and substantive law in different forums should be given little weight in forum non conveniens analysis because such analyses pose significant practical problems." *Id.* at 688.

- *In re Ensco Offshore Int'l Co.*, 311 S.W.3d 921 (Tex. 2010). In *Ensco* the Court held that § 71.051 does not require the defendant to show that the factors to be considered in choosing between fora

weigh heavily or strongly in favor of the alternate forum. *See id.* at 928-29. This is a requirement imported from common law forum non conveniens and has no application when deciding under § 71.051: "The statute's language simply does not require that the Section 71.051 factors 'strongly' favor staying or dismissing the suit." *Id.* at 929. The court also rejected the plaintiff's argument that the defendant was required to show that a single, specific alternate forum was adequate to handle the litigation; defendants were permitted to cite multiple alternative fora. *See id.* at 924-25. "Nothing in Section 71.051 indicates the Legislature contemplated the denial of forum non conveniens motions because multiple adequate alternate forums existed, or that a defendant should be required to focus on only one alternate forum to the exclusion of other forums."

- *Quixtar Inc. v. Signature Mgmt. Team LLC*, 315 S.W.3d 28 (Tex. 2010). Because *Quixtar* was not a personal injury suit, § 71.051 did not apply, and forum non conveniens was analyzed under the common law test. *See id.* 30. But the case has one holding that is likely relevant to forum non conveniens under § 71.051. In denying the writ, the court of appeals noted that the defendant had failed to identify witnesses unwilling to appear in Texas and beyond the court's process, quantify the expenses required to procure attendance of its witnesses in Texas, or demonstrate the volume of records outside Texas. *See id.* at 34. Faulting the defendant for these gaps in proof was erroneous, the Supreme Court held: "However, parties do not need to quantify the extra costs of litigating in an undesirable forum in detail for a forum non conveniens dismissal. They only must provide enough information for the trial court to weigh the interests at hand. The court of appeals inappropriately disregarded Quixtar's evidence about the location of its witnesses and records." *Id.* at 34-35.

- *In re Bridgestone Am. Tire Operations LLC*, No. 12-0946 (Tex.), the Texas Supreme Court has ordered and received briefing on the merits in a case involving the application of § 71.051 where a next friend who is a Texas resident filed suit on behalf of Mexican citizens. *See In re Bridgestone Am. Tire Operations LLC*, 387 S.W.3d 840 (Tex. App. – Beaumont 2012). A case may not be dismissed under § 71.051 if the plaintiff is a legal resident of Texas. TEX. CIV. PRAC & REM. CODE § 71.051(e). Defendants argue that the plaintiff, the uncle of children injured in the accident, had no right to bring suit on his nephews' behalf under TEX. R. CIV. P. 44 because the minors have a legal guardian – their grandmother in Mexico, who is guardian by virtue of Mexican law. *See* Relators' Brf. at 15-16. Thus, they claim he is not a "plaintiff" under § 71.051(e) because he cannot legally "seek recovery of damages for personal injury to… another person," namely his nephews. *See id.* at 20 (quoting § 71.051(h)(2)).

- *In re Ford Motor Co.*, No. 12-0957 (Tex.), the Texas Supreme Court has ordered and received briefing on the merits in a case involving the application of § 71.051 where intervenors, some of whom are Texas residents, asserted claims against Ford and Michelin. *See In re Ford Motor Co.*, 2012 WL 5949026 (Tex. App. – Corpus Christi 2012). Under § 71.051(h)(2), third party plaintiffs and cross claimants are not "plaintiffs" for purposes of the exemption from forum non conveniens dismissal under § 71.051(e). The relators argue that intervenors are third party plaintiffs ineligible for the residency exemption, whereas the court of appeals held that only defendants can be third party plaintiffs. *See* 2012 WL 5949026 at * 5; Relators' Brf. at 19-26. Relators also argue that § 71.051(h)(2) requires the decedent and all beneficiaries to be treated as a single plaintiff, and that the decedent's residency – here Mexico – controls. Relators' Brf. at 26-33.

5. Mandamus and Discovery

The Texas Supreme Court and lower courts have used mandamus to review rulings ordering discovery or disclosures relators would otherwise be spared. "Mandamus relief is available when the trial

court compels production beyond the permissible bounds of discovery." *In re Weekley Homes, Inc.*, 295 S.W.3d 309, 322 (Tex. 2009); *see also In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009) ("An order that compels overly broad discovery is an abuse of discretion for which mandamus is the proper remedy"). Yet it is unclear exactly which compelled productions of unnecessary or extraneous material merits mandamus relief and which do not. Discussion in one recent intermediate appellate decision nicely reflects this vagueness:

> A discovery order mandating the disclosure of irrelevant documents does not normally satisfy the standard for mandamus relief. *Tilton v. Marshall,* 925 S.W.2d 672, 682–83 (Tex.1996) (orig. proceeding). However, a party will not have an adequate remedy by appeal when the appellate court would not be able to cure the trial court's discovery error. *Walker v. Packer,* 827 S.W.2d 833, 843 (Tex.1992) (orig. proceeding). This may occur where a discovery order compels the production of patently irrelevant or duplicative documents, such that it 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.

In re Chinn Exploration Co., 349 S.W.3d 805, 809 (Tex. App. – Tyler 2011).

Recent discovery-related mandamus decisions by the Texas Supreme Court and lower courts include:

- *In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009). In *Deere*, the Court held that an order requiring production of information regarding similar backhoes "going back decades" was an abuse of discretion where the plaintiff himself only sought data for the last 15 years. *See id.* at 821. But the Court rejected Deere's objection that some of the backhoes were dissimilar to the product at issue because Deere failed to present evidence substantiating the claim. *See id.*

- *In re Weekley Homes, Inc.*, 295 S.W.3d 309 (Tex. 2009). In *Weekley*, the Court rejected an order requiring the defendant to provide employees' computer hard drives and, therefore, their deleted e-mails to plaintiffs' experts for inspection and retrieval. *See id.* at 315-22. The Court set forth new, more specific and protective procedures for production of electronic material under TEX R. CIV. P. 196.4. Regarding mandamus, the Court observed:

  > Intrusive discovery measures – such as ordering direct access to an opponent's electronic storage device – require, at a minimum, that the benefits of the discovery measure outweigh the burden imposed upon the discovered party. If an appellate court cannot remedy a trial court's discovery error, then an adequate appellate remedy does not exist.
  >
  > In this case, HFG failed to make the good-cause showing necessary to justify the trial court's order. The harm Weekley will suffer from being required to relinquish control of the Employees' hard drives for forensic inspection, and the harm that might result from revealing private conversations, trade secrets, and privileged or otherwise confidential communications, cannot be remedied on appeal.

  Id. at 322-23 (citations and quotations omitted).

- *In re Union Pacific R.R. Co.*, 294 S.W.3d 589 (Tex. 2009). In *Union Pacific*, relator sought relief from an order compelling production of certain rate information it claimed to be a trade secret. *Id.* at 591-92. It relied on testimony from a corporate representative establishing the factors denoting trade secrets under Texas law. The Court held that the plaintiff failed to met her burden to show

necessity for the material. *See id.* at 592-93. It reversed the order compelling production even though the trial court entered a protective order limiting who could have access to the information. *See id.* at 593. It also reiterated that "no adequate appellate remedy exists if a trial court orders a party to produce privileged trade secrets absent a showing of necessity." *Id.* (quotation omitted).

- *In re Whipple*, 373 S.W.3d 119 (Tex. App. – San Antonio 2012). In *Whipple*, the court denied a mandamus petition complaining of certain discovery because the relator waited over a year to object to the order requiring production. *See id.* at 122-23.

6. Other Recent Mandamus Decisions Related to Personal Injury Practice

a. Guardians

In *In re KC Greenhouse Patio Apartments, LP*, the court of appeals granted a mandamus petition filed by a defendant in a personal injury case seeking reversal of a trial court order removing a minor's mother as next friend and installing the child's uncle as next friend and guardian ad litem. *See* __ S.W. 3d __, 2012 WL 3525615 (Tex. App. – Houston [1st Dist.] 2012). The court of appeals held that the trial court's order erred because TEX. R. CIV. P. 44 only permits appointment of a next friend where a minor lacks a guardian, and in this case the child's mother was her guardian despite lack of interest in prosecuting a lawsuit. *See id.* at ** 2-3. "Neither Rule 44 nor Rule 173 permits another person to sue as next friend for a minor who has a legal guardian or permits a court to replace a legal guardian with another person to act as next friend for purposes of pursuing a lawsuit on behalf of a minor." *Id.* at 3. Nor was appointment of the uncle as guardian ad litem proper, since the mother's apparent unwillingness to prosecute the case did not constitute a conflict with the daughter's interests under TEX. R. CIV. P. 173. *See id.* at * 7. The court assumed without analysis that mandamus is the proper vehicle to remove a wrongly appointed next friend or guardian ad litem, and that appeal does not afford an adequate remedy, presumably because the mother's rights would be violated by the continuing arrangement (though the defendant objected rather than the mother). *See id.* at * 9.

b. Arbitration

In *In re Golden Peanut Co., LLC*, the Texas Supreme Court held that a provision of the Texas Labor Code voiding waivers of causes of action against non-subscribers to workers compensation insurance does not preclude arbitration required by a clause contained in an employee benefit plan. *See* 298 S.W.3d 629 (Tex. 2009). Arbitration agreements are not waivers of the right to sue, merely an agreement to pursue claims in a different forum. *See id.; see also In re Odyssey Health Care, Inc.*, 310 S.W.3d 419 (Tex. 2010) (granting mandamus to enforce arbitration clause between non-subscriber and employee).

II. INTERLOCUTORY APPEALS

"Appellate courts have jurisdiction to consider immediate appeals of interlocutory orders only if a statute explicitly provides such jurisdiction." *Tex. A&M University Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). "Because section 51.014(a) is a limited exception to the general rule that a party may appeal only from final judgments or orders, it is strictly construed." *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). Questions of interlocutory appellate jurisdiction are reviewed de novo. *See Koseoglu*, 233 S.W.3d at 840.

Permissive interlocutory appeals are now permitted where "(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX.

CIV. PRAC & REM. CODE § 51.014(d).

*** **For a comprehensive overview of interlocutory appeals, *see* Pamela Stanton Baron and Justice Sue Walker, *Interlocutory Appeals*, presented at State Bar of Texas Civil Appellate Practice 101 (September 5, 2012).**

A. Tex. Civ. Prac & Rem. Code § 51.014

TEX. CIV. PRAC & REM. CODE § 51.014 permits interlocutory appeals of certain orders common in personal injury practice issued by district courts, county courts at law, and county courts. An interlocutory appeal is permitted if it seeks review of an order that:

- grants or denies a special appearance, TEX. CIV. PRAC & REM. CODE § 51.014(a)(7);
- denies a summary judgment motion based on immunity claimed by a state (or subdivision) employee, or grants or denies a plea to the jurisdiction by a governmental entity, TEX. CIV. PRAC & REM. CODE § 51.014(a)(5), (a)(8);
- denies a motion to dismiss a health care liability claim for failure to serve an expert report under TEX. CIV. PRAC & REM. CODE § 74.351, or dismisses for failure to serve an adequate report, TEX. CIV. PRAC & REM. CODE § 51.014(a)(9) -(10); or
- denies a motion to dismiss for failure to serve an expert report or an adequate report in an asbestos or silica case under TEX. CIV. PRAC & REM. CODE § 90.007, TEX. CIV. PRAC & REM. CODE § 51.014(a)(11).

B. Recent Decisions Under § 51.014

1. Decisions Relating to Special Appearances

- *Trenz v. Peter Paul Petroleum Co.*, 388 S.W.3d 796 (Tex. App. – Houston [1st Dist.] 2012). In *Trenz*, the court held that the defendant's argument on appeal that lack of subject matter jurisdiction required dismissal was not interlocutorily reviewable under § 51.014(a)(7) because that section is limited to challenges to personal jurisdiction. *See id.* at 806. To the degree the defendant also challenged personal jurisdiction on appeal, that had been waived for failure to present the argument in the trial court. *See id.*
- *In re J.P.L.*, 359 S.W.3d 695 (Tex. App. – San Antonio 2011, rev. denied). In *J.P.L.*, the court held that it lacked appellate jurisdiction over the defendant's interlocutory appeal under § 51.014(a)(7) because the section expressly exempts suits brought under the Family Code, but would treat defendant's appeal as a petition for writ of mandamus.
- *Town of Flower Mound v. Mockingbird Pipeline, L.P.*, 353 S.W.3d 230 (Tex. App. – Ft. Worth 2011). In *Flower Mound*, the court held that § 51.014(a) does not permit interlocutory appeals from probate courts because the statute is expressly limited to district courts, county courts at law, or county courts. The court acknowledged that other courts had permitted interlocutory appeals from probate courts, but noted that the issue had not arisen in those cases. *See id.* at 238. The Texas Supreme Court granted review in this case, but the appeal was dismissed when the judgment was vacated and remanded by agreement.

2. Decisions Relating to Health Care Liability and

Asbestos/Silica Expert Reports

- *CHCA Woman's Hosp., L.P. v. Lidji,* __ S.W.3d __, 2013 WL 3119577 (Tex. 2013). In *CHCA Woman's Hosp.*, the court held that nonsuit of a health care liability claim before expiration of the statutory deadline to serve the expert report tolls (but does not restart) the period for serving the report.

- *TTHR Ltd. Partnership v. Moreno,* __ S.W.3d __, 2013 WL 1366028 (Tex. 2013). In *TTHR*, the court held that the combined conclusions of three experts were adequate to satisfy expert report requirement, and that the statute did not require an expert report as to each liability theory.

- *Certified EMS, Inc. v. Potts,* 392 S.W.3d 625 (Tex. 2013). In *Certified EMS*, the court held that as long as a health care liability claim contained at least one viable liability theory, evidenced by an expert report meeting statutory requirements, the entire case could proceed.

- *Scoresby v. Santillan,* 346 S.W.3d 546 (Tex. 2011). In *Scoresby*, the court considered the level of adequacy an expert report must meet in order to take advantage of the 30-day extension and cure period in § 74.351(c):

> [W]e hold that a document qualifies as an expert report if it contains a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit. An individual's lack of relevant qualifications and an opinion's inadequacies are deficiencies the plaintiff should be given an opportunity to cure if it is possible to do so. This lenient standard avoids the expense and delay of multiple interlocutory appeals and assures a claimant a fair opportunity to demonstrate that his claim is not frivolous. The expert report before us meets this test, and therefore the trial court's order allowing thirty days to cure deficiencies and denying the defendants' motions to dismiss were not appealable.

Id. at 549.

- *Hernandez v. Ebrom*, 289 S.W.3d 316 (Tex. 2009). In *Hernandez*, the court held that a doctor's failure to take an interlocutory appeal challenging a deficient expert report did not preclude a post-judgment appeal on that ground after the plaintiff nonsuited the case, which resulted in an order dismissing it with prejudice: "The Legislature *authorized* health care providers to pursue interlocutory appeals from trial court denials of challenges to plaintiffs' expert reports, but we see no indication that the Legislature effectively *mandated* interlocutory appeals by providing that if no appeal was taken, then the health care provider waived the right to challenge the report under all circumstances." *Id.* at 319 (emphasis in orig.). This construction furthered the statutory purpose to enable defendants to obtain fees in meritless cases. *See id.* at 320, "Appeals of some interlocutory orders become moot because the orders have been rendered moot by subsequent orders," the Court recognized, but that is not the case with all statutes. *Id.*

- *Stockton v. Offenbach,* 336 S.W.3d 610 (Tex. 2011). In *Stockton*, the court held that the court of appeals' decision to extend the 120-day deadline for serving expert reports in § 74.351(a) is reviewed de novo, not for abuse of discretion based on factual aspects of the question regarding service. The court held that plaintiff's inability to timely serve the report through publication required dismissal.

3. Decisions Relating to Immunity

- *Austin State Hosp. v. Graham,* 347 S.W.3d 298 (Tex. 2011). In *Austin State Hosp.*, the court held that the state could appeal a motion to dismiss based on immunity – not simply a motion for summary judgment: "The point of section 51.014(a)(5), like section 51.014(8), is to allow an interlocutory appeal from rulings on certain issues, not merely rulings in certain forms. Therefore, we hold that an appeal may be taken from orders denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used." *Id.* at 301.

- *Rusk State Hosp. v. Black*, 392 S.W.3d 88 (Tex. 2012). In *Rusk State Hosp.*, the Court held that governmental entities can raise immunity for the first time on appeal because it implicates subject matter jurisdiction, which cannot be waived. *See id.* at 95. "We hold that if immunity is first asserted on interlocutory appeal, section 51.014(a) does not preclude the appellate court from having to consider the issue at the outset in order to determine whether it has jurisdiction to address the merits." *Id.* But if immunity is first considered on appeal, the plaintiff must be protected:

  > Under such circumstances appellate courts must construe the pleadings in favor of the party asserting jurisdiction, and, if necessary, review the record for evidence supporting jurisdiction. In some instances the pleadings or record may conclusively negate the existence of jurisdiction, in which case the suit should be dismissed. But if the pleadings and record neither demonstrate jurisdiction nor conclusively negate it, then in order to obtain dismissal of the plaintiff's claim, the defendant entity has the burden to show either that the plaintiff failed to show jurisdiction despite having had full and fair opportunity in the trial court to develop the record and amend the pleadings; or, if such opportunity was not given, that the plaintiff would be unable to show the existence of jurisdiction if the cause were remanded to the trial court and such opportunity afforded. If the governmental entity meets this burden, then the appellate court should dismiss the plaintiff's case.

  Id. at 96.

- *City of Houston v. Estate of Jones*, 388 S.W.3d 663 (Tex. 2012). In *Estate of Jones*, the court held that a plea to the jurisdiction based on immunity filed by the city simply reurged issues argued in an earlier plea and so had to be appealed within twenty days of the original plea under TEX. R. APP. P. 26.1(b).

- *Tex. A&M University Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). In *Koseoglu*, the court held that individual governmental employees could take interlocutory appeals under § 51.014(a)(8), despite that section's express reference to "governmental unit[s]" only. "There is no reason to believe the Legislature intended the statute to apply to all parties who ordinarily would have standing to appeal an interlocutory order granting or denying a jurisdictional plea with the sole exception of state officials… [C]onstruing Section 51.014(a)(8) to exclude state officials would draw an artificial distinction between pleas filed by governmental entities and pleas filed by state officials asserting the entities' sovereign immunity from suit, a distinction we believe the Legislature could not have intended." *Id.* at 844.

- *Klein v. Hernandez*, 315 S.W.3d 1 (Tex. 2010). In *Klein*, the court held that a resident physician at a state hospital by virtue of its agreement with his private medical school qualified as a state employee for purposes of interlocutory appeal following denial of his motion for summary judgment based on immunity.

- *City of Webster v. Myers,* 360 S.W.3d 51 (Tex. App. – Houston [1st Dist.] 2011, rev. denied). In *City of Webster*, the court held that the city could take advantage of the interlocutory appeal

afforded individuals under § 51.014(a)(5) because "[c]ourts have indicated that when a governmental unit seeks dismissal of the claims against an employee under subsection 101.106(e) – ["If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit"] – such action is based on an assertion of immunity." *Id.* at 55. It is immaterial that the government sought dismissal on the individual's behalf rather than the individual making the motion. *See id.*

- *Cen-Tex Childcare v. Johnson*, 339 S.W.3d 734 (Tex. App. – Ft. Worth 2011). In *Cen-Tex Childcare*, the court held that a private state contractor entity cannot take advantage of § 51.014(a)(5) as a putative "employee of the state" because it is an independent contractor excluded from the definition of employee under TEX. CIV. PRAC & REM. CODE § 101.001(2):

> Cen–Tex confuses its potential entitlement to official immunity after a final adjudication of the case with its entitlement to immediate appellate review of an interlocutory order denying a motion for summary judgment. The issue presented by Appellees' motion to dismiss is not whether Cen–Tex may ultimately be entitled to official immunity but is instead whether Cen–Tex is "an individual who is an officer or employee of the state"... Regardless of whether Cen–Tex may ultimately be entitled to official immunity because of its contract with the Department, Cen–Tex cannot seek immediate appellate review of the trial court's interlocutory order denying its motion for summary judgment because it is not 'an individual who is an officer or employee of the state."

Id. at 737

B. Other Statutes Permitting Interlocutory Appeals Relevant to Personal Injury Practice

1. Interlocutory Appeals of Venue Decisions in Multi-Plaintiff suits.

TEX. CIV. PRAC & REM. CODE § 15.003(a) provides:

> In a suit in which there is more than one plaintiff, whether the plaintiffs are included by joinder, by intervention, because the lawsuit was begun by more than one plaintiff, or otherwise, each plaintiff must, independently of every other plaintiff, establish proper venue. If a plaintiff cannot independently establish proper venue, that plaintiff's part of the suit, including all of that plaintiff's claims and causes of action, must be transferred to a county of proper venue or dismissed, as is appropriate, unless that plaintiff, independently of every other plaintiff, establishes that:
>
> (1) joinder of that plaintiff or intervention in the suit by that plaintiff is proper under the Texas Rules of Civil Procedure;
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> (2) maintaining venue as to that plaintiff in the county of suit does not unfairly prejudice another party to the suit;
>
> (3) there is an essential need to have that plaintiff's claim tried in the county in which the suit is pending; and
>
> (4) the county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against whom the suit is brought.

2. Interlocutory Appeals of Orders Granting or Denying Motions to Dismiss For Failure to File Certificates of Merits in Cases Against Licensed Professionals

TEX. CIV. PRAC & REM. CODE § 150.002(b) requires a plaintiff to file an affidavit by a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor setting forth the defendant's negligence and other information. Failure to file the affidavit requires dismissal, § 150.002(e), and § 150.002(f) permits interlocutory appeals of such dismissals.

3. Interlocutory Appeals of Orders Denying Applications to Arbitrate

TEX. CIV. PRAC & REM. CODE § 171.098 provides for interlocutory appeals of orders denying applications to arbitrate under the Texas Arbitration Act:

> (a) A party may appeal a judgment or decree entered under this chapter or an order:
>
> (1) denying an application to compel arbitration made under Section 171.021;
>
> (2) granting an application to stay arbitration made under Section 171.023;
>
> (3) confirming or denying confirmation of an award;
>
> (4) modifying or correcting an award; or
>
> (5) vacating an award without directing a rehearing.
>
> (b) The appeal shall be taken in the manner and to the same extent as an appeal from an order or judgment in a civil action.

TEX. CIV. PRAC & REM. CODE § 51.016 permits interlocutory appeals of orders denying arbitration under the Federal Arbitration Act "under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16."

"Mandamus is the appropriate procedure by which we may review the trial court's ruling on a motion to compel arbitration under the common law." *Royston, Rayzor, Vickery & Williams, L.L.P. v. Lopez*, __ S. W.3d __, 2013 WL 3226847 (Tex. App. – Corpus Christi 2013).

C. Texas Supreme Court Jurisdiction Over Court of Appeals Decisions in Interlocutory Appeals is Limited

TEX. GOV'T CODE § 22.225(b) provides that decisions of the courts of appeals in interlocutory appeals are generally final, but:

> This section does not deprive the supreme court of jurisdiction of a civil case brought to the court of appeals from an appealable judgment of a trial court in which the justices of the courts of appeals disagree on a question of law material to the decision or in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court, as provided by Subdivisions (1) and (2) of Section 22.001(a).

TEX. GOV'T CODE § 22.225(c). "Interlocutory appeals such as this are generally final in the court of

appeals. TEX. GOV'T CODE § 22.225(b)(3). However, there are exceptions, and, as relevant here, we may review an interlocutory appeal when the intermediate court's decision conflicts with a prior decision of another court of appeals, or of this Court." *City of Houston v. Williams*, 353 S.W.3d 128, 133 (Tex. 2011).

The Texas Supreme Court also has jurisdiction over petitions for review from interlocutorily appealable decisions in asbestos and silica cases. TEX. GOV'T CODE § 22.225(d).

Finally, the Texas Supreme Court may review the jurisdictional decisions of courts of appeals in interlocutory appeals. *See LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011).

D. Procedure

Interlocutory appeals are accelerated under TEX. R. APP. P. 26.1. This shortens deadlines governing when the appeal must be noticed and briefed and results in priority consideration by the court of appeals.

TEX. CIV. PRAC & REM. CODE § 51.014 also provides for stays when interlocutory appeals are filed:

> (b) An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4), stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), or (8) also stays all other proceedings in the trial court pending resolution of that appeal.
>
> (c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:
>
> > (1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or
> >
> > (2) the 180th day after the date the defendant files:
> >
> > > (A) the original answer;
> > >
> > > (B) the first other responsive pleading to the plaintiff's petition; or
> > >
> > > (C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.