The Seven Year Itch: *Prudential* and Expansion of Mandamus Powers

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Chapter 1

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I. INTRODUCTION

Under the traditional two-prong test for the issuance of a writ of mandamus, a party must show that the complained of ruling constitutes a clear abuse of discretion and that the party has no adequate remedy at law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).

The course directors asked for a seven-year retrospective on the Texas Supreme Court's view on the adequacy of appellate remedies under this traditional test. This paper is not intended to be an exhaustive review of opinions issued. Rather, the author studied the Court's mandamus docket over the last seven years (since the 2011 term) in hopes of identifying insights about the current Court's views on this critical second prong.[1]

II. KEY CASES – KEY PLAYERS

1. In re Prudential

In 2004, the landscape of Texas mandamus practice changed. Historically, the Supreme Court viewed the lack of an adequate remedy at law as a "fundamental tenet" of mandamus practice that served the goals of avoiding unnecessary encroachment on the jurisdiction of the trial courts in incidental pretrial rulings and maintaining the "extraordinary" nature of the writ. *Walker v. Packer*, 827 S.W.2d 833, 840, 842 (Tex. 1992). In the *Walker v. Packer* "era," the Court had taken the approach of defining categories of circumstances in which an appellate remedy was, and was not, adequate.

But the landmark decision of *In re Prudential* arguably replaced *Walker*'s categorical approach to the adequacy of appellate remedy with a cost-benefit balancing test. 148 S.W.3d 124 (Tex. 2004). *Prudential* viewed the adequacy of an appellate remedy as "simply a proxy for the careful balance of jurisprudential considerations," including both public and private interests, that inform whether courts will exercise mandamus review. *Id.* at 135–36. "An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments." *Id.* at 136. The adequacy of appellate remedy, the Court explained, "depends heavily on the circumstances presented and is better guided by general principles than by simple rules." *Id.* at 137.

Commentary following *Prudential* was noteworthy not just for the volume or intensity, but also for the variety. While everyone seemed to recognize the significance of *Prudential*, there was little consensus about what the decision actually meant to Texas mandamus practice. Even legal scholars and seasoned appellate practitioners found themselves struggling to find consensus about the meaning and significance of *Prudential*.

At one extreme viewpoint, the opinion was harshly criticized as "simple ad hoc decision making" that was "an abrogation of the court's responsibility to make informed decisions on the bases of established legal principles and precedents." Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More Mile Marker Down the Road of No Return*, 39 ST. MARY'S L. J. 3, 143 (2007). From this viewpoint, the decision indicated that "the court has made the unilateral decision to circumvent the legislative restrictions on its jurisdiction in the area of reviewing trial courts' interlocutory orders and has made the conscious decision to use mandamus as a general supervisory writ of trial court decisions with which it is dissatisfied." *Id.* at 144–45. Commentators who subscribed to this view believe that *Prudential* would "have a significant impact upon the future of mandamus practice." *Id.* at 143.

At the opposite end of the spectrum, the significance of the *Prudential* opinions was significantly downplayed. As a noted appellate practitioner wrote:

> [T]hree years after *Prudential* – the impact of that decision has been far different from what was anticipated. In the aftermath of *Prudential*, the Texas Supreme Court and Texas appellate courts have in fact continued to apply the more rigid *Walker* standard, resulting in little, if any, expansion of mandamus case law . . . . Despite predictions

[1] The author is indebted to her partner's insights on *Prudential* and its progeny as articulated in Kurt Kuhn, "Mandamus Is Not A Four-Letter Word," University of Texas School of Law, 18th Annual Conference on State and Federal Appeals (May 2008), and, with permission, has borrowed liberally from that paper. The author also recommends a paper by Warren Harris, Jeffery L. Oldham, and Yvonne Ho, "Mandamus Trends," State Bar of Texas, 27th Annual Advanced Civil Appellate Practice Course (Sept. 2013). The paper's analysis of the adequacy prong of mandamus review is thorough and still insightful for today's mandamus practitioner.

> of massive change to the mandamus system, the actual impact of *Prudential* (and its supposedly more lenient standard for obtaining mandamus) has been mild.

Reagan W. Simpson and Aditi R. Dravid, *The Aftermath of Prudential: Much Ado About Nothing?*, Texas State Bar 21st Annual Advanced Civil Appellate Practice Course, at 1 (Sept. 2007). From this viewpoint, the result has been merely to reaffirm the principles of *Walker* while providing a more candid recognition of how that standard applied in differing, extraordinary circumstances. *Id.* at 5, 7.

2. In re McAllen Medical Center

The debate about *Prudential* heated when Justice Wainwright, who joined the majority in *Prudential*, wrote a scathing dissent in *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 466 (Tex. 2008).

The majority reinforced that *Walker* serves as an example—and not a limit—on when mandamus could be appropriate. "[W]hile rejecting a standard allowing mandamus almost always, we did not adopt a standard allowing it almost never." *McAllen Medical*, 275 S.W.3d at 468. This language is consistent with *Prudential*'s refusal to draw rigid mandamus rules.

The majority explained that mandamus is not appropriate when the matter at issue was so innocuous or incidental that the burden of reviewing it would outweigh the benefits of review. "Appellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pre-trial mistake. But we cannot afford to ignore them all either." This mirrors language used in *Prudential*:

> Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. 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.

Prudential, 148 S.W.3d at 136.

The court also highlighted, as in *Prudential*, that mandamus is most appropriate when awaiting a normal appeal would effectively defeat the purpose. Reviewing the court's mandamus case law, the majority noted that the "most frequent use [the court has] made of mandamus relief involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved." *McAllen Medical*, 275 S.W.3d at 465. Returning to the notion of efficiency, the majority looked upon mandamus as a necessary means to ensure confidence in the court system:

> [I]nsisting 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.

Thus, the majority indicated that the courts should not let a too-strict application of mandamus as a procedural device prevent the courts from preserving the purpose of the underlying statute. *Id.* at 466.

The dissent was as scathing as it was memorable. Quoting a song from Disney's *Aladdin*, the dissent wrote: "A whole new world in mandamus practice, hinted by opinions in the last few years, is here." *Id.* at 470 (Wainwright, J., dissenting). Justice Wainwright lamented the "Court's heavy reliance on costs and delay to support its conclusion" that a hospital has no adequate remedy by appeal when a trial court refuses to dismiss a medical malpractice claim for lack of an adequate expert report. *Id.*

The dissent faulted the majority for acting simply to avoid expense and delay for the petitioner, convinced that the issues in the case were the type of incidental rulings that should not be subject to mandamus review. Apparently, *Prudential* marked the outer limits for which Justice Wainwright believes mandamus should be used. As the dissent reads:

> 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.

McAllen Medical, 275 S.W.3d at 474.

3. Change in composition of the Court.

The problem with a modern appellate practitioner focusing too intently on the *Prudential* and *McAllen Medical* decisions is that the composition of the Court has changed dramatically since either opinion issued.

The author of *Prudential*—(now) Chief Justice Hecht—is the *only* justice that decided *Prudential* who is still on the Court. Chief Justice Jefferson and Justice O'Neill joined the dissent in both cases. Neither are on the Court anymore.

Four of the six justices who joined the majority in *McAllen Medical* are still sitting: Chief Justice Hecht and Justices Green, Willett, and Johnson. But not a single justice that dissented in either *Prudential* or *McAllen Medical* still serves on the Court.

Five justices, a majority of the Court, were not involved in the passionate internal debate (as evidenced by the separate writings) of either case: Justices Guzman, Lehrmann, Boyd, Devine, and Brown.

This does not diminish the precedential value of *Prudential* and *McAllen Medical*. To the contrary, it may suggest more weight be given to them. But it may suggest the "Mandamus War" is truly over. *See* Boyce, Dubose, Warren, *The 20 Year Mandamus War*, State Bar of Texas, Advanced Civil Appellate Course (Sept. 2009).

III. *PRUDENTIAL* BY THE NUMBERS.

Since *Prudential* and *McAllen*, commentators have studied the Court's mandamus docket and noted that "the raw numbers make it impossible to deny that the court has increasingly accepted mandamus as a normal and important segment of its docket." Kurt Kuhn, "Mandamus Is Not A Four-Letter Word," University of Texas School of Law, 18th Annual Conference on State and Federal Appeals, at 7 (May 2008). The statistics at that time showed that the number of filings of mandamus petitions did not increase, despite predictions that they would. *Id.* But, still, the commentators noted, "post-*Prudential* has seen a dramatic increase in the number of mandamuses that the court grants"—"a 450% increase over the prior five years." *Id.* at 8.

A decade later, those numbers are leveling a bit:

Mandamus Petitions in the Texas Supreme Court			
Year	**Filed**	**Granted**	**% Granted**
2000	276	6	2.1%
2001	255	6	2.3%
2002	269	7	2.6%
2003	267	3	1.1%
2004	268	3	1.1%
2005	255	22	8.6%
2006	235	24	10.2%
2007	231	21	9.0%
2008	244	21	8.6%
2009	273	20	7.3%
2010	264	24	9.0%
2011	223	13	5.8%
2012	203	13	6.4%
2013	224	7	3.1%
2014	216	10	4.6%
2015	192	15	7.8%
2016	173	9	5.2%
2017	179	8	4.4%
AVERAGE	**236**	**13**	**5.5%**

As previously reported, there is a significant and undeniable spike in grant rate around the time of *Prudential*. The average grant rate before *Prudential* (2000-2004) was only 1.8%. The six years following *Prudential* (2004-2010), the grant rate jumped to 8.8% (which is close to the historical 10% grant rate for petitions for review). In the last seven years (2011-2017), the grant rate has dropped a bit, down to 5.3%. But, still, that rate is nowhere near as low as the 1.8% grant rate before *Prudential*.

Interestingly, though, despite predictions of an influx of mandamus filings, filings appear to be trending down. The average filings pre-*Prudential* (2000-2004) were 267 per year. The average filings the last seven years (2011-2017) were 201 per year—an almost 25% decrease.

IV. RELIANCE ON *PRUDENTIAL* BY CURRENT COURT.

Despite the increased grant rate, the *Prudential* cost-benefit analysis has been mostly a non-issue in the Court's mandamus jurisprudence the last seven years.

In roughly 50 opinions issued in mandamus proceedings over the last 7 years, there has been hardly any written analysis from the Court on the adequacy prong.

1. In re J.B. Hunt

The Court's decision in *In re J.B. Hunt Transport Company* is the only significant discussion of *Prudential* in the last 7 years. 492 S.W.3d 287 (Tex. 2016). The case involved dominant jurisdiction.

Historically, mandamus review of a plea in abatement based on another trial court's dominant jurisdiction was an "incidental" pre-trial ruling not reviewable by mandamus in the absence of some circumstance in which one court "'actively interferes with the exercise of jurisdiction' in the other court" — e.g., overlapping trial dates or an injunction or order from one court purporting to prohibit the other court from acting. *See Abor v. Black*, 695 S.W.2d 564 (Tex. 1985).

Since *Prudential*, however, lower courts had split on whether the more modern cost-benefit analysis displaced *Abor*. *See J.B. Hunt*, 492 S.W.3d at 298 (recognizing split).

Calling the *Abor* test a "stringent" one, the Court noted:

> That stringency makes *Abor* a wasteful standard in cases where a trial court abused its discretion by not granting a plea in abatement but there is no requisite conflict of jurisdiction: An appellate court cannot correct the reversible error through mandamus relief, which then leads to the gross and unnecessary waste of economic and judicial resources as the case is tried in the wrong court only to be automatically reversed on appeal after judgment.

Id. at 298–99 (citations omitted).

This result, the Court wrote, is "at odds" with *Prudential*. *Id.* at 299. "*Prudential*'s virtue is that it spares private parties and the public [the] costs" associated with going to trial in the wrong court. *Id.*

Thus, the Court confirmed in *J.B. Hunt* that "*Prudential* indeed abrogates *Abor*'s inflexible understanding." *Id.* Going forward, "a relator need only establish a trial court's abuse of discretion with regard to a plea in abatement in a dominant-jurisdiction case." *Id. See also In re Red Dot Building System, Inc.*, 504 S.W.3d 320, 324 (2016) ("In sum, the Henderson County court acquired dominant jurisdiction, the Hidalgo County court should have granted Red Dot's plea in abatement and abused its discretion in failing to do so, and Red Dot is entitled to mandamus relief." (citing *J.B. Hunt*, 492 S.W.3d at 300)).

Worth noting, Justice Willett wrote the opinion in *J.B. Hunt*. The paper's author had previously pegged him as one of the few post-*Prudential* "new" members of the Court who had shown some reservation in expanding mandamus review. He has twice expressed his view that "the Court has stretched our mandamus jurisprudence beyond its constitutional and prudential limits." *In re Nestle USA Inc.*, 387 S.W.3d 610, 626 (Tex. 2012) (Willett, J., dissenting); *see also In re Allcat Claims Service, L.P.*, 356 S.W.3d 455, 474–93 (Tex. 2011) (Willett, J., dissenting). He wrote powerfully: "Mandamus is not a jurisdictional talisman to conjure instant Supreme Court review." *Nestle*, 387 S.W.3d at 626.

Perhaps Justice Willet's mandamus hesitance was limited to the particular Tax Code provision at issue in those cases, which was a special statutory grant of original jurisdiction, according to the majority. Or perhaps he believes forum-driven rulings are particularly worthy of mandamus review.

2. In re Connor

Beyond *J.B. Hunt*, very few cases even appear to weigh the cost and benefits of mandamus review at all. The petitioner in *In re Connor* complained about a trial court's failure to dismiss a claim for lack of prosecution. 458 S.W.3d 532 (Tex. 2015) (per curiam). The Court held that the plaintiff's failure to provide good cause for their nearly-decade long delay in prosecuting their suit mandated dismissal. As to whether the error could be remedied on appeal, the Court said no:

> A defendant should not be required to incur the delay and expense of appeal to complain of delay in the trial court. To deny relief by mandamus permits the very delay dismissal is intended to prevent. In addition, the danger that a trial will be hampered by stale evidence and lost or clouded memories is particularly distinct after the [10-year] delay in this case.

Id. at 535.

3. In re Essex

In *In re Essex Ins. Co.*, the Court found appellate remedies inadequate to correct trial court errors that result in "fatally flawed proceedings." 450 S.W.3d 524 (Tex. 2014) (per curiam).

An insurance company refused to settle a personal injury case within policy limits. The plaintiff sued the insurance company, seeking a declaration that it had a duty to indemnify the defendant corporation for plaintiff's injuries. The insurance company filed a motion to dismiss pursuant to Texas Rule of Civil Procedure 91a. The company argued that, under established Texas law, "an injured party cannot sue the tortfeasor's insurer directly until the tortfeasor's liability has been finally determined by agreement or judgment." *See Angus Chem. Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138, 138 (Tex.1997). The trial court denied the motion, and the court of appeals denied mandamus review.

The plaintiff argued that his claims against the insurance company did not violate the "no direct action" rule because he is merely seeking a declaration of coverage, not a money judgment. The Court disagreed. It noted that the plaintiff would have no claim against the insurance company if the insured is found not to be liable. *Id.* at 526. In the meantime, the Court explained, both defendants are prejudiced in two ways: (1) by the creation of a conflict between the insured and its insurance company; and (2) by the inevitable admission of evidence of liability insurance in violation of the evidentiary rules. *Id.* "Because those policy reasons for the 'no direct action' rule apply regardless of whether the plaintiff is seeking declaratory relief or money damages from the insurer, we reject [the plaintiff's] reliance on the Declaratory Judgments Act as a means to avoid the rule." *Id.* at 527.

The opinion only briefly discusses why the insurance company had no adequate remedy on appeal. The discussion of *Prudential*'s test was a single line. "In light of the conflict of interest and prejudice that we have noted above, we conclude that mandamus relief is appropriate to spare the parties and the public the time and money spent on fatally flawed proceedings." *Id.* at 528.

4. In re H.E.B.

Rarely does the Court address the adequacy prong in discovery cases. *In re H.E.B. Grocery Company, L.P.*, is an exception. 492 S.W.3d 300 (2016) (per curiam).

The trial court denied a defendant's request to conduct a physical examination of a personal-injury plaintiff. The Court held the trial court's denial was an abuse of discretion under the standard established by Texas Rule of Civil Procedure 204.1.

As to the *Prudential* balancing test—which the Court described as "heavily circumstantial"—the Court wrote:

> A benefit-and-detriment analysis of the circumstances in this case leads us to conclude that mandamus is appropriate. Again, HEB's defense hinges in large part on its challenges to the nature, extent, and cause of Rodriguez's injuries. As noted, these issues will in turn depend significantly on competing expert testimony. HEB seeks to allow its expert the same opportunity as Rodriguez's expert to fully develop and present his opinion, ensuring a fair trial. Without that opportunity, HEB lacks an adequate appellate remedy.

Id. at 304–05.

5. In re Lipsky

Beyond these few cases, the Court's opinions were either completely silent about the adequacy of the remedy or fell back to the categorical approach that *Prudential* supposedly abandoned. *See In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d 565, 569 (Tex. 2015) ("We have held that a trial court's erroneous denial of a forum-non-conveniens motion cannot be adequately remedied on appeal and therefore warrants mandamus relief." (citing *In re Gen. Elec. Co.*, 271 S.W.3d 681, 685 (Tex. 2008)); *In re Ford*, 442 S.W.3d 265, 269 (Tex. 2014) ("We have held that no adequate remedy by appeal can rectify an erroneous denial of a forum non conveniens motion. Neither party questions the propriety of this holding." (citing *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007)); *In re Lee*, 411 S.W.3d 445, 450 n.7 (Tex. 2014) ("Mandamus relief is available to remedy a trial court's erroneous refusal to enter judgment on an MSA." (citing *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 659 (Tex.1996)). *See also In re Vaishangi, Inc.*, 442 S.W.3d 256, 261 (Tex. 2014) ("When the trial court nevertheless heard the motion and issued an order enforcing the settlement agreement, the trial court exceeded its jurisdictional authority. In these instances, mandamus is proper even without a showing that the relator lacks an adequate remedy on appeal." (citations omitted)).

Perhaps the most lax view of the adequate remedy prong is shown in the Court's opinion in *In re Lipsky*, 460 S.W.3d 579 (2015). This proceeding involved the review over a denial of a motion to dismiss under the state's new anti-SLAPP law. As noted by the Court, there was a split among the courts of appeals about whether those rulings were subject to interlocutory review by statute. *Id.* at 585 n.2. The Legislature

intervened, clarifying in the 2013 session that interlocutory appeal was permitted. *Id.* But the statute, it seems, was not retroactive.

This procedural stance was similar to what the Court faced in *McAllen Medical*, which involved the review of the sufficiency of a pre-2003 expert medical report. "The plaintiffs point out that when the Legislature mandated interlocutory review of expert reports in 2003, it did not make those procedures retroactive." 275 S.W.3d at 466. But the Court rejected the argument that "the Legislature's provision for mandatory review in future cases suggests it intended to prohibit review in cases already pending." *Id.* Nor should all pre-2003 cases be reviewed, the *McAllen Medical* opinion emphasized. Only "if the legislative purposes behind the statute are still attainable through mandamus review," should it be done.

The *McAllen* discussion and application of *Prudential* is in stark contrast to the Court's more recent single-line declaration in *Lipsky*: "Although an interlocutory appeal is clearly the appropriate remedy going forward, we nevertheless consider the issues presented here in the context of the original mandamus proceedings filed in this Court." 460 S.W.3d at 585 n.2.

That said, because the "legislative purposes behind" the anti-SLAPP statute were still attainable in that suit, which had still not progressed beyond the pleading stage, the Court likely reached the right result in *Lipsky*. But its attitude that it need not justify its reasoning is informative about the Court's changing views on mandamus.

6. In re Lazy W

In re Lazy W District No. 1 does not expressly address the adequacy prong, but its nevertheless worth discussion. 493 S.W.3d 538 (2016). This original mandamus proceeding involved two governmental entities, one of which petitioned for condemnation of a water pipeline easement across the other's land. The condemnee asserted governmental immunity. The trial court, however, refused to rule on the immunity question until appointed special commissioners made the initial determination of the value of the property to be taken. The court of appeals granted mandamus relief, holding that the trial court must defer ruling on the immunity issue until after the commissioners file their award and a party objects. The supreme court disagreed, directing the trial court to address the immunity issue.

The opinion does not expressly discuss the adequacy of any appellate remedies, nor does it expressly cite *Prudential* or its progeny. But the Court does end its opinion on this note:

> As our cases reflect, it is important that the special commissioners convene and render an award expeditiously and without interference from the trial court. But the special commissioners' proceeding should not be a probable waste of time and effort. Governmental immunity from suit "implicates a court's subject-matter jurisdiction over pending claims, and without jurisdiction the court cannot proceed at all in any cause." The trial court had the obligation to consider the Lazy W's assertion.

Id. at 544.

7. In re C.T. (dissent to denial of petition)

Another opinion worth discussing is Justice Guzman's dissent to the denial of a motion for rehearing of a petition for writ of mandamus in *In re C.T.*, 491 S.W.3d 323 (2016) (Guzman, J., dissenting). The facts of this family law case are complex, but the gist of the procedural history is that the trial court missed mandatory statutory deadlines in a suit affecting the parent child relationship. Justice Guzman would have heard the case. As to whether an appeal would be adequate to correct the trial court's error, she noted the trial court's orders were interlocutory and not subject to immediate review:

> Meanwhile, I.C. remains in foster care, subject to an unknown number of temporary placements, pending further proceedings relating to the Relators' conservatorship claims. And even after the Relators' conservatorship claims are decided in the trial court, any ensuing appeals will further delay permanency and stability for I.C. If the trial court clearly erred in failing to return I.C. to the Relators following the January 2014 hearing, the Relators are being continuously denied the right to possession of I.C. pending disposition of the proceedings, and the Relators and I.C. are being denied familial companionship with one another. These rights can never be vindicated by a subsequent appeal because lost time together is irremediable.

Id. at 331–32.

V. CONCLUSION

Last decade, the justices of the Texas Supreme Court appeared mired in a heated internal debate

concerning the Court's role in correcting trial error that resulted in delay and expense to litigants but otherwise could be reviewed upon final judgment. Separate writings on the topic seemed common during those years. Yet the justices that warned of the perils of expanded mandamus review have all since left the Court.

None of the current members of the Court appear bothered by expanded mandamus practice. There has really only been one opinion in the last 7 years that analyzes *Prudential* in any meaningful way, and that unanimous opinion abrogated long-standing appellate jurisprudence that rulings on pleas to the jurisdiction based on dominant jurisdiction were not subject to mandamus review. The "whole new world" is now the "new normal," it seems.