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Member, Supreme Court Rules Advisory Committee, 1993 - present
Chair, Subcommittee on Tex. R. Civ. P. 1-14c
Member, Subcommittees on Texas Rules of Appellate Procedure and Tex. R. Civ. P. 215
Chair, Appellate Section, State Bar of Texas; Chair-Elect (2003-2004); Vice Chair (2002-2003); Secretary and Membership Services Committee Chair (2001-2002); Treasurer (2000-2001); Council Member (1996-1999); Appellate Rules Committee Chair (1997-2001)
Member, Civil Appellate Law Exam Commission, Texas Board of Legal Specialization, 1996-2005
Chair, University of Texas School of Law, Sixth, Seventh, Tenth, Thirteenth, and Fifteenth Annual Conferences on State and Federal Appeals
Member, Texas Supreme Court Taskforce to Expand Legal Services Delivery
Secretary-Treasurer and Board of Directors, Friends of the State Law Library
Top 50 Female Super Lawyers, *TexasMonthly Magazine*, November 2003; Texas Super Lawyer, *TexasMonthly Magazine*, November 2004
Frequent speaker and author on Texas Supreme Court practice and other appellate law topics
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SELECTED PUBLICATIONS

Certified Questions To and From the Texas Supreme Court, 17 APP. ADVOCATE 6 (Winter 2005).
Chutes and Ladders: Unusual Paths In and Out of the Appellate Courts, Advanced Civ. Appellate Practice Course, Sept. 2003.
Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies, Advanced Civ. Trial Course, Fall 2003.
Help! The Other Side Has Filed a Petition for Review — What Do I Do Now? State Bar of Texas, Practice Before the Supreme Court of Texas, April 2003.
Texas Supreme Court Practice, Advanced Personal Injury Law Course, Summer 2002.
Drafting Issues in the Texas Supreme Court, Advanced Civ. Appellate Practice Course, Sept. 2001.
Simplicity, Simplicity, Simplicity! Techniques for Presenting Complicated Facts and Issues Simply, Advanced Civ. Appellate Practice Course, Sept. 2000.
Petitions for Review: Frequently Asked Questions, 12 APPELLATE ADVOCATE 3 (June 1999).

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TEXAS SUPREME COURT MANDAMUS UPDATE, INCLUDING SUMMARY OF MANDAMUS ACTIVITY BY SUBJECT AREA SEPTEMBER 1, 1997-MARCH 10, 2005

I. INTRODUCTION

This paper focuses on recent mandamus activity in the Texas Supreme Court. The objectives are to (1) give a quick overview of activity over the last year; (2) explain the shift in mandamus jurisprudence over the last thirteen years, culminating in a major change in the mandamus standard in *In re The Prudential Ins. Co. of America*, 148 S.W.3d 123 (Tex. 2004); (3) summarize briefly the Court's mandamus jurisprudence over the last eight years; and (4) pass on a few practice tips from court personnel for avoiding delays at the Court when seeking emergency relief. The paper is not a primer on the general laws governing issuance of the writ of mandamus, nor does it provide a "how to" guide to mandamus filings. Readers seeking assistance with these matters should consult another paper by the author: Pamela Stanton Baron, *Interlocutory Appeals, Mandamus, and Other Extraordinary Remedies*, State Bar of Texas, Advanced Civil Trial Course, Fall 2003.

II. THE PAST YEAR IN A NUTSHELL

The number of mandamus petitions filed in the Texas Supreme Court over the past three terms has been eerily consistent — in the last three completed terms, there were 269, 267, and 268 mandamus petitions filed. Mandamus petitions have remained steady despite the fact that the last full term saw a significant decrease in petitions for review filed, from 968 to 810, a 16% single-year drop.

Overall, opinion output has declined, and mandamus opinion output has also generally been low. In the term ended August 31, 2004, the Court issued eleven mandamus opinions, which represented about 13% of the 86 deciding opinions issued during the term. In the current term, through March 10, the Court had issued seven mandamus opinions. Four of these related to forum issues — two involved enforcement of a forum selection clause, one enforcement of a jury trial waiver, and one related to when local courts could transfer cases among themselves under local rules. As to the other three cases, one involved attorney disqualification,

one dealt with consolidation of cases for trial, and the last presented an election issue. The most significant of these cases was *In re The Prudential Ins. Co. of America*, 148 S.W.3d 123 (Tex. 2004), which materially altered the standard for determining when an appeal is not an adequate remedy and the writ of mandamus should issue. The *Prudential* case is discussed in more detail in the following section.

Seven mandamus cases have been argued and are awaiting decision by the Court. Four of these seven cases involve enforcement of an arbitration agreement by or against a nonsignatory to the agreement in a variety of contexts. These cases are discussed in Part IV.A.1.b, below. The remaining three include a discovery question, a mandatory venue issue, and a question about intervening in a case for the first time on appeal. But in short, arbitration issues continue to dominate the mandamus docket.

III. PLOTTING THE PENDULUM: THE ROAD FROM *Walker* TO *Prudential*

The appellate courts have long grappled with the questions of under what circumstances and how often the discretionary writ should issue. Two policy concerns predominate the debate. The first is one of trust: is the appellate court willing to permit the trial court to exercise discretion without any immediate review prior to the taking of an appeal? The second concern is one of docket control: how can the appellate court restrict mandamus review to a limited number of cases so that the court will not be overwhelmed by petitions for relief?

Obviously, there are no simple answers to these questions. Over the last thirteen years, the Texas Supreme Court has struggled with establishing a workable standard — one that provides some predictability to when the writ is available yet provide enough flexibility to keep rogue trial courts in check. It began by setting a firm standard in *Walker v. Packer*. Some members of the Court, however, found that standard not adequately flexible, producing a series of close decisions,

resulting in the writ issuing in various “extraordinary” circumstances but not others.

In September 2005, in *In re Prudential*, the Court appears to have given up on *Walker*, and set a standard that permits the writ to issue whenever the issue is important enough or the burden on the parties and the court system would be harsh if mandamus were not to issue.

The history of this struggle is discussed in some detail in the remainder of this section.

A. The Court Sets a Standard: *Walker v. Packer* (1992).

A rapid increase in the number of mandamus filings, known as the “mandamus explosion,” set the stage for the Supreme Court's decision in *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992, orig. proceeding), which revised the rules for seeking mandamus from trial court discovery orders. There the Court, in a 5-3 opinion authored by Chief Justice Phillips, recognized a limited number of situations in the discovery context in which mandamus review was available: (1) when the trial court erroneously orders disclosure of privileged materials which would materially affect the rights of the aggrieved party; (2) when a discovery order constitutes harassment by compelling the production of irrelevant or duplicative documents; (3) when the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error or imposition of sanctions; and (4) when discovery is denied and the undisclosed information cannot be made part of the appellate record.

Walker's importance is not limited to discovery matters. *Walker* reaffirmed the stringent application of the traditional requisites for mandamus relief, emphasizing a need to show an abuse of discretion or a mistake of law on the part of the trial judge and a lack of an adequate remedy by appeal. *Walker* overruled several cases that had granted mandamus relief on the basis that appeal taken after a long, expensive, and error-infected trial would not be an adequate legal remedy. Under *Walker*, mere time, expense, and delay will not justify mandamus relief.

B. The Standard Ignored or Distinguished: Post-*Walker* Cases (1994-1997).

The Supreme Court set a tough standard in *Walker*. The “mere time, expense, and delay” language often proved unworkable, requiring the Court to make numerous exceptions based on

“extraordinary circumstances.” Under this exception, the Court has sometimes expanded the use of mandamus into many areas in which it has not traditionally been available.

1. Special appearance.

A triad of cases from the Texas Supreme Court best demonstrates how the Court has grappled with *Walker* and how the standard has proved unworkable.

First came *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304 (Tex. 1994, orig. proceeding). There, in a 7-2 decision, the Supreme Court declined mandamus review of a trial court's denial of Canadian Helicopters' special appearance motion but refused to preclude review of such motions in all cases. The Court was unwilling to trust in the proper exercise of discretion by all trial judges in all special appearance cases yet sought to limit review to only unusual circumstances so that the Court would not be in the business of reviewing de novo all special appearance rulings.

The majority, in an opinion by Chief Justice Phillips, held that Canadian Helicopters had an adequate remedy by appeal, reiterating that a party must “be in danger of permanently losing substantial rights.” The majority, though, noted that mandamus review was not necessarily precluded in all personal jurisdiction cases, but was limited to “special appearances . . . where truly extraordinary circumstances exist.”

The Court, then, placed itself in the position of having to define what constitutes truly extraordinary circumstances. In *Canadian Helicopters*, at least one example is provided: “appeal is frequently inadequate to protect the rights of children and parents in family law situations.” Others are hinted at: (1) cases, like *United Mexican States v. Ashley*, 556 S.W.2d 784 (Tex. 1977), involving “the issue of sovereign immunity, [and] implicating comity and foreign affairs concerns not present in the usual special appearance”; (2) cases in which the time and cost of defending suit in a foreign jurisdiction are so great as to render the defendant “unable to present a defense”; and (3) when the “trial court . . . act[s] with such disregard for guiding principles of law that the harm to the defendant becomes irreparable, exceeding mere increased cost and delay.” (Later, in *K.D.F. v. Rex*, 878 S.W.2d 589 (Tex. 1994, orig. proceeding), the Court granted mandamus relief to Kansas governmental entities because “the risk of harm to interstate and international relations likely

to occur if a Texas trial court erroneously exercises jurisdiction over another sovereign" constituted harm "beyond the additional time and expense ordinarily required to pursue an appeal, and beyond the immediate interest of the parties to the suit.").

In *Canadian Helicopters*, Justice Hecht, in a dissent joined only by Justice Gonzalez, would grant the writ and extend mandamus review to all special appearance motions. The dissent was sharply critical of the third category identified by the majority as possibly giving rise to mandamus review, asserting that the majority requires in special appearance cases "a super-clear abuse of discretion," as opposed to all other cases requiring only a "clear abuse of discretion." If the majority were concerned with limiting the number of mandamus cases, the dissent asserted, the better approach would be simply to strictly apply the traditional standard.

The sequel to *Canadian Helicopters* is *National Industrial Sand Ass'n v. Gibson*, 897 S.W.2d 769 (Tex. 1995, orig. proceeding). There, the Supreme Court granted mandamus to vacate a trial court's denial of a special appearance of a national lobbying association. In a 5-4 decision, this time with Justices Gonzalez and Hecht in the majority, the Court relied on the third example in *Canadian Helicopters* — that the trial court had acted with such disregard for guiding principles that the harm to the defendant becomes irreparable.

The dissent was written by Justice Cornyn, joined by Chief Justice Phillips and Justices Enoch and Gammage. The dissent argued that, under *Canadian Helicopters*, the defendant still must show that appeal is not adequate. Noting that even the United States Supreme Court had held an appeal adequate for review of special appearance motions, the dissenters argued that mandamus could now issue for any ruling — even denials of summary judgments.

The third case in the trilogy is *CSR Limited v. Link*, 925 S.W.2d 591 (Tex. 1996, orig. proceeding). This time the Court held 8-1 that the trial court abused its discretion in denying a special appearance motion of an Australian asbestos manufacturer. The Court also found "extraordinary circumstances" that would render appeal an inadequate remedy.

The circumstances were that the manufacturer had been sued by five plaintiffs in Texas in the case before the Court, but thousands of potential claimants existed, and more than 1600 plaintiffs has

sued CSR in Texas in other pending cases. The majority then found that: (1) appeal is not adequate from the denial of a special appearance when the defendant could be subjected to a large number of lawsuits; and (2) early mandamus review would conserve judicial resources by preventing unnecessary trials on the merits. The majority professed that the case does not indicate a retreat from the requirement that the relator must show an inadequate remedy by appeal: "While the question of personal jurisdiction is remediable by appeal in most cases, we hold that under the circumstances of this case, the concerns of judicial efficiency in mass tort litigation combined with the magnitude of the potential risk for mass tort action against the defendant makes ordinary appeal inadequate."

Justice Baker was the lone dissenter. He argued that the Court's decisions in *Canadian Helicopters*, *National Industrial Sand*, and *CSR* cannot be reconciled, that there is little rhyme or reason to the cases, and that the courts of appeals have no clear standard under which to decide mandamus review of special appearance motions. Justice Baker further asserted that parties will be encouraged to seek mandamus review of all denials of special appearance motions.

NOTE: Subsequent legislation now permits interlocutory appeal of a denial of a special appearance motion. Tex. Civ. Prac. & Rem. Code § 51.014(a)(7). Trial is stayed pending appeal in most cases. *Id.* § 51.014(b),(c).

2. Class action certification.

The uncertainty as to when mandamus would issue based on "extraordinary circumstances" was then expanded to potentially include class action certifications.

In *Deloitte & Touche LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394 (Tex. 1997, orig. proceeding), an interlocutory appeal was taken to the court of appeals and the class was certified. By statute, interlocutory appeals of class certification are final in the court of appeals. Tex. Gov't Code § 22.225. The Court, then, had to address an important jurisdictional question: May the Supreme Court determine that an appeal made final in the court of appeals is not an adequate remedy? Or, put more bluntly, may the Supreme Court avoid legislative restrictions on its appeal jurisdiction by using mandamus?

The Court held that legislative restrictions on its appellate jurisdiction constituted no obstacle to

