Mandamus After *McAllen*: Have The Sands Really Shifted?

By Michelle May O'Neil

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The Texas Supreme Court recently reexamined the standards for granting mandamus, seeming to ease the standards for seeking a pre-trial ruling on such matters as discovery objections, expert witness reports, or jurisdictional disputes. In 1992, the Court set out the standards for mandamus relief in the case of *Walker v. Packer*. *Walker v. Packer*, 827 S.W.2d 833, 839-43 (Tex. 1992). *Walker*'s standard for mandamus relief required a showing that the trial court (1) committed a clear abuse of discretion; (2) which could not be adequately remedied by appeal. The first prong of the *Walker* test remains relatively absolute: an abuse of discretion is shown when the trial court could have reached only one decision in determining what the law is or applying the law to the facts. *Id.* at 840.

After a hiatus of twelve years, the Court took another look at the second prong of the *Walker* elements, providing a balancing test to determine when appeal is inadequate. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136 (Tex. 2004). Under this balancing test, remedy by direct appeal is adequate when the "detriments of mandamus review outweigh the benefits". The Court noted that these considerations implicate both public and private interests. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.

Despite the efforts of the *Prudential* opinion, the developments of mandamus review remained unclear because the Court employed a case-specific, generalized analysis. So, in August 2008, the Court clarified the *Prudential* balancing test in a way that seems to make the remedy more available. *In re McAllen Medical Center, Inc.*, 2008 WL 4051053, *6 (Tex. Aug. 29, 2008). "The problem with defining inadequate appeals as each situation 'comes to mind' [under the *Prudential* opinion] was that it was hard to tell when mandamus was appropriate until this court said so . . . ." *McAllen* at *6. The Legislature has recognized that the traditional rules of litigation have increased the cost to the litigants and responded by passing more laws requiring pre-trial standards for maintaining the suit. This influenced the Court to examine the standards for seeking "instant replay", because some calls are so important and so likely to change the outcome of the litigation that they require quicker review. "Insisting on a wasted trial

simply so that it can be reversed and tried all over again creates the appearance, not that the courts are doing justice, but that they don't know what they are doing. Sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded." *McAllen* at *5-6.

"Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review. The comparison requires an analysis of whether mandamus relief will safeguard important substantive and procedural rights from impairment or loss, and also whether mandamus will allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgment. *McAllen* at *6; *see also In re Global SantaFe Corp.*, 2008 WL 5105257 *3-4 (Tex. Dec. 5, 2008).

While some commentators assert that *Prudential* and *McAllen* represent a dramatic shift in the mandamus standards, the cases decided by the various courts of appeals since the *McAllen* opinion suggest a dismissal of the *Prudential* and *McAllen* opinions and continued reliance on *Walker's* more rigid standard. For example, in the case of *Pilgrim's Pride Corp.*, the Texarkana Court limited *McAllen* to only situations involving health care liability claims, without extending the holding to other mandamus situations. The Dallas Court of Appeals denied mandamus relief when its review of the trial court's denial of a motion to enforce a forum selection clause was not an abuse of discretion. *In re Wilmer Cutler Pickerling Hale & Door, LLP*, 2008 WL 5413097, *2 (Tex. App. – Dallas Dec. 31, 2008). And, the Corpus Christi Court denied review of an arbitration clause, despite prior cases saying mandamus review is appropriate in those situations. *SCI Texas Funeral Svcs., Inc. v. Leal*, 2009 WL 332043 (Tex. App. – Corpus Christi Feb. 12, 2009).

So, where do we stand in the shadow of *McAllen*? The Texas Supreme Court has clearly set out the opportunity for broader utilization of mandamus as a remedy to correct important, case-defining pre-trial rulings. However, the various courts of appeals have continued to allow use of the remedy conservatively. Where the Texas Supreme Court may be viewing broader policy considerations such as the negative view of the judicial process and the Legislature's increasing interference into providing for specific review of certain types of cases, the courts of appeals may be examining their individual dockets to control overuse of the pre-trial "instant replay". Interpretation of the availability of the remedy seems at odds, leaving litigants to wonder whether review of important pre-trial rulings is more available in light of *McAllen*, or whether the recent expansions are only an empty nod to the Legislature's public policy considerations. Without an increase in the number of cases provided pre-trial review in order to avoid costly, unnecessary trials, the judicial system will continue to be viewed negatively as the *McAllen* opinion fears.