ORAL ARGUMENT — 10/20/98
97-0884 & 97-0885
IN RE MASONITE

LAWYER: This court has consolidated two cases for argument: *Arredondo,* which was originally composed of 419 plaintiffs, we filed suit in Jim Hogg County, of which 352 were admittedly not residents of that county; and, *Adams,* was composed of 323 plaintiffs, 158 admittedly not residents of Duval County. In response these defendants, relators, filed appropriate motions to transfer the nonresident plaintiffs' cases in each case to Dallas county, a county of unquestioned propriety, but never challenged, never specifically denied. In response, the plaintiffs amended their petitions, admitted the impropriety of their choice of venue, moved to sever and to transfer to the counties of the nonresident plaintiffs' residencies.

At the hearings on Feb. 10 and Feb. 26, the respondent, Judge Garcia, sitting in each of Jim Hogg and Duval counties on his own motion, as is clearly reflected in the orders, as well as in the transcripts of the hearings, which have been provided to the court, transferred each of the nonresident plaintiffs' cases, not to Dallas county, not a county designated by the defendants, but instead to their home counties. In total, 510 plaintiffs, 14 different counties.

I believe the law is absolutely fair. The TC had no authority, statutory or otherwise, to transfer to any county other than that specified by the defendants.

ENOCH: The response from Mr. McMains is that's not what the authority says. The authority just simply says: If the county where it is is not the proper county, then it shall be transferred to a county that is a proper county. There's nothing there that says only to where the defendant says.

LAWYER: I think that section 15.063, which is the section Mr. McMains points to reads: "Shall transfer an action to another county of proper venue," has to read in conjunction with this court's rules of civil procedure. It was 86 and 87.

Any reading of those rules clearly states that plaintiff gets the first choice, but upon proper challenge and upon denial of that venue if the defendant then comes forth and designates a county of proper venue, then the court only has those two choices. The fact that the court looks at 87(d)(3), which is the rule on the hearing, the rule makes it clear that the court can hear additional evidence either on the plaintiff's choice of county, or the defendants. There is not a third option.

ABBOTT: What about his argument that the statute trumps the rule?

LAWYER: I don't believe that the statute can be read other than in conjunction with.

PHILLIPS: Well the statute was passed first and then we passed the rule that the statute says anything in the rule...

LAWYER: But the statute does not say, "Any other county of proper venue." It says, "Any county of proper venue." And of course the only other designated in the rules or in the statute is that county designated by the defendants. And that of course is consistent with the case law. And this court itself in *Wilson v. Texas Parks & Wildlife* said: "That if the plaintiff fails to meet his burden to establish venue in the county of suit, the TC must transfer the lawsuit to another specified county of proper venue." And if you look at footnote 1 to that opinion, that is the county designated by the defendant.

BAKER: So it's an abuse of discretion?

LAWYER: No, that order is void. He had no authority.

BAKER: But there's a line of cases that say to the contrary.

LAWYER: I think that the better _____ certainly is that a court, which on its own motion transfers to a county other than that designated by the defendant or the plaintiff, that order is void, and mandamus _____.

BAKER: Well can't you make the argument by whatever the TC did, he didn't follow guiding rules and principles, which are the arguments that you're making exists. That is, that the statutes say you can't do that, but he did have jurisdiction of both the parties and the subject matter.

LAWYER: Absolutely. No one is contesting that. What he didn't have jurisdiction to do was to issue this order. He had no statutory or other authority to issue this order - to just grab a county.

PHILLIPS: The rule requires a party with making your type of motion to specify another county. But what language in the rule says that that's all the trial judge can consider?

LAWYER: I think if you look at 87(3)(d): In the event that the parties shall fail to make prima facie proof that the county of suit or the specific county to which transfer is sought is a county of proper venue, then the court may direct the parties to make further proof. Those are the only two options: the county of suit, or the designated county. And that has been the law for 100 years.

And to get to your point, Justice Baker. If you look at the precedential value of this, what we have is a trial court on its own motion picking a county, admittedly a county that initially might have been a county of proper venue, and transferring a case. Do we want the TCs of this state to do that, or do we want them limited as they are presently limited by the statute and by

the rules?

BAKER: Well let's say we don't want them doing that, but they just exceed the statutory scheme, which you say is void, and it's an abuse of discretion. Or you say, it doesn't matter whether he abused his discretion or not, it's just flat void, so that's why we are going to say, we can have mandamus?

LAWYER: Right. I think you can either take the void approach or you can take devoid of any basis in law separate approach.

BAKER: Under *Walker v. Packer*, we've clearly said that to improperly apply the law, the TC has no discretion, and accordingly, it's an abuse of discretion if you don't do so. Why doesn't that facet of mandamus practice apply in this case?

LAWYER: It does. I'm sorry. What we have now is, we have 510 plaintiffs, 14 different counties. Now even if you assume that we could try all those plaintiffs' cases in 14 courts before 14 juries, we have wasted 14 courts and 14 juries time. Now there is no way we can try one case involving 352 plaintiffs at one time. So I think it's easy to assume there are going to be dozens of trials.

ABBOTT: But wouldn't that be the situation if all these cases had been filed in the originally proper venue, you would be stuck trying a whole bunch of cases in a whole bunch of counties?

LAWYER: We would. But they lost that option as a matter of law by choosing the counties they did - they don't get a second bite at the apple. And of course, they tried to take one and that kind of makes this situation even more egregious. What the TC did, albeit on its own motion, was take the suggestion of the plaintiffs and send them back to the residence counties where they could have filed originally, but they didn't. They also could have all filed in Dallas county - everyone of them - which would have made everyone's life much easier.

BAKER: Well maybe the plaintiffs wouldn't agree that that makes everyone's life easier to be in Dallas county. But you still have the problem even if you are in Dallas county, you are going to try an outrageous number of cases, but it will be a whole lot more convenient for your clients, because that's where their home office is.

ABBOTT: Let's take a slight step back. Let's assume that the trial judge clearly unequivocally violated the venue statutes, and violated the venue rules of civil procedure. You're saying that that makes the court's order void?

LAWYER: Yes.

ABBOTT: My question is, why would that not be the case in every situation where a judge's ruling is contrary to the clear wording of a statute or the clear wording of a rule? We have that occur all the time, and we're not saying that all those rulings of TC's are void.

LAWYER: I think this is a different situation than one in which the court simply makes a mistake. This is one in which the court had no authority to act.

ABBOTT: He had no authority to act because he acted contrary to what the statute says?

LAWYER: That's true.

ABBOTT: And if that's the case, then literally almost on a weekly basis we have situations where trial judges make rulings that are contrary to statutes, and arguably by extension all of those rulings are void.

LAWYER: We also have in addition to the rules in the statute, we do have a well-developed body of case law addressing exactly this kind of issue that hold, whether it be *Robertson v. Gregory*, *The City of LaGrange*, and in many cases have held orders transferring venue on a court's own motion even in cases where someone else has initiated the motion for transfer.

BAKER: I'm a little confused. Your opening statement indicated that when the plaintiffs saw they were in some trouble they filed a motion asking that all of the non-Jim Hogg county residents be sent back to their home county?

LAWYER: They _____ a Motion to Sever.

BAKER: A venue transfer?

LAWYER: Yes. And that of course is a problem.

BAKER: Well I don't disagree with that. But your next statement is, but then the TC did what they asked, but "on his own motion." Now how does that happen when you have a pending motion saying, "Do this for us?"

LAWYER: This court specifically said: He was not granting defendants' motion, he was not granting plaintiffs' motion, he was on his own motion transferring these cases.

BAKER: The CA said that.

LAWYER: So did the TC.

OWEN: Let's assume you went through a trial and you won in all of these 14 different counties. Would you then say that the take nothing judgment in your favor was void because the TC had no jurisdiction?

LAWYER: I think that we have built reversible error into this case.

OWEN: I'm not saying reversible error. You win.

LAWYER: I win, but I might...

OWEN: And then can the plaintiff come back and say that that take nothing judgment in your favor is void, because the TC never had jurisdiction?

LAWYER: No. But I think what the plaintiffs' lawyer could say is, that transfer was void.

OWEN: He could try it?

LAWYER: Right. Absolutely. There is automatic reversible built into all of these cases.

OWEN: Even you don't think it can be waived? You don't think that the TC's error in transferring to these 14 counties could be waived by you or by the plaintiff?

LAWYER: I certainly think it could be waived.

OWEN: If it's waivable, then how can it be void?

LAWYER: As with any judgment, if you choose not to challenge it, you can waive the challenge.

OWEN: Well void means it's a nullity, so it's not something that you can waive.

BAKER: Subject to a collateral attack in any court?

LAWYER: Yes. I think that's an interesting question. I would think though it would always be up to the litigants to decide whether they want to live with that result or not before they try to challenge it.

ABBOTT: Somewhat along those lines, regardless of whether what the trial judge did is void or voidable, let's assume that it was voidable. Under the circumstances of this case involving a transfer of venue, as opposed to some other voidable action by a trial judge, is there valid jurisdiction vested into the transferring court? In other words, do all these transferring courts have

valid jurisdiction? If it's void, I am going to presume I don't have jurisdiction. Let's assume it's voidable.

LAWYER: That is a very good question. I don't know how to answer that question.

ABBOTT: I would like a supplemental briefing after oral argument on the answer about whether or not if what the trial judge did is voidable if there is a lack of jurisdiction in the transferring courts?

LAWYER: We will get you that. We have touched upon the adequacy of the appeal. I think the *Dikeman* background...

BAKER: But the inadequacy of appeal is based upon the argument that the order is void. What if it's just a voidable order?

LAWYER: I don't believe we have an adequate remedy on appeal. If you look at your *CSR* decision, we fall right within that court decision. And we're talking about an enormous waste of judicial time, of juries' time, of litigants' time, lawyers' time.

BAKER: But that was just one factor in *CSR*.

LAWYER: Another factor that was mentioned by this court is of course the pressure to settle. We're going to have to try hundreds of cases in different locations. And that of course increases the pressure to settle when we certainly don't believe any of these cases have any merit. These are all summary judgment material. Limitations ran years ago.

BAKER: You can file 16 different motions for summary judgment and it's all over pretty fast if that's the case. I'm just responding to your argument that that's why there is a massive amount of time and effort in lawyer and client money, but if they are all summary judgment cases, you can file those pretty rapidly under 166(a)(i) now.

LAWYER: But if you assume that any fact question is raised, then you assume that it's not going to be sent to the 14 courts _____, because as I said, no way we can try one case with 352 plaintiffs who have different claims, different homes.

BAKER: Well was there just one petition filed with however many plaintiffs there were?

LAWYER: Two.

BAKER: Two petitions in two different counties totaling 510 plaintiffs?

LAWYER: No, 700 plus.

* * * * * * * * * *

RESPONDENT

McMAINS: I am co-counsel for the respondents in the two consolidating cases, which I think basically present the same issues, which principally is, is this order subject to being mandamus. That, I, believe is the crucial issue that is before the court.

The standard principles of mandamus that this court articulated in *Walker v. Packer*, which the court has relied upon frequently since, recognized that generally even if a TC makes a mistake, an error of law, which constitutes an abuse of discretion, and whether it's voidable or legally erroneous or whatever, that these are incidental rulings that are not subject to review by mandamus unless there is no adequate remedy by appeal. In order to avoid that effort, the suggestion was made that the TC's order in this case is "void."

Basically what he is suggesting is, that every time there is an erroneous venue decision, that is mandamusable, and this court has held quite to the contrary, as has the legislature in the statute that they passed. The statute specifically authorizes mandamus only in the event of mandatory venue. That's the only time that the statute suggest that mandamus is appropriate.

OWEN: Well it also provides the right of interlocutory appeal for most cases, doesn't it?

McMAINS: No, not for most cases. Only for the situation as held by the San Antonio court and I think supported by the San Antonio court's analysis, the legislative history with regards to the *Polaris* situation, that is people who come in later. In regards to decisions on intervention and decisions on joinder at a later time, those are the only things that are subject to an interlocutory appeal, which has some very rigorous rights. It was specifically crafted to deal with the *Polaris* situation. It is not designed to deal with a situation simply where there is more than one party that files a lawsuit in the same lawsuit, and the initial joinder. That is not what the function of that statute was as appropriately held by the San Antonio CA.

The purpose of the statute when it was originally changed in 1983, and we don't have 100 years of jurisprudence on the question of proper venue, we had 100 years of jurisprudence on the question of pleas and privilege, which the court was fed up with. And that's why Justice Pope went to the legislature with regards to making the alterations that ultimately came into the statute in what used to be the old section 15, and now is in chapter 15 of the Texas Civil Prac. & Rem. Code, as they've been changed after tort reform to embrace more protections for defendants with regards to their venue assertions. But not to the point in saying, and not undoing what was one of the principle concerns of Justice Pope was that there is a lot of unnecessary

appellate activity in the venue area. That's precisely the reason that the statute precisely provides that it is not subject to bring an appeal. And the trade-off for that is, that there is presumptive reversible error in the event that there is an improper venue trial. And that's before the person obviously was asserted. Now that is what the statute trade-off basically is, and that's to say that we're not going to saddle a person on a venue issue with a harmless error principle.

ABBOTT: I presume you're going to be of the opinion that regardless of the error of the TC's ways in transferring these cases to the counties that they are transferring them to, the counties to which these cases got transferred to, the courts to which they got transferred to have jurisdiction?

McMAINS: Yes.

ABBOTT: Tell me why that's your position?

McMAINS: It's my position for the simple reason that if the trial judge making an error of law does not deprive a subsequent judge from the subject matter or a party jurisdiction.

HECHT: Let's take a hard case. Say the trial judge is just sitting there, he calls everybody in and says, "I _____ think about this, and I'm just going to try to transfer this case to Jefferson county." The plaintiff said, "Well we object to that." The defendants say, "Well we do, too. Jefferson county doesn't have anything to do with this. It couldn't have been brought in Jefferson county. Why are you going to do this?" "Well I know I don't have any statutory authority. I know I don't have any rule authority, but I know you can't mandamus me, so you're off to Beaumont, and have a good time." Does mandamus not lie in those circumstances?

McMAINS: There is a difference in terms of *Humphreys*. This court in *Mapco* pretty well laid out the notion that if a court has the power to act as a court, and if the court has subject matter jurisdiction and they have jurisdiction over the parties, what the court does that's illegally erroneous are not in compliance with statutes does not render the order void. Now in the context that your honor has presented, the suggestion is that there nobody sought any kind of a transfer. And given the fact that *Wilson v. Texas Parks & Wildlife* case, the court was actually attempting to enforce what the plaintiffs had bargained for in the 1983 changes, which was: "We have the right to retain the case in a county that we file if we make the proof proper, and the judge doesn't have the power to transfer it." And all that *Wilson* recognizes is that that right shall be enforced through an appeal basically. It's not a mandamus.

HECHT: So in my situation, you wouldn't have mandamus?

McMAINS: You mean in the situation where it's just automatically done? *Wilson* is an appeal of course. And I don't think they have mandamus jurisdiction if it's the plaintiff either. If I file in a proper county and the TC transfers me anyway for whatever reason...

HECHT: Without a motion?

McMAINS: Without a motion or with a motion, he's still wrong. If it's a proper county they file in, *Wilson* says, "I get reversal." But it wouldn't authorize me to seek mandamus.

PHILLIPS: Is there any district court in Texas where it would be void for that court to hear, regardless of a venue?

McMAINS: Frankly, I think that the entire issue of does the transferee of a court assume jurisdiction over the case that's been transferred, assuming that it was erroneously transferred, which I think it is basically the assumption, however it is determined to be, that it was erroneously transferred. It is interesting to note that the legislature has provided a system in ch. 15, which specifically authorizes the transfer for convenience of the parties when that county is proper county to any other proper county.

PHILLIPS: Justice Hecht's hypothetical is an indigent county with no venue. It's clear there's no venue. Now is that a void judgment?

McMAINS: Transferring to a county with no proper venue?

PHILLIPS: That Jefferson county in his hypothetical had improper venue?

McMAINS: I believe that transferring it to a county of improper venue is erroneous. But, no, I do not think that it's void.

PHILLIPS: And it's not mandamusable?

McMAINS: I do not think that it's mandamusable. I think that it's erroneous. Voidable in the sense that it is not in compliance with statutes. But I don' think that that renders it void in and of itself.

ENOCH: Why do you conclude that that order even if it's not void is not mandamusable? What is the basis for saying that an order entered under...

McMAINS: Well this court has frequently said that you must, again in *Walker v. Packer,* and a litany of cases that are cited in *Walker v. Packer* that is part and parcel to the mandamus jurisdiction being an equitable remedy, is the necessity that there is no adequate remedy at law. And in the case of the mandamus context usually talked about in terms of no adequate remedy by appeal, and the mere fact that it will cost more money, or be more inconvenient in some cases does not in any way impede the appellate rights according to this court's general decisions.

ENOCH: Hasn't this court always said in relation to many mandamus cases that there could be extraordinary circumstances involved in a given case where ordinarily the court would not entertain mandamus, but under the facts of these cases they would? And it's not clearly that it's not protectable on appeal. It could be protectable on appeal. But the circumstances are so extraordinary that mandamus is merited.

McMAINS: We attempted to deal with all those exceptions, none of which of course apply in this case in terms of any precedent this court has ever used in the past. But this court once it opens the door to say that inadequate remedy by appeal is no longer a prerequisite in mandamus has no way to shut the door.

ENOCH: So you say *National Sand* was just not an example of an extraordinary circumstance...

McMAINS: I'm not suggesting that there aren't exceptional circumstances especially in the special appearance and the requirement to be in the court in the first place, those kinds of exceptional context. Right to due process with regards to notices, things that this court has taken exceptional issues with, things that go directly to the heart of it being able to establish the merits in the first place, I don't think this impedes the merits at all. I can't disagree more with my opposing counsel when he suggest that we would have any right at all to complain about take nothing judgments entered in the transferee courts in this case. Absolutely would have no rights. No basis whatsoever for doing so.

PHILLIPS: Let's assume that this is not void and go to the merits here. For your view to prevail eventually, either here or on appeal, does our *Wilson* footnote have to be wrong?

McMAINS: No, not necessarily. It's not to say that the rules aren't designed in the idea that basically there is a first choice. Incidentally, if I may make one correction, there was not only one choice of venue in this case despite what has been suggested by the other side in its briefing. There were 3 defendants that filed 3 motions to transfer to 3 different counties. And one of the things that was accomplished in the '83 statute was the unitary notion of causes in the sense that cause of action by a single plaintiff against multiple defendants should all go to one county. And one of the discretions that is vested with the court is to send it to any of the proper counties. The idea that it could only sever and send part of the case was exactly what the court was trying to avoid when they proposed to the legislature that these things be changed. They did not like the fact that cases were being split up so that the court did not have only one decision to make, which *Johnson v. Fourth Court* holds is really the requisite for mandamus, it had any number of decisions to make even if the idea that it had to go to one of the ones requested by the defendants. There were 3. It had that choice. It does not have a right to go to Dallas. There is not one decision without invading the court's discretion in this case, which is another reason why mandamus is simply inappropriate.

SPECTOR: Do you agree that the court acted on its own motion?

McMAINS: That is what the court said, that's what it says on the record, and I think that's what it says in fact in the order, that the court says on his own motion that he did so. Now let me explain this. By personal opinion there were motions to transfer for convenience of the parties that were made by one of the defendants, not all of the defendants, in each of the cases a motion to transfer for convenience to the parties. That is a completely new practice in terms of having any law on it. And it should be because the simple fact is that the statute itself says that it's not subject to appeal or mandamus or being complained about in anyway.

ABBOTT: Isn't that irrelevant though, because doesn't the order say: "Motion to transfer venue on the court's own motion?"

McMAINS: Not in those terms. It just says: "Came on to be heard, these motions." And it lists a bunch of motions that are filed by the defendant. And included in those is the motion to transfer for convenience. And then the court says: "On my own motion, I am transferring it here." It is true that he says that. But it is also true that he is ruling on motions that are brought into issue by all of the parties. The complaint that was made by the other side at the particular venue hearing was, you can't send it to where the plaintiffs request. And that's why the judge basically said: "Well I'll send it where I think it ought to be."

But the point remains, and in answer to your honors question, the question of ultimately to prevail must I disagree, the issue of reversible error in the venue determination is one made at the end of the trial on the basis of the complete record? I am not suggesting to you that there is any venue basis at the present time on the present record. We also haven't had a trial. The issue of reversible error, however, is one that is determined on the entirety of the record.

PHILLIPS: But this points is not going to change, I don't think.

McMAINS: It might. Again, I'm not suggesting to the court that we're hiding anything on terms of other venue.

PHILLIPS: Let's take the case where there aren't different defendants asking it to be scattered by the winds, but just a case where there is a simple, you filed it in Duval, etc., and there's a motion to take it to Dallas, and the judge sends it to Cameron or some place. Under our *Wilson* footnote wasn't the judge confined to one of those two counties, the one where it is right now or where it's being...

McMAINS: Assuming there was evidence that it was a proper county, I think you are correct under the *Wilson* footnote, which is dicta in *Wilson*.

PHILLIPS: So if the *Wilson* footnote is right, that's going to be reversible error. The appellate court doesn't look at the whole trial and say: Well this was a great trial and they got a good jury in quickly and so it's okay, it's reversible error.

McMAINS: I understand that. But of course, as already pointed out, the defendants may win in which case there's not going to be an issue of reversible error.

PHILLIPS: I'm talking about you holding a verdict in the long run doesn't *Wilson* have to be wrong? You say the rule conflicts with the statute. Either the rule says: Can't be read as tightly as they read it, or if you do read it that way, it conflicts with the statute; and therefore, it falls under the 1995 amendments?

McMAINS: *Wilson,* of course, is not a defendant's case. It's a plaintiff's case in the sense that it is the plaintiff who filed it in the proper county, and it was erroneously transferred. And the SC specifically said: That it should be kept, that having transferred it, that transfer was improper, and therefore, reversible error. And I really believe that the court did that in order to avoid the very question of whether or not mandamus might be the only remedy to a plaintiff who is transferred. Because, otherwise, the statute simply says: Is presumptively reversible error if it's tried in an improper county. And so what the court did was basically say: No, you do have these remedies even if it is transferred to what is otherwise a proper county. If it is done improperly, then it may still be presumptively reversible error.

Now the question, as your honor poses in regards to voidability, the question now comes, the statute specifically says: You can transfer anywhere by consent of the parties. Suppose we agree to go and one or more of the parties agree to go to another county from the county that it has been transferred. There is simply no basis in the world to suggest that that transfer to the third county would ever be any error or any impropriety whatsoever. So is there reason for the court not to immediately intervene in mandamus situations? Yes, in the context of ancillary matters. I don't think there is any place to draw the line. What's the difference between this and a plea in abatement in _____*v. Black* in terms of dominant jurisdiction and the overruling of a plea in abatement when a prior suit is filed earlier in _____? The court says we're not going to mandamus. It's not a good idea, you shouldn't do that. But we're not going to mandamus in that particular context. It's clearly erroneous. It's clearly inconsistent with rules and decisions by this court. It clearly builds in reversible error should it carry forward that far. And, yet, the court chose not to mandamus.

PHILLIPS: I don't see an answer to my question about *Wilson*.

McMAINS: The answer to your question simply is, if the dicta in *Wilson* is correct, that is that he had to transfer it to either - Dallas, Tarrant county, or San Antonio, and he didn't do that, then it's reversible error if we tried the case in the counties he did transfer it to. Your honors

question, however, assumes that that is where we are going to try the cases. What I am saying is that the difference between a choice of mandamus, which is immediate intervention, and a choice of waiting until the record is closed, which is the choice made in terms of the reversible error determination in the venue statute is an intentional choice. The reason for limiting the nature of what can be appealed in terms of joinder in intervention decisions, not venue decisions, not transfer decisions, but joinder and intervention decisions only after the initial filing, and mandamus _____ are mandatory.

OWEN: Even the CA didn't read the statute that narrowly. For example, in this case, if the TC had denied to any relief at all, I think it's pretty clear that defendants would have had interlocutory appeal. I take it you don't disagree with that?

McMAINS: I do disagree with that. I don't believe the CA - the CA didn't have to reach that issue in this case.

OWEN: The statute has two different conjunctive phrases, which makes it pretty clear to me it's talking about a multitude of plaintiffs, some of which do not have proper venue.

McMAINS: The legislative history of that statute is very clear, that it was designed to deal with *Polaris*. And that's the legislative history that is relied upon by the CA.

OWEN: Isn't this kind of an unusual situation that just really fell through the crack in the interlocutory appeals statute?

McMAINS: I don't believe so. Otherwise, what your honor is saying is that every time there is more than one party to a lawsuit, there is a right of interlocutory appeal under a venue determination. If that's true, then what the legislature did in 1995 was to basically wipe out 12 years of jurisprudence under what they had done in 1983.

OWEN: They said joinder or intervention. So they must have meant something other than later filing plaintiffs...

McMAINS: Simply by amending a pleading to add people is a joinder. Intervention is what it is under the rules, and that's what it's always been. Joinder does not mean: I filed a petition that has more than one party. If it does, then there is a right to interlocutory venue appeal, and the CA's will be cluttered with venue appeals. Because there is very seldom a lawsuit filed that doesn't have more than one party in it. It's not venue determination, it's the propriety of the joinder or intervention decisions, and not a venue issue that is at issue in those cases.

* * * * * * * * * *

REBUTTAL

PHILLIPS: If this order is merely voidable and not void, do you have a right to mandamus relief here?

LAWYER: I believe I do under this court's decisions in *Deloitt and National Sand. T*his order is so devoid of any basis of law that mandamus should in fact be applicable here, or available.

BAKER: You're saying it's an abuse of discretion, but that's only half of what you look at when you're talking about a mandamus proceeding.

LAWYER: But then under the *Dikeman* line of cases, and I know that this court in *Walker v. Packer* and subsequently in *Geary* said, it really has not decided whether or not *Dikeman* still stands. But the court has applied the *Dikeman* reason in a number of cases without mentioning it specifically. I would direct the court's attentions to the *in re Union Pacific Resources*. This is a judge continuing to sit in violation of a constitutional prescription, mandamus lay. *Dunn v. Street*; *Mitchell Energy v. Ashworth*, *Ryan* and *Zimmerman* are cases in which the CA has acknowledged this exception to *Walker* and to the general rule that you need to have an adequate remedy of appeal. So I do think there is substantial authority out there that mandamus will lie; and whether this is a void order, or one devoid of any basis in law, you could go either way, and I think this fits those facts. Following *Browning v. Placke*, there the language was the jurisdiction to enter the particular order. This court did not have jurisdiction to enter this order. He had jurisdiction over the parties and over the subject matter, but nothing in the statute, nothing in the case law gave him the jurisdiction of _____.

BAKER: TC's have jurisdiction to enter all kinds of orders. They just don't have the power to abuse the discretion when it departs from the statute or the rule. And it seems to me that jurisdiction and authority are two different things here.

LAWYER: I think that is consistent with this court's earlier decisions. If you look back in the way the *Mapco* language was stated earlier in *Browning v. Placke*, and then its predecessors (I think there is a case even earlier than *Browning v. Placke* on what is void and what is voidable), the language is very clear: they look at jurisdiction of the person, the subject matter jurisdiction to enter the particular order. It is a separate segment. And I think that is applicable here. I think you also can take comfort in reaching down and grabbing this case from that line of cases in which this court has found those actions would be so devoid of any basis of law, that they should be remedied and or available to remedy by mandamus.

On this court's point on footnote 1, I think, yes. Footnote 1, is going to be rendered meaningless if this court says any trial court can simply pick any jurisdiction that might initially have been appropriate, but was not initially chosen by the plaintiff or the defendant to send the case to. And if the only remedy is appeal there potentially could be a lot of appeals. I think it better that this court correct this at this junction, because I do think it is a very damaging precedent

going forward.