EXPANDING MANDAMUS JURISPRUDENCE: NAVIGATING AN INCREASINGLY INDEFINITE STANDARD OF REVIEW

LEIGHTON DURHAM
P.O. Box 224626
Dallas, Texas 75222
214-946-8000 phone
214-946-8433 fax
ldurham@durhampittard.com

State Bar of Texas
32nd ANNUAL ADVANCED CIVIL TRIAL COURSE
July 29-31, 2009
San Antonio

CHAPTER 22

Leighton Durham
P.O. Box 224626, Dallas, Texas 75222
214-946-8000 phone 214-946-8433 fax
ldurham@durhampittard.com

EDUCATION

1996-1999 **Texas Wesleyan University School of Law**
Valedictorian
Law Review
Dean's List

1992-1996 **Texas A&M University**
Bioenvironmental Science, *cum laude*
GPA: In major 4.0
Cumulative 3.7

EXPERIENCE

Durham & Pittard, LLP
Civil Appeals; Civil Litigation – Commercial and Personal Injury Litigation; Federal and State Courts; Trial Support and Legal Briefing

January 2003 - August 2003 **Honorable Ed Kinkeade**
United States District Judge
Northern District of Texas, Dallas Division
Law Clerk

August 2000 - January 2003 **Waters & Kraus, LLP**
Associate
Duties involved briefing and arguing before appellate and trial courts in multi-party toxic tort cases. Duties also included managing cases from inception through trial.

August 1999 - August 2000 **Justice John Ovard**
Fifth District Court of Appeals at Dallas
Briefing Attorney

Fall 1998 **Honorable Charles Bleil**
United States Magistrate Judge
Northern District of Texas, Fort Worth Division
Extern

ACTIVITIES AND ADMISSIONS

2006, 2008	**Texas Monthly Texas Super Lawyers Rising Star**
1992 – Present	**Member of Tyler Street United Methodist Church** Served on the Church Council, Trustees Committee, and Staff Parish Relations Committee, as well as chair of the Finance Committee.
2002 – Present	**Tyler Street Manor** - Home for Retired and Disabled Individuals Vice President of the Board of Directors
2002 – Present	**Member of the Dallas Bar Association** Co-chair of the Library Committee 2005
2004 - Present	**Member of the Texas Trial Lawyers Association** Member of the Amicus Committee and the TTLA Advocates
2004 – Present	**Member of the Dallas Trial Lawyers Association**
2008 – Present	**Member of the American Association for Justice**
2009 – Present	**Member-at-Large of Citizen Election Advisory Committee** Dallas County, Texas
2009 – Present	**Member of the Mississippi Association for Justice**
Admitted	**United States Supreme Court, Fifth Circuit Court of Appeals, the Northern, Southern, and Eastern Districts of Texas and the Eastern and Western Districts of Arkansas.**

PRO BONO ACTIVITIES

Amicus Curiae Briefs for the Texas Trial Lawyers Association

Unauthorized Practice of Law Committee v. American Home Assurance Co., 261 S.W.3d 24 (Tex. 2008)

McAteer v. Silverleaf Resorts Inc., 514 F.3d 411 (5th Cir. 2008)

Other Pro Bono Cases - Regularly represent local churches and pastors in various matters including lease disputes, an adult adoption, wills, and probate.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

EXPANDING MANDAMUS JURISPRUDENCE: NAVIGATING AN INCREASINGLY INDEFINITE STANDARD OF REVIEW

I. INTRODUCTION

For decades now, "expanding mandamus review" has been a perennial topic for continuing legal education courses. This course is no different. The continuing viability of this issue as a topic of interest in Texas is the result of the apparent inability of the Supreme Court to articulate and adhere to a clear standard for mandamus review: a compass to guide courts and practitioners through the wilderness of this unique area of litigation.

Of particular concern is the Supreme Court's inability to meaningfully define an "inadequate remedy at law." Despite the court's effort to establish the guideposts for a definite standard in *Walker v. Packer*, the court has since wandered from its stated course. In 2004, the court finally abandoned the map it had attempted to craft for decades by determining that "[t]he operative word, 'adequate', has no comprehensive definition." As a consequence, the availability of mandamus review has devolved into more of an ad hoc determination turning on the particular policy preferences of the justices deciding the case rather than a viable legal standard.

That the Texas Supreme Court has struggled with defining its mandamus jurisprudence is not news. What may be news to many is that now the Fifth Circuit has recently deviated from its long-held mandamus jurisprudence to expand the availability of the remedy to an undefined extent. In *In re Volkswagen of Am. Inc.*, the Fifth Circuit expanded the scope of its mandamus review beyond the traditional confines of analyzing only whether a district court acted within its judicial authority to include whether the court's decision on a matter within its authority was correct. Moreover, as in Texas, the court's new interpretation of the "adequate remedy on appeal requirement" is so broad that it renders the requirement virtually meaningless. As a result, the Fifth Circuit has embarked on the same path of mandamus jurisprudence that has led Texas courts to reduce mandamus review to little more than a discretionary interlocutory review of any matter that a sufficient number of justices deem worthy of consideration.

The practitioner, therefore, is left without much guidance in determining whether to file a petition for mandamus and in how to best create a record for mandamus review. Nevertheless, there are some helpful suggestions that have aided practitioners before the Texas Supreme Court in their efforts to obtain discretionary review. It is hoped that this paper will provide some assistance to attorneys navigating this increasingly ill-defined area of law.

Before beginning, however, a disclaimer is necessary. Fortunately and unfortunately for the author, much of this topic has been extensively analyzed by some of the brightest minds in our profession. While the thorough and repeated treatment of this issue has made the assimilation of information much easier, it has also made new insight particularly difficult to find. Consequently, the authors of previously published articles, especially those articles cited in the bibliography, deserve substantial credit for the information provided in this paper. The author has attempted to provide proper citations throughout the paper to the original sources of information; however, this task has been difficult given the volume of publications available on this topic. Any failure or inadequacy in the citations is purely inadvertent.

II. MANDAMUS PRACTICE IN TEXAS COURTS

To know whether mandamus jurisdiction is, in fact, expanding, it is necessary to first know the history of mandamus jurisprudence. It is impossible to say that mandamus review is expanding unless you know where it began. In Texas, the history of mandamus review is well documented in numerous well researched papers, some of which are cited in the bibliography. For more than a century following Texas' statehood, a writ of mandamus was available only to correct the failure to perform a ministerial act, not as a mechanism to control the exercise of judgment or discretion. William E. Barker, *The Only Guarantee is There Are No Guarantees: The Texas Supreme Court's Inability to Establish a Mandamus Standard*, 44 HOU. L.R. 703 (2007). Beginning in the 1960s and 1970s, however, the court began to loosen the requirements for obtaining relief. In particular, the court began reviewing the correctness of discretionary rulings and often neglected to analyze whether an alternate remedy existed. When the court did analyze whether an adequate remedy existed, it occasionally treated the relevant standard as whether the alternate remedy was "equally convenient, beneficial, and effective as mandamus." *See, Walker v. Paker*, 827 S.W3d 833 (Tex. 1992, orig. proceeding) (quoting *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984); *Crane v. Tunks*, 160 Tex. 182, 190, 328 S.W.2d 434, 439 (Tex. 1959)). As is widely recognized, a rapid increase in mandamus filings followed the loosening of the mandamus standards.

A. *Walker v. Packer* – A Compass in the Wilderness

In an attempt to rein in the "mandamus explosion," the Supreme Court finally set forth identifiable guideposts for mandamus review in *Walker v. Packer*, 827 S.W3d 833 (Tex. 1992, orig. proceeding). In *Walker*, the court first reiterated the long-standing principle that mandamus relief is only appropriate to correct a clear abuse of discretion. *Id.* at 839-40. The court did not specifically articulate what constitutes a clear abuse of discretion, but it is clear that the court's understanding of the requirement includes error in an exercise of discretion, not just an act outside the scope of judicial authority. *Id.* at 843 (holding, for example, that "a party will not have an adequate remedy by appeal when the appellate court would not be able to cure the trial court's discovery error."). This understanding marked an important distinction between Texas and federal jurisprudence on mandamus relief. *See, e.g., Will v. United States*, 389 U.S. 90, 103-04, 88 S. Ct. 269 (1967) ("Mandamus, it must be remembered, does not "run the gauntlet of reversible errors." Its office is not to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power.").

More importantly for purposes of this paper, the court also held that, even if a court clearly abused its discretion, a writ of mandamus would issue only if there was no other adequate remedy at law. *Id.* In describing what constituted an adequate remedy by appeal, the court held that mandamus was appropriate "'only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies.'" *Id.* (quoting *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989)). The court also reaffirmed the principle that "[m]andamus will not issue where there is a 'clear and adequate remedy at law, *such as a normal appeal*.'" *Id.* at 840 (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984)) (emphasis added). As a corollary to this principle, the court also noted that an appellate remedy was adequate even if it involved "more expense or delay than an extraordinary writ." *Id.* at 842. The court cautioned that, without the limitation of requiring an inadequate remedy at law, the writ would soon "cease to be extraordinary." *Id.* at 842 (quoting *Braden v. Downey*, 811 S.W.2d 922, 928 (Tex. 1991)). Consequently, the court held that interference in the litigation process by a mandamus proceeding was warranted "only when parties stand to lose their substantial rights." *Id.* (quoting *Iley v. Hughes*, 158 Tex. 362, 368, 311 S.W.2d 648, 652 (1958)).

The court also specifically rejected the more lenient standard that had been applied in some earlier cases, which merely sought to determine whether the alternate remedy was "equally convenient, beneficial, and effective as mandamus." *Id.* at 842. The court considered this definition of "adequate remedy at law" to be no limitation at all merely because an appeal after a final judgment would be more costly and time consuming. *Id.* at 842. Such a standard would cause undue interruption of the trial proceedings to resolve issues that might be resolved as the litigation progressed without the expense and delay of resulting from a mandamus proceeding. *Id.* In fact, the court held that "[a]voiding interlocutory appellate review of errors that, in the final analysis, will prove to be harmless, is one of the principal reasons that mandamus should be restricted." *Id.* at 842-43.

The result of the court's holding in *Walker* was to provide a clear standard for determining whether mandamus relief was appropriate. In short, mandamus was available to prevent the loss of "substantial rights," not to correct errors that could be rendered harmless or that could be effectively resolved on appeal from a final judgment. Although the standard was subject to valid criticism, such as Justice Doggett's complaint that it left open the potential for abuse in the context of discovery, the court had, at least, provided a compass by which litigants and courts could determine whether mandamus relief was available when a trial court abused its discretion.

B. Dismantling the Compass.[1]

As one commentator has noted, the debate surrounding the proper mandamus review turns on two competing policy concerns: (1) trust in the ability of trial courts and intermediate appellate courts to properly exercise their discretion and (2) the ability of appellate courts to review petitions for mandamus without becoming overwhelmed. Pamela Stanton Baron, *Texas Supreme Court: Mandamus Update, Including Summary of Mandamus Activity by Subject Area*, PRACTICE BEFORE THE SUPREME COURT (State Bar of Texas 2005). In the opinions following *Walker*, the court began to demonstrate a distinct and undeniable mistrust of inferior courts by retreating from a definite standard for mandamus review in favor of a more flexible standard that turned as much on the severity of the courts error as it did the

[1] The content of this section is derived extensively from Pamela Stanton Baron, *Texas Supreme Court: Mandamus Update, Including Summary of Mandamus Activity by Subject Area*, PRACTICE BEFORE THE SUPREME COURT (State Bar of Texas 2005). This excellent article provides a much more thorough analysis of the opinions following *Walker* than is intended with this paper.

availability of an appellate remedy. Unfortunately, this shift began the dismantling of the compass established by the *Walker* opinion, as well as the certainty that accompanies a definite standard.

The first hints that the court would stray from the *Walker* standard appeared just two year later in *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304 (Tex. 1994, orig. proceeding). At issue in that case was whether the denial of a special appearance warranted a writ of mandamus. The court reiterated the language used in *Walker*, asserting that mandamus is proper only when a party is "in danger of permanently losing substantial rights" and ultimately held that the defendant had an adequate remedy by appeal. *Id.* at 306, 310. However, the court also added a new factor to the equation by stating that, while a ruling on a special appearance was not generally subject to mandamus review, mandamus review of such rulings was not precluded "where truly extraordinary circumstances exist." *Id.* at 308. In effect, the court created an undefined exception to the principle that the mere expense and delay of an appeal was not an inadequate remedy at law. While the definition of "truly extraordinary circumstances" was left to later cases, one particularly significant example provided by the court of such a circumstance was when the "trial court . . . act[s] with such disregard for guiding principles of law that the harm to the defendant becomes irreparable, exceeding mere increased cost and delay." *Id.* at 308-09. In short, the adequacy of an appellate remedy now turned on the severity of the error.

The effect of the new "truly extraordinary circumstances" test was to reintroduce confusion and uncertainty into mandamus procedure. The clear standard set in *Walker* was now encumbered by an amorphous exception that required the court to determine on an ad hoc basis whether the trial court had committed a particularly incorrect error, even if the trial court's error could be remedied by appeal. In so doing, the court took the first step in dismantling the *Walker* standard by negating the fundamental premises that: (1) mandamus is proper only when the error cannot be corrected by a normal appeal and (2) courts should avoid the interlocutory review of errors that may ultimately prove to be harmless.

The practical consequence of the opinion in *Canadian Helicopters, Ltd.*, became apparent in *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769 (Tex. 1995, orig. proceeding). Again, the court was faced with determining whether a writ of mandamus should be issued to correct a trial court's denial of a special appearance. *Id.* at 771. This time, however, the court granted the petition for writ of mandamus, determining that extraordinary circumstances existed because the trial court had acted in gross disregard for guiding principles of law. *Id.* Stated differently, the court determined that the petitioner lacked an adequate remedy on appeal because the trial court's ruling was not just wrong, but very wrong.

In his dissent, Justice Cornyn argued that the court had improperly discarded the inadequate remedy at law requirement by failing to require the petitioner to establish that the error could not be remedied on appeal. As Justice Cornyn pointed out, under the standard applied by the majority, virtually any ruling was subject to mandamus review, even the denial of a summary judgment. In fact, Justice Cornyn's predictions proved true the following year when the court found that extraordinary circumstances warranted mandamus review of a trial court's refusal to dismiss claims against a religious organization in *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996, orig. proceeding).

For several years following the recognition of the extraordinary remedies exception to the *Walker* standard, the court continued to vacillate between the application of the more restrictive standard and its exception. As described by Ms. Baron, the court "firmly" returned to *Walker* in *In re Union Pacific Resources, Co.*, 969 S.W.2d 427 (Tex. 1998, orig. proceeding). *See* Baron, *supra*, at 5. However, the court soon strayed again from the strict application of the *Walker* standard in *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1999, orig. proceeding) by granting a mandamus petition in a case involving a trial court's venue determination because the trial court acted 'with such disregard for guiding principles of law that the harm ... becomes irreparable.'" The state of mandamus jurisprudence in light of the cases following *Walker* was most accurately captured by Justice Hankinson in a concurring opinion in which she stated that:

> In lieu of standards, and without guidance, litigants are simply put to guessing what issue will catch the attention of five justices at any given time.

In re Smith Barney, Inc., 975 S.W.2d 593, 600 (Tex., orig. proceeding) (Hankinson, J. concurring). The compass provided by the court had been completely dismantled.

C. Throwing out the Map – *In re Prudential Ins. Co. of Am.*

Whatever meaning "inadequate remedy on appeal" had after the litany of cases following *Walker* was finally erased in the Supreme Court's decision in *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004, orig. proceeding). In that case, the court

proclaimed that the term "adequate" had no "comprehensive definition," but was:

> [S]imply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts."

Id. at 135-36. In other words, the "inadequate remedy on appeal" requirement is no longer a standard by which the court determines whether a trial court's error may be adequately addressed on appeal, but merely an incomplete description of circumstances in which the court has previously found, and may in the future find, to warrant mandamus relief.

That the "inadequate remedy on appeal" standard has been fully reduced to a guessing game as to "what issue will catch the attention of five justices at any given time" is made clear by the court's description of when the "balance of jurisprudential considerations" will result in mandamus review. According to the court:

> Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments.

Id. at 136. In short, whether an inadequate remedy on appeal exists turns entirely on the court's determination of whether the issues in a case are sufficiently important for the court's consideration. Practitioners are, therefore, left with no practical guidance in determining what issues are proper for mandamus review other than speculation concerning the preferences of the court's members.

Moreover, the court's opinion provides no practical limitation to the court's mandamus authority. Effectively, the Supreme Court now has the jurisdiction to conduct an interlocutory review of any matter it deems worthy of review prior to a final judgment. The court even stated that "Prudent mandamus relief is . . . preferable to legislative enlargement of interlocutory appeals." *Id.* at 137. The court's unapologetic assumption of this authority without any legislative enactment demonstrates, not only a distrust of inferior courts, but a distrust of the legislature to provide adequate interlocutory review of matters that the members of the court deem important. In short, the court has endowed itself with the ability to impose its policy preferences concerning what matters warrant interlocutory review where it believes the legislature has failed to act in accordance with those preferences.

What remains, therefore, is a meaningless limitation on the court's authority. "Inadequate remedy on appeal" certainly does not mean that a party lacks an adequate remedy on appeal. Instead, it is hard, if not impossible, to articulate a meaningful distinction between the new mandamus standard and the standard for general appellate jurisdiction of the Supreme Court as set forth below:

> (a) the newly stated authority to utilize the mandamus procedure to (i) review "significant rulings in exceptional cases . . . to preserve important substantive and procedural rights from impairment or loss," (ii) provide "needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments," and (iii) "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings"
>
> (b) the general jurisdiction of the court to review matters on appeal because it appears that an error has been committed that "is of such importance to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction . . . ." Tex. Gov't Code § 22.001(a)(6).

In the end, the only limitation on the court's mandamus authority in either circumstance is a mere determination of what the current members of the court believe is important to the jurisprudence of the state. The court's ability to review interlocutory orders is now, therefore, coextensive with its ability to review orders on appeal from a final judgment. To suggest that the "inadequate remedy on appeal" requirement retains any real meaning as a limitation on the court's authority or a guiding principle for litigants is simply misguided.

D. Walking in Circles

If there was any question that the standard for mandamus review in Texas has devolved into a question of the policy preferences of at least five justices, that doubt was removed by the court's recent opinion in *In re Columbia Medical Center of Las Colinas*, __ S.W.3d __, No. 06-0416, 2009 WL

1900509 (Tex. July 3, 2009, orig. proceeding). Since 1856, the court has consistently held that:

> In ordinary cases the judge has discretion to grant a new trial whenever, in his opinion, wrong and injustice have been done by the verdict; and it is upon this ground that courts have refused to interfere to revise the granting of new trials.

Goss v. McClaren, 17 Tex. 107, 115 (1856). The court has affirmed similarly refused to interfere with the court's determination to grant a new trial in the interest of justice as recently as 2000. *See, e.g., In re Bayerische Motoren Werke, AG*, 8 S.W.326 (Tex. 2000) (Hecht, J., dissenting). Nevertheless, in a 5-4 opinion, the court in this case determined that a trial court abused its discretion by failing to provide an explanation for granting a new trial "in the interest of justice," overruling more than 150 years of precedent.

Setting aside the issue of how a trial court could clearly abuse its discretion by correctly applying well-settled authority, what is clear from the opinion is that at least a majority of the court senses no restraint on the court's ability to correct any interlocutory error that five justices, applying some unstated standard, deem sufficiently important to warrant interlocutory review. Moreover, the court apparently senses no restraint on its ability to impose its own personal policy preference by providing a remedy that the legislature has specifically refused to provide for decades. As Justice Hecht aptly noted in a dissenting opinion in 2000:

> The Legislature could provide for an interlocutory appeal from an order granting a new trial, and it did so in 1925. But two years later it withdrew the provision, concluding that too many meritless appeals were being taken solely for delay. In 1987 the Legislature provided for an appeal from an order granting a new trial in a criminal case, but no statute or rule provides for such an appeal in a civil case.

In re Bayerische Motoren Werke, AG, 8 S.W.3d 326, 328 (Tex. 2000, orig. proceeding) (Hecht, J., dissenting) (citations omitted). The court has, therefore, exerted the full strength of the modified mandamus standard to exert its power to conduct an interlocutory review over whatever matter it desires, including those matters that the legislature has determined resulted in "too many meritless appeals . . . taken solely for delay." *Id.*

Texas' mandamus jurisprudence is more lost that it has ever been. By redefining "inadequate remedy on appeal" to be mean simply that the court believes the issue warrants interlocutory review, the court has rendered this long-standing requirement meaningless. Not only is it impossible for litigants to accurately guess what will catch the attention of the court, but topics of interest are certain to change as the current justices are replaced over time. Litigants are, therefore, left with no guidance on what matters warrant mandamus review, and courts are destined to be inundated with meritless appeals sought only for delay. Texas mandamus jurisprudence is in desperate need of a new compass that both defines when mandamus review is appropriate and precludes the court from usurping the legislature's authority to set policy for the state.

III. MANDAMUS PRACTICE IN THE FIFTH CIRCUIT

A. Federal Mandamus Practice

For decades, the federal mandamus jurisprudence stood in stark contrast to the continually vacillating Texas jurisprudence on the subject. The authority for federal courts to issue writs of mandamus is found in the All Writs Act, which provides that:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law

28 U.S.C § 1651(a). As in Texas courts, the remedy is considered "extraordinary." However, unlike Texas jurisprudence, the writ of mandamus has traditionally been "to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380, 124 S. Ct. 2576, 2586-87 (2004) (quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S. Ct. 938 (1943)). Under this standard, only "exceptional circumstances amounting to a judicial usurpation of power,' or 'clear abuse of discretion,' justify the issuance of a writ of mandamus. *Id.* (citations omitted). Before a writ of mandamus may be issued, three conditions must be met:

> (1) "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," - a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process;

(2) the petitioner must satisfy " 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable;" and

(3) even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Id. at 380-81, 124 S. Ct. at 2586-87 (citations omitted) (emphasis added). Until recently, the scope of this standard appeared to be clear.

B. Dangerous Tinkering: *In re Volkswagen of Am., Inc.*

Drastically differing interpretations of the *Cheney* requirements, however, recently came to a head in the Fifth Circuit in a debate reminiscent of the Texas Supreme Court's struggle with articulating a workable mandamus standard. In *In re Volkswagen of Am., Inc.*, 545 F.3d 304 (5th Cir. 2008) (en banc), the court addressed a claim by Volkswagen that the district court had clearly abused its discretion in denying a motion to transfer venue from the Eastern District of Texas to the Northern District of Texas based on the convenience of the parties standard articulated in 28 U.S.C. § 1404(a). The en banc court, in a 10-7 vote, granted the petition for mandamus, finding that the district court's ruling was "patently erroneous." *Id.* at 318.

In discussing whether there existed an adequate alternative remedy, the majority held that the requirement was "certainly satisfied here" for three reasons. First, it would be difficult for a party seeking review of an improper failure to transfer a case under § 1404(a) after a final judgment to establish harmful error because the party would not be able to show that "it would have won the case had it been tried in a convenient [venue]." *Id.* at 318-19 (quoting *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003)) (alterations in original). Second the court noted that interlocutory review of such orders in not available under 28 U.S.C. § 1292(b). *Id.* at 319. Finally, the court held that there was no adequate alternative remedy on appeal because the inconvenience of the witnesses and parties would already be complete by the time the case is appealed. *Id.*

With regard to the third element, the majority assured itself that mandamus relief was appropriate in the case because the district court "clearly abused its discretion and reached a patently erroneous result." *Id.* Additionally, the majority noted that issuing a writ in this case was appropriate because the issues had "importance beyond the immediate case" and venue transfer decision tend to evade review. *Id.* According to the majority, the lack of review has led to district courts "develop[ing] their own tests, and . . . appl[ying] these tests with too little regard for consistency of outcomes." *Id.* Therefore, having found all three elements of the *Cheney* standard met, the court issued the writ of mandamus.

In her dissent, Justice King faults the majority opinion for ignoring two-hundred years of Supreme Court precedent to use the mandamus procedure to conduct an interlocutory review of a nonappealable order committed to the district court's discretion. *Id.* at 319 (King, J., dissenting). Justice King first criticized the majority for expanding mandamus review by finding that there existed no adequate remedy on apepal. In response to the suggestion that a direct appeal is effectively unavailable, Justice King asserted that this premise was "flat wrong," citing *Action Indus., Inc. v. United States Fidelity & Guaranty Co.*, 358 F.3d 337 (5th Cir. 2004), in which the court reviewed a § 1404(a) transfer decision after final judgment. *Id.* at 323. Justice King also criticized the majority for suggesting that a party had no adequate remedy on appeal simply because the harmless error rule might limit the success of such an appeal. *Id.* According to Justice King, a direct appeal is not unavailable simply because it is not likely to succeed. In fact, as Justice King pointed out, if the majority is correct in finding that a failure to grant a § 1404(a) motion is not likely to affect a parties' substantial rights sufficiently to warrant a finding of harmful error on direct appeal, then there is no basis for issuing a writ of mandamus. A party that simply cannot prevail on direct appeal certainly cannot meet the more stringent requirements for obtaining a writ of mandamus. *Id.*

With respect to the majority's determination that the district court had clearly abused its discretion, Justice King criticized the majority for reducing mandamus jurisprudence to the "interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Id.* at 324 (quoting *Will v. United States*, 389 U.S. 90, 98 n. 6, 88 S. Ct. 269 (1967)). Justice King argued that, under binding Supreme Court authority:

> [A] "clear abuse of discretion" does not involve a district court's possibly erroneous exercise of its conceded authority; rather, clear abuse occurs when the district court lacks the judicial power or authority to make the decision that it did.

Id. at 325 (citing *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-83, 74 S. Ct. 145 (1953)). By equating "clear abuse of discretion" with ordinary

error, instead of confining the phrase to circumstances where the district court has acted outside of its scope of authority, Justice King argues that the majority exceeded the authority granted by the All Writs Act and undermined the policy decision of Congress to limit interlocutory review of district court orders. *Id.* 325-26.

C. "I Think We Might Be Lost."

As Justice King's dissent demonstrates, the majority's opinion in *In re Volkswagen of Am., Inc.* is a marked departure from established mandamus jurisprudence and dramatically expands the availability of the remedy. Not only does the court's opinion enlarge the definition of "clear abuse of discretion," but it reduces the "no other adequate remedy" requirement to virtual meaninglessness. If a party lacks an adequate remedy on appeal simply because a direct appeal is not likely to succeed, then even summary judgment rulings are now subject to mandamus review, especially given that "clear abuse of discretion" merely requires a showing that the district court's ruling was "patently wrong."

As with current Texas jurisprudence, the Fifth Circuit's opinion in *In re Volkswagen of Am., Inc.* leaves practitioners with little practical guidance as to what constitutes an issue worthy of mandamus review. Without any meaningful limitation on the court's authority, the standard appears to be simply that mandamus is available to correct whatever interlocutory order a panel of justices deems worthy of interlocutory review, which is particularly difficult to gauge in the Fifth Circuit because there is no way of knowing which three of the 17 justices and five senior status justices will be assigned to any particular case. Like the Texas Supreme Court, the Fifth Circuit's opinion in *In re Volkswagen of Am., Inc.*, demonstrates a clear distrust of inferior courts' ability to correctly exercise their discretion and Congress' ability to provide for interlocutory review for matters that the court deems necessary. Instead of allowing Congress to determine the scope of the court's jurisdiction to review interlocutory orders, the court has endowed itself with the ability to make that policy choice in contravention of the principle that only Congress should make such a determination. *Bankers* Life, 346 U.S. at 382-83, 74 S. Ct. 145.

IV. PRACTICAL ADVICE: WHAT SHOULD YOU DO WHEN YOU'RE LOST IN THE WOODS?

Regardless of whether the mandamus precedent in Texas and the Fifth Circuit is right or wrong, the practitioner is not left without any strategy for improving the odds of succeeding in a mandamus petition. In 2005, Russell Post submitted a paper to the University of Texas School of Law State and Federal Appeals Conference entitled *Preservation of Harm: A New Approach to an Old Problem.* In this article, Mr. Post argued that a careful appellate practitioner should not only preserve error, but make a record concerning the harm that would result from a trial court's erroneous ruling. Mr. Post noted that, in discretionary petition practice before the Texas Supreme Court, "[t]he paramount consideration in obtaining Supreme Court review is framing an interesting and jurisprudentially important issue. *Id.* at 13 (citing David M. Gunn, *How to Be a Practitioner in the Supreme Court*, Practice Before the Texas Supreme Court 5-7 (State Bar of Texas 2005)). Preserving harm in this context distinguishes a case from others filed and increases the chances that the court will find a case sufficiently interesting to warrant the court's exercise of discretionary review.

While Mr. Post's paper is limited to preserving harm in a direct appeal, the same principles are sure to aid a practitioner in a mandamus proceeding, especially in light of the ever-expanding scope of mandamus review in both Texas and the Fifth Circuit. What is clear from the recent cases discussed above is that mandamus review in both Texas and the Fifth Circuit is devolving into little more than a discretionary review similar to the petition practice before the Texas Supreme Court. It makes sense, then, that a careful practitioner would approach a petition for mandamus with the same strategies as are employed in a petition for review in the Texas Supreme court, regardless of whether the petition for mandamus is filed in an intermediate state appellate court, the Texas Supreme Court, or the Fifth Circuit.

Consequently, the "paramount consideration" for the mandamus practitioner is the "framing of an interesting and jurisprudentially important issue." By preserving harm as Mr. Post suggests, an appellate lawyer only serves to increase the likelihood that a court will find the issue worthy of interlocutory review. Moreover, the concern noted by Mr. Post that preserving harm in a direct appeal situation may alienate a trial judge is of less concern in a mandamus situation because, if a judge is likely to be offended by the preservation of harm, the judge will probably be offended when the petition for mandamus is filed anyway. Preserving harm is not likely to increase the judge's displeasure with a party, but may persuade the court to correct an error. As in a direct appeal, "it is far better to win the battle today than preserve it for appeal tomorrow." *Id.* at 11.

V. CONCLUSION

In concluding her dissent in *In re Volkswagen of Am., Inc.*, Justice King appropriately quoted from Justice Friendly of the Second Circuit, who wrote:

> Appellate courts die hard in relinquishing powers stoutly asserted but never truly possessed . . . . [W]e should . . . end this sorry business of invoking a prerogative writ to permit appeals, which Congress withheld from us, from discretionary orders fixing the place of trial.

In re Volkswagen of Am., Inc., 545 F.3d at 327 (quoting *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 445-46 (2d Cir. 1966) (Friendly, J., concurring)). The wisdom of Justice Friendly's admonition is not limited to venue determinations or to the federal judiciary.

In the meantime, a careful practitioner anticipating a mandamus proceeding should take the time to create a record establishing the harm that will result from a court's erroneous ruling. Preserving harm not only increases the chances that a court will find an issue worthy of interlocutory review, but provides the trial court the opportunity to correct an error without the need for interlocutory review. Again, there can be little doubt that winning the battle at the trial level is far better than increasing your odds for success in a petition for mandamus, especially given the absence of any real guidance from the courts on what matters will warrant mandamus review.

BIBLIOGRAPHY

1. 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 (2007)

2. William E. Barker, *The Only Guarantee is There Are No Guarantees: The Texas Supreme Court's Inability to Establish a Mandamus Standard*, 44 HOU. L.R. 703 (2007).

3. Pamela Stanton Baron, *Texas Supreme Court: Mandamus Update, Including Summary of Mandamus Activity by Subject Area*, PRACTICE BEFORE THE SUPREME COURT (State Bar of Texas 2005).

4. Russell S. Post, *Preservation of Harm: A New Approach to an Old Problem*, STATE AND FEDERAL APPEALS CONFERENCE (University of Texas School of Law 2005).

5. Alan T. Cooperman, *Mandamus Granted or Mandamus Denied? Confusing Standards to Remedy an Improperly Overruled Special Appearance*, 48 BLR. L.R. 1175 (1996).