



Changes in Mandamus Review

Over the past few years, the Texas Supreme Court has slowly changed the standards for mandamus review by refining how courts should consider whether the ordinary appellate remedy is adequate. Under the standards announced in 1992 in the case *Walker v. Packer*, an appellate court had to find that the trial court committed a “clear abuse of discretion” for which there was not an “adequate remedy by appeal.” 827 S.W.2d 833, 839-845 (Tex. 1992). The Court designed these standards to ensure that writs of mandamus would be rarely issued, “only in situations involving manifest and urgent necessity.” *Id.* at 840. Central to the discussion of adequate remedy, the Court made it clear that the mere delay or expense of having to proceed through trial to correct the error of the trial court did not make the appellate remedy inadequate. *Id.* at 842.

The Court did not further address the concept of whether the appellate remedy was adequate until 2004 when it decided *In re Prudential Insurance Company of America*. 148 S.W.3d 124 (Tex. 2004). In this case, the Court determined that contractual agreements to waive a jury trial are enforceable agreements in Texas. *Id.* at 129-135. In resolving the case, the Court then had to decide whether the insurance company had an adequate remedy on appeal to justify mandamus relief. After noting a variety of public and private concerns, the Court concluded:

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. An appellate remedy is “adequate” when any benefits to the mandamus review are outweighed by the

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detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

Id. at 136. Over a strong dissent, the Court found that the trial court's refusal to abide by the parties' contractual agreement to forego a jury trial could not be corrected by an ordinary appeal because the right would be lost if the case proceeded to a jury trial. *Id.* at 140-141.

Finally, the consideration of cost and delay – factors not to be considered under the *Walker v. Packer* analysis – have come to the forefront in answering the question of whether an ordinary appeal provides an adequate remedy. In June 2008, the Texas Supreme Court decided the case *In re McAllen Medical Center*, 51 Tex. Sup. Ct. J. 893, 2008 WL 2069837 (Tex. 2008). In this case, the central question was whether an appellate court could review through a mandamus proceeding the sufficiency of an expert report in a medical malpractice case when the trial court found the report sufficient.¹ *Id.* at *1. In medical malpractice cases, if the preliminary expert report is insufficient, the case should generally be dismissed. Ultimately, a majority of the Court concluded that mandamus relief was available. *Id.* at *4-5. The majority considered the wasted cost and effort of a trial in a case that would be reversed. *Id.* In short, if the preliminary expert report is insufficient, the case should be dismissed, and the health care provider should not have to undergo the time and expense of useless trial.

While the standard for an adequate remedy on appeal has dramatically evolved since 1992, the evolution is not unexpected. Since then, the Texas Supreme Court has granted mandamus relief when substantive legal rights would be vitiated by continuing through a trial on the merits. These cases include, among others, providing a mandamus remedy for cases that should be arbitrated, cases that should proceed to non-jury trials, cases with forum selection clauses, and cases where a legislative continuance should be granted where one party is represented by a member of the legislature. Cost and delay in vindicating a legal remedy will now play a greater factor in determining the adequacy of an appeal, but mandamus will still be a remedy reserved for exceptional cases.

¹ The case arose before the recent changes in medical malpractice law. Under the law existing at the time, the plaintiff had to file the preliminary expert report shortly after filing suit. The law, however, did not provide for interlocutory review of the trial court's determination of the sufficiency of the report. The courts of appeal were split whether mandamus review was appropriate. Compare *In re Schneider*, 134 S.W.3d 866, 869 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding) with *In re Samonte*, 163 S.W.3d 229, 238 (Tex.App.—El Paso, 2005, orig. proceeding). Of course, after tort reform, the legislature specifically provided for interlocutory review of the sufficiency of the preliminary expert report. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9)-(10).



Agreeing to What You Mean

Two recent cases from the Texas Supreme Court emphasize the need to be careful with your agreements so that the agreement actually reflects what you mean. In both cases, one party felt that an oral side agreement provided them additional benefits not contained in the actual agreement. However, in both cases, the Court found that agreement was limited to its express terms.

In *Knapp Medical Center v. De La Garza*, the Court analyzed a settlement agreement read into the court record pursuant to Rule 11 of the Texas Rules of Civil Procedure. 238 S.W.3d 767 (Tex. 2007). Dr. De La Garza sued the hospital for defamation related claims. *Id.* at 767. During trial, the parties agreed to settle for, as reflected in the transcript, \$1,000,000 to be paid by the hospital's insurance company. *Id.* at 767-68. Dr. De La Garza, on the other hand, felt that the agreement was for

\$1,000,000 from the insurance company plus an additional \$200,000 to be paid by the hospital. *Id.* at 768. Because the record indicated that the settlement was for \$1,000,000, the court held that the agreement was limited to \$1,000,000 despite the alleged oral promise by the hospital to pay an additional amount. *Id.*

More recently, the Texas Supreme Court addressed a similar issue in the case *Sacks v. Harden*, 51 Tex. Sup. Ct. J. 1135, 2008 WL 2702184 (Tex. 2008). This case related to a fee dispute between attorney and client. *Id.* at *1. Despite a written fee agreement, the client insisted that the attorney agreed to cap the fees at \$10,000. *Id.* The court ruled that the oral agreement modifying the written contract was inadmissible because it was barred by

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the parole evidence rule. *Id.* at *3. The client argued that the agreement was ambiguous because it did not indicate that the fee would be uncapped. *Id.* The Court noted that it never imposed such a requirement on open-ended fee agreements and declined to do so in this case. *Id.*

The lesson from these two cases is important: if the agreement does not fully express what you think the agreement is, you should not sign or signify your assent to it and you should insist on modifications to reflect the full agreement.

A case from Canada also emphasizes the importance of ensuring that the agreement says what you want. As reported in the *Toronto Globe and Mail*, Rogers Communication entered an agreement for Aliant to string cable lines through utility poles, expecting that the agreement would be in place for 5 years. After market conditions changed, Aliant backed out of the agreement after one

year, claiming permission under the contract. The specific provision stated:

The agreement shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.

The Canadian court ruled that, because the “unless and until” clause was set off by a comma, it modified the entire sentence and not just the clause discussing successive five year terms. Had the comma been omitted, it would be clear that the “unless and until clause” modified the “successive terms” clause, giving Rogers the meaning intended. The newspaper estimated that the error in comma placement cost Rogers over \$2 million.



For more information regarding Chamblee & Ryan’s Appellate Law practice, please contact David Walsh, who is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization, at (214) 905-2003