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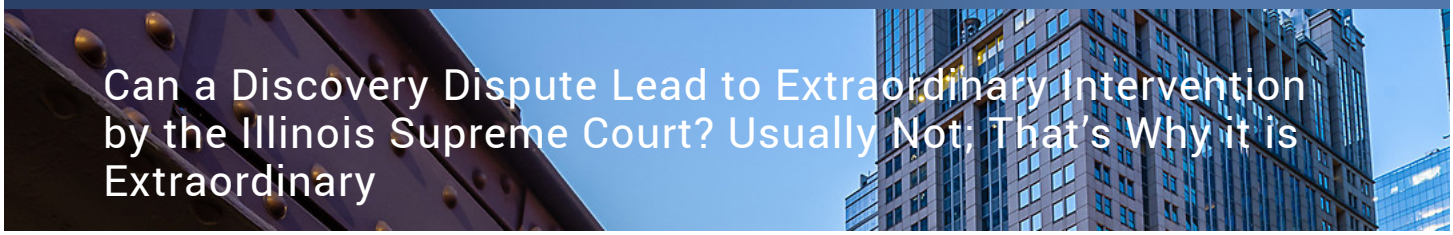

Can a Discovery Dispute Lead to Extraordinary Intervention by the Illinois Supreme Court? Usually Not; That's Why it is Extraordinary

By George Kiser on January 10, 2023
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Recently, I was talking with colleagues about overly broad discovery orders entered against defendants and the options for appealing those orders. Wouldn't it be nice to be able to appeal these orders before the case is over, to prevent a costly search of a client's records? However, a party is generally not able to appeal a trial court order issued in the middle of a case, before final verdict is entered. Generally, a party can appeal from a final judgement in a case, but not before it. The trial court can grant permission to appeal a decision, but that's not often done. A party can intentionally refuse to comply with the order and allow a contempt citation to be issued by the court, which usually can be appealed. As with parenting, contempt is a punishment for disobeying an order. Those are the ordinary routes for appealing a non-final order of a court. In law, there is almost always an exception to every rule, however. Not surprisingly then, there is an extra-ordinary option available to try and have a non-final ruling reviewed by an appellate court. It is called the Extraordinary Writ.

Uses of the Writ of Prohibition/Mandamus

Most people have heard of the Writ of Habeas Corpus, which is literally a plea to release the body of a person being detained. The extraordinary Writ of Prohibition/Mandamus in the context of a pending civil case are pleas to make a lower court judge do something that he or she has refused to do (known as a Writ of Mandamus) or to keep the lower court judge from doing what should not be done (known as a Writ of Prohibition). Frankly, sometimes these descriptions are difficult for lawyers and judges to navigate and often a party will file a "writ of both" to make sure they have asked for the right remedy. For simplicity, it doesn't really matter which action is requested, the purpose of the writ is to ask the Supreme Court to order that a lower court judge undo what he or she has done. In Illinois, these writs are established by the Illinois Constitution and rest with the Illinois Supreme Court.

Article VI, Section 4(a), of the Illinois Constitution provides that the Illinois Supreme Court may exercise original jurisdiction (i.e., not appellate review) of cases relating to prohibition. The Illinois Supreme Court in the recent case of *Edwards v. Atterberry*, 433 Ill Dec. 142, 131 N.E.3d 500 (2019), noted that a writ of prohibition is an extraordinary remedy. Id., 131 N.E.3d at 504. It later explained that the writ is not to be used to circumvent the normal appellate process and is only to be granted in "rare instances where none of the ordinary remedies is available or adequate." Id. at 506. As the Constitutional provision itself states, the Court "may" exercise original jurisdiction. That means the Supreme Court does not have to hear such a writ.

Edwards v. Atterberry

In *Edwards*, Kenin Edwards was facing criminal sentencing for violating a state regulation that he said could not be used by the trial judge to send him to jail. Id. at 503. In the meantime, a regulatory agency was working to suspend or revoke his timber buyer's license. He argued that he would be without a real remedy if he were forced to fight the licensing action, which affected his livelihood, from a jail cell in which the trial judge had no jurisdiction to put him. Id. at 505. The Supreme Court noted that there were four requirements that a party needed to establish before the court would grant a writ of prohibition.

1. The action that the person wants to prohibit must be of a judicial or quasi-judicial nature. Id. at 504.
2. The writ must be directed against a lower court. Id.
3. The action that is the subject of the writ must be outside the lower court's or judge's jurisdiction—or if is within its jurisdiction, it's "beyond its legitimate authority." Id.
4. There must not be any other adequate remedy available to the person. Id.

In *Edwards*, there was no disputing the first three of these requirements. But the court went into great detail explaining why Mr. Edwards did not meet the fourth criteria; he had an appeal from an imprisonment order and he had not been sentenced yet. He also still had a motion pending before the trial court asking him to change his order of conviction. Id. at 505 to 508. The Court also noted that every person who is facing a conviction pending an appeal potentially faces collateral consequences in other aspects of their lives. Id at 505.

The Supreme Court also recognized that there is yet another consideration that the Supreme Court could choose to invoke if it wanted to hear a person's Petition for Writ of Prohibition. The Court noted that where the issue presented by the writ of prohibition is sufficiently important to the administration of justice, the Court could grant the writ even if all of the four other requirements were not met. Id at 504, quoting *People ex rel. Foreman v. Nash*, 118 Ill.2d 90, 97, 112 Ill. Dec 714, 514 N.E.2D 180 (1987). The *Edwards* Court did not decide to grant the writ on this basis, either. Yet, writs of prohibition have been granted by the Supreme Court on discovery issues in rare instances.

Owen v. Mann

In the case of *Owen v. Mann*, William Starnes and International Harvester sued Robert Owen for defamation. Owen, an attorney, had responded to a Judicial Inquiry Board request and turned over documents and had communications with the board. William Starnes was a judge. In the defamation case, the trial court had ordered that Owen comply with written discovery requests from Judge Starnes and International Harvester, including that he turn over documents or communication that Mr. Owen had provided to the Judicial Inquiry Board. Owen sought a writ of mandamus from the Supreme Court, or a supervisory order from them regarding discovery, compelling the trial court to vacate his discovery order. *Owen v. Mann*, 105 Ill.2d 525, 86 Ill Dec. 507, 475 N.E.2D 886, 888-890 (1985). Interestingly in this case, trial Judge Richard Mann had dismissed the original complaint and allowed time for the plaintiff to file an amended complaint. However, when the court's discovery order was entered, the plaintiff had not filed the amended complaint.

The Supreme Court noted that it was clearly improper for the trial court to enter a discovery order compelling production of material before the court could know what was or was not at issue; the Supreme Court said that on this basis alone, the court could issue a writ of mandamus or supervisory order (another option, for another day) directing the trial court to vacate its order. Id. 475 N.E. 2d at 890. But the Supreme Court went further. It addressed the issue of the discoverability of material presented to the Judicial Inquiry Board, which was created under Article VI, Section 15 of the Illinois Constitution and it has a provision that states that "all proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission." Ill.Const. 1970, art. VI, sec. 15(c).

While Judge William Starnes, the plaintiff in the case, had argued that the Supreme Court's exercise of original jurisdiction, not appellate review, in this case was not appropriate, the Court disagreed. It noted that while mandamus will not ordinarily lie to correct an abuse of discretion by a lower court or regulate discovery, in this case the issues presented were of vital importance to the administration of justice which will likely be raised again if not addressed currently. Id. at 890. The Court ruled that Mr. Owen's communications with the Board were confidential, not subject to discovery and granted the writ of mandamus directing Judge Mann to vacate his order. Id at 892.

People ex rel. General Motors v. Bua

In *People ex rel. General Motors Corporation v. Bua*, 37 Ill.2d 180, 226 N.E.2d 6 (1967), the Supreme Court granted a writ of mandamus against a trial court judge in a strict product liability action against General Motors (GM). The case involved an accident with a 1961 Chevrolet Corvair. Plaintiff had alleged that the Corvair's tie rod was defective causing an accident, and later alleged that the design of the Corvair was defective. Id. 226 N.E.2d at 8- 12. The trial court had required GM to produce "all engineering plans, specifications, blueprints, memoranda, written reports, reports of laboratory and proving ground tests, and all other records, papers, moving pictures and documents which show as to model years of the Corvair 1960 through 1965" in two separate orders. Id. at 11. General Motors brought a writ of mandamus asking the Illinois Supreme Court to use its original jurisdiction to vacate the orders as over broad, among other complaints. Id at 13. General Motors argued that the trial court's orders exceeded its jurisdiction by entering the broad order, which allegedly violated GM's due process and amounted to unreasonable searches and seizures under constitutional law. Id. The plaintiff in the underlying action argued that G.M.'s complaints were simply about the breadth of the discovery, which is within the trial court's discretion and not subject to review by the extraordinary writ of mandamus. Id.

The Illinois Supreme Court agreed with the plaintiff that the orders at issue did not rise to a constitutional level. It also stated that "original Mandamus or prohibition is an inappropriate remedy to regulate discovery in the trial court." Id. It went on to note that the Illinois Supreme Court has always been wary of exercising its original jurisdiction even in cases involving void orders, unless the issues involved were of general and compelling importance. Id. Yet, it also recognized that the extraordinary writ of mandamus is a valuable "judicial tool which must be considered even though some of the normal criteria for its use are absent." Id. In the *Bua* case, the Illinois Supreme Court did grant the writ of mandamus and scrutinized the discovery orders at issue. The court explained that it hoped that its discussion would encourage the bench and bar to wisely use discovery to illuminate the actual issues in a case rather than using discovery to harass and obstruct the opponent. Id at 14. The Court then

further cautioned other litigants from asking the court to review "normal pretrial discovery procedure by original Mandamus." Id. The Supreme Court in *Bua* granted the "writs of Mandamus and prohibition," ordered the trial court to expunge the discovery orders and prohibited the trial court from enforcing them. Id. at 16.

Summary

So, is a really broad discovery order from a trial court reviewable by a writ of prohibition or mandamus to the Illinois Supreme Court? The answer is no, not ordinarily. But the key word is ordinarily. Where a litigant can convince the Supreme Court that the actions of the trial court are of such vital importance to the administration of justice that its intervention is needed, the Court might consider the issues. That is what happened in *Owen* and *Bua;* cases that were well out of the ordinary, and which the Supreme Court thought worthy of intervention. However, as the court cautioned in *Bua*, for most issues, the Court is hesitant to exercise its original, extraordinary jurisdiction.

Tags: Extraordinary Write, Illinois Supreme Court, Writ of Mandamus, Writ of Prohibition