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What's New in Early Review: Recent Developments in Mandamus and Interlocutory Appeal

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Table of Contents

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Interlocutory appeals and mandamus proceedings create significant opportunities to determine important legal questions without the necessity of a trial or final judgment. This paper highlights recent developments and emerging trends in early appellate review that every trial lawyer should know.

The first half of this paper discusses statistics and general attitude of the appellate courts about early review. The second half of the paper discusses the issues being decided in interlocutory appeals and mandamus proceedings.

Statistics and Attitude on Mandamus and Interlocutory Appeals

1. Early review continues to be on the rise.

Today, appellate courts see an unprecedented number of early review cases. Interlocutory appeals have been described as "the new norm." Justice Sue Walker, *Interlocutory Appeals*, CIVIL APPELLATE PRACTICE 101 (SBOT 2012). Although the legislature did not add any new interlocutory appeals in 2015, the two prior sessions saw more than three new categories of appeals and other increases in the availability of interlocutory review.

Increasing mid-case review burdens the system and the parties. "Interlocutory appeals are disruptive, time-consuming, and expensive." *Hernandez v. Ebrom*, 289 S.W.3d 316, 322 (Tex. 2009) (Jefferson, C.J., dissenting). "[P]rotected pretrial proceedings and multiple interlocutory appeals," then Justice Hecht wrote about interlocutory appeals of orders ruling on challenges to expert reporters under the Medical Liability Act, are "threatening to defeat the Act's purpose by increasing costs and delay that do nothing to advance claims resolution." *Loaisiga v. Cerda*, 379 S.W.2d 248, 264 (Tex. 2012) (Hecht, J., concurring and dissenting). The increase in interlocutory review, warns Justice Sue Walker, also "impact[s] the ability of the courts of appeals to timely handle and process non interlocutory, non accelerated appeals." Justice Sue Walker, *Interlocutory Appeals*, CIVIL APPELLATE PRACTICE 101 (SBOT 2012).

But credit or blame for the astonishing amount of pre-trial appellate activity is not for the Legislature alone. The Texas Supreme Court shares responsibility. As shown below, the Court has shown a willingness to read broadly the interlocutory appeal statute. It also has exhibited a rather expansive approach to mandamus review.

No surprise then that approximately 30 percent of the Texas Supreme Court's opinions the last three terms came to the Court through interlocutory appeal or mandamus.

2. The Court continues to expand appellate jurisdiction over interlocutory appeals.

The Texas Supreme Court issued several opinions last term that continued the Court's trend of expanding appellate courts' jurisdiction over interlocutory appeals.

An interlocutory order is appealable "only if a statute explicitly provides appellate jurisdiction." *Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998) (per curiam). An appellate court commits fundamental error in exercising jurisdiction over an interlocutory order in the absence of express statutory authority. *N.Y.*

Underwriters Ins. Co. v. Sanchez, 799 S.W.2d 677, 679 (Tex. 1990) (per curiam). The Court has held that appellate courts must strictly construe statutes authorizing interlocutory appeals. *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007) ("We strictly construe Section 51.014(a) as 'a narrow exception to the general rule that only final judgments are appealable.'").

Recent decisions from the Supreme Court, however, demonstrate a more generous approach to jurisdiction than these rote statements suggest. The Court has repeatedly—and in a variety of contexts—overturned courts of appeals' decisions refusing to exercise jurisdiction over an interlocutory appeal. *Rice Univ. v. Refaey*, 459 S.W.3d 590, 594 (Tex. 2015) (private university peace officers are "officers of the state" for purposes of immunity because they are authorized to enforce state laws within their jurisdictions and, as such, act as officers of the state); *Phillips Petroleum Co. v. Yarbrough*, 405 S.W.3d 70, 80 (Tex. 2013) (trial court order refusing to dismiss new claims in class action reviewable as a class certification order because new claims altered fundamental nature of class); *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73 (Tex. 2011) (holding that an open-enrollment charter school is a governmental unit as defined in the Tort Claims Act for purposes of taking an interlocutory appeal from a trial court's denial of its plea to the jurisdiction); *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 300-01 (Tex. 2011) (appeal may be taken from orders denying an assertion of immunity regardless of the procedural vehicle used); *Klein v. Hernandez*, 315 S.W.3d 1 (Tex. 2010) (medical or dental school employees are treated like state employees under the Tort Claims Act and may bring interlocutory appeal).

The Supreme Court has also expanded its own jurisdiction over interlocutory appeals, which are generally final in the court of appeals in the absence of a conflict, disagreement (usually a dissent), or special statute (which, for example, allow Supreme Court review of class certification orders, media summary judgment motions, orders on dismissal in certain asbestos and silicosis cases, and permissive appeals). The Court recognized another avenue in *Stockton v. Offenbach*, 336 S.W.3d 610 (Tex. 2011). Stockton brought a healthcare liability claim against Offenbach but did not timely serve an expert report because the defendant could not be found. The trial court refused to dismiss, and by statute an interlocutory appeal was permitted to the court of appeals. The court of appeals held that the time deadline for obtaining service recognized no exceptions and that the trial court should have dismissed. It remanded the case to the trial court with instructions to render judgment. Stockton then sought Supreme Court review. The Court held that Stockton was not required to show a conflict or a disagreement "because the court of appeals disposition of the interlocutory appeal [requiring the trial court to dismiss] is essentially the final judgment in the case." So, petitioners looking for a creative way to invoke Supreme Court jurisdiction should consider the effect of the lower courts' dispositions to see if they have the effect of a final resolution of the case.

Conflicts jurisdiction, however, is not terribly difficult to establish. The Court may only hear an interlocutory appeal in "a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case." TEX. GOV'T CODE §§22.001(a)(2); 22.225(c). Previously, conflicts jurisdiction was only established if the rulings in the two cases were "so far upon the same state of facts that the decision of one case [was] necessarily conclusive of the decision in the other." *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex.1998). In 2003, however, "the Legislature redefined and broadened" the Court's conflicts jurisdiction. *City of San Antonio v. Ytuarte*, 229 S.W.3d 318, 319 (Tex. 2007) (per curiam). Today, one court "holds differently" from another "when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *Id.* §22.001(e).

Evidence of the distance between the new and old standard is best shown by the Court's recent opinion in *Lubbock Co. Water Control & Improvement Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 n.3

(Tex. 2014). The issue in *Lubbock Co.* was whether a lease agreement constituted a written contract for "goods and services" to a governmental entity under Chapter 271 of the Texas Local Government Code. The Court found a conflict in how "services" had been defined in two prior cases. One was an immunity case. It alone may have established the Court's conflicts jurisdiction. But the Court also cited a case that defined "services" under the Deceptive Trade Practices Act. Thus, *Lubbock Co.* may be used to argue that "inconsistency" and "uncertainty in the law" may be based on alleged conflicts between two different and unrelated statutes. This is a far cry from the pre-2003 conflicts standard and shows that the jurisdictional bar to high court review in interlocutory appeals is not high.

That said, should you find yourself hoping to evade review based on the lack of a conflict, remember the time-honored principles that (1) the conflict must be on a *material* question of law; and (2) a mere *misapplication* of a settled legal principle does not create conflicts jurisdiction. *See* E. Lee Parsley, Changes to Supreme Court Jurisdiction, 24 THE ADVOC. 53, 56 (2003) ("The Government Code amendments do not change the requirement that the conflict be on a material question of law announced in a prior decision of an appellate court. Furthermore, as before, the erroneous application of a legal principle will not establish conflict jurisdiction nor will a conflict with an unpublished opinion."). *See also Gonzalez v. Avalos*, 907 S.W.2d 443, 444 (Tex. 1995) ("An apparent inconsistency . . . in the application of recognized principles" will not create conflicts jurisdiction); *see also Mooers v. Hunter*, 67 S.W.2d 860, 861 (Tex. Comm'n App. 1934, recommendation accepted); *Garitty v. Rainey*, 247 S.W. 825, 827 (Tex. 1923).

3. The current Court exhibits a permissive view of mandamus review.

In 2004, the landscape of Texas mandamus practice changed. Historically, the Supreme Court viewed the lack of an adequate remedy at law as a "fundamental tenet" of mandamus practice that served the goals of avoiding unnecessary encroachment on the jurisdiction of the trial courts in incidental pretrial rulings and maintaining the "extraordinary" nature of the writ. *Walker v. Packer*, 827 S.W.2d 833, 840, 842 (Tex. 1992) In the *Walker v. Packer* "era," the Court had taken the approach of defining categories of circumstances in which an appellate remedy was, and was not, adequate.

But the landmark decision of *In re Prudential* largely replaced *Walker*'s categorical approach to the adequacy of appellate remedy with a cost-benefit balancing test. 148 S.W.3d 124 (Tex. 2004). *Prudential* viewed the adequacy of an appellate remedy as "simply a proxy for the careful balance of jurisprudential considerations," including both public and private interests, that inform whether courts will exercise mandamus review. *Id.* at 135–36. "An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments." *Id.* at 136. The adequacy of appellate remedy, the Court explained, "depends heavily on the circumstances presented and is better guided by general principles than by simple rules." *Id.* at 137.

Prudential was criticized from its issuance. *See, e.g.*, Richard E. Flint, "The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More Mile Marker Down the Road of No Return," 39 St. Mary's L. J. 3, 143 (2007).

But the debate about *Prudential* heated when Justice Wainwright, a part of the majority in *Prudential*, wrote a scathing dissent in *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 466 (Tex. 2008). "A whole new world in mandamus practice, hinted by opinions in the last few years, is here." *Id.* at 470 (Wainwright, J., dissenting). Justice Wainwright lamented the "Court's heavy reliance on costs and delay to support its conclusion" that a hospital has no adequate remedy by appeal when a trial court refuses to dismiss a medical malpractice claim for lack of an adequate expert report. *Id.*

Soon thereafter, commentators studied the Court's mandamus docket and noted that "the raw numbers make it impossible to deny that the court has increasingly accepted mandamus as a normal and important segment of its docket." Kurt Kuhn, "Mandamus Is Not A Four-Letter Word," University of Texas School of Law, 18th Annual Conference on State and Federal Appeals, at 7 (May 2008). The statistics showed that the number of filings of mandamus petitions did not increase, despite predictions that they would. *Id.* But, still, the commentators noted, "post-*Prudential* has seen a dramatic increase in the number of mandamuses that the court grants"—"a 450% increase over the prior five years." *Id.* at 8.

A decade later, those numbers are leveling a bit:

Mandamus Petitions in Supreme Court			
Year	**Filed**	**Granted**	**% Granted**
2000	276	6	2.1%
2001	255	6	2.3%
2002	269	7	2.6%
2003	267	3	1.1%
2004	268	3	1.1%
2005	255	22	8.6%
2006	235	24	10.2%
2007	231	21	9.0%
2008	244	21	8.6%
2009	273	20	7.3%
2010	264	24	9.0%
2011	223	12	5.3%
2012	203	17	8.3%
2013	224	8	3.5%
2014	216	12	5.5%
2015	192	14	7.3%
AVERAGE	**243**	**14**	**5.7%**

As previously reported, there is a significant and undeniable spike in grant rate around the time of *Prudential*. The average grant rate before *Prudential* (2000-2004) was only 1.8%. The six years following *Prudential* (2004-2010), the grant rate jumped to 8.8% (which is close to the historical 10% grant rate for petitions for review). In the last five years (2011-2015), the grant rate has dropped a bit, down to 6.1%. But, still, that rate is nowhere near as low as the 1.8% grant rate before *Prudential*.

Interestingly, though, despite the increased grant rate, the *Prudential* cost-benefit analysis has been a non-issue in the Court's mandamus jurisprudence the last three terms. In over 30 opinions issued in mandamus proceedings, only two even arguably weigh the benefits and detriments to mandamus review.

The petitioner in *In re Connor* complained about a trial court's failure to dismiss a claim for lack of prosecution. 458 S.W.3d 532 (Tex. 2015) (per curiam). The Court held that the plaintiff's failure to provide good cause for their nearly-decade long delay in prosecuting their suit mandated dismissal. As to whether the error could be remedied on appeal, the Court said no:

> A defendant should not be required to incur the delay and expense of appeal to complain of delay in the trial court. To deny relief by mandamus permits the very delay dismissal is

> intended to prevent. In addition, the danger that a trial will be hampered by stale evidence and lost or clouded memories is particularly distinct after the [10-year] delay in this case.

Id. at 535. *See also In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (per curiam) (discussed in detail later but, with regard to adequate appellate remedy, offering only a single line: "In light of the conflict of interest and prejudice that we have noted above, we conclude that mandamus relief is appropriate to spare the parties and the public the time and money spent on fatally flawed proceedings.").

Beyond these two cases, the Court's opinions were either completely silent about the adequacy of the remedy or fell back to the categorical approach that *Prudential* supposedly abandoned. *See In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d 565, 569 (Tex. 2015) ("We have held that a trial court's erroneous denial of a forum-non-conveniens motion cannot be adequately remedied on appeal and therefore warrants mandamus relief." (citing *In re Gen. Elec. Co.*, 271 S.W.3d 681, 685 (Tex. 2008)); *In re Ford*, 442 S.W.3d 265, 269 (Tex. 2014) ("We have held that no adequate remedy by appeal can rectify an erroneous denial of a forum non conveniens motion. Neither party questions the propriety of this holding." (citing *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007)); *In re Lee*, 411 S.W.3d 445, 450 n.7 (Tex. 2014) ("Mandamus relief is available to remedy a trial court's erroneous refusal to enter judgment on an MSA." (citing *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 659 (Tex.1996)). *See also In re Vaishangi, Inc.*, 442 S.W.3d 256, 261 (Tex. 2014) ("When the trial court nevertheless heard the motion and issued an order enforcing the settlement agreement, the trial court exceeded its jurisdictional authority. In these instances, mandamus is proper even without a showing that the relator lacks an adequate remedy on appeal." (citations omitted)).

In fact, only two sitting justices seem outwardly concerned about the Court's overreaching on mandamus. Justice Willett, with Justice Lehrmann concurring, have twice expressed their view that "the Court has stretched our mandamus jurisprudence beyond its constitutional and prudential limits." *In re Nestle USA Inc.*, 387 S.W.3d 610, 626 (Tex. 2012) (Willett, J., dissenting); *see also In re Allcat Claims Service, L.P.*, 356 S.W.3d 455, 474–93 (Tex. 2011) (Willett, J., dissenting). Justice Willett wrote powerfully: "Mandamus is not a jurisdictional talisman to conjure instant Supreme Court review." *Nestle*, 387 S.W.3d at 626. The mandamus hesitance of these two justices, however, may be limited to the particular Tax Code provision at issue in that case, which was a special statutory grant of original jurisdiction, according to the majority.

In addition to the conspicuous omission of any *Prudential* analysis, the Court's lax attitude about mandamus may also be evidenced by the sheer number of mandamus opinions last term that were unsigned, per curiam opinions. There were 14 opinions issued in mandamus proceedings that term, and 8 of those opinions were per curiam opinions.

Why is this noteworthy? Per curiam opinions are typically employed to resolve "routine, non-controversial issues." Justice Debra H. Lehrmann, The Per Curiam Opinion and the Texas Supreme Court: A Long-Standing and Controversial Relationship, Practice Before the Texas Supreme Court (SBOT 2011), at *1. A mandamus petition, on the other hand, seeks "extraordinary relief." TEX. R. APP. P. 52.1. This raises the question of whether extraordinary relief should be given in a routine manner.

The 2014 statistics, if carried into the future, open the age-old question of the Court's role in error correction. "Proponents of error correction feel that supreme courts have a duty to provide justice to individual parties and rectify misinterpretation, while critics maintain that courts of last resort should only spend their time handling issues that concern controversial, broad-sweeping questions of law." Lehrmann, at 7. Former Justice Brister, a proponent of error correction, would add that "error correction is a beneficial practice because it can ultimately create a significant impact within the state's court system. While an issue in

one case might seem trivial, if the issue comes up repeatedly, rectifying the error could end up having a substantial impact to a large number of litigants." *Id.*

Justice Brister is correct that the per curiam opinions issued in 2014 will have a substantial impact on litigants. Many of the per curiam opinions arose from discovery disputes. For example, in *In re Ford*, the Court refused a litigant discovery intended to show the bias of a defense expert. 427 S.W.3d 396 (Tex. 2014). The trial court ordered production of financial and business information for all cases the companies have handled for Ford or any other automobile manufacturer from 2000 to 2011. "[S]eeking sensitive information covering twelve years," the Court held, was an impermissible "fishing expedition." *Id.* at 397.

Another important discovery case is *In re National Lloyd's Ins. Co.*, 449 S.W.3d 486 (2014) (per curiam). This case involved allegations by an insured that the insurer, National Lloyd's, had undervalued and underpaid her claims stemming from damage from a series of storms in Cedar Hill near Dallas. The trial court ordered production of claim files for properties in the same city and from the same storms that damaged the insured's home. The insured argued that the discovery was relevant and necessary to prove that the adjusters had "established a baseline" for damages and compared her claims to that baseline without properly inspecting or valuing her individual property. The insured contended this information would support her claims of bad faith and fraud.

But the Supreme Court did not agree. The court noted there was "at best a remote possibility that request would lead to admissible evidence." *Id.* at 489. It further stated that "[s]couring claim files in hopes of finding similarly situated claimants whose claims were evaluated differently from [the insured's] is at best an 'impermissible fishing expedition.'" *Id.*

These cases show that the Court is willing to "error correct" even narrowly tailored orders that are overly broad. Some might say this is not the Court's role. Justice Brister might argue that this is precisely the role of the Court—to send the important jurisprudential message that all fishing is prohibited, one routine per curiam opinion at a time.

4. Permissive appeals are disfavored by the courts of appeals.

With its discretionary review an ever-present safe-valve to expanded jurisdiction, the Supreme Court probably feels little heartburn over having its interlocutory appeal and mandamus jurisdiction expanded. But the intermediate courts of appeals certainly do. It is no surprise, then, to see them resisting the modern trend of easy early review. Nowhere is this better seen than in studying the development of the law with regard to permissive appeals.

Since 2001, Texas has had a mechanism under CPRC §51.014(d) by which parties could seek appeal of an interlocutory order that was not otherwise expressly appealable. The statute was amended in 2005 and 2011. Under the most current version, an appellate court may accept jurisdiction over an interlocutory order if both the trial court and the appellate court agree. TEX. CIV. PRAC. & REM. CODE §51.014(d), (f); *see* TEX. R. CIV. P. 168 (requiring the district to state its "[p]ermission . . . in the order to be appealed"); TEX. R. APP. P. 28.3(a) ("When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.").[1]

[1] This current version of the permissive appeal statute and rule applies only to cases filed in the trial court on or after September 1, 2011. *See* Act of Sept. 1, 2011, 82nd Leg., R.S., ch. 203, § 6.01; TEX. R. APP. P. 28.3 cmt.

Previous versions required the parties to agree to the interlocutory appeal. Party agreement is no longer required.

To be entitled to a permissive appeal under Section 51.014(d), a party must establish that: "(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."

Taking a permissive appeal is a multi-step process. First, the trial court must permit the appeal. Texas Rule of Civil Procedure 168 provides that:

- Permission to appeal an interlocutory order may be made on a party's motion or on the trial court's own initiative;
- Permission to appeal must be stated in the order to be appealed from;
- A previously issued interlocutory order may be amended to state that permission to appeal is given;
- The order must identify the controlling question of law as to which there is a substantial ground for difference of opinion; and
- The order must state why an immediate appeal may materially advance the ultimate termination of the litigation.

TEX. R. CIV. P. 168. The key provision is the one allowing the trial court to amend a previously-issued interlocutory order to add permission to appeal.

The court of appeals must also agree to hear the appeal. A party seeking to appeal the interlocutory order must file a petition asking the court of appeals for permission within 15 days after the order to be appealed is signed (or amended to allow the appeal). TEX. R. APP. P. 28.3(a), (c). The petition essentially combines the elements of a notice of appeal with those of a petition for review filed in the Supreme Court. The petition must provide:

- The information required by TEX. R. APP. P. 25.1(d) for a notice of appeal (trial court, trial court style and number, date of order, name of each party filing notice, statement that desire to appeal, court of appeals to which appeal taken, and a statement that the appeal is accelerated);
- A copy of the order to be appealed;
- A table of contents, index of authorities, issues presented, and a statement of facts;
- Arguments stating clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal may materially advance the ultimate termination of the litigation; and
- A certificate of service showing service on all parties.

TEX. R. APP. P. 28.3(e). In addition to the petition, the petitioning party must also file a docketing

statement as required by TEX. R. APP. P. 32.1.

The court of appeals then determines whether to grant the petition to appeal. If the court of appeals grants the petition, a notice of appeal is deemed to have been filed on the date permission is granted. The appeal would than proceed under the rules for accelerated appeals, which impose shortened deadlines for filing the record and briefs. *See* TEX. R. APP. P. 35.1 (record to be filed within 30 days after notice of appeal is filed), 38.6 (shortened timeline for briefs in accelerated appeal).

So far, the courts of appeals seem skeptical of permissive appeals. Courts are quick to deny (or dismiss for lack of jurisdiction) a petition that fails to strictly comply with the procedural requirements in Rules 168 or 28.3. *See, e.g.*, *Heinrich v. Strasburger & Price, L.L.P.*, No. 01-15-00473-CV, 2015 WL 5626507 (Tex. App.—Houston [1st Dist.] Sept. 24, 2015, no pet. h.) (per curiam) (mem. op.) (dismissing for lack of jurisdiction because trial court signed separate order permitting appeal instead of amending order to be appealed); *Estate of Marshall*, No. 04-15-00521-CV, 2015 WL 5245268, *2 (Tex. App.—San Antonio Sept. 9, 2015, no pet. h.) (per curiam) (mem. op.) (denying petition because order granting permission to appeal omitted why an immediate appeal may materially advance the ultimate termination of the litigation).

They also will strictly construe the statutory grounds for appeal, *i.e.*, that the appeal presents a controlling legal question that will materially advance the litigation. *See, e.g.*, *Gulf Coast Asphalt Company, L.L.C. v. Lloyd*, 457 S.W.3d 539, 545 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (dismissing appeal for lack of jurisdiction because not convinced the issue presented was controlling and also questioning whether the parties can add to the judge's description of the controlling issue of law); *Austin Commercial, L.P. v. Texas Tech Univ.*, No. 07-15-00296-CV, 2015 WL 4776521 (Tex. App.—Amarillo Aug. 11, 2015, no pet. h.) (per curiam) (dismissing appeal for want of jurisdiction which raised whether contract was ambiguous); *Vestalia, Ltd. v. Taylor-Watson*, No. 01-15-00332-CV, 2015 WL 3799505 (Tex. App.—Houston [1st Dist.] June 18, 2015, no pet.) (per curiam) (mem. op.) (general denial of summary judgment raising four issues does not show controlling issue of law); *Undavia v. Avant Medical Group, P.A.*, No. 14-15-00378-CV, 2015 WL 3524234 (Tex. App.—Houston [14th Dist.] June 4, 2015, no pet.) (dismissing appeal for lack of jurisdiction because legal issue required a determination of whether an agency relationship exists, which was a fact question); *Stewart Title Co. v. Vantage Bank Tex.*, No. 04-15-00228-CV, 2015 WL 2124802 (Tex. App.—San Antonio May 6, 2015, no pet.) (per curiam) (mem. op.) (same). *See also College Station Med. Ctr., LLC v. Kilaspa*, No. 10-14-00374-CV, 2015 WL 4504361, at *5 (Tex. App.—Waco July 23, 2015, pet. filed) (Gray, J., dissenting) (identifying "several problems" that "show why we should be so very careful when we agree to accept a permissive appeal from an interlocutory order," and noting he would hold that "permission was improvidently granted").

To be sure, parties can successfully convince a court of appeals that the case meets the standards in 51.014(d). *See, e.g.*, *Arlington Surgicare Partners, Ltd. v. CFLS Investments, LLC*, No. 02-15-00090-CV, 2015 WL 2266535 (Tex. App.—Fort Worth May 14, 2015, no pet. h.) (per curiam) (order granting permission to appeal on issue of whether contract allowed general contractor to consent to investment); *Montalvo v. Lopez*, No. 04-14-00803-CV, 2015 WL 1639580 (Tex. App.—San Antonio April 8, 2015, pet. filed) (granting petition raising whether limitations provision on Medical Liability Act is unconstitutional as applied to minor); *Davis v. Montiva Enterprises, LLC*, No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App.—Beaumont, pet. denied) (mem. op.) (reviewing interlocutory order dismissing claims under Communications Decency Act) But petitions are still more likely than not to be denied.

5. Take it or lose it: will foregoing your right to immediate review waive your right to raise the error on appeal from final judgment?

Texas law is pretty clear—though not certain—that an interlocutory appeal under §51.014 is permissive and not mandatory; a litigant does not waive its right to challenge the order on final judgment when it elects not to pursue an immediate appeal of the order. Because of the uncertainty, a thoughtful litigant will assess the current status of the law on this issue before deciding to forego the expense and delay of an otherwise valid interlocutory appeal.

The key case is *Hernandez v. Ebrom*, 289 S.W.3d 316 (Tex. 2009)—a med mal suit. The doctor filed a motion to dismiss based on an insufficient expert report. The trial court denied the motion. The doctor elected not to appeal. Six months later and shortly before trial, the plaintiff nonsuited, and the court dismissed the case with prejudice. Wanting to avail itself of a provision in the med-mal statute that allows for the recovery of attorney fees for the failure to file an adequate expert report, the doctor appealed the "win," arguing the trial court erred by denying his earlier motion to dismiss.

On appeal, the plaintiff argued the doctor's failure to pursue an interlocutory appeal waived his complaints about the expert report on final judgment. The Court disagreed: the doctor's "failure to pursue an interlocutory appeal did not waive the right to challenge the order after Ebrom nonsuited and final judgment was entered." *Hernandez*, 289 S.W.3d at 318.

The Court's analysis focused on the fact that the interlocutory appeal statute provides that a person "may" appeal from an interlocutory order. *Id.* at 318–19. This language, the Court highlighted, is permissive:

> 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. Neither section 51.014(a)(9) nor section 74.351 indicates there are consequences if an appeal from the interlocutory order is not pursued. The statute providing for interlocutory appeals states only that "[a] person may appeal from" certain specified interlocutory orders. And section 74.351, which requires expert reports and allows health care providers to challenge them, does not reference the question of appeal, interlocutory or otherwise, from such a challenge or the ruling on it.

Id. at 319 (emphasis in original) (citations omitted).

The practical consequence of a ruling otherwise was not lost on the Court:

> [H]olding that failing to take an interlocutory appeal forfeits the right to statutory sanctions could induce defendants who might not otherwise take an interlocutory appeal from denials of their motions to do so in order to avoid losing any chance of recovering sanctions. Placing defendants in such a position surely would slow down the process of disposing of health care liability claims by increasing interlocutory appeals and would increase costs of resolving the claims.

Id. at 320.

Because this holding was based on the language of Section 51.014(a), the Court's reasoning seems to apply to all the categories of interlocutory orders under that section, as well as any other interlocutory appeal statute written in similar language. *See, e.g.*, *In re Roughley*, No. 02-07-0069-CV, 2007 WL 1018665, *1 (Tex. App.—Fort Worth Mar. 30, 2007, no pet.) (stating broadly that "the failure to pursue an interlocutory appeal does not prevent a party from pursuing an appeal after the trial court renders a final, appealable judgment or order").

But the *Hernandez* court did not expressly extend its holding to all interlocutory orders. And then Chief Justice Jefferson authored a strong dissent urging that a blanket rule not be applied. His opinion, joined by Justices O'Neill and Medina, challenged the majority's rational and adoption of a bright-line rule:

> It is not enough to say that because "may"—which applies to every appeal in section 51.014(a)—is permissive, a party can always elect to appeal either immediately or after final judgment. We must also examine the nature of the claim and the right sought to be vindicated. Efficiency, third-party interests, public policy, jurisdiction, a preference for outcomes based on substance—these and other concerns have historically informed the decision whether an interlocutory appeal is lost if not taken immediately. The analysis can be straightforward in a given case, but it may also require a deeper understanding of the purposes interlocutory review was meant to serve. Whether an interlocutory appeal may await final judgment depends on circumstances that evade the easy fix the Court applies today.

Id. at 323–24.

Jefferson then proceeded through the types of orders reviewable under §51.014. He starts with the orders he thinks are <u>not</u> reviewable upon final judgment: temporary injunction orders, orders appointing receivers, and an order denying a media defendant's summary judgment. *See id.* 325–26. He explains generally that:

- Temporary injunction appeals "must either be taken immediately or lost, because a temporary injunction, by its very nature, ceases to exist when the controversy has proceeded to final judgment."

- Orders appointing receivers may also be waived, if not immediately challenged, because vacating a receivership order regardless of how long ago it was entered would work undue hardship on third parties who have dealt in good faith with the receiver.

- And denials of summary judgment are not reviewable following a final trial on the merits.

"By contrast," he continues, "cases involving jurisdictional matters generally follow a different rule." *Id.* at 326. He points as an example an appeal of a plea to the jurisdiction by a governmental entity. Then he continues: "This rule would presumably extend to interlocutory orders involving the trial court's personal jurisdiction over a party. The prevailing view is that an order granting or denying a special appearance may be challenged after final judgment." *Id.* at 327.[2] He also notes that "federal courts have concluded that a

[2] Most courts of appeals have held that an order granting or denying a special appearance may be challenged after final judgment. *See GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 866–67 (Tex. App.—Austin 2008, no pet.) (holding that appellate jurisdiction to review special appearance rulings was not limited solely to interlocutory appeal authorized by section 51.014(a)(7)); *Canyon (Australia) Pty., Ltd. v. Maersk Contractors, Pty., Ltd.*, No. 08–00–00248–CV, 2002 WL 997738, at *4 (Tex. App.—El Paso May 16, 2002, pet. denied) (concluding that interlocutory appeal was not "mandatory" and trial court's special

party's failure to seek interlocutory review of an order granting or denying class certification does not bar the same complaint on final judgment." *Id.*

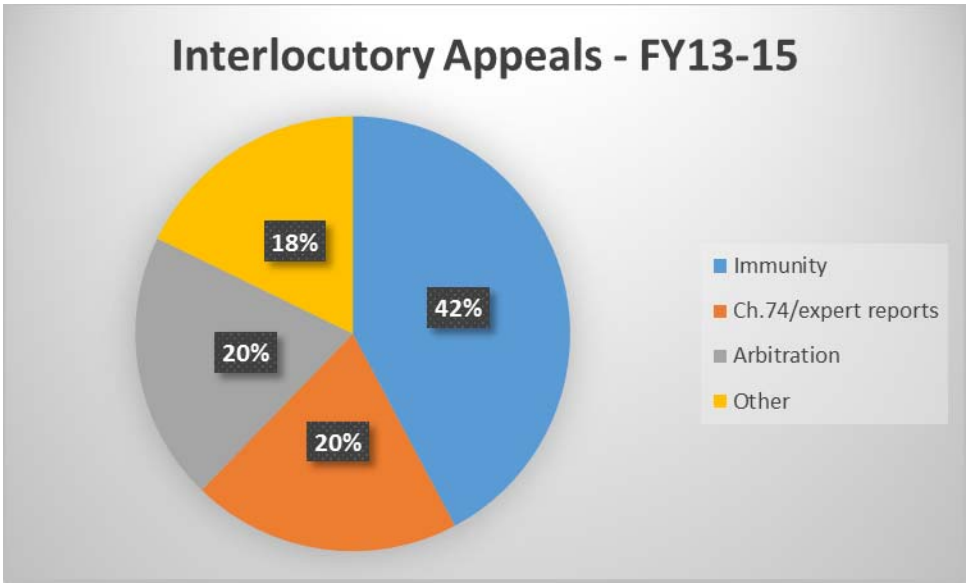
The *Hernandez* dissent's well-reasoned rejection of a bright-line rule, coupled with the majority's reluctance to apply its analysis to all interlocutory appeals, creates some uncertainty about whether interlocutory appeals are discretionary or mandatory. The most likely rule that will develop from this line of cases is that, with few obvious exceptions, a party "may" file an interlocutory appeal where the Legislature has authorized it, but it is probably not mandatory. But the issue could be a trap in certain cases, and a prudent attorney will at least advise her client of the risk should the client decide to forego an interlocutory appeal.

Issues Being Decided by Mandamus and Interlocutory Appeal

6. Certain standard topics continue to dominate the Court's docket.

There are a handful of substantive topics that, historically, have dominated the Court's docket of causes being reviewed on interlocutory appeal or by mandamus. Those same topics maintain their stronghold.

The majority of the Court's interlocutory appeal docket is immunity cases—followed by issues arising under Chapter 74, Civil Practice and Remedies Code, and general arbitration cases. Together, these three topics represent over 80% of the cases that are decided by interlocutory appeal in the last three terms.



Immunity. One important development in the immunity context is the Court's holding that, because immunity implicates subject matter jurisdiction, a governmental entity may raise any new immunity argument at any time. *Rusk State Hospital v. Black*, 392 S.W.3d 88, 96 (Tex. 2012) (court of appeals erred in refusing to consider immunity issue on appeal from adverse ruling on expert affidavit under Medical Liability Act). *See also Dallas County v. Logan*, 407 S.W.3d 745, 746 (Tex. 2013) (per curiam) (same); *Dallas Metrocare Services v.*

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appearance grant could be reviewed on appeal from final judgment). Only one court of appeals has held otherwise. *Matis v. Golden*, 228 S.W.3d 301, 305 (Tex. App.—Waco 2007, no pet.) (concluding that challenge to order denying special appearance, raised for the first time on appeal from final judgment, was untimely because parties failed to bring an interlocutory appeal).

Juarez, 420 S.W.3d 39 (Tex. 2013) (same); *Manbeck v. Austin ISD*, 381 S.W.3d 528, 530 (Tex. 2012) (per curiam) (immunity from suit barred attorney fees raised for the first time in petition for review). Most recently, the supreme court heard a legal sufficiency challenge that had never been raised before because, according to the court, the sufficiency of the evidence "implicates immunity from suit." *San Antonio Water Systems v. Nichols*, 461 S.W.3d 131, 136 (Tex. 2015).

Arbitration. In the arbitration context, the Court has held that the Federal Arbitration Act preempts the specific language and conspicuousness requirements for arbitration agreements under the Texas Medical Liability Act. *Fredricksburg Care Co., L.P. v. Perez*, 461 S.W.3d 513 (Tex. 2015). The Medical Liability Act requires an arbitration clause concerning healthcare liability claims to have additional elements that the FAA does not require, such as 10-point boldface type, specific language warning the patient that she is waiving her rights, and the patient's attorney's signature on the agreement. TEX. CIV. PRAC. & REM. CODE §74.451. The statute further provides that a healthcare provider who fails to comply with the requirements violates the Texas Occupations Code and DTPA. *Id.* As a result, Texas providers have hesitated in the past to include arbitration clauses in their pre-treatment agreements. Under *Fredricksburg Care*, however, courts will enforce standard arbitration clauses concerning healthcare liability claims (assuming the agreement affects interstate commerce).

Another significant arbitration case is *G.T. Leach Builders, LLC v. Sapphire V.P.,* 458 S.W.3d 502 (Tex. 2015). In that case, the Court actually refused to send all claims in a real estate dispute to arbitration. Sapphire was the developer of a condominium project on South Padre Island, which suffered extensive damage in Hurricane Dolly. Sapphire initially sued its insurance brokers because, eight days before the hurricane, the brokers allowed the builder's risk policy to lapse and be replaced by a permanent policy, even though construction was not complete. Years into the litigation, the insurance brokers designated several responsible third parties, including the general contractor, Leach, and certain subcontractors. Sapphire then added these parties as defendants. The Texas Supreme Court held that, although the developer must arbitrate its claims against the general contractor, as it agreed to, the claims against the other defendants need not be arbitrated because there was no arbitration agreement among those parties and no legal right for the non-signatories to compel arbitration based on the contract between the developer and the general contractor.

Chapter 74. A TMLA case of note is *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015). The *Ross* decision held that a premises liability claim by a non-patient against a hospital was not a healthcare liability claim controlled by the TMLA. Lezlea Ross accompanied a friend who was visiting a patient in St. Luke's Episcopal Hospital. Ross was leaving the hospital through the lobby when, as she approached the exit doors, she slipped and fell in an area where the floor was being cleaned and buffed. She sued St. Luke's on a premises liability theory. St. Luke's filed a motion to dismiss Ross's claim for failure to serve an expert report as required by the TMLA. The Court had previously held that the "safety" component of health care liability claims need not be directly related to the provision of health care. *See Texas West Oaks Hospital, L.P. v. Williams*, 371 S.W.3d 171 (Tex. 2012). The Court clarified that for a safety based claim to be a health care liability claim, there must be a substantive nexus between the safety standards allegedly violated and the provision of health care. Because Ross's claim was based on safety standards that had no substantive relationship to the hospital's provision of health care, it was not a health care liability claim.

Other. A rising class of cases worth noting are cases arising under Chapter 150 of the Texas Civil Practice and Remedies Code. This chapter requires a plaintiff who sues a design professional to include an expert affidavit setting forth the factual basis for the lawsuit. Similar to expert reports under the TMLA, the

purpose of Chapter 150 is to deter meritless claims. *CTL/Thompson Texas, LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 301 (Tex. 2013). But the expert affidavit requirement under Chapter 150 may apply only when architects and engineers are sued by original plaintiffs in lawsuits. *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 571 (Tex. 2014). In *Jaster*, a plurality of the Texas Supreme Court held that design professionals sued in existing lawsuits, as third-party defendants or cross-claim defendants, could not rely on the protections of Chapter 150. *Id.*

Mandamus. As far as the Court's mandamus docket, issues concerning the appropriate forum to resolve a dispute or the trial court's authority to do so have always been likely to catch the Court's eye. The last few terms are no exception. The Court decided the following forum/jurisdiction cases of note:

- *In re Fisher*, 433 S.W.3d 523 (Tex. 2014) (holding that "major transaction" mandatory venue provisions in CPRC §15.020 apply and trump venue provisions for defamation claims generally);

- *In re Ford Motor Co.*, 442 S.W.3d 265 (Tex. 2014) (holding that intervening wrongful-death beneficiaries—some of whom were Texas residents—are "plaintiffs" under Texas-resident exception to the forum non conveniens statute);

- *In re Vaishangi, Inc.*, 442 S.W.3d 256 (2014) (per curiam) (holding that a trial court had no jurisdiction after the expiration of its plenary power to "enforce" a Rule 11 agreement that was not made part of the final judgment); and

- *In re Dean*, 393 S.W.3d 741 (2012) (Texas court has no jurisdiction over custody determination involving child born in New Mexico and that had lived in New Mexico for his entire life despite the fact that divorce petition was filed in Texas).

7. Mandamus review if 91a motion denied: Another incentive to use the new fee-shifting rule?

Commentators seemed skeptical about whether a trial court's denial of a motion to dismiss under new Texas Rule of Civil Procedure 91a would warrant mandamus review. *See, e.g.*, Timothy Patton, Motions to Dismiss Under Texas Rule 91a: Practice, Procedure and Review, 33 Rev. Litig. 469, 579-80 (2014). After all, the expense and delay of a trial should not, in itself, make the appellate remedy inadequate. *Id.*

But now there is authority for such review. *See In re Essex Ins. Co.*, 450 S.W.3d 524 (Tex. 2014) (per curiam). When an insurance company refused to settle this personal injury case within policy limits, the plaintiff sued the insurance company, seeking a declaration that it had a duty to indemnify the defendant corporation for plaintiff's injuries. The insurance company filed a motion to dismiss pursuant to Texas Rule of Civil Procedure 91a. The company argued that, under established Texas law, "an injured party cannot sue the tortfeasor's insurer directly until the tortfeasor's liability has been finally determined by agreement or judgment." *See Angus Chem. Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138, 138 (Tex.1997). The trial court denied the motion, and the court of appeals denied mandamus review.

The plaintiff argued that his claims against the insurance company did not violate the "no direct action" rule because he is merely seeking a declaration of coverage, not a money judgment. The Court disagreed. It noted that the plaintiff would have no claim against the insurance company if the insured is found not to be liable. *Id.* at 526. In the meantime, the Court explained, both defendants are prejudiced in two ways: (1) by the creation of a conflict between the insured and its insurance company; and (2) by the inevitable admission of evidence of liability insurance in violation of the evidentiary rules. *Id.* "Because those

policy reasons for the 'no direct action' rule apply regardless of whether the plaintiff is seeking declaratory relief or money damages from the insurer, we reject [the plaintiff's] reliance on the Declaratory Judgments Act as a means to avoid the rule." *Id.* at 527.

The opinion only briefly discusses why the insurance company had no adequate remedy on appeal. "In light of the conflict of interest and prejudice that we have noted above, we conclude that mandamus relief is appropriate to spare the parties and the public the time and money spent on fatally flawed proceedings." *Id.* at 528.

8. A trilogy of cases on suspending enforcement of judgment pending appeal send a clear message to trial courts: appeals should cost less!

A significant development is the Texas Supreme Court's view on the amount needed to suspend enforcement of a money judgment pending appeal. This last term, Chief Justice Hecht chronicled the history of supersedeas, from seventeenth century England to the landmark Texas tort reform bill in 2003, House Bill 4. *In re Longview Energy Co.*, No. 14-0175, 2015 WL 2148353, *2–4 (Tex. May 8, 2015). He concluded:

> These changes in supersedeas may be seen as more protective of debtors, consistent with deep, populist Texas traditions. They may also be seen as respecting the importance of the right to a meaningful appeal. Either way, first the Court, and then the Legislature, have deliberately made supersedeas more easily available.

Id. at *4.

Four of the mandamus cases the last few years concern supersedeas and the message the Court is sending to the bar is consistent with Chief Justice Hecht's conclusion: appeals should cost less.

Nalle Plastics: The most significant case on supersedeas was *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168 (Tex. 2013). The issue in that case was whether an award of attorneys' fees must be included in the amount of security. By law, the security amount needed is "the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment." TEX. R. APP. P. 24.2(a)(1). *See also* TEX. CIV. PRAC. & REM. CODE §52.006(a) (same).

The intermediate courts were split on whether attorneys' fees were either compensatory damages or costs and must be included in a bond. Both Houston appellate courts, as well as the Eighth and Thirteenth courts, held that attorney's fees were either a type of "compensatory damages" or were in the nature of "costs" that the Legislature did not intend to exempt from the bond requirement. *Fairways Offshore Explor., Inc. v. Patterson Servs., Inc.*, 355 S.W.3d 296, 301–03 (Tex. App.—Houston [1st Dist.] 2011) (Order on Motion to Enlarge Supersedeas); *Clearview Props., L.P. v. Property Texas SC One Corp.*, 228 S.W.3d 262 (Tex. App.—Houston [14th Dist.] 2007) (Per Curiam Order on Motion to Review Supersedeas); *see also Nalle Plastics Fam. Ltd. P'ship v. Porter, Rogers, Dahlman & Gordon, P.C.*, No. 13-11-00525-CV, 2013 WL 1683618 (Tex. App.—Corpus Christi Apr. 18, 2013, mand. granted); *Corral-Lerma v. Border Demolition & Environmental, Inc.*, No. 08-11-00134-CV, 2012 WL 1943763 (Tex. App.—El Paso May 30, 2012, mand. pending).

The Third and Fifth courts disagreed, holding that neither "compensatory damages" nor "costs awarded in the judgment" includes attorney's fees. *See Shook v. Walden*, 304 S.W.3d 910, 923, 926 (Tex. App.—Austin 2010) (Opinion on Motion to Review Security); *Imagine Auto. Group, Inc. v. Boardwalk Motor*

Cars, LLC, 356 S.W.3d 716 (Tex. App.—Dallas 2011) (Opinion on Motion to Review Sufficiency of Security).

The Texas Supreme Court sided with the minority view. "While attorney's fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages." *Nalle Plastics*, 406 S.W.3d at 173. Nor are they costs. "We disagree that 'costs awarded in the judgment' includes anything other than what it ordinarily means: court costs." *Id.* at 175. Attorney's fees, the Court thus concluded, need only be included in the supersedeas bond when they are an element of actual damages. "If the underlying suit concerns a claim for attorney's fees as an element of damages, as with Porter's claim for unpaid fees here, then those fees may properly be included in a judge or jury's compensatory damages award." *Id.* at 175.

Interestingly, the *Nalle Plastics* opinion is also good authority for a contention that pre-judgment interest also need not be included in the supersedeas bond. Although courts of appeals had unanimously held otherwise, *see Shook*, 304 S.W.3d at 928 (pre-judgment interest was a compensatory award that was included in "compensatory damages"); *Fairways*, 355 S.W.3d at 303–04 (same), and pre-judgment interest was not at issue in *Nalle Plastics*, the Court nevertheless stated: "Like attorney's fees, court costs make a claimant whole, as does pre-judgment interest. Yet it is clear that neither costs nor interest qualify as compensatory damages." 406 S.W.3d at 173. The statute expressly requires that a supersedeas bond include "interest for the estimated duration of the appeal," *i.e.*, post-judgment interest, but it does not require security for the amount of pre-judgment interest. Thus, while the Court did not explicitly hold that pre-judgment interest is excluded from the bonding requirement, the conclusion follows from its opinion.

Corral-Lerma: The next supersedeas opinion of late is *In re Corral-Lerma*, 451 S.W.3d 385 (Tex. 2014) (per curiam). The trial court had concluded that the supersedeas statute does not require inclusion of attorney's fees in calculating the security amount. But the court of appeals—deciding the issue before the *Nalle Plastics* opinion issued—ordered the security amount to be increased to include fees. On review at the high court, the judgment-creditor argued that, notwithstanding *Nalle Plastics*, the attorney's fees awarded in the underlying judgment were compensatory under the particular statute at issue, the Texas Theft Liability Act, because the statute requires an award of fees regardless of whether the party recovers damages. Thus, the fee award, the judgment debtor argued, "compensates or indemnifies a defendant for the legal expense he incurs in successfully defending a claim made against him under the Act" and "falls within the common definition of compensatory damages." *Id.* The Court found the distinction unpersuasive. Relying on the same reasoning articulated in *Nalle Plastics*, the Court concluded that, while the fees might be intended to make the plaintiff whole, the fees were still not damages. The court of appeals, it held, was wrong to increase the supersedeas amount.

Since *Corral-Lerma*, a court of appeals has held that attorneys' fees awarded under the Texas Citizens Participation Act are also excluded from the security amount. *See Mansik & Young Plaza LLC v. K-Town Mgmt., LLC*, No. 05-15-00353-CV, 2015 WL 4504875 (Tex. App.—Dallas July 24, 2015) (Order on Motion to Set Supersedeas). "There is nothing in the language of the TCPA to indicate that the attorney's fees provided constitute "compensation owed for an underlying harm" in accordance with the purpose of the TCPA rather than "fees that may be awarded for counsel's services" in defending a claim. 2015 WL 4504875, at *4. Thus, the trend appears to be that there will be no statutory exceptions to the ruling that attorneys' fees are not compensatory damages under the supersedeas statute.

The Texas Supreme Court also decided another curious supersedeas issue in *Corral-Lerma*. The judgment-debtor, with supporting authority, argued that even if the amount need not cover the attorney's-

fees award, it nonetheless must include interest on those fees. *See Tex. Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 344 S.W.3d 628, 629 (Tex. App.—Houston [14th Dist.] 2011) (Order on Motion to Review Supersedeas); *Shook*, 304 S.W.3d at 929. The Court said no. Relying on the "well-reasoned dissent in Texas Standard," the Court found such an interpretation of the CPRC "'contradict[s] the unambiguous language of the applicable statute and violate[s] the firmly embedded rule that interest follows principal." *Corral-Lerma*, 451 S.W.3d at 387 (quoting *Texas Standard*, 344 S.W.3d at 633 (Frost, J., dissenting)). "Accordingly, we disapprove of *Texas Standard* and *Shook* to the extent they hold that a security amount must include interest on attorney's fees or any other category of a judgment not required to be included in the security amount." *Id.* at 387–88.

State Board for Educator Certification: Another recent supersedeas opinion is *In re State Bd. for Educator Certification*, 452 S.W.3d 802 (2014). In this case, a school teacher sought judicial review of the revocation of his teaching certificate. The trial court reversed the revocation and then refused to allow the Board to supersede the judgment pending appeal. "Untangling the various rules applicable to appellants generally and to government appellants specifically," the Court held "that a trial court has discretion to deny any party—even the State—the right to supersede a non-money, non-property judgment." *Id.* at 802. Thus, the Court denied mandamus relief, noting that the "Government's right to supersede is automatic, but not absolute." *Id.*

Longview Energy: The fourth and final supersedeas opinion of note came just this May. *See In re Longview Energy Co.*, No. 14-0175, 2015 WL 2148353 (Tex. May 8, 2015). The underlying case involved breach of fiduciary duty claims. An oil and gas company sued a minority shareholder, a private investment fund, for usurping corporate opportunities by forming a related entity to compete with the oil and gas company. The plaintiff won, and the trial court imposed a constructive trust over certain assets in the Eagle Ford shale and also awarded a money judgment of $95.5 million against four jointly and severally liable defendants. The court of appeals had ruled that the defendants could post a joint supersedeas bond in the statutorily capped amount of $25 million (rather than each defendant posting a capped bond of $25 million).

The Supreme Court did not reach this interesting issue. Instead, the Court characterized the award of future production revenues as either punitive or disgorgement. *Id.* at *5. Either way, it concluded, the judgment was not "compensatory" under TEX. CIV. PRAC. & REM. CODE §52.006(a) and need not be included in the supersedeas bond. *Id.* at *6. The result was that the judgment-debtor only had to post security in the amount of $70,000, not millions.

Longview Energy also discussed post-judgment discovery. The trial court ordered the judgment debtor to produce documents monthly concerning assets under the constructive trust. The debtor challenged the order claiming "as a practical matter, the [discovery order] gives Longview free rein to continue seeking discovery as a means of coercing . . . settlement." *Id.* at 7. The Court disagreed: "Instead of a bond, the court gave Longview access to information regarding those operations to protect itself from any dissipation of assets while the appeal was pending. This was not an abuse of discretion." *Id.* at *6. Moreover, the ongoing "discovery in lieu of security" was proper even though there was "no evidence of a threat of dissipation of assets." *Id.* at 7.

9. Courts continues to grant mandamus relief to prevent abuse of pre-suit discovery.

The Court decided a new Rule 202 case last term that, once again, shows its hostility to pre-suit discovery under this uniquely Texas rule.

Because of the risk for abuse under Rule 202, the Texas Supreme Court interprets the rule narrowly and has emphasized that pre-suit discovery was not "intended for routine use." *In re Jorden*, 249 S.W.3d 416, 423 (Tex. 2008). The Court has implored courts to "strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule." *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011).

The new Rule 202 opinion held that a petitioner seeking pre-suit discovery under Rule 202 for use in an anticipated suit must "plead allegations showing personal jurisdiction over the defendant." *In re John DOE a/k/a "Trooper,"* 444 S.W.3d 603 (Tex. 2014). A company and its CEO filed a Rule 202 petition seeking to depose Google in order to discover the name, address, and telephone number of an anonymous blogger, "the Trooper," who allegedly defamed the petitioners. The Trooper specially appeared. The Supreme Court ruled that Rule 202's requirement that the pre-suit petition be filed in a "proper court" implicitly mandated that the court have both subject matter jurisdiction over the potential lawsuit and personal jurisdiction over the potential defendant. *Id.* at 608. If pre-suit discovery were allowed without personal jurisdiction, the Court reasoned, Rule 202 could be used by anyone in the world to investigate anyone else in the world, "mak[ing] Texas the world's inspector general." *Id.* at 611.

Rule 202 is noteworthy, in the context of a mandamus update, because the intermediate courts of appeals seem to be taking seriously their obligation to supervise orders allowing pre-suit discovery. *See* Karen S. Prucella, Discovery Update for Appellate Lawyers, University of Texas School of Law, Conference on State and Federal Appeals (June 2015) (citing the following court of appeals opinions concerning 202: *In re PrairieSmarts LLC*, 421 S.W.3d 296, 310 (Tex. App.—Fort Worth 2014, orig. proceeding) (conditionally granting a writ of mandamus where the trial court abused its discretion by issuing an order permitting pre-suit discovery of information and documents that were proven to be subject to a trade secrets privilege in the absence of proof of necessity); *In re Hanover Ins. Co.*, No. 01-13-01066-CV, 2014 WL 7474203, at *3 (Tex. App.—Houston [1st Dist.] Dec. 30, 2014, orig. proceeding) (granting mandamus relief because pre-suit discovery under Rule 202 is not mechanism for obtaining third-party discovery that a party was unable to obtain in pending litigation); *In re Bailey-Newell*, 439 S.W.3d 428, 431–32 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (granting mandamus relief from the trial court's order allowing pre-suit discovery because the relator failed to exhaust administrative remedies and allowing discovery to go forward would impermissibly use Rule 202 to undercut administrative procedures); *In re East*, No. 13-14-00317-CV, 2014 WL 4248018, at *7 (Tex. App.—Corpus Christi Aug. 22, 2014, orig. proceeding) (granting mandamus relief because the real party in interest failed to meet the requirements of Rule 202); *In re Dallas Cnty. Hosp. Dist.*, No. 05-14-00249-CV, 2014 WL 1407415, at *2–3 (Tex. App.—Dallas Apr. 1, 2014, orig. proceeding) (granting mandamus relief because the record did not demonstrate that the real party in interest offered sufficient evidence to show the deposition was necessary); *In re Noriega*, No. 05-14-00307-CV, 2014 WL 1415109, at *3 (Tex. App.—Dallas Mar. 28, 2014, orig. proceeding) (granting mandamus relief because the party seeking the pre-suit deposition failed to provide any evidence on which the trial court could have based its finding that the likely benefit of the deposition outweighed the burden); *In re Reassure Am. Life Ins. Co.*, 421 S.W.3d 165, 175 (Tex. App.—Corpus Christi 2013, orig. proceeding) (finding that the trial court's order granting a petition for pre-suit depositions constituted an abuse of discretion where the petitioner failed to meet the requirements of Texas Rule of Civil Procedure 202); *Combs v. Tex. Civil Rights Project*, 410 S.W.3d 529, 538–39 (Tex. App.—Austin 2013, pet. denied) (vacating the trial court's order allowing pre-suit depositions because the petitioner failed to show that the claim would not be barred by sovereign immunity, and such a showing is necessary for the trial court to have subject matter jurisdiction over the Rule 202 proceedings); *In re Anand*, No. 01-12-01106-CV, 2013 WL 1316436, at *2–3 (Tex. App.—Houston [1st Dist.] Apr. 2, 2013, orig. proceeding) (denying mandamus relief for trial court's order granting pre-suit depositions because the record on appeal was insufficient and nothing in the language of Rule 202 prohibited requesting

the production of documents in conjunction with the deposition); *In re Campo*, No. 05-13-00477-CV, 2013 WL 3929251, at *1–2 (Tex. App.—Dallas July 26, 2013, orig. proceeding) (granting mandamus relief because the trial court abused its discretion by allowing the deposition to go forward when no evidence was presented to show that the likely benefit outweighed the burden of the deposition)). *See also In re Seton NW. Hosp.*, No. 03-15-00269-CV, 2015 WL 4196546 (Tex. App.—Austin July 10, 2013) (mem. op.) (potential claim by patient stemming from incident of hospital housekeeper exposing himself was healthcare liability claim about which discovery is stayed until an expert report is served).

10. Appellate courts may conduct merits-based review of a trial court order granting a new trial.

The most significant substantive development over the last decade in mandamus proceedings is undoubtedly the trilogy of opinions concerning appellate review of trial court orders granting a new trial. In *In re Columbia Medical Center of Las Colinas*, the Court held that, in granting a motion for new trial, the trial court must "specify its reasons for disregarding the jury verdict and granting a new trial." 290 S.W.3d 204, 209 (Tex. 2009). "We direct the trial court to specify the reasons it refused to enter judgment on the jury verdict and ordered a new trial as to Columbia. The reasons should be clearly identified and reasonably specific. Broad statements such as 'in the interest of justice' are not sufficiently specific." *Id.* at 215.

Columbia raised as many questions as it answered. For example, when a trial court grants a new trial and states its reasons, how specific do those reasons need to be? The Court also anticipated a statement of "proper reasons" and a "valid basis" for granting a new trial. *Id.* at 212, 210 n.3. Did that mean mandamus review is available to evaluate the validity of the reasons given? These questions were debated in many an advanced-appellate CLE.

The bar anticipated the next new trial case, *United Scaffolding*, would answer these questions. And *United Scaffolding* does explain that the order must be "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." 377 S.W.3d 685, 688–89 (Tex. 2012). It also again noted that the reason stated must be "legally appropriate." *Id.* But it did not expressly mandate or condone a merits-based review of the reasons stated.

That came in an opinion issued later in the year. In *Toyota*, the Court held that an appellate court may perform a merits-based review of the trial court's articulated reasons for granting a new trial. *In re Toyota Motor Sales, USA Inc.*, 407 S.W.3d 746, 752 (Tex. 2013). The Court considered the *Columbia* and *United Scaffolding* holdings and reasoned: "Having already decided that new trial orders must meet these requirements and that noncompliant orders will be subject to mandamus review, it would make little sense to conclude now that the correctness or validity of the orders' articulated reasons cannot also be evaluated." *Id.* at 758.

Since *Toyota*, the Court has decided two other new trial cases. *In re Whatatburger*, 429 S.W.3d 597 (Tex. 2014) (per curiam); *In re Health Care Unlimited, Inc.*, 429 S.W.3d 600 (Tex. 2014) (per curiam). Both cases concerned juror misconduct. *Whataburger* involved the failure to disclose information in voir dire. In *Health Care Unlimited*, the juror had talked to a corporate representative of the defendant during the trial. The court held in both cases that it was an abuse of discretion to grant a new trial because, in neither case, was there evidence that the misconduct probably caused injury. *Whataburger*, 429 S.W.3d at 598; *Health Care Unlimited*, 429 S.W.3d at 602. "To show probable injury, there must be some indication in the record that the alleged

misconduct most likely caused a juror to vote differently than he would otherwise have done on one or more issues vital to the judgment." *Health Care Unlimited*, 429 S.W.3d at 603.

The intermediate courts are also diligently reviewing new trial orders. *See, e.g., In re Zimmer, Inc.*, 451 S.W.3d 893 (Tex. App.—Dallas 2014, orig. proceeding) (abuse of discretion to grant new trial based on jury voir dire response, juror's violation of admonitory instructions, and the factual sufficiency of jury finding); *In re United Servs. Auto. Ass'n*, 446 S.W.3d 162 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (abuse of discretion to order new trial on jury's failure to find, violation of limine, improper closing argument, damages not supported by the evidence); *In re Baker*, 420 S.W.3d 397, 400 (Tex. App.—Texarkana 2014, orig. proceeding) (abuse of discretion to order new trial based on factually insufficient evidence); *In re City of Houston*, 418 S.W.3d 388 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (abuse of discretion to order new trial based on newly discovered evidence).

One appellate justice has recommended, during a meeting of the Supreme Court Advisory Committee about ways to improve the civil justice system, that an interlocutory appeal might be the better route than mandamus for review of an order granting a motion for new trial. *See* Memorandum by Tracy Christopher to SCAC, Motions for New Trial and Mandamus Review (Dec. 1, 2014). The Bar might watch for that during the next Legislative session.