IN THE SUPREME COURT OF TEXAS

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NO. 05-0326
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IN RE D. WILSON CONSTRUCTION COMPANY, ET AL., RELATORS

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ON PETITION FOR WRIT OF MANDAMUS
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consolidated with

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NO. 05-0327
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AMERICAN STANDARD AND THE TRANE COMPANY, ET AL., PETITIONERS,

v.

BROWNSVILLE INDEPENDENT SCHOOL DISTRICT, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS
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Argued February 14, 2006

JUSTICE BRISTER, concurring.

I agree that the court of appeals erred in dismissing the petitioners' interlocutory appeal, and join in the Court's judgment. I disagree that we should continue requiring litigants to pursue parallel

mandamus and interlocutory appeal proceedings in arbitration cases. This unnecessary duplication makes arbitration more cumbersome and costly than other cases, rather than the "simplicity, informality, and expedition" intended for them. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628 (1985).

An interlocutory appeal is proper to enforce arbitration agreements under the Texas Arbitration Act. *See* TEX. CIV. PRAC. & REM. CODE § 171.098. Mandamus is proper to enforce arbitration agreements under the Federal Arbitration Act. *See In re Weekley*, 180 S.W.3d 127, 130 (Tex. 2005).

When a party chooses the wrong form to enforce arbitration, Texas appellate courts "must not . . . dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities." TEX. R. APP. P. 44.3; *Higgins v. Randall County Sheriff's Office*, ___ S.W.3d ___, ___ (Tex. 2006) (per curiam); *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994); *Grand Prairie Indep. Sch. Dist. v. S. Parts Imps., Inc*., 813 S.W.2d 499, 500 (Tex. 1991) (per curiam). When this and other Texas appellate courts decide that an appeal or other pleading should have been pursued by mandamus, we do not generally toss out the appeal or require it to be done twice; instead, we treat the improper appeal as a proper mandamus. *See, e.g., Powell v. Stover*, 165 S.W.3d 322, 324 (Tex. 2005); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 494 (Tex. 1991); *Bielamowicz v. Cedar Hill Indep. Sch. Dist*., 136 S.W.3d 718, 719-20 (Tex. App.—Dallas 2004, pet. denied); *In re Cobos*, 994 S.W.2d 313, 314 (Tex. App.—Corpus Christi 1999, no pet.); *In re Swarthout*, 982 S.W.2d 92, 92 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *State ex rel. Wade v. Stephens*, 724 S.W.2d 141, 143 (Tex. App.—Dallas 1987,

no writ); *Clark v. Russell*, 590 S.W.2d 651, 652 (Tex. Civ. App.—Dallas 1979, no writ).

Parties should not have to file both an interlocutory appeal and an original proceeding; even attorneys who can predict which one an appellate court will find proper may hesitate to gamble with their client's money. I would allow them to file either, and then have the appellate courts treat it as they think proper.

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Scott Brister
Justice

OPINION DELIVERED**:** June 30, 2006