IN THE SUPREME COURT OF TEXAS

NO. 02-0690

IN RE THE PRUDENTIAL INSURANCE CO. OF AMERICA AND FOUR PARTNERS, L.L.C., D/B/A PRIZM PARTNERS, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued April 2, 2003

CHIEF JUSTICE PHILLIPS, joined by JUSTICE O'NEILL, JUSTICE JEFFERSON, and JUSTICE SCHNEIDER, dissenting.

Mandamus is an extraordinary remedy available "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). To obtain mandamus relief, the relator must satisfy a two-prong test. Relator must demonstrate (1) that the lower court committed a clear abuse of discretion (2) for which there is no adequate remedy at law, such as a normal appeal. *Id*. at 839-40. Although the Court's mandamus jurisprudence has not always strictly adhered to these tenets, we have endeavored to apply them more consistently since our decision in *Walker*. Because the Court retreats from that approach today, I respectfully dissent.

Under the second prong, the Court concludes that we must grant mandamus relief here because "the trial court's denial of Prudential's contractual right to have the Secchis waive a jury

[cannot] be rectified on appeal." ___ S.W.3d at ___. I, of course, agree that an appellate remedy is inadequate if it comes too late to cure the trial court's error. *Walker*, 827 S.W.2d at 843. As we have said, a party establishes that its appellate remedy is inadequate by showing that it is in real danger of permanently losing its substantial rights. *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001); *Walker*, 827 S.W.2d at 842; *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994). But that is not the present case.

The Court suggests, however, that if we do not act immediately Prudential's contractual right will be lost forever. I disagree. The Court confuses the adequacy of Prudential's appellate remedy with the damages Prudential may suffer as a consequence of its tenant's breach of contract. The purpose of the appellate remedy is not to compensate Prudential for this contractual breach, but to correct the trial court's error. If Prudential has been otherwise damaged, it should seek damages directly from the breaching party as in any other contract case.

The Court further suggests that Prudential's appellate remedy is inadequate because the burden of showing harmful error in this instance is simply too great. This is also wrong. Texas courts have readily found harm when a party has been denied its right to present disputed questions of fact to a jury. *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 667 (Tex. 1996). In this instance, even if the evidence greatly preponderates in favor of the judgment, the judgment must nevertheless be reversed if there is any evidence on which a jury could have reached a different result. *See id.*; *Wm. D. Cleveland & Sons v. Smith*, 119 S.W. 843, 843-44 (Tex. 1909). Our harmful error analysis in these cases reflects the importance our justice system accords the right to trial by jury. *See Gen. Motors Corp.*, 951 S.W.2d at 476 (right to jury trial is "one of our most precious

rights"). If a pre-dispute jury waiver is enforceable, an issue I would not decide here, then logic dictates that a wrongful failure to honor the agreement should be reviewed under the same appellate standard. Thus, a trial court's erroneous decision about who is to determine the facts in a case is harmful error if there are material facts in dispute. *See Halsell v. Dehoyos*, 810 S.W.2d 371, 372 (Tex. 1991).

The Court finally compares this case to those cases in which we have enforced arbitration agreements through mandamus. *See In re J.D. Edwards World Solutions Co*., 87 S.W.3d 546, 551 (Tex. 2002) (per curiam); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001)*; Prudential Securities, Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex. 1995) (per curiam); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992). Our choice of the mandamus remedy in *Jack B. Anglin Co.* and the other Federal Arbitration Act cases was influenced by three factors: (1) the strong public policy of both Texas and the federal government favoring arbitration, 842 S.W.2d at 268, (2) the procedural anomaly that permitted an interlocutory appeal under the state arbitration act but not the federal act, *id*. at 272, and (3) the United States Supreme Court's pronouncement that appellate delays defeated the "core purpose" of contracts to arbitrate, *id*. at 273 n.14 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984)), which we took as a mandate from our nation's highest court to provide an extraordinary remedy. None of these factors are in the case before us.

Even if parties may freely waive their right to trial by jury, there is no public policy reason for encouraging them to do so. *See generally Bell Helicopter Textron, Inc. v. Abbott*, 863 S.W.2d 139, 141 (Tex. App.–Texarkana 1993, *writ denied*) (restrictions on right to jury subject to utmost scrutiny). Furthermore, whereas the mandamus remedy in *Jack B. Anglin Co.* corrected a procedural

anomaly, its use here creates one, authorizing mandamus relief to enforce a contractual jury waiver while relegating a party to its appellate remedy when denied its constitutional right to a jury trial. *See Gen. Motors Corp.*, 951 S.W.2d at 477 ("Because the denial of a jury trial can be reviewed by ordinary appeal, mandamus is generally not available to review such a ruling."). Finally, as I have explained, an appeal will not destroy Prudential's contractual right; it merely postpones its application. Because any error in submitting this case to a jury may be corrected on appeal, mandamus relief is therefore inappropriate. *See Walker*, 827 S.W.2d at 842 (quoting *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958) (appellate remedy inadequate "'when parties stand to lose their substantial rights'")); *see also McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995) (erroneous decision on right to jury trial is reversible error).

Admittedly, Prudential's appellate remedy is not as efficient or economical as mandamus, but that has never been the test. It is not enough to show that mandamus is a quicker or more beneficial remedy because the writ's purpose is not merely to expedite the correction of legal errors. *See In re Ford Motor Co*., 988 S.W.2d 714, 721 (Tex. 1998); *Walker,* 827 S.W.2d at 842*; Bell Helicopter Textron, Inc. v. Walker,* 787 S.W.2d 954, 955 (Tex. 1990) (per curiam). If the writ were available to correct every reversible error as it occurred in the trial court, the writ would cease to be extraordinary, and appellate courts would soon find themselves embroiled in the management of the trial court's docket. *See Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969). Thus, we have not granted mandamus relief to correct rulings incidental to the trial process that do not involve the permanent deprivation of a substantial right. *Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex. 1995) (per curiam).

But the Court now surprisingly suggests that the second prong of our mandamus standard has no fixed meaning. ___ S.W.3d at ___ (The word "'adequate' has no comprehensive definition."). Instead, the Court says we must weigh all the public and private interests implicated by the lower court ruling at issue and then decide on balance whether a remedy other than mandamus is adequate or not. *Id*. at ____. And although the Court ultimately does not apply its new ad hoc balancing test here, it calls into question much of our jurisprudence in this area.

I see no need to inject even greater uncertainty into an already difficult and frequently subjective process. In the past, we have emphasized that the writ of mandamus should not issue absent "compelling circumstances." *See, e.g., Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996); *Geary v. Peavy*, 878 S.W.2d 602, 603 (Tex. 1994) (per curiam). But today, in circumstances far from compelling, the Court uses mandamus as a substitute for appeal, an approach rejected even by the federal procedure the Court purports to emulate. *See In re Avantel, S.A.*, 343 F.3d 311, 317 (5th Cir. 2003) (Writ of mandamus is not a substitute for appeal; relator must show that the "clear and indisputable" error is irremediable on ordinary appeal.); *In re Ramu Corp*., 903 F.2d 312, 318 (5th Cir. 1990) ("Although it may obviate the need for improper or unwarranted proceedings, mandamus cannot be used as substitute for appeal, even when hardship may result from delay or unnecessary trial."). Whether today's ruling has fundamentally altered these traditional rules, or is merely an anomaly, remains to be seen.

Because Prudential has failed to demonstrate that the trial court's refusal to quash the jury setting involves the deprivation of a substantial right that cannot be corrected on appeal, I would, without reference to the merits of the case, deny the petition for writ of mandamus.

Thomas R. Phillips
Chief Justice

Opinion delivered: September 3, 2004