PERMISSIVE INTERLOCUTORY APPEALS

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I. INTRODUCTION

Interlocutory orders cannot be appealed absent specific authority to do so. *E.g., Rusk State Hosp. v. Black*, 392 S.W.3d 88, 92 (Tex. 2012). "Appellate courts do not have jurisdiction over interlocutory appeals in the absence of a statutory provision permitting such an appeal." *De La Torre v. AAG Props., Inc.*, No. 14-15-00874-CV, 2015 WL 9308881, at *1 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet.); *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011); *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007); *Hebert v. JJT Constr.*, 438 S.W.3d 139, 140 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In addition to granting authority for interlocutory appeals from an ever-increasing list of specific orders, the Legislature has also granted trial courts the authority to certify other orders for immediate appeal if certain criteria are met. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d).

The first iteration of the statute permitted an interlocutory appeal only with the parties' agreement and the court of appeals had discretion to accept or deny the appeal. *See* Acts 2001, 77th Leg., ch. 1389, § 1, eff. Sept. 1, 2001. In 2005, the Legislature removed the court of appeals' discretion, but retained the requirement that the parties agree to the appeal. Acts 2005, 79th Leg., ch. 1051, §§ 1, 2, eff. June 18, 2005.

In 2011, the Legislature made section 51.014(d) similar to federal law. *See* Act of May 25, 2011, 82d Leg., ch. 203, § 3.01; *see also* 28. U.S.C. § 1292(b). This amendment removed the requirement that the parties agree, but restored the court of appeals' discretion to either accept or reject the appeal.

In 2019, the Supreme Court of Texas decided *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 729 (Tex. 2019). While the Supreme Court confirmed that appellate courts have discretion over whether to grant permission to appeal, the Court urged courts to grant permission when the statutory requirements are met. *Id.* at 732–33. An earlier version of this article looked at grant rates in the light of Sabre Travel and found that the Supreme Court's encouragement did not appear to have materially increased grant rates.

Then, in 2022, the Supreme Court decided *Industrial Specialists, LLC v. Blanchard Refining Co.*, LLC, 652 S.W.3d 11 (Tex. 2022). The trial court granted permission to appeal, but the court of appeals denied the petition with just a cursory statement that the statutory requirements were not met. *Id.* at 13. Both parties argued in the Supreme Court that the court of appeals had abused its discretion in denying permission to appeal. *Id.* The Supreme Court disagreed. Justice Boyd authored a plurality opinion (joined by Justice Devine and Justice Huddle), noting that "the limits section 51.014 imposes restrict the permitting and accepting—not the denial or refusal—of an interlocutory appeal." *Id.* at 15. Thus, the plurality reasoned that the court of appeals did not (and could not) abuse its discretion in denying permission to appeal. *Id.* at 16. The plurality also rejected the parties' contention that the court of appeals was required to give a more detailed explanation for its decision to deny permission to appeal. *Id.* It was sufficient that the court stated that it found that the statutory requirements were not met. *Id.*[1]

Justice Blacklock wrote a concurring opinion (joined by Justice Bland), agreeing with the plurality's conclusion that "section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met." *Id.* at 23. Otherwise, Justice Blacklock and Justice Bland concurred in the judgment.

Justice Busby (joined by Chief Justice Hecht and Justice Young) dissented. *Id.* at 23. The dissent notes that Sabre Travel's admonition did not appear to have the desired effect of encouraging courts of appeals to grant permission to appeal when the statutory requirements are met. *Id.* at 25. The dissenters would have held that the court of appeals abused its discretion by not adequately advising the parties of the basis for its decision. *Id.* at 30. They also would have held that the court of appeals abused its discretion in finding that the statutory requirements were not met. *Id.* at 39. They would have remanded the case for the court of appeals to exercise its discretion in deciding whether to accept an appeal where the statutory requirements are met. *Id.*

In the wake of *Industrial Specialists*, the Supreme Court asked the Supreme Court Advisory Committee to "consider whether Rule 28.3 or Rule 47 of the Texas Rules of Appellate Procedure should be amended to require a court of appeals to provide more than the 'basic' reasons for its decision to reject a permissive appeal and to draft any recommended amendments."[2] The Advisory Committee discussed these rules

[1] In a footnote, the plurality notes that an opinion that simply states "Having fully considered the petition for permissive appeal and response, we deny the petition for permissive appeal," may not be sufficient. *Id.* at 19 n.13.

[2] Letter dated September 15, 2022 from Chief Justice Nathan Hecht to Charles L. "Chip" Babcock, Chair of the Supreme Court Advisory Committee (*available at* https://www.txcourts.gov/media/1460190/202209-referral-letter.pdf).

amendments at its meetings in February 2023, June 2023, and August 2023.

At the same time, during the 2023 Legislative session, the Legislature enacted additional amendments to the permissive appeal procedure. The amendment added section 51.014(g) and section 51.014(h) to the statute. Acts 2023, 88th Leg., ch. 209. Section 51.014(g) requires the court of appeals to explain its reasons for denying a petition for permission to appeal. Tex. Civ. Prac. & Rem. Code § 51.014(g). Section 51.014(h) expressly gives the Supreme Court the power to review a denial of permission to appeal de novo and to direct a court of appeals to accept an appeal. *Id.* at 51.014(h).

In light of the statutory amendments and discussions of the Advisory Committee, the Supreme Court adopted Texas Rule of Appellate Procedure 28.3(l) and amended Texas Rule of Appellate Procedure 28.3(e). Rule 28.3(l) requires a court of appeals that denies permission to appeal to "explain in its decision the specific reasons for its finding that an appeal is not warranted." Tex. R. App. P. 28.3(l). It also addresses the Supreme Court's review of a decision denying permission to appeal. *Id.* Amended Rule 28.3(e)(2) addresses required attachments to a petition for permission to appeal. Tex. R. App. P. 28.3(e)(2).

This article outlines the requirements of a permissive interlocutory appeal under section 51.014(d) and examines how appellate courts have applied those requirements. After the 2023 amendments to the statute and the applicable rules, appellate courts have begun providing more guidance about the statutory requirements.

The article also looks at some statistics about how appellate courts have responded to the 2023 statutory and rule amendments. It will also look at some lessons that can derive from recent decisions on petitions for permission to appeal

II. SECTION 51.014(D) AND RELATED RULES

The original version of section 51.014(d) was enacted as part of tort reform legislation aimed at lowering the costs of litigation and improving judicial efficiency by allowing appellate courts to address and answer controlling questions of law without the need for the parties to incur the expense of a full trial. *See* House Research Organization, Bill Analysis, H.B. 274, 82d Leg., R.S. (2011).[3]

The current version of section 51.014(d) authorizes a trial court, on the motion of a party or on its own initiative, to permit an appeal from an order that is not otherwise appealable if (1) the order involves a controlling question of law as to which there is a substantial ground for disagreement; and (2) an immediate appeal will materially advance the termination of the litigation. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d).

Texas Rule of Civil Procedure 168 implements section 51.014(d) in the trial court. The rule states:

> On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.

Tex. R. Civ. P. 168. Under this rule, the trial court's permission, the controlling legal issue, and the reasons why an immediate appeal will materially advance the litigation must be stated in the order to be appealed. *Id.*

After the trial court grants permission to appeal, the appellant must seek permission from the court of appeals. *See* Tex. Civ. Prac. & Rem. Code § 51.014(f). Section 51.014(f) specifies the procedure for seeking the appellate court's permission:

> (f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

Tex. Civ. Prac. & Rem. Code § 51.014(f).

Texas Rule of Appellate Procedure 28.3 implements the procedure in the court of appeals for

[3] The amendment was declared an important component of tort reform legislation aimed at making the Texas civil justice system "more efficient, less expensive, and more accessible." C.S.H.B. 274, Committee Report, Bill Analysis. *See also* Lynne Liberato, Will Feldman, *How to Seek Permissive Interlocutory Appeals in State Court*, 26 App. Advoc. 287, 287 (2013).

seeking permission to appeal. Tex. R. App. P. 28.3. Rule 28.3(a) and (b) address the filing the petition:

> (a) Petition Required. When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.
> (b) Where Filed. The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.

Tex. R. App. P. 28.3(a), (b). In addition, Rule 28.3(e) specifies the required contents for a petition for permission to appeal. Under this rule, the petition must:

> (1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;
> (2) attach:
>
> (A) a copy of the order from which appeal is sought;
> (B) a copy of every file-marked document that is material to the order from which appeal is sought and that was filed in the trial court; and
> (C) a properly authenticated transcript of any relevant testimony from the underlying proceeding, including any relevant exhibits offered in evidence relating to the order from which appeal is sought; a statement that the transcript has been ordered and will be filed when it is received; or a statement that no evidence was adduced in connection with such order.
>
> (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and
> (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Tex. R. App. P. 28.3(e).

In sum, the following must occur to perfect a permissive interlocutory appeal:

> (1) on a party's motion or on its own initiative, the trial court must issue a written order (or amend a prior order) that includes both an interlocutory order that is not otherwise appealable and a statement of the trial court's permission to appeal this order under Texas Civil Practice and Remedies Code § 51.014(d);
> (2) in this statement of permission, the trial court must identify and rule on the controlling question of law as to which there is a substantial ground for difference of opinion and must state why an immediate appeal may materially advance the ultimate termination of the litigation;
> (3) after the trial court signs the order granting permission in accordance with Texas Civil Practice and Remedies Code § 51.014(f) and Texas Rule of Appellate Procedure 28.3, the appellant must timely file a petition seeking permission from the court of appeals to appeal; and
> (4) the court of appeals must grant the petition for permission to appeal.

See Tex. Civ. Prac. & Rem. Code § 51.014(d)-(f); Tex. R. App. P. 28.3 & cmt; Tex. R. Civ. P. 168. The procedure for bringing a permissive appeal is detailed in the following section. In addition, Appendix A to this paper is a checklist for the order granting permission to appeal and Appendix B is a checklist for the petition for permission to appeal.

III. SECTION 51.014(D) IN PRACTICE

A. Step One: The Trial Court's Permission to Appeal

The appeal process under section 51.014(d) begins in the trial court. After an interlocutory order is entered, a party seeking appeal should file a motion with the trial court for permission to appeal. Tex. R. Civ. P. 168. The motion should explain how the order to be appealed involves "a controlling question of law" as to which there is a substantial ground for difference of opinion and why an immediate appeal may "materially advance the ultimate termination of the litigation." Tex. Civ. Prac. & Rem. Code § 51.014(d); Tex. R. Civ. P. 168. The rules do not set a deadline for a party to ask the trial court to amend an order to grant permission to appeal. *Id.* But be aware that at least one court of appeals has exercised its discretion to deny permission to appeal at least in part based on the party's delay in seeking permission to appeal. *Murphy v. Harris*, No. 02-24-00019-CV, 2024 WL 1670903, at *1 (Tex. App.—Fort Worth Apr. 18, 2024, no pet.). The trial court may also grant permission to appeal on its own initiative. Tex. R. Civ. P. 168.

If the trial court grants permission to appeal, it must state its permission in the order being appealed, not in a separate order. Tex. R. Civ. P. 168. The court may amend a previously entered interlocutory order to include the required information. Tex. R. Civ. P. 168.

The trial court's order must "identify," but does not have to explain or discuss, the controlling legal question as to which there is a substantial ground for difference of opinion. But the order must state why an immediate appeal may materially advance the ultimate termination of the litigation. *See* Tex. R. Civ. P. 168.

A recent case in the Corpus Christi-Edinburg Court of Appeals flags a potential wrinkle. In *Sifuentes v. Maka Logistics, LLC*, the trial court's initial order denying a plea to the jurisdiction granted the losing party permission to appeal. No. 13-24-00179-CV, 2024 WL 3197477, at *1 (Tex. App.—Corpus Christi/Edinburg June 27, 2024, no pet.). It is unclear from the court of appeals' opinion whether the order complied with Rule 168. *Id.* But while the court of appeals was considering the petition for permission to appeal, the trial court withdrew its permission to appeal. *Id.* The court of appeals granted an opposed motion to dismiss the appeal because there was no order granting permission to appeal. *Id.* at *2. The order withdrawing permission seems to be permissible under Texas Rule of Appellate Procedure 29.5, which allows a trial court to take additional action, including dissolving the order appealed from. Tex. R. App. P. 29.5.

B. Step Two: The Court of Appeals' Permission to Appeal

After the trial court enters the order granting permission to appeal, the appellant must file a petition for permissive appeal in the court of appeals. The court of appeals has discretion about whether to grant or deny permission to appeal, even if the statutory requirements are met. *E.g., Sabre Travel*, 567 S.W.3d at 732.

The petition for permission to appeal must be filed with the clerk of the court having jurisdiction over the action. Tex. R. App. P. 28.3(b). For appeals that would go to either the First or the Fourteenth Court of Appeals, the petition should be filed with the clerk of the First Court during the first half of the calendar year and with the clerk of the Fourteenth Court during the second half of the calendar year. 1st & 14th Tex. App. Loc. R. 1.6. The petitions are then assigned to either the First or the Fourteenth Court on an alternating basis. *Id.*

The deadline to file the petition is relatively short: it must be filed within 15 days after the order to be appealed is signed, unless the order is amended to add the permission to appeal, in which case the 15-day period runs from the date on which the amended order is signed. Tex. R. App. P. 28.3(c). An extension may be granted if the party files the petition within 15 days after the deadline and files a motion complying with Texas Rule of Appellate Procedure 10.5(b). Tex. R. App. P. 28.3(d).

The petition for permission to appeal must: (1) contain the information required for a notice of appeal in Texas Rule of Appellate Procedure 25; (2) contain a table of contents, an index of authorities, issues presented, and a statement of facts; and (3) argue "clearly and concisely" why the order at issue "involves a controlling question of law as to which there is a substantial ground for difference of opinion." Tex. R. App. P. 28.3(e). The petition must also explain "how an immediate appeal from the order may materially advance the ultimate termination of the litigation." Tex. R. App. P. 28.3(e). In the First and Fourteenth Courts, the petition must also state whether a related appeal or original proceedings has previously been filed in or assigned to either the First or the Fourteenth Court. 1st & 14th Tex. App. Loc. R. 6.1(d). The following must be attached to the petition: (1) a copy of the order from which appeal is sought; (2) a file-marked copy of each document filed in the trial court that is material to order being appealed; and (3)

The briefing schedule for a petition for permission is abbreviated, although the court has discretion to grant extensions. A cross-petition may be filed within 10 days after an initial petition is filed. Tex. R. App. P. 28.3(f). A response to a petition or cross-petition is due 10 days after the petition or cross-petition is filed. Tex. R. App. P. 28.3(f). A petitioner or cross-petitioner may reply to any matter in a response within 7 days after the day on which the response is filed. Tex. R. App. P. 28.3(f). The petition and any cross-petitions, responses, and replies, must comply with the word-count and page limitations for petitions generally. Tex. R. App. P. 28.3(g). This means a petition and response cannot exceed 4,500 words, and a reply is limited to 2,400 words. *See* Tex. R. App. P. 9.4(i)(2)(D)–(E).

The court will generally rule on a petition without oral argument "no earlier than 10 days after the petition is filed." Tex. R. App. P. 28.3(j). In some cases, the court may order additional jurisdictional briefing from the parties. *See generally, Double Diamond-Del., Inc. v. Walkinshaw*, No. 05-12-01140-CV, 2013 WL 3327523, at *1 (Tex. App.—Dallas June 27, 2013, no pet.) (requesting additional jurisdictional briefing); *Bank of N.Y. Mellon v. Guzman*, 390 S.W.3d 593, 594 (Tex. App.—Dallas 2012, no pet.) (requesting additional briefing under former 51.014(d)).

If the petition for permissive appeal is granted, the notice of appeal is deemed to have been filed under Appellate Rule 26.1(b) on the date the petition is granted, and the appellant is not required to file a separate notice of appeal. Tex. R. App. P. 28.3(k). The case is considered an accelerated appeal with the appellant's brief on the merits due 20 days after filing of the clerk's record. Tex. R. App. P. 28.3(i).

Granting permission to appeal does not automatically stay proceedings in the trial court. Either the parties must agree to a stay or the trial court or court of appeals must order a stay. Tex. Civ. Prac. & Rem. Code § 51.014(e)(1), (2).

IV. CASES ADDRESSING 51.014(D) APPEALS

A. What is the scope of the appellate court's discretion?

In 2019, the Supreme Court of Texas issued its decision in *Sabre Travel*, a case in which the court of appeals had denied permission to appeal. 567 S.W.3d at 729. In an unanimous opinion, the Court first held that because the court of appeals had discretion to grant or deny review, the Court could not hold that the court had abused its discretion in denying permission. *Id.* at 732. But at the same time, the Court also expressly encouraged intermediate appellate courts to exercise their discretion to grant permission to appeal when the statutory requirements are met:

> When courts of appeals accept such permissive appeals, parties and the courts can be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation. Indeed, the Legislature enacted section 51.014 to provide "for the efficient resolution of certain civil matters in certain Texas courts" and to "make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." If all courts of appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted. Just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should; in fact, in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified.

Id. at 732–33. Finally, the Court held that it had jurisdiction to grant a petition for review even if the court of appeals had denied permission to appeal. *Id.* at 736.

The Supreme Court's 2022 decision in *Industrial Specialists* was decidedly less unanimous. The case produced three opinions and no majority. One of the key points in dispute was the extent of the appellate court's discretion to deny permission to appeal. Justice Boyd, Justice Devine, and Justice Huddle opined that "if the two requirements are satisfied, the statute then grants courts vast—indeed, unfettered—discretion to accept or permit the appeal." 652 S.W.3d at 16. In their view, because the statute does not include any guiding principles for the courts' exercise of discretion, there is no basis to determine whether a denial of permission to appeal is an abuse of discretion. Justice Blacklock (joined by Justice Bland) agreed that the appellate courts' discretion is "absolute" *Id.* at 21. The dissenters (Justice Busby, joined by Chief Justice Hecht and Justice Young) rejected the idea of unreviewable discretion. *Id.* at 24. The dissenters would have required courts of appeals to explain their reasons for denying permission to appeal. *Id.* at 30. They would have also held that an appellate court cannot act arbitrarily in denying permission to appeal and that requiring an explanation for a denial would facilitate review of the appellate court's exercise of discretion. *Id.* at 36.

The 2023 statutory and rules amendments did not change the language about the appellate court's discretion to grant (if the requirements are met) or deny permission to appeal. But they made other changes that relate to the exercise of discretion. First, they require appellate courts to explain their reasons for denying permission to appeal. When there is an explanation that the Supreme Court can review, the Supreme Court will be able to review the exercise of discretion.

Our review of decisions on petitions filed after the amendments found one case in which the appellate court expressly exercised its discretion to deny permission to appeal. In *Murphy v. Harris*, the appellant initially filed a notice of appeal of an interlocutory summary-judgment order. No. 02-24-00019-CV, 2024 WL 1670903, at *1 (Tex. App.—Fort Worth Apr. 18, 2024, no pet.). When the court of appeals questioned its jurisdiction (both because the order was interlocutory and because the notice of appeal was filed four months after the order was signed), the appellant secured permission from the trial court for an appeal under section 51.014(d). *Id.* The court of appeals declined grant permission to appeal. *Id.* The court concluded that given the appellant's delay, an immediate appeal would not materially advance termination of the litigation. *Id.* at *2. The court added that even if the statutory requirement had been met, the court would exercise its discretion to deny permission to appeal because of laches. *Id.* at *3.

Second, the amendments give the Supreme Court the power to review denial of permission de novo. De novo review of the statutory requirements is fairly straightforward, but it is not entirely clear how de novo review of a discretionary decision will work. The Supreme Court has not yet issued an opinion about a permission to appeal since the amendments were

adopted,[4] so we will have to wait to see how the Court applies these amendments.

Thus, appellate courts retain discretion to deny permission to appeal even if the statutory requirements are met. But their decision could be subject to de novo review by the Supreme Court, which has repeatedly encouraged courts to grant permission to appeal. Because appellate courts have almost exclusively focused on the statutory requirements, it may take some time for the law to develop on this issue.

B. What is the scope of the appeal?

The Supreme Court addressed the scope of a permissive appeal in *Elephant Insurance Co., LLC v. Kenyon,* 644 S.W.3d 137 (Tex. 2022). The controlling question of law at issue was whether the insurance company owed a duty to its insured "to process a single-vehicle accident claim without requesting that the insured take photographs or to issue a safety warning along with any such request." *Id.* at 140. The court of appeals "constrained its principal analysis to only a portion of the duty inquiry—whether any duty exists at all." *Id.* at 147. The Supreme Court held that this was too narrow. Instead, "when an appellate court—this or any other—accepts a permissive interlocutory appeal, the court should do what the Legislature has authorized and "address the merits of the legal issues certified." *Id.* And this means, just as with any other appeal, that the appellate court can address and resolve "all fairly included subsidiary issues and ancillary issues pertinent to resolving the controlling legal issue." *Id.*

Applying the Supreme Court's instruction about the scope of the appeal, the court in *Milberger Landscaping, Inc. v. City of San Antonio* concluded that it could consider evidentiary rulings that the trial court made in the course of ruling on the motion for no-evidence summary judgment at issue. No. 08-23-00283-CV, 2024 WL 5099206, at *4 (Tex. App.—El Paso Dec. 12, 2024, pet. denied). The court of appeals noted that the trial court specifically mentioned the evidentiary rulings in its certification order and that the rulings were subsidiary rulings pertinent to resolving the controlling legal issue. *Id.*

While this view of the scope of the appeal can be beneficial to appellants, they must also be sure to address every issue certified for appeal. In *B&T Dependable Services, LLC v. Santos*, the trial court certified its order denying appellants' summary-judgment motion and identified three questions of law underlying the denial of the motion. No. 04-24-00516-CV & No. 04-24-00521-CV, 2025 WL 2331485, at *6 (Tex. App.—San Antonio Aug. 13, 2025, no pet. h.). The appellants' petition for permission to appeal attempted to frame the issue more narrowly. *Id.* The court of appeals rejected that attempt and held that by addressing only one of the elements of their affirmative defense, they did not carry their burden to establish every element of the defense to show their entitlement to summary judgment. *Id.*

C. How should the statutory requirements be applied?

The dissent in *Industrial Specialists* noted that one reason for requiring a more detailed explanation for denying permission to appeal is "to develop the jurisprudence regarding non-arbitrary reasons why permissive appeals should be accepted or denied in order to supply guidance and promote comparable outcomes in future case." 2022 WL 2082236, at *10. There had been relatively little development in the case law about what some of the statutory requirements mean or how they should be applied. The good news is that after the 2023 amendments, appellate courts are providing greater guidance in their decisions denying permission to appeal. As discussed more fully below, courts have noted that the requirement for a substantial ground for difference of opinion precludes a permissive appeal when the law is well-settled but the trial court fails to follow it. Additionally, whether the immediate appeal may materially advance the termination of the litigation may be an area ripe for additional development.

(1) What constitutes a controlling question of law?

The meaning of "question of law" is fairly straightforward. Courts consistently hold that if the trial court's decision turns on fact issues, there is no controlling question of law to support a permissive appeal. *E.g., State v. LBJBrookhaven Investors, LP*, No. 05-25-00525-CV, 2025 WL 1594380, at *4 (Tex. App.—Dallas June 5, 2025, no pet. h.) ("Furthermore, the 'controlling question[s] of law' presented in the State's application turn on resolution of fact questions that are inappropriate in a permissive appeal."); *Aris Water Solutions, Inc. v. Stateline Operating, LLC*, No. 08-25-00031-CV, 2025 WL 1207315, at *6 (Tex. App.—El Paso Apr. 25, 2025, no pet. h.) (finding a fact issue that prevented an interlocutory appeal); *Fali Holdings, Inc. v. State*, No. 02-25-00106-CV, 2025 WL 1197261, *2 (Tex. App.—Fort Worth Apr. 24, 2025, pet. filed)[5] (holding that the question identified by the

[4] The Court may be interested in granting review in a case where permission to appeal was denied. The court of appeals denied permission to appeal in *Culberson Midstream Equity, LLC v. Energy Transfer LP,* finding that the statutory requirements were not met. 705 S.W.3d 817, 819 (Tex. App.—Dallas 2025, judgm't vacated w.r.m.). The Supreme Court requested a response to the petition for review, but the parties settled before the Court decided whether to grant the petition.

[5] The Supreme Court has requested a response to the petition.

trial court—admissibility of evidence—involved questions of fact and was not appealable under section 51.014(d)); $*17.060.00 U.S. Currency v. State*, No. 09-24-00273-CV, 2024 WL 4295275, at *1 (Tex. App.—Beaumont Sept. 26, 2024, no pet.) (holding that whether the state exercised due diligence is not a controlling question of law because turns on the underlying facts); *Progressive Cty. Mut. Ins. Co. v. Wade*, No. 03-21-00415-CV, 2022 WL 406360, at *2 (Tex. App.—Austin Feb. 10, 2022, no pet.) (denying permission to appeal because the legal issue turned on determinations of fact issues); *In re* Estate of Barton, No. 06-21-00009-CV, 2021 WL 1031540, at *4 (Tex. App.—Texarkana Mar. 18, 2021, no pet.) (determining certified question does not constitute controlling question of law because "the fact-intensive nature of the question before the trial court" resulted in "a controlling fact issue, not a legal one").

But the meaning of "controlling" is still not as clear. The observation that "[t]here has been little development in the case law construing section 51.014 regarding just what constitutes a controlling legal issue about which there is a difference of opinion and the resolution of which disposes of primary issues in the case" still holds true. *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, No. No. 14–13–00991–CV, 2015 WL 393407, at *4 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.).

One commentator has suggested a few characteristics of a "controlling question of law:"

- The issue "deeply affects the ongoing process of litigation."
- Resolution of the issue "will considerably shorten the time, effort, and expense of fully litigating the case."
- "[T]he viability of a claim rests upon the court's determination" of the question.

Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 St. Mary's L.J. 729, 747–49 (1998) (cited with approval by *Gulf Coast Asphalt*, 2015 WL 393049, at *4)).

One court found that the identified question of law—whether Texas law or New Mexico law governed the dispute—was not "controlling." *JAJ Equip., Inc. v. Ramos*, No. 04-21-00459-CV, 2021 WL 6127925, at *3 (Tex. App.—San Antonio Dec. 29, 2021, no pet.). The court noted that the petitioners did not establish a "material variance" in Texas law and New Mexico law. *Id.* Moreover, the petitioners argued only that the choice of law issues "may" be outcome determinative. *Id.* Ultimately, whether a legal issue is "controlling" is still within the eye of the beholder.

One court has expressed concern about whether a permissive appeal can involve more than one controlling question of law. *Johnson v. Walters*, No. 14-15-00759-CV, 2015 WL 9957833, at *1 (Tex. App.—Houston [14th Dist.] Nov. 17, 2015, no pet.) (strictly construing section 51.014(d) to allow only a single controlling question of law); *Armour Pipe Line Co. v. Sandel Energy, Inc*., No. 14-16-00010-CV, 2016 WL 514229, at *3 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet.) (questioning whether the court has jurisdiction to hear more than one controlling question of law). In contrast, other courts have accepted permissive appeals presenting multiple questions. *See One Vision JHS, LLC v. Thirty-three Eleven Investments, Inc.*, No. 03-24-00834-CV, 2025 WL 270609, at *1 (Tex. App.—Austin Jan. 23, 2025, order) (granting permission to appeal when the district court "order expressly identifies four controlling questions of law"); *Ho v. Johnson*, No. 09-15-00077-CV, 2016 WL 638046, at *1 (Tex. App.—Beaumont Feb. 18, 2016, pet. filed) (accepting permissive appeal of multiple issues in healthcare liability suit); *Landmark Am. Ins. Co. v. Eagle Supply & Manufacturing L.P.*, No. 11-14-00262-CV (accepting permissive appeal of multiple issues arising out of trial court orders denying motions for summary judgment).

(2) When is there a substantial ground for difference of opinion?

Whether there is a substantial ground for difference of opinion is still less clear. The fact that the trial court disagreed with the appellant's position is not sufficient to satisfy the threshold for "substantial ground for difference of opinion." *WC Paradise Cove Marina, LP v. Herman*, No. 03-13-00569-CV, 2013 WL 4816597, at *1 (Tex. App.—Austin Sept. 6, 2013, no pet.) ("The fact that the trial court ruled against petitioners does not mean that the court decided a controlling question of law about which there is substantial ground for a difference of opinion.").

Some courts have held that if the issue is one of first impression, there is a substantial ground for difference of opinion. *See Byrd v. Phillip Galyen, P.C.*, 430 S.W.3d 515, 520 (Tex. App.—Fort Worth 2014, pet. denied) (granting review of interlocutory permissive appeal and noting that issue presented was matter of first impression). But more recently, in *Devillier v. Leonards*, the court held that the mere fact that the issue was one of first impression was not sufficient to show that there was a substantial ground for a difference of opinion. No. 01-20-00223-CV, No. 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.).

One area of increasing agreement among the appellate courts is that there is no substantial ground for difference of opinion if the law is settled. *See In re Estate of Hansson*, 710 S.W.3d 398, 402 (Tex. App.—Waco 2025, no pet.) ("There is no disagreement about the test to determine whether a will is contractual and

there is substantial authority upon which the trial court can rely."); *Culberson Midstream Equity, LLC v. Energy Transfer LP*, 705 S.W.3d 817, 818 (Tex. App.—Dallas 2025, judgm't vacated w.r.m.) ("Case law on when contractual provisions are sufficient to avoid a claim of fraudulent inducement is well settled."); *Fali Holdings*, 2025 WL 1197261, at *2 ("Further, the law is well settled regarding testimony under the Property Owner's Rule."); *Helena Chem. Co. v. Bales*, No. 08-25-00003-CV, 2025 WL 1803385, at *2 (Tex. App.—El Paso June 30, 2025, no pet.) ("As the statutory text has been interpreted by our sister courts of appeal, and on which we agree, settled questions of law are not proper for a permissive appeal because they are not subject to a substantial ground for difference of opinion."); *VCC, LLC v. Allied World Specialty Ins. Co.*, No. 01-24-00599-CV, 2025 WL 1225117, at *5 (Tex. App.—Houston [1st Dist.] Apr. 28, 2025, pet. filed)[6] (refusing permission to appeal because "the law is settled as to both questions" identified for the appeal); *Spicer v. Euler Hermes N. Am. Ins. Co.*, No. 05-24-01156-CV, 2024 WL 5251995, at *1 (Tex. App.—Dallas Dec. 31, 2024, no pet.) ("The cases cited by the parties in their petition demonstrate that these questions are governed by settled law.").

The opinion in *VCC* is worth additional consideration. The appellate court noted that "the trial court acknowledged the existence of controlling precedent on both questions, but chose to disregard it, finding it "just wrong."" 2025 WL 1225117, at *5. The appellate court noted that the trial court's refusal to follow settled law did not create a substantial ground for difference of opinion. *Id.* Justice Jennifer Caughey wrote a concurring opinion addressing the current limitation on permissive interlocutory appeals. *Id.* at *9. She noted that the limitation insulates from immediate appeal a decision by a trial court that expressly refuses to follow settled law. *Id.* She suggested that the Legislature may want to revisit this limitation (or at least clarify it). *Id.* at *9–10. Justice Clint Morgan also concurred, noting that denial of an interlocutory appeal "is not a bad thing" because the law is settled and the appellant will eventually have a remedy through an appeal after the final judgment. *Id.* at *10–11.

The most obvious scenario for a substantial ground for difference of opinion is a split of authority. But short of that, it is unclear how to demonstrate that this requirement is met. In any event, the petition must attempt to show why the legal issue is open to interpretation or disagreement.

(3) When will an immediate appeal materially advance termination of the litigation?

The first part of this requirement that often trips up petitioners is that the trial court's order granting permission to appeal must state why the appeal may materially advance termination of the litigation. Tex. R. Civ. P. 168. It is not sufficient that the order simply state that it may materially advance termination, it must explain why. *See, e.g., Mack v. Pittard*, No. 04-24-00201-CV, 2024 WL 2836624, at *3 (Tex. App.—San Antonio June 5, 2024, no pet.) (noting that "the order did not explain why the trial court" concluded that an immediate appeal may materially advance termination of the litigation); *FCA US LLC v. Adient US LLC*, No. 05-25-00836-CV, 2025 WL 2108829, at *2 (Tex. App.—Dallas July 28, 2025, no pet. h.) ("The order's rote recitation of possible material advancement—without an explanation of 'why' immediate appeal may advance ultimate termination of the litigation—fails to satisfy an express requirement of Rule 168.").

Texas courts are still working through how to determine when an immediate appeal may materially advance the termination of the litigation. This requirement is tethered to the requirement of a controlling question of law. Tex. Civ. Prac. & Rem. Code § 51.014(d)(2). That is, there must be a "controlling legal question as to which there is a substantial ground for difference of opinion," the immediate appeal of which will "materially advance the ultimate termination of the litigation." *Id.* § 51.014(d)(1)&(2). Noting the interplay between these requirements, courts and commentators have described the latter portion as being satisfied "when resolution of the legal question dramatically affects recovery in a lawsuit.":

> If resolution of the question will considerably shorten the time, effort, and expense of fully litigating the case, the question is controlling... Substantial grounds for disagreement exist when the question presented to the court is novel or difficult, when controlling ... law is doubtful, when controlling ... law is in disagreement with other courts of appeals, and when there simply is little authority upon which the district court can rely.... Generally, a district court will make [a finding that the appeal will facilitate final resolution of the case] when resolution of the legal question dramatically affects recovery in a lawsuit.

[6] The Supreme Court has requested a response to the petition for review.

Barton, 2021 WL 1031540, at *4 (quoting *Gulf Coast Asphalt*, 457 S.W.3d at 545 and Renee F. McElhaney, *Toward Permissive Appeal in Texas*, 29 St. Mary's L.J. 729, 747 (1998) (emphasis added)); *see also ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers*, No. 05-15-00646-CV, 2015 WL 4554519, at *2 (Tex. App.—Dallas July 29, 2015, no pet.).

The critical inquiry seems to be whether granting the appeal would be dispositive of most or all of the issues in the case. *See Barton*, 2021 WL 1031540, at *5 ("[A] permissive appeal should provide a means for expedited appellate disposition of focused and potentially dispositive legal questions.") (citation omitted); *see also Triple P.G. Sand Dev., LLC v. Nelson*, No. 14-21-00066-CV, 2022 WL 868868, at *2 n.1 (Tex. App.—Houston [14th Dist.] Mar. 24, 2022, no pet. h.) (granting permission to appeal and noting that "resolution of over seventy percent of the pending claims in the MDL litigation would be a material advancement in the ultimate termination of the litigation.").

But the courts' views of this requirement vary widely. One court found the requirement was satisfied when the order simply stated that immediate appeal may materially advance the ultimate termination of this litigation because remaining damages claims were based on duty to defend. *StarNet Ins. Co. v. RiceTec, Inc.*, 586 S.W.3d 434, 442 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

Other courts have observed that, even if the ultimate appeal is successful, the presence of "other" legal issues counsels against granting a permissive appeal. *See Boone v. Whittenburg*, No. 07-24-00258-CV, 2024 WL 4346412, at *2 (Tex. App.—Amarillo Sept. 18, 2024, no pet.) ("Other material issues would remain for trial irrespective of our decision"); *Barton*, 2021 WL 1031540, at *5 (collecting cases); *see also Harden Healthcare, LLC v. OLP Wyo. Springs, LLC*, No. 03-20-00275-CV, 2020 WL 6811994, at *1 (Tex. App.—Austin Nov. 20, 2020, no pet.) (collecting cases and denying petition because, even if appeal were successful, issue of liability would remain pending to be tried with other remaining issues). Generalized assertions that an immediate appeal might enhance the possibilities of settlement are likely not sufficient. *See Boone*, 2024 WL 4346412, at *2.

Moreover, if the order at issue may "result soon" in an appealable order, an immediate appeal will not likely materially advance the termination of the litigation. *In re Estate of Hansson*, 710 S.W.3d 398, 402 (Tex. App.—Waco 2025, no pet.); *In re Estate of Fisher*, 421 S.W.3d 682, 683 (Tex. App.—Texarkana 2014, no pet).

On the stricter end of the spectrum, the court of appeals in *International Business Machines Corp. v. Lufkin Industries, Inc.*, concluded that the requirement was not met where the trial court's order identified three "novel issues under Texas law," and stated that an immediate appeal "may materially advance the ultimate termination of the litigation because it will foreclose duplicative litigation costs and remove years of litigation expense and effort from this case." No. 12-20-00249-CV, 2020 WL 6788140, at *3 (Tex. App.—Tyler Nov. 18, 2020, pet. dism'd).

And the Dallas Court of Appeals has imposed perhaps the strictest view of this requirement. It has held that an appeal may materially advance the termination of the litigation only if, after the appeal, one of the parties will be able to move for judgment without further litigation in the trial court. *See Zurich Am. Ins. Co. v. MB2 Dental Solutions, LLC*, 698 S.W.3d 355, 359 (Tex. App.—Dallas 2024, pet. dism'd);[7] *ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers*, No. 05-15-00646-CV, 2015 WL 4554519, at *3 (Tex. App.—Dallas July 29, 2015, no pet.).

This seems an area that is ripe for the Supreme Court to address to provide more guidance. For now, at a minimum, something more than conclusory assertions about moving the case forward is required. In the Dallas Court of Appeals, parties will have to be able to show that resolving the issue will lead to an immediate judgment. In the other courts, the petition should explain why resolution of the issues will dramatically affect the outcome of the case or otherwise move the case toward resolution. The petition should also explain why any other remaining issues would not be material or would not materially affect how the case proceeds.

V. STATISTICS SINCE THE 2023 STATUTORY AND RULES AMENDMENTS

Prior versions of this paper provided statistical analysis of permissive interlocutory appeals before and after Sabre Travel. This version provides statistics of decisions on petition for permission to appeal filed after the September 1, 2023 statutory and rules amendments. The purpose of this analysis is to try to evaluate the impact, if any, of those amendments.

The statistical analysis is hampered somewhat by record-keeping differences among the courts of appeals. Some of the courts use the "permissive appeal" event in TAMES, which allows easier searching of cases in which petitions were filed. But most do not. As a result, the statistics below are chiefly based on Westlaw searches for any order or opinion citing section 51.014(d), 51.014(f), Texas Rule of Appellate

[7] The Supreme Court requested a response to the petition for review, but the parties settled before the response was filed.

Procedure 28.3, Texas Rule of Civil Procedure 168, using the words "permissive appeal" or "permission to appeal." We then removed opinions and orders arising out of petitions filed before September 1, 2023 (i.e., before the 2023 statutory and rules amendments went into effect).

Note this statistical analysis is subject to several difficulties. The first complexity is that while denials tend to be issued through memorandum opinions, grants are issued through orders that do not generally show up on Westlaw. Thus, we generally found grants only for cases in which the court has issued an opinion on the merits. It is likely that there are other grants that we were unable to find because the appeal has not yet been decided. Further, docket-equalization orders and consolidations may affect these statistics.

A. Petitions for Permissive Appeal Since the 2023 Amendments to Section 51.014 and the Rules

We found 51 petitions for permissive appeal filed under amended section 51.014(d) between September 1, 2023, when the amendments to section 51.014 and the Rules went into effect, and August 15, 2025. The following chart breaks down the number of petitions addressed by each court of appeals and the outcomes for those petitions.

Court of Appeals	Petitions Filed	Petition Dismissed or Denied	Review Granted	% Granted
Houston [1st]	6	5[8]	1	16.6%
Fort Worth [2nd]	4	3	1	25%
Austin [3rd]	5	2	3	60%
San Antonio [4th]	4	3	1	25%
Dallas [5th]	10	9	1	10%
Texarkana [6th]	1	1	0	0%
Amarillo [7th]	1	1	0	0%
El Paso [8th]	6	5	1	16.6%
Beaumont [9th]	2	2	0	0%
Waco [10th]	1	1	0	0%
Eastland [11th]	2	1[9]	1	50%
Tyler [12th]	3	3	0	0%
Corpus Christi-Edinburg [13th]	1	1	0	0%
Houston [14th]	4	1	3	75%
15th	1	0	1	100%
Totals	51	38	13	25.5%

B. Lessons from Denials

(1) Limitations of the Statistics

The raw numbers above seem to bear out the concern expressed in the dissent in *Industrial Specialists*. A 2016 version of this paper found that from 2011 through 2016, the statewide grant rate was around 40%. A later version of this paper found that after Sabre Travel, the grant rate had fallen to around 26%. From September 1, 2023, to date, the grant rate appears to have held steady around 25.5%. It would thus appear that the amendments have not had the desired impact of increasing the grant rate. But these numbers may not reflect the appellate courts' willingness to grant review for several reasons.

First, a sizable portion of the denials relate to procedural defects, rather than the appellate court's analysis or the statutory factors or its exercise of discretion. Prior versions of this paper noted that one of the most common reasons for denial was failure to satisfy procedural requirements. This continues to be a common theme.

For example, in several cases, the appellant simply failed to establish that the trial court granted permission to appeal. *See, e.g., Channelview MHP, LLC v. Hernandez*, No. 01-24-00923-CV, 2024 WL 5160635, at *1 (Tex. App.—Houston [1st Dist.] Dec. 19, 2024, no pet.) (dismissing an appeal when the trial court's order was "silent on the subject of permission to appeal the interlocutory order"); *Broussard v. Arnel*, No. 01-

[8] This number includes one petition that was dismissed on the appellant's own motion to withdraw the petition.

[9] This petition was dismissed on appellant's own motion to withdraw the petition.

23-00769-CV, 2024 WL 2278831, at *1 (Tex. App.—Houston [1st Dist.] May 21, 2024, no pet.); *Cobb v. Estate of Cobb*, No. 03-25-00045-CV, 2025 WL 626586, at *1 (Tex. App.—Austin Feb. 27, 2025, no pet.); *Sifuentes v. Maka Logistics, LLC*, No. 13-24-00179-CV, 2024 WL 3197477, at *2 (Tex. App.—Corpus Christi/Edinburg June 27, 2024, no pet.).

Nor is it sufficient if the trial court's order merely recites the statutory language without identifying the controlling question of law or explaining why an immediate appeal may materially advance the termination of the litigation. *See, e.g., Toro Co. v. Lira*, No. 08-24-00348-CV, 2024 WL 4635422, at *1 (Tex. App.—El Paso Oct. 31, 2024, no pet.); *LBJBrookhaven Investors*, 2025 WL 1594380, at *3; *Wholesale, Inc. v. Houston Specialty Ins. Co.*, No. 01-23-00867-CV, 2024 WL 234745, at *2 (Tex. App.—Houston [1st Dist.] Jan. 23, 2024, no pet.).

Permission was also denied where parties sought to bring an appeal from a case to which section 51.014(d) does not apply. *See Noble v. State*, No. 05-25-00852-CR, 2025 WL 2076489, at *1 (Tex. App.—Dallas July 23, 2025, no pet. h.) (denying permission to appeal because section 51.014(d) does not apply to criminal cases); *Galyon v. Noble*, No. 04-24-00888-CV, 2025 WL 325331, at *1 (Tex. App.—San Antonio Jan. 29, 2025, no pet.) (refusing permission to appeal because section 51.014(d) does not apply to family law cases).

Because so many denials hinge on procedural failures, the overall grant rate likely does not accurately reflect the appellate courts' willingness to accept permissive appeals. Removing the procedural default cases from the analysis would increase the grant rate. Accurately removing those denials is not possible because some of the denial orders do not distinguish between procedural issues and other statutory issues (such as a controlling question of law). Moreover, it is not clear (and is, in fact, unlikely) that the courts would have granted permission to appeal in all cases in which the procedural failures were cured. But the appellate courts are likely somewhat more willing to grant permission to appeal than the raw statistics would suggest.

Second, as discussed above, one limitation in searching for cases is that some grants can only be "found" when the court issues its opinion on the merits. Until then, only the parties and the court know about the grant and we have not found a good way to find those orders. So it is almost certain that there are more granted petitions that won't be searchable until the court issues its opinion on the merits.

In short, while the statistics have value, it is important to understand these limitations before relying on them to make any conclusions about the likelihood that a particular court will or won't grant permission to appeal.

(2) Other Issues

A few other lessons can be drawn from decisions on permission to appeal. First, as noted above, careful attention to exact compliance with the procedural issues is essential. In particular, there appears to still be some confusion about the timing for filing a petition for permission to appeal in the court of appeals. More than one petition was denied because the petitioner filed in the court of appeals before the trial court granted permission to appeal, mistakenly believing that the deadline to seek permission was about to expire. For example, in *Houston Foam Plastics, Inc. v. Anderson*, the trial court had not granted permission to appeal. No. 01-20-00714-CV, 2020 WL 7349090 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020). The petitioner explained that it filed without permission because, even though it was still seeking permission from the trial court, "it was necessary for appellant to file its petition now because the fifteen-day time period provided under Section 51.014(d) for filing the petition [in the appellate court] runs from the signing of the 'the order to be appealed.'" *Id.* at *1. The court of appeals denied the petition, explaining that the 15-day deadline to file the petition in the court of appeals did not start to run until after the trial court amended the order at issue to grant permission to appeal. *Id.*

Second, the trial court must actually decide the legal issue that is the subject of the appeal; it is not sufficient merely to identify the issue. For example, in *IBM v. Lufkin*, the trial court denied summary judgment and identified three issues of law. No. 12-20-00249-CV, 2020 WL 6788140, at *3 (Tex. App.—Tyler Nov. 18, 2020, no pet.) But the trial court did not actually decide any of the three issues. *Id.* The court of appeals noted that:

> The order sets forth no substantive ruling on any of the three issues identified therein. Nor does the record otherwise indicate the trial court's substantive ruling on each issue. As such, the order serves as nothing more than an attempt to certify three legal questions for our review.

Id. Accordingly, the court denied the petition for permission to appeal. *See also Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00196-CV, 2019 WL 3293699, at *1 (Tex. App.—Houston [1st Dist.] July 23, 2019, no pet.) (denying permission to appeal because "the trial court's order identified 'the controlling question[ ] of law decided by the [c]ourt' but did not include a substantive ruling on that issue").

Courts have also denied permission to appeal because, although the trial court identified controlling questions of law, the court of appeals could not determine how the court resolved the questions. *See In re Estate of Ward*, No. 02-24-00330-CV, 2024 WL

3948018, at *2 (Tex. App.—Fort Worth Aug. 27, 2024, no pet.). In *Ward*, the trial court denied a plea to the jurisdiction and a summary-judgment motion. *Id.* It granted permission to appeal and identified a controlling question of law, but because the court did not state the basis for its ruling, the court of appeals could not tell how the trial court resolved the question of law. *Id.*; *see also AccessDirect-A Preferred Provider Network, Inc. v. RCG E. Texas, LP*, No. 12-24-00056-CV, 2024 WL 2337632, at *8 (Tex. App.—Tyler May 22, 2024, no pet.) ("Under these circumstances, any opinion issued by this Court would necessarily be advisory because there is nothing in the record showing that the trial court ruled on the specific legal issues that Appellants present to us to decide.").

Third, if you find that there may be a procedural issue after you have filed a petition for permission to appeal, all may not be lost. In *Duncan v. Prewett Rentals Series 2 752 Military, LLC*, the court of appeals noted that the trial court had not granted permission for an appeal. No. 03-21-00244-CV, 2021 WL 2604053, at *1 (Tex. App.—Austin June 25, 2021, no pet.). But the court noted that "the record reflects that Duncan has sought permission to appeal and we have been informed the trial court has conducted a hearing and rendered an oral ruling on Duncan's motion." *Id.* The court therefore abated the appeal to allow the petitioner to secure a written ruling and to supplement the record on appeal with that written order granting permission to appeal. *Id.* at *2;10 *see also Toro*, 2024 WL 4635422, at *2 (denying permission to appeal without prejudice for the party to refile after obtaining an amended order from the trial court).

Finally, the Supreme Court has rejected a party's attempt to use the theoretical availability of a permissive interlocutory appeal to avoid mandamus relief. In *In re American Airlines, Inc*., the real party in interest argued that the relator had an adequate remedy by appeal because it could have sought to appeal under section 51.014(d). 634 S.W.3d 38, 43 (Tex. 2021). The Supreme Court found that the relator did not have an adequate remedy by appeal because the requirements of section 51.014(d) were not met. *Id.* The order at issue allowed an apex deposition. So it is not hard to see why that order would not satisfy the requirements. The Supreme Court's opinion seems to leave open the possibility that the availability of a permissive appeal could preclude mandamus relief. But since the Court has now repeatedly held that appellate courts have discretion to deny permissive appeals even if the statutory requirements are met, it seems unlikely that the Court would hold that the mere possibility of a permissive appeal would preclude mandamus relief.

VI. CONCLUSION

In almost 15 years after section 51.014(d) was adopted, courts are still wrestling with how it should be applied. The fractured opinion in *Industrial Specialists* illustrates these difficulties. The statute grants appellate courts discretion in whether to accept permissive appeals, but does not set the parameters of that discretion. It appears that the Supreme Court's encouragement to intermediate appellate courts to accept these appeals has not had the desired effect. But because of the number of denials based on procedural defects, the raw numbers likely do not tell the whole story.

Before the 2023 amendments, opinions denying review tended to be fairly short, and the case law had not really developed about what the statutory requirements mean or how they should be applied. This is starting change because appellate courts are now required to explain their reasons for denying permission to appeal. And it appears that the Supreme Court is taking an interest in some of these denials because it has requested responses to several petitions for review arising from the denials.

The main lessons are: (1) follow the procedures in the statute and the rules to the letter; (2) make sure that the trial court expressly decides the controlling issues of law; and (3) in explaining how the statutory requirements are met, be sure to give the court of appeals a good reason to exercise its discretion to grant review. That is, a petition for permission to appeal needs to look like a petition for review; it will need to convince the court of appeals that an immediate appeal is a good use of judicial resources. Merely showing compliance with the statutory requirements will not be enough.

[10] After the record was supplemented, the court granted permission to appeal. *Duncan v. Prewett Rentals Series 2 752 Military, LLC*, No. 03-21-00244-CV, 2021 WL 3118420, at *2 (Tex. App.—Austin July 22, 2021, no pet.).

APPENDIX A

CHECKLIST FOR TRIAL COURT ORDER GRANTING PERMISSION TO APPEAL

- ☐ Permission must appear in the order to be appealed (this usually requires amending the order to add permission to appeal and the required findings)
- ☐ Expressly grant permission to appeal
- ☐ Identify one or more controlling questions of law as to which there is a substantial ground for difference of opinion
- ☐ Rule on the controlling question(s) of law identified for appeal
- ☐ State *why* an immediate appeal may materially advance the termination of the litigation

APPENDIX B

CHECKLIST FOR PETITION FOR PERMISSION TO APPEAL

- ☐ File within 15 days of the date the order granting permission to appeal is signed
- ☐ File with the clerk of the court of appeals having jurisdiction over the appeal
  - ☐ For First Court of Appeals and Fourteenth Court of Appeals, file with the clerk of the First Court of Appeals January 1 through June 30 and with the clerk of the Fourteenth Court of Appeals July 1 through December 31
- ☐ Include the information required by Rule 25.1(d) to be included in a notice of appeal
  - ☐ Identify the trial court and state the case's trial court number and style
  - ☐ State the date of the judgment or order appealed from
  - ☐ State the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the notice must state that the appeal is to either of those courts;
  - ☐ State the name of each party filing the notice
  - ☐ State, if applicable, that the appellant is presumed indigent and may proceed without paying costs under Rule 20.1
  - ☐ State whether the case involves subject-matter exclusively within the jurisdiction of the Fifteenth Court of Appeals
- ☐ In the First Court of Appeals and Fourteenth Court of Appeals, state whether a related appeal or original proceedings has previously been filed in or assigned to either the First or the Fourteenth Court
- ☐ Contain a table of contents, index of authorities, issues presented, and a statement of facts
- ☐ Argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation
- ☐ Attach the following
  - ☐ The order granting permission to appeal
  - ☐ File-marked copies of every document filed in the trial court that is material to the order being appealed
  - ☐ Hearing Transcripts
    - ☐ An authenticated transcript of any relevant testimony from the underlying proceeding, including any relevant exhibits offered in evidence relating to the order from which appeal is sought OR
    - ☐ A statement that the transcript has been ordered and will be filed when it is received OR
    - ☐ A statement that no evidence was adduced in connection with such order