IN THE SUPREME COURT OF TEXAS

NO. 05-0892

IN RE MCALLEN MEDICAL CENTER, INC., D/B/A
MCALLEN MEDICAL CENTER & UNIVERSAL HEALTH SERVICES, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued December 5, 2006

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

A whole new world
A new fantastic point of view
No one to tell us no
Or where to go
Or say we're only dreaming . . .
It's crystal clear
That now I'm in a whole new world with you.

BRAD KANE, *A Whole New World*, on ALADDIN (Disney 1992).

A whole new world in mandamus practice, hinted by opinions in the last few years, is here. The Court's heavy reliance on costs and delay to support its conclusion that the hospital has no adequate remedy by appeal marks a clear departure from the historical bounds of our mandamus jurisprudence. Because the Court's opinion in this case does not follow the standards we established in the once-seminal case of *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992), for exercising our mandamus jurisdiction, notwithstanding the merits of the case, I respectfully dissent.

I.

The Court's jurisdiction to act on interlocutory orders from trial courts is more limited than its jurisdiction to act on final judgments. *Ogletree v. Matthews*, __ S.W.3d __, __ n.1 (Tex. 2007) ("Texas appellate courts have jurisdiction only over final orders or judgments unless a statute permits an interlocutory appeal.").[1] The jurisdiction to act on interlocutory orders includes areas in which the Legislature has provided for appeals of interlocutory orders[2] and instances in which the Court has decided to exercise its constitutionally recognized and legislatively defined mandamus jurisdiction.[3] "[E]xcept to enforce its own jurisdiction, the Supreme Court has only such original jurisdiction to issue writs of mandamus 'as may be specified' by the Legislature." *Pope v. Ferguson*, 445 S.W.2d 950, 952 (Tex. 1969) (quoting TEX. CONST. art. V, § 3). In 1992, in *Walker v. Packer*, the Court comprehensively summarized and restated the standards for the exercise of its mandamus authority. 827 S.W.2d at 839–44. As Chief Justice Phillips explained, the basic standards for mandamus relief date back to the 1901 case of *Aycock v. Clark*, 60 S.W. 665, 666 (1901), and before. *Id.* at 841 n.8; *Pope*, 445 S.W.2d at 953; *cf. Crane v. Tunks*, 328 S.W.2d 434, 440 (Tex. 1959) (In

[1] *See* TEX. CONST. art. V, § 3-c(a) (granting the Court jurisdiction to decide questions, *not* only cases or controversies, certified from federal courts of appeal). The Legislature may change the Court's jurisdiction over final judgments in cases or controversies and interlocutory matters.

[2] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a).

[3] This Court "may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified." TEX. CONST. art. V, § 3. The Court may issue writs of "mandamus agreeable to the principles of law regulating those writs, against . . . any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals." TEX. GOV'T. CODE § 22.002(a).

the 1950s the mandamus writ was modified to allow correction of clear abuses of discretion by trial courts instead of limiting the writ to compelling performance of a ministerial duty or act.).

Mandamus is an extraordinary writ that should issue "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies." *Walker*, 827 S.W.2d at 840 (quoting James B. Sales, *Original Jurisdiction of the Supreme Court and the Courts of Civil Appeals of Texas*, *in* APPELLATE PROCEDURE IN TEXAS § 1.4(1)(b) at 47 (Orville C. Walker 2d ed., 1979)). We established two pillars as predicates for exercise of this extraordinary writ. Where a trial court's order is a clear abuse of discretion and there is no adequate remedy on appeal, the aggrieved party need not wait for a final judgment to seek judicial review of the decision. *Walker*, 827 S.W.2d at 839; *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) ("A general requirement for a writ of mandamus is the lack of a clear and adequate remedy at law, such as a normal appeal."); *Pope*, 445 S.W.2d at 953 ("[W]e have consistently refused to issue writs of mandamus . . . when the party applying has an adequate remedy by appeal."); *Aycock*, 60 S.W. at 666 (adopting the no adequate remedy by appeal requirement from *Ex parte Newman*, 81 U.S. 152, 165 (1872), which stated no writ will "be issued in any case if the party aggrieved may have a remedy by writ of error or appeal"). The first requirement continues to be viable—there must be a clear abuse of discretion by the trial court. *In re Living Cts. of Tex., Inc.*, 175 S.W.3d 253, 255–56 (Tex. 2005); *Walker*, 827 S.W.2d at 839 (writ of mandamus corrects a "clear abuse of discretion"). The second requirement for granting mandamus relief, the inadequacy of an appeal, has been the focus of debate for the entire life of *Walker*, especially in recent years as it has inhaled increasingly difficult gasps of breath to avoid succumbing to extinction in the traditional world of mandamus

practice. *See, e.g.*, *In re Allied Chem. Corp.*, 227 S.W.3d 652, 663–67 (Tex. 2007) (5-4 decision) (Jefferson, C.J., dissenting); *id.* at 667 (Wainwright, J., dissenting); *In re Ford Motor Co.*, 988 S.W.2d 714, 724–27 (Tex. 1998) (Baker, J., concurring and dissenting).

Until recently, we defined an inadequate remedy on appeal as a circumstance in which waiting for a final appealable judgment in a case would deprive the aggrieved party of substantial rights or result in a legal error that the appellate court would be unable to correct. *In re Kansas City S. Indus., Inc.*, 139 S.W.3d 669, 670 (Tex. 2004); *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958) (Interference in the normal trial and appellate process by mandamus "is justified only when parties stand to lose their substantial rights."). Deprivation of substantial rights would occur if waiting for an appeal would vitiate or severely compromise a party's ability to present a viable claim or defense at trial,[4] or privileged and confidential information would be disclosed. *Huie v. DeShazo*, 922 S.W.2d 920, 928 (Tex. 1996). Appellate courts would be unable to cure such errors after a final judgment, causing irreparable harm to the aggrieved party and, importantly, wasting judicial resources. *Walker*, 827 S.W.2d at 843 (The trial court's ruling is an "effective denial of a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources."). This *was* the vaunted "no adequate remedy by appeal" requirement, which *Walker* explained was a "'fundamental tenet' of mandamus practice." *Id.* at 840 (quoting *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989)); *see Pope*, 445 S.W.2d at 954 ("[A] writ [of

[4] *See Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996) (disqualification of counsel); *Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995) (denial of discovery); *TransAmerican Natural Gas Corp. v. Flores*, 870 S.W.2d 10, 12 (Tex. 1994) (outcome determinative sanctions).

mandamus] positively will not issue . . . [where] there is an adequate remedy by appeal for correction.").

In *Walker*, we reviewed several of our precedents in which we issued writs of mandamus without addressing this fundamental tenet and expressly disapproved of them "and any other authorities to the extent they might be read as abolishing or relaxing" the no adequate remedy on appeal requirement. *Walker*, 827 S.W.2d at 842 (expressly disapproving of *Barker v. Dunham*, 551 S.W.2d 41 (Tex. 1977) and *Allen v. Humphreys*, 559 S.W.2d 798 (Tex. 1977)).

Laboring to establish predictable standards to guide Texas appellate courts in determining whether an adequate remedy by appeal existed, we expressly excluded certain burdens in litigation from satisfying the no adequate remedy standard. An appellate remedy is not inadequate "merely because it may involve more expense or delay than obtaining an extraordinary writ." *Id.* at 842. In previous cases, we explained that "the cost and delay of pursuing an appeal will not, in themselves, render appeal an inadequate alternative to mandamus review." *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990); *Iley*, 311 S.W.2d at 652 ("[D]elay in getting questions decided through the appellate process . . . will not justify intervention by appellate courts through the extraordinary writ of mandamus.").

The no adequate remedy by appeal condition serves important purposes. While we lamented the substantial fees and costs of litigation and the significant delay that could be incurred waiting for the opportunity to appeal, we noted that every erroneous ruling would create these burdens, and mandamus would not lie to correct every one as it would cause substantial disruption to the trial process. *Walker*, 827 S.W.2d at 842. This limitation on the exercise of mandamus jurisdiction

prevented appellate courts from becoming entangled in the myriad of routine rulings made by trial courts in every case before entry of an appealable order. *Id.* Trial courts could then manage their dockets and preside over trials without repeated delays in judicial proceedings. *Id.* Moreover, the adequate remedy standard curbed the potential deluge of appellate cases that could be raised by hard-charging parties to increase the expense and the stakes in the case.

We have recognized, however, that harm to the judicial system, affecting our constitutional obligation to oversee the administration of justice and the rights of all Texans to a fair and efficient judicial system, is a basis for acting by mandamus. On that basis, we held, for example, that appeal is an inadequate remedy when one Texas court issues an order that directly interferes with another Texas court's jurisdiction. *In re SWEPI, L.P.,* 85 S.W.3d 800, 809 (Tex. 2002); *Perry v. Del Rio*, 66 S.W.3d 239, 258 (Tex. 2001). We also acted by mandamus when thousands of potential claimants seeking personal jurisdiction in Texas courts would exact a significant cost to the judicial system that it need not bear. *CSR Ltd. v. Link*, 925 S.W.2d 591, 596–97 (Tex. 1996). Times have changed as today this Court reverses itself. The cost and delay to the parties in this case is the very basis on which the Court concludes there is no adequate remedy by appeal. __ S.W.3d __.

The Court extended *Walker* and the established tenets of mandamus review to their logical limits in *In re AIU Insurance Co.*, 148 S.W.3d 109 (Tex. 2004) and *In re Prudential Insurance Co. of America*, 148 S.W.3d 124 (Tex. 2004). One may reasonably view these two cases as expanding the application of *Walker*'s standards. More than mere delay in time and incurred litigation expense was necessary for the Court to act under its mandamus authority in both cases. The inadequate remedy on appeal tenet in *In re AIU* was based on the failure of the trial court to enforce a venue

provision in a commercial agreement, when such failure would have forfeited for all time the contract rights the relator purchased and on which the parties agreed. 148 S.W.3d at 115. Once tried in Texas, contrary to the venue provision, it would be impossible for the relator to receive the benefit of its bargain that any dispute would only be tried in New York. *Id.* at 117–18. *In re Prudential* held that mandamus was proper when the trial court denied a party's attempt to enforce a contractual waiver of a jury trial. 148 S.W.3d at 138–39. In these cases, proceeding to trial as the real party in interest would be a waste of judicial resources and a forfeiture of substantial rights. *See Walker*, 827 S.W.2d at 843; *In re AIU Ins. Co.*, 148 S.W.3d at 117 ("Subjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment. There is no benefit to either the individual case or the judicial system as a whole."); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 138 ("If Prudential were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever" because "[e]ven if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.").

The Court creates a whole new world today, jettisoning the well-established precept that delay and expense alone do not justify mandamus review.[5] While such costs are undesirable and should be avoided when appropriate, the requirement of an inadequate remedy on appeal served as

[5] The Court recites that the expert reports at issue addressed the claims of 224 patients. However, only ten patients were real parties when the petition was filed in this Court and only eight patients remain in this proceeding.

a check on appellate entanglement in incidental trial rulings and as a guide to the bench and bar on when to seek mandamus review.

II.

In this case, relator filed a motion to dismiss under former article 4590i of the MLIIA for failure to file an adequate expert report, which the trial court denied. TEX. REV. CIV. STAT. art. 4590i § 13.01(d). Defendants were not entitled to an interlocutory appeal of a trial court's denial of a motion to dismiss under former article 4590i. Although the Legislature later provided an interlocutory appeal for some denials of motions to dismiss, that right only applies to cases filed after September 1, 2003. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9); *see Lewis v. Funderburk*, __ S.W.3d __, __ (Tex. 2008). Because this case was filed prior to that date, an interlocutory appeal is not available, and relator seeks mandamus relief from the trial court's order. The Court previously had the opportunity to decide whether to address the question of dismissal of medical malpractice cases by mandamus. *See In re Women's Hosp. of Tex.*, 141 S.W.3d 144 (Tex. 2004) (Owen, J., concurring in part and dissenting in part to the denial of the petitions).

In a vigorous dissent to the denial of several petitions, Justice Owen, joined by Justice Hecht and Justice Brister, wrote, "I would grant mandamus relief in health care liability cases that remain governed by former article 4590i when an expert report fails to meet the statutory requirements and the trial court has nevertheless refused to comply with governing law that requires dismissal of the case." *Id.* at 147.[6] The dissent acknowledged the 2003 Legislature's decision to grant interlocutory

[6] It remains an open question whether a denial of a motion to dismiss under the MLIIA's expert report requirement is reviewable on appeal after a final judgment on the merits. *See Villafani v. Trejo*, __ S.W.3d __, __ n.2 (Tex. 2008) (holding that the denial of a motion to dismiss under the MLIIA is reviewable after a nonsuit but noting that

review only prospectively for some denials of defendants' motions to dismiss. *Id.* at 148. The dissent argued that the purpose of the expert report requirement and the legislative decision to grant interlocutory review prospectively only were not indications "that the Legislature intended for courts to deny mandamus relief in medical liability cases filed before that date," but reflections of the Legislature's intent that courts grant mandamus relief in former article 4590i cases and apply a narrower scope of review in new cases subject to the interlocutory appeal provisions. *Id.* Notwithstanding these arguments, a majority of the Court decided to deny mandamus relief. I respectfully declined to join the dissent's position as to our mandamus jurisdiction then and continue to disagree with that position as now articulated in the Court's opinion only a few years later.

So the Court's opinion today is based neither on legislative intent, nor on judicial precedent.[7] It is, simply, the introduction of a whole new world in mandamus practice, perhaps foreshadowed by steps in this direction in the *In re Allied Chemical*, *In re Prudential*, and *In re AIU* opinions. While *In re Prudential* and *In re AIU* represented perhaps the endpoints of *Walker*'s logic, in the new world *In re Prudential* and *In re AIU* are just the beginning.

In re Prudential and *In re AIU* were still tethered to *Walker,* and they assiduously endeavored to explain the inadequacy of an appeal. In this case, the Court merely cites this standard and then summarily rejects the clear rule affirmed in many cases—that the delay and expense of pursuing an appeal do not justify mandamus review. __ S.W.3d at __; *see, e.g.*, *Walker*, 827 S.W.2d at 843;

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a motion for sanctions under the MLIIA may not always be reviewable on appeal after a final judgment).

[7] The Legislature has the authority to make and change the avenues for and timing of appellate review of these interlocutory orders. The Court misconstrues my position on the propriety of the Legislature to make policy.

Hooks v. Fourth Court of Appeals, 808 S.W.2d 56, 60 (Tex. 1991); *Bell Helicopter Textron, Inc.*, 787 S.W.2d at 955; *Iley*, 311 S.W.2d at 652. The opinion in this case signals a new mandamus jurisprudence not tied to the check against reviewing incidental trial court rulings. As the Court says, it will act on mandamus petitions when "some calls are so important" and sufficiently incorrect that they move the Court to action, notwithstanding the former limitations imposed by the requirement that there be no adequate remedy by appeal. __ S.W.3d at __.

There are egregious cases that compel action by mandamus on grounds that may not fit neatly within the traditional mandamus standards established by our precedents. Such cases should be the exception; they may now have become the rule. Because the Court abandons important tenets in our traditional mandamus practice and is not authorized to act by section 22.002 of the Texas Government Code on the interlocutory trial court order, I respectfully dissent.

_____
J. Dale Wainwright
Justice

OPINION DELIVERED: May 16, 2008