The Top 10 Things the Appellate Specialist Should Know About Texas Mandamus Practice

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I. INTRODUCTION

Advanced appellate lawyers watch closely major decisions in original proceedings that the Texas Supreme Court issues. This paper is not intended to be an exhaustive review of those cases. Rather, the author studied the Court's mandamus docket over the last three years (since 2012) in hopes of identifying trends and insights that might be helpful to an appellate practitioner. In honor of the retirement of David Letterman,[1] who kept me up late laughing as a tween and teenager, I present my thoughts in a "Top 10" format.

The paper is divided into three broad topics. The first section addresses substantive topics that dominate the Court's mandamus docket. The second section highlights some new opinions on mandamus procedure. And the third and final section investigates the current Court's general attitude on mandamus.

II. THE TOP 10

A. Topics Dominating the Docket

1. Forum/Jurisdiction

Issues concerning the appropriate forum to resolve a dispute or the trial court's authority to do so have always maintained a stronghold on the Court's mandamus docket. The last few terms is no exception. The Court decided the following forum/jurisdiction cases of note:

- *In re Fisher*, 433 S.W.3d 523 (Tex. 2014)[2] (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).
- *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).

2. Supersedeas: 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

[1] David Letterman hosted *Late Night with David Letterman* from February 1, 1982, until May 20, 2015, and is the longest serving late night talk show host in American television history.

[2] In the interest of space—and sanity—the parenthetical "(orig. proceeding)" is omitted in this paper in citations to supreme court opinions.

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.

3. 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 presuit 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 presuit 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 presuit 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 presuit 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 presuit 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 presuit 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 presuit 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).

4. New Trials: Merit Based Review

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.

B. Mandamus Procedure Update

5. Be diligent in pursuing mandamus relief.

Mandamus, of course, is a discretionary remedy, not a matter of right. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993). And, though a writ of mandamus is not an equitable remedy, equitable principles govern its issuance. *Id.* "One such principle is that '[e]quity aids the diligent and not those who slumber on their rights.'" *Id.* (quoting *Callahan v. Giles*, 155 S.W.2d 793, 795 (Tex. 1941)).

Rivercenter, which involved a four month delay in seeking mandamus review, has always been a black cloud, looming over appellate specialists as they assess whether to proceed on mandamus and work to prepare the mandamus papers. But the current Supreme Court is seen as being far less likely to find waiver. For example, more recently, the Court held there was no waiver in seeking review of a denial of a motion to dismiss based on a forum selection clause in *In re International Profit Assocs.*, 274 S.W.3d 672 (Tex. 2009) (per curiam). The motion was filed in January and heard in May. It was almost 8 months later before the movant sought mandamus review. *Id.* at 676. The delay was explained because the May order had to be corrected. The Court noted that, while the movant "could have been more diligent in its efforts to have a corrected order entered," the movant also never "took any actions inconsistent with pressing its motion to dismiss or seeking mandamus review." *Id.* The facts, the Court held, "do not indicate the type of delay that forfeits a party's right to mandamus relief." *Id.* at 676–77.

Conventional wisdom, however, suggests that the high court can keep a liberal view of waiver because it just denies a petition for writ of mandamus when equity weighs against review, with litigants none the wiser. A recent opinion by Justice Brown, joined by Justice Green, concurring in the denial of a petition for writ of mandamus, offers proof to support that position. *See In re Dorn*, No. 15-0632 (Sept. 4, 2015).

Dorn involved a grass-roots effort to prohibit the City of San Marcos from using fluorinated water. The citizens garnered the necessary signatures to have the issue included on the city's general-election ballot for this November. The deadline to be on the ballot was August 24, 2015.

On May 5, 2015, the city clerk rejected the citizen petition. Demand letters were sent May 18 and June 16, insisting that the city officials had improperly refused to perform a ministerial duty, but no formal legal action was taken. Instead, on June 18, the city filed a declaratory-judgment action in district court. "Despite the looming deadline, the relators waited until July 17 to answer the city's lawsuit and counterclaim for declaratory, injunctive, and mandamus relief—more than ten weeks after the city had refused the petition." Op. at 2. On August 14, the trial court ruled in the citizens' favor. The City filed a notice of appeal the next day, staying any further action in the trial court. Six days later, on August 21—the Friday before the Monday ballot deadline—the citizens sought mandamus relief in the Texas Supreme Court.

Justices Brown and Justice Green voted to deny the petition, they write, because the citizens "offered no explanation for their failure to diligently pursue the remedies available to them":

> The relators knew on May 5 that the city had refused to consider their petition. Yet with the August 24 statutory deadline less than 16 weeks away, the relators waited more than ten weeks before seeking mandamus relief from the district court. Even then, the relators sought mandamus only in response to the city's request for declaratory relief, and only after the city's lawsuit had been on file for nearly a month. To top it off, it took the relators almost a week to ask for a mandamus from this Court once the city had appealed the trial court's ruling. By then the statutory deadline was just three days away.

Op. at 2–3. "We will not grant extraordinary remedies to litigants who 'slumber on their rights' and then demand expedited relief." Op. at 3 (quoting *Callahan*, 155 S.W.2d at 795).

Although Justice Brown is not writing for the Court, his analysis is a good reminder to the appellate bar that we must be diligent in pursuing mandamus relief.

6. Go to the court of appeals first.

Rule 52.3(e) requires that mandamus petitions be first presented to the court of appeals "unless there is compelling reason not to do so." Several recent cases shed light on the current Court's attitude about this prerequisite to review.

One was a same-sex marriage case. *State v. Naylor*, No. 11-0222, 2015 WL 3852284 (Tex. June 19, 2015). The State's position in *Naylor* was that the trial court lacked subject matter jurisdiction over a divorce involving a same-sex couple because Texas did not recognize same-sex marriage. The State, however, did not file their plea in intervention until after judgment was rendered. The court held that the State, not a party to the underlying proceeding, did not have standing to appeal. *Id.* at *5. Alternatively, then, the State had petitioned for writ of mandamus. The Court refused to consider the mandamus petition because it was not presented first to the court of appeals. *Id.* at *7. The Court rejected at least two reasons the State offered for its omission. First, the "State argues it did not file a mandamus petition in the court of appeals because it thought it would have standing to appeal. A litigant's mistaken understanding of law is not a compelling reason for this Court to consider an unreviewed mandamus argument." *Id.*

The State also argued that it did not first submit its petition to the court of appeals because the effort would have been "futile." The Court rejected the State's argument that the court of appeals had already shown skepticism about the merits of the case. But it also seemed to not care: "a party may not circumvent the court of appeals simply by arguing futility." *Id.* (citing *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 729, 730 (Tex. 2006) (per curiam) (denying belated intervenor's mandamus petition where relator alleged the court of appeals had already rejected its arguments on direct appeal)).

Justice Willett wrote in dissent. He would allow a party to bypass the court of appeals "'when the request would have been futile and refusal little more than a formality'." *Id.* at 21 (Willett, J., dissenting) (quoting *Terrazas v. Ramirez*, 829 S.W.2d 712, 723 (Tex.1991)). He also noted that the substance of the State's arguments had been presented to the court of appeals. *Id.* at 22. Thus, "[a]s a matter of judicial economy," he would have reached the merits. *Id.*

Two other cases show that there is still at least one type of case that will warrant skipping the intermediate appellate courts: election cases. *See, e.g.*, *In re F.N. Williams Sr. and Jared Woodfill*, No. 15-0581, 2015 WL 4931372 (Tex. Aug. 19, 2015): "Although the

Relators did not seek mandamus first in the court of appeals, we note 'the imminence of the election places this case within the narrow class of cases in which resort to the court of appeals is excused.'" *Id*. at *2 (quoting *Bird v. Rothstein*, 930 S.W.2d 586, 587 (Tex. 1996)). *See also In re Woodfill*, No. 14-0667, 2015 WL 4498229, at *7 (Tex. July 24, 2015) (per curiam) (accepting jurisdiction over mandamus petition that was never filed in lower court).

But even election cases are not a sure-shot into the supreme court, as Justice Brown's recent concurrence to the denial of a petition for writ of mandamus in *In re Dorn*, No. 15-0632 (Sept. 4, 2015), shows. Justice Brown rejected the argument that an impending statutory deadline for ballot printing justified the failure to file first in the court of appeals. "[A]s the urgency the relators face is of their own making, it is no excuse for skipping past the court of appeals." Op. at 3. He also expressed logistical concern if the Court were to accept all mandamus petitions in election cases without requiring litigants to first seek review from an intermediate appellate court. "[T]he fourteen courts of appeals have mandamus jurisdiction for a reason. This Court cannot be the sole arbiter of expedited extraordinary relief in a state of nearly 30 million people spread out across 254 counties." Op. at 3–4.

7. New Judge? Expect a punt.

The appellate rules provide that, in an original proceeding, where the judge who signed the order at issue has "cease[d] to hold office," an appellate court "must abate the proceeding to allow the successor to reconsider the original party's decision." TEX. R. APP. P. 7.2; *see also In re Schmitz*, 285 S.W.3d 451, 454 (Tex. 2009); *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 228 (Tex. 2008).

In a recent opinion, the Court resolved a split of authority among the courts of appeals as to how to proceed if the judge who signed the order subject to mandamus review later recuses herself. One court of appeals declined to abate a case to allow reconsideration of an order following a recusal, reasoning that Rule 7.2 applies in the limited situation where the original judge "ceases to hold office." *In re Guerra*, 235 S.W.3d 392 (Tex. App.—Corpus Christi 2007, orig. proceeding). Another court of appeals abated a mandamus proceeding following a recusal, based on the underlying policy of Rule 7.2. *In re Gonzales*, 391 S.W.3d 251 (Tex. App.—Austin 2012, orig. proceeding). Although the court of appeals held that abatement was not mandatory under Rule 7.2, "the underlying policy rationale behind Rule 7.2(b)—i.e., affording a successor judge an opportunity to rule on a relator's complaint before we issue mandamus—is as applicable in the recusal context as it is when a judge ceases to hold office." *Id*. at 252.

Without explanation of its rationale, the supreme court determined that a successor judge, even in the recusal context, should be afforded the opportunity to rule on the matter being challenged before a mandamus petition will be entertained. *In re Blevins*, No. 12-0636, 57 Tex. Sup. Ct. J. 38, 2013 WL 5878910, at *2 (Tex. Nov. 1, 2013). Interestingly, despite Rule 7.2's language that the appellate court "must abate" the proceeding, the Court opened the door for original proceedings simply to be dismissed if a subsequent judge recuses:

> We conclude that under circumstances such as those before us, appellate courts should either deny the petition for mandamus . . . or abate the proceedings pending consideration of the challenged order by the new trial judge . . . . Because mandamus is a discretionary writ, the appellate court involved should exercise discretion to determine which of the two approaches affords the better and more efficient manner of resolving the dispute.

Id. at *2. The Court elected to abate, not dismiss, Blevins's petition for writ of mandamus.

C. The Developing Attitude on Mandamus

8. The rise of the extraordinary PC?

One observation of note concerning the Court's last term was the number of per curiam opinions that were issued in mandamus proceedings. There were 14 opinions issued in mandamus proceedings that term, and 8 of those opinions were per curiam opinions.

Statistics showing almost 60% of original proceedings decided by the supreme court were decided in a per curiam opinion would not be noteworthy if the per curiam opinions were "in light of" another cause that was argued. Two of the 7 may fall into that category. *In re Crawford & Co.*, 458 S.W.3d 920 (Tex. 2015), could be viewed as an opinion "in light" of *Tex. Mutual Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012). But even the Court itself noted that "the parties dispute whether and how *Ruttiger* applies to causes of action that we did not specifically address in that case." *Id*. at 925. *In re Corral-Lerma*, already discussed, was arguably "in light of" *In re Nalle Plastics*. But the fee statute at issue in *Corral-Lerma* served a different role, at least according to the court of

appeals. 451 S.W.3d at 386. So neither case is *necessarily* decided by the original, argued opinion.

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. Can, or *should*, extraordinary relief 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.

9. 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 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.

10. *Prudential* by the Numbers: A whole new world?

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 the Texas 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.

In re Essex, the 91a/insurance case discussed previously, was the only other case. The discussion of *Prudential*'s test was 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." *Id.* at 528. If a trial court error that might result in the admission of prejudicial evidence is enough to create a "fatally flawed proceeding," I predict *In re Essex* will be cited frequently for those seeking mandamus review of otherwise incidental trial rulings.

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)).

Perhaps the most lax view of the adequate remedy prong is shown in the Court's opinion in *In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. April 24, 2015). This proceeding involved the review over a denial of a motion to dismiss under the state's new anti-SLAPP law. As noted by the Court, there was a split among the courts of appeals about whether those rulings were subject to interlocutory review by statute. *Id.* at *2 n.2. The Legislature intervened, clarifying in the 2013 session that interlocutory appeal was permitted. *Id.* But the statute, it seems, was not retroactive.

This procedural stance was similar to what the Court faced in *In re McAllen Medical Center, Inc.*, 275 S.W.3d 458 (2008), which involved the review of the sufficiency of a pre-2003 expert medical report. "The plaintiffs point out that when the Legislature mandated interlocutory review of expert reports in 2003, it did not make those procedures retroactive." *Id.* at 466. But the Court rejected the argument that "the Legislature's provision for mandatory review in future cases suggests it intended to prohibit review in cases already pending." *Id.* Nor should all pre-2003 cases be reviewed, it emphasized. Only "if the legislative purposes behind the statute are still attainable through mandamus review," should it be done.

The *McAllen* discussion and application of *Prudential* is in stark contrast to the Court's more recent single-line declaration in *Lipsky*: "Although an interlocutory appeal is clearly the appropriate remedy going forward, we nevertheless consider the issues presented here in the context of the original mandamus proceedings filed in this Court." 2015 WL 1870073, *2 n.2.

That said, because the "legislative purposes behind" the anti-SLAPP statute were still attainable in that suit, which had still not progressed beyond the pleading stage, the Court likely reached the right result in *Lipsky*. But its attitude that it need not justify its reasoning is informative about the Court's changing views on mandamus.

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 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. But a careful appellate practitioner seeking to evade mandamus review might study closely the writings of Justices Willett and Lehrmann in hopes of winning an advocate around the conference table.

III. CONCLUSION

The last few terms have not been groundbreaking in mandamus developments. But there are some identifiable trends and attitudes worthy of the appellate specialist's consideration.