TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00220-CV

In re Empower Texans, Inc. and Michael Quinn Sullivan

ORIGINAL PROCEEDING FROM TRAVIS COUNTY

M E M O R A N D U M O P I N I O N

Relators Empower Texans, Inc. and Michael Quinn Sullivan filed a petition for writ of mandamus seeking to vacate the trial court's order granting a plea to the jurisdiction filed by real parties in interest Tom Ramsay, Paul Hobby, Hugh C. Akin, James T. Clancy, Wilhelmina R. Delco, Warren T. Harrison, Robert K. Long, and Charles G. Untermeyer in which they sought the dismissal of claims filed against them in their individual capacities pursuant to 42 U.S.C. § 1983.[1] We will deny the petition.

Mandamus will issue to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005). The adequacy of appeal as a remedy for an alleged clear abuse of discretion in an interlocutory ruling involves a balance of jurisprudential considerations. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 134, 135 (Tex. 2004). "The operative word, 'adequate,' has no comprehensive definition; it is simply

[1] The real parties in interest are current and former members of the Texas Ethics Commission, some of whom were also sued in their official capacities. The trial court's order does not dismiss claims asserted against either the Texas Ethics Commission or any of its current or former member in their official capacities.

a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use the original mandamus proceedings to review the actions of lower courts." *Id.*

> 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.

Id. An appellate remedy is not inadequate merely because it may involve more expense or delay. *Id.* at 136.

"Incidental district court rulings, which include pleas to the jurisdiction, generally will not be reviewed by mandamus because an adequate appellate remedy exists." *In re State Bar of Tex.*, 113 S.W.3d 730, 734 (Tex. 2003) (citing *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992)). There are, however, noted exceptions to this general principle involving orders denying pleas to the jurisdiction. *See, e.g.*, *In re Southwestern Bell Tel. Co.*, 235 S.W.3d 619, 623-24 (Tex. 2007) (applying exception where Public Utility Commission had exclusive jurisdiction, because permitting trial court to go forward would interfere with important legislatively mandated function and purpose of Commission); *In re Entergy Corp.*, 142 S.W.3d 316, 321-22 (Tex. 2004) (same); *In re State Bar of Tex.*, 113 S.W.3d at 734 (applying exception for interference with authority of state agency); *In re SWEPI, L.P.*, 85 S.W.3d 800, 808 (Tex. 2002) (applying exception for interference with another court's jurisdiction). *In re Entergy* is instructive as to what circumstances will qualify as an exception to the long standing principle that there exists an adequate remedy by appeal when a trial court denies a plea to the jurisdiction. The supreme court stated:

> In certain circumstances, we have recognized that incidental trial court rulings can be corrected by writ of mandamus. [] In each of these instances, the Court exercised its jurisdiction not merely because inaction would have caused hardship to the parties, but because special, unique circumstances mandated the Court's intervention. Here, the possibility that Entergy will be forced to endure the "hardship" of a full-blown trial if we decline to issue a writ of mandamus is, in itself, not sufficient to dictate mandamus relief. But Entergy's hardship is not the only factor we consider in deciding whether mandamus is appropriate. We must also consider that if Entergy is correct in its assertion that the [Commission] has exclusive jurisdiction, permitting a trial to go forward would interfere with the important legislatively mandated function and purpose of the [Commission]. *Cf. State v. Sewell*, 487 S.W.2d 716, 719 (Tex. 1972) (granting mandamus to vacate injunction barring Grievance Committee proceedings because injunction was "an interference with the grievance procedures authorized by . . . the State Bar Act" and restating that mandamus may be appropriate when "the orderly processes of government" are disturbed); *U.S. Alkali*, 325 U.S. at 203-04 (concluding that extraordinary writ would be appropriate to correct federal district court's denial of motion to dismiss complaint if Federal Trade Commission had jurisdiction). In short, if the [Commission] has exclusive jurisdiction in this dispute, the judicial appropriation of state agency authority would be a clear disruption of the "orderly processes of government." This disruption, coupled with the hardship imposed on Entergy by a postponed appellate review, warrants an exception to our general proscription against using mandamus to correct incidental trial court rulings.

In re Entergy Corp., 142 S.W.3d at 321-22. This Court has held that mandamus review is available to remedy a trial court's erroneous denial of a plea to the jurisdiction for failure to exhaust administrative remedies in a dispute that implicates the Texas Department of Insurance, Division of Worker's Compensation's exclusive jurisdiction. *See In re Texas Mut. Ins. Co.*, 360 S.W.3d 588, 592 (Tex. App.—Austin 2011, orig. proceeding) (citing *In re Liberty Mut. Fire Ins. Co.*, 295 S.W.3d 327, 328 (Tex. 2009)).

In the present case, there is no contention that another body, either administrative or judicial, has exclusive jurisdiction over this matter. In their petition, Relators state, without further elaboration, that the order granting the plea "skews the procedural dynamics of the case" and that

"[w]aiting to appeal the order granting the Individual Defendants' plea to the jurisdiction until after the remaining issues are tried is utterly a waste of time and money for the state and private parties." Relators also argue that "[b]ecause the order granting the plea will be overturned at the conclusion of the case, resulting in a second trial over the same issues, waiting to appeal the order would be an irreversible waste of judicial and public resources." However, supreme court precedent is clear that an appellate remedy is not inadequate merely because it may involve more expense or delay. *In re Prudential*, 148 S.W.3d at 136. As such, the burden of additional expense and delay is, in itself, not usually sufficient to dictate mandamus relief. *Id.*

While holding that "an appellate remedy is not inadequate *merely* because it may involve more expense and delay," *Walker*, 827 S.W.2d at 842 (emphasis added), the supreme court has also noted that the word "merely" carries heavy weight. *In re Prudential*, 148 S.W.3d at 136. The court illustrated that point by discussing cases where expense and delay greatly exceeded the norm. *See id.* at 136-37 (citing *In re E.I. DuPont de Nemours & Co.*, 92 S.W.3d 517, 523-24 (Tex. 2002) (court concluded that defending claims of more than 8,000 plaintiffs in litigation that would last for years was not "mere" expense and delay even though duPont could eventually appeal and did not appear to be in any danger of succumbing to burden of litigation); *In re Masonite Corp.*, 997 S.W.2d 194, 195-98 (Tex. 1999) (court concluded that defendants were not required to wait until appeal to complain where trial court, on its own motion and without any authority whatever, split two cases into sixteen and transferred venue of fourteen of them to other counties); *Travelers Indem. Co. v. Mayfield*, 923 S.W.2d 590, 595 (Tex. 1996) (court concluded that carrier could have appealed from final judgment and won recovery for amounts paid, but because trial court's order not only cost

the carrier money, but "radically skew[ed] the procedural dynamics of the case" by requiring defendants to fund plaintiff's prosecution of her claims, mandamus review was appropriate)). The supreme court stated that whether an appellate remedy is "adequate" so as to preclude mandamus review "depends heavily on the circumstances and is better guided by general principles than by simple rules." *Id*. at 137.

It is significant that the most frequent use of mandamus relief by the supreme court involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved. These include:

- forcing parties to trial in a case they agreed to arbitrate, *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 789 (Tex. 2006);
- forcing parties to trial on an issue they agreed to submit to appraisers, *In re Allstate Cty. Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002);
- forcing parties to a jury trial when they agreed to a bench trial, *In re Prudential*, 148 S.W.3d at 138;
- forcing parties to trial in a forum other than the one they contractually selected, *In re AIU Ins. Co.*, 148 S.W.3d 109, 115 (Tex. 2004);
- forcing parties to trial with an attorney other than the one they properly chose, *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d at 383;
- forcing parties to trial with an attorney who should be attending the Legislature, *In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005);
- forcing parties to trial with no chance for one party to prepare a defense, *In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007).

Informed by this precedent, we conclude that mandamus is not warranted in this case, particularly in light of the fact that (1) there is no interference with the orderly processes of government involved

in this case; (2) Relators have not explained how the alleged burden and expense would "greatly exceed the norm" or skew the procedural dynamics of the case; and (3) the trial court *granted* as opposed to *denied* the plea to the jurisdiction such that we are not here faced with a party being forced to proceed with a potentially wasteful trial or forfeit a substantive right by the very act of proceeding to trial. In fact, Relators do not cite a single case in which a court has granted mandamus relief when a trial court granted a plea to the jurisdiction. In short, this case implicates none of the concerns that the supreme court has concluded render the remedy of appeal inadequate such that the extraordinary relief of mandamus is warranted.

For the foregoing reasons, we deny the petition for writ of mandamus.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Goodwin and Field

Filed: April 17, 2018