EXTRAORDINARY CIRCUMSTANCES

Challenging denials of summary judgment by mandamus.

WRITTEN BY **DAVID F. JOHNSON** AND **MATT JOHNSON**

It is not uncommon for a party to want to challenge a trial court's denial of a summary judgment in the court of appeals. Generally, a party cannot appeal a trial court's denial of a summary judgment motion because the order is interlocutory.[1] Historically, a party simply had to go to trial and appeal the resulting judgment. Further, when a motion for summary judgment is denied by the trial court and the case is tried on the merits, the order denying the summary judgment cannot be reviewed on appeal.[2] The losing party's remedy is to assign error to the trial court's judgment ultimately rendered following trial on the merits based on the grounds and evidence admitted at trial.[3] It is as if the summary judgment ruling never happened.

There is now a statute that allows parties to a permissive appeal for almost any order so long as "the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation."[4] However, this permissive appeal option requires the trial court to agree to it. What if the trial court refuses to allow a permissive appeal and forces the party to trial? Historically, a party just had to go to trial, taking up judicial resources and both parties' time and expense. Mandamus was not an option to review the denial of a summary judgment motion.[5] Rather, courts of appeals historically limited their mandamus review to ordering a trial court to rule on a properly filed motion, not on what ruling to make.[6] This can be very frustrating for parties and attorneys. For example, where a properly filed no-evidence motion is pending with no response filed, the trial court should grant the motion; yet, mandamus is not allowed to order the granting of the motion.[7] When something as simple as that occurs, it creates distrust in the civil justice system.

Recently, there has been some precedent that may allow a court of appeals to review a denial of summary judgment via mandamus review. Because mandamus is an "extraordinary remedy," it historically has only been available in limited circumstances when necessary to "correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law."[8] However, in 2004, the Supreme Court of Texas changed the way that mandamus relief is evaluated.[9] The court held that an "adequate" remedy, which precludes mandamus relief, is a "proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests."[10] With this rather loose standard, parties initiated new attempts to challenge summary judgment denials by mandamus.

In *In re McAllen Medical Center, Inc.,* the Supreme Court of Texas granted mandamus relief to force a trial court to grant motions to dismiss based on expert reporting requirements, and in so doing the court discussed the use of mandamus relief in the context of summary judgment denials.[11] While generally holding that parties are not entitled to mandamus for denials of summary judgments, the court held: "[I]nsisting on a wasted trial simply so that it can be reversed and tried all over again creates the appearance not that the courts are doing justice, but that they don't know what they are doing. Sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded."[12]

After *In re McAllen Medical Center, Inc.,* the court granted mandamus relief in *In re USAA* to order a trial court to grant summary judgment based on a statute of limitations defense.[13] The extraordinary circumstances in *In re USAA* that justified mandamus relief were: (1) a previous trial by a trial court without jurisdiction, (2) an appeal to an appellate court and then to the Supreme Court to get that error corrected, and (3) a proposed second trial on a claim barred by limitations. In granting mandamus relief, the court noted: "Two wasted trials are not '[t]he most efficient use of the state's judicial resources.'" The court concluded:

> Denying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years (as well as the tolling provision's inapplicability to suits filed with intentional disregard of proper jurisdiction), and we should not "frustrate th[at] purpose[] by a too-strict application of our own procedural devices." Because the extraordinary circumstances presented here merit extraordinary relief, we conditionally grant the writ and direct the trial court

to grant USAA's motion for summary judgment.[14]

The Supreme Court of Texas revisited mandamus relief from summary judgment denials in *In re Academy, Ltd.*[15] The court held: "although we have held that 'mandamus is generally unavailable when a trial court denies summary judgment,' that principle is not, and cannot be, absolute."[16] The court held that the trial court erred denying summary judgment on a federal defense involved with retailers selling firearms, and held:

> To that end, in *In re United Services Automobile Ass'n,* we granted mandamus relief from an order denying summary judgment because the specter of a second "wasted" trial on a claim barred by limitations constituted "extraordinary circumstances" meriting "extraordinary relief." Here, Academy faces multiple trials in the four underlying suits alone, plus multiple additional lawsuits arising from the Sutherland Springs shooting. Absent mandamus relief, Academy will be obligated to continue defending itself against multiple suits barred by federal law. As in *United Services,* this case presents extraordinary circumstances that warrant such relief.[17]

So, the Supreme Court of Texas has granted mandamus relief in extraordinary cases where there are rather extreme procedural circumstances. Since *In re USAA,* courts of appeals have not generally been receptive to mandamus relief from summary judgment denials absent the showing of some extraordinary issue.[18]

However, some courts have found exceptional circumstances and have granted mandamus relief to compel a trial court to grant summary judgment.[19] For example, in *In re Hoskins,* the family had several different lawsuits and appeals.[20] The court held that mandamus was appropriate:

> Reviewing the specific circumstances of this case, both legal and factual, we conclude that relator has shown that extraordinary circumstances justify granting mandamus relief in this case. The matters at issue here regarding Tilden Ranch have been repeatedly litigated and have been determined in an arbitration proceeding and relator should not be subject to defending against the same claims in a subsequent suit more than a decade after the transaction at issue and well past the expiration of the statute of limitations.[21]

In *In re Robinson,* the court granted mandamus relief ordering the granting of a summary judgment motion where "an almost four-year-old personal injury cause of action has been put on hold while the parties litigate an unenforceable settlement agreement" and otherwise, "all parties, including both the trial court and this Court, will be forced to endure the delay, cost, and expense of both the litigation and inevitable appeal of nothing more than an unenforceable oral settlement of the abated personal injury cause of action."[22] In *In re Kingman Holdings, LLC,* the court granted mandamus relief to order the granting of a no-evidence motion for summary judgment where the defendant "should not have to endure the time and expense of continuing to litigate a four-year-old case that is not being diligently prosecuted when the property interests that are the subject matter of the case suffer damage and devaluation through delay."[23] In *In re McIntire,* the court did not grant mandamus relief, but used a broad standard that it may do so where it would end the litigation.[24]

Courts have also granted mandamus relief to order a trial court to grant a summary judgment where the subject matter was extraordinary and important, such as religious and constitutional rights[25] or the right to the advancement of attorneys' fees in the interim.[26] Further, in *In re S.T.,* the court granted mandamus review of an order denying summary judgment regarding paternity in a suit affecting the parent-child relationship because "issues involving the rights of parents and children should be resolved expeditiously, and delay in such cases often renders appellate remedies inadequate."[27]

So far, *In re USAA* has not opened Pandora's box to a litany of summary judgment mandamus actions. The courts of appeals have not seemed inclined to offer broad mandamus relief to parties who wish to challenge a trial court's denial of a summary judgment in an ordinary case. But there is Supreme Court of Texas precedent that would support such relief depending on the factual and procedural posture of the case. Parties should focus on arguing that: (1) a case has been pending for a long period of time, (2) there are multiple cases that could be impacted by the ruling, (3) the case is set for trial for a second time, (4) other unique procedural circumstances, or (5) the subject matter of the case is extraordinary and important. It is important to remember that 25 years ago few would have even considered filing a mandamus from the denial of a summary judgment motion. Today, parties do so regularly, even if unsuccessfully. Tomorrow may see courts of appeals regularly intervening in trial courts' summary judgment denials. **TBJ**

NOTES

1. *Lancer Ins. Co. v. Garcia Holiday Tours,* 345 S.W.3d 50, 59 (Tex. 2011); see also *Cincinnati Life Ins. Co. v. Cates,* 927 S.W.2d 623, 625 (Tex. 1996).
2. See *Ackermann v. Vordenbaum,* 403 S.W.2d 362, 365 (Tex. 1966); see also *Schack v. Prop. Owners Ass'n of Sunset Bay,* 555 S.W.3d 339, 351 (Tex. App.—Corpus Christi-Edinburg 2018, pet. denied).
3. *HNMC, Inc. v. Chan,* 637 S.W.3d 919, 928 (Tex. App.—Houston [14th Dist.] 2021, pet. filed); see also *United Parcel Serv., Inc. v. Tasdemiroglu,* 25 S.W.3d 914, 916 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
4. Tex. Civ. Prac. & Rem. Code § 51.014(d), (f).
5. *In re McAllen Medical Center, Inc.,* 275 S.W.3d 458, 465 (Tex. 2008); see also *In re Mohawk Rubber Co.,* 982 S.W.2d 494 (Tex. App.—Texarkana 1998, original proceeding).
6. *In re Mission Consolidated Indep. Sch. Dist.,* 990 S.W.2d 459, 461 (Tex. App.—Corpus

Christi 1999, orig. proceeding).

7. *In re Elizabeth Benavidez Elite Aviation, Inc.,* No. 04-19-00283-CV, 2019 Tex. App. LEXIS 3892 (Tex. App.—San Antonio May 15, 2019, original proceeding).
8. *CSR Ltd. v. Link,* 925 S.W.2d 591, 596 (Tex. 1996).
9. *In re Prudential Ins. Co.,* 148 S.W.3d 124, 135-38 (Tex. 2004) (orig. proceeding).
10. *Id.* at 136.
11. 275 S.W.3d at 465.
12. *Id.* at 466.
13. *In re United Servs. Auto. Ass'n,* 307 S.W.3d 299, 314 (Tex. 2010) (hereinafter "In re USAA").
14. *Id.*
15. 625 S.W.3d 19 (Tex. 2021).
16. *Id.* at 32.
17. *Id.* at 36.
18. *In re Columbus,* No. 01-21-00272-CV, 2022 Tex. App. LEXIS 8586 (Tex. App.—Houston [1st Dist.] November 22, 2022, original proceeding); see also *In re Jennings,* No. 05-22-00804-CV, 2022 Tex. App. LEXIS 6415 (Tex. App.—Dallas August 25, 2022, original proceeding); see also *In re Suman,* No. 14-20-00509-CV, 2020 Tex. App. LEXIS 6101 (Tex. App.—Houston [14th Dist.] August 4, 2020, original proceeding); see also *In re Allen,* No. 09-20-00113-CV, 2020 Tex. App. LEXIS 3642 (Tex. App.—Beaumont April 13, 2020, original proceeding); see also *In re E. Tex. Oilfield Prod. Servs., Inc.,* No. 12-20-00077-CV, 2020 Tex. App. LEXIS 2930, 2020 WL 1697428 (Tex. App.—Tyler Apr. 8, 2020, orig. proceeding); see also *In re Altecor,* No. 13-20-00076-CV, 2020 Tex. App. LEXIS 1100 (Tex. App.—Corpus Christi February 7, 2020, original proc.); *McBride v. Tex. Bd. of Pardons & Paroles,* No. 03-19-00329-CV, 2019 Tex. App. LEXIS 7433 (Tex. App.—Austin August 22, 2019, pet. denied); see also *In re Elizabeth Benavidez Elite Aviation, Inc.,* No. 04-19-00283-CV, 2019 Tex. App. LEXIS 3892 (Tex. App.—San Antonio May 15, 2019, original proc.); see also *In re Double Diamond,* No. 11-18-00318-CV, 2018 Tex. App. LEXIS 10274 (Tex. App.—Eastland December 13, 2018, original proceeding); see also *In re OOIDA Risk Retention Grp., Inc.,* No. 02-15-00238-CV, 2015 Tex. App. LEXIS 9449 (Tex. App.—Fort Worth September 4, 2015, original proceeding); see also *In re Crawford & Co.,* 453 S.W.3d 450 (Tex. App.—Amarillo 2014, original proceeding).
19. *See, e.g., In re Hoskins,* No. 13-18-00296-CV, 2018 Tex. App. LEXIS 10826, 2018 WL 6815486 (Tex. App.—Corpus Christi Dec. 27, 2018, original proc.); see also *In re S.T.,* 467 S.W.3d 720 (Tex. App.—Fort Worth 2015, original proceeding); *see also In re Robinson,* 335 S.W.3d 776 (Tex. App.—Amarillo February 23, 2011, original proceeding).
20. 2018 Tex. App. LEXIS 10826, at *2.
21. *Id.* at *25–26.
22. 335 S.W.3d at 776.
23. No. 13-21-00217-CV, 2021 Tex. App. LEXIS 7785, 2021 WL 4301810, at *5 (Tex. App.—Corpus Christi Sept. 22, 2021, orig. proceeding).
24. No. 07-22-00249-CV, 2023 Tex. App. LEXIS 60 (Tex. App.—Amarillo January 5, 2023, original proceeding).
25. *Tilton v. Marshall,* 925 S.W.2d 672 (Tex. 1996).
26. *In re DeMattia,* 644 S.W.3d 225 (Tex. App.—Dallas 2022, original proceeding).
27. 467 S.W.3d at 729.

DAVID F. JOHNSON
is the managing shareholder in Winstead's Fort Worth office.

MATT JOHNSON
is an attorney with Jackson Walker in its Dallas office.