

MANDAMUS UPDATE

**THE LONG AND WINDING ROAD:
THE TRIP FROM *WALKER* TO *PRUDENTIAL***

CYNTHIA KEELY TIMMS
Locke Liddell & Sapp LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776

State Bar of Texas
**19TH ANNUAL ADVANCED
CIVIL APPELLATE PRACTICE COURSE**
September 8-9, 2005
Austin

CHAPTER 11

CYNTHIA KEELY TIMMS

Locke Liddell & Sapp LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(214) 740-8635 (telephone)
(214) 740-8800 (telecopier)
ctimms@lockeliddell.com

EMPLOYMENT

January 1999 to present	Locke Liddell & Sapp LLP
June 1987 to January 1999	Locke Purnell Rain Harrell (A Professional Corporation)
May 1982 to June 1987	Rain Harrell Emery Young & Doke

BOARD CERTIFICATION

Board Certified by the Texas Board of Legal Specialization in Civil Appellate Law – 1990

PROFESSIONAL ACTIVITIES

Member of Council, Appellate Section of the State Bar of Texas

Former Member of Examination Commission, Texas Board of Legal Specialization, Civil Appellate Law

Co-author, as part of Appellate Practice Group of Locke Liddell & Sapp, LLP, of *Recurring Issues in Consumer and Business Class Action Litigation in Texas*, 33 TEX. TECH L. REV. 971 (2002); Co-author along with Michael S. Truesdale, Jerry D. Bullard and Samara L. Kline of *The Process: Internal Operating Procedures of the Texas Appellate Courts*, Special Edition of the Appellate Advocate (February 2005).

Author of seminar papers, including *Current and Recently Resolved Conflicts Among the Courts of Appeals*, Judicial Section Annual Conference, September 2004; *Federal Practice & Procedure*, Civil Appellate Practice Boot Camp, 16th Annual Advanced Civil Appellate Practice Course, September 2002; *Federal Practice & Procedure*, 14th Annual Advanced Civil Appellate Practice Course, September 2000; *Fifth Circuit Update*, University of Texas School of Law, 11th Annual Conference on State and Federal Appeals, May 2001 (co-authored with Scott Hastings and a cast of thousands).

EDUCATION

J.D., University of Oklahoma, Order of Coif, 1982
Bachelor of Science in Chemical Engineering, Oklahoma State University, 1978

TABLE OF CONTENTS

I.	<i>WALKER V. PACKER</i> – THE ROOTS OF THE CONTROVERSY	1
II.	<i>IN RE PRUDENTIAL</i> – THE SUPREME COURT’S MOST RECENT INTERPRETATION OF TEXAS’S MANDAMUS STANDARDS.....	2
	A. The <i>Prudential</i> Majority Decision	2
	B. The <i>Prudential</i> Dissent.....	3
III.	MANDAMUS IN THE TEXAS SUPREME COURT BETWEEN <i>WALKER V. PACKER</i> AND <i>PRUDENTIAL</i>	3
	A. Jack B. Anglin Co. v. Tipps	3
	B. Canadian Helicopters v. Wittig.....	3
	C. Nat’l Indus. Sand Ass’n v. Gibson.....	4
	D. Tilton v. Marshall.....	5
	E. CSR Ltd. v. Link.....	5
	F. In Re Ford Motor Co.	6
	G. Discovery Cases.....	6
IV.	MANDAMUS IN THE TEXAS SUPREME COURT THUS FAR FOLLOWING <i>IN RE PRUDENTIAL</i>	7
V.	MANDAMUS IN THE COURTS OF APPEALS THUS FAR FOLLOWING <i>IN RE PRUDENTIAL</i>	10

MANDAMUS UPDATE

THE LONG AND WINDING ROAD: THE TRIP FROM WALKER TO PRUDENTIAL

Mandamus update circa 2005 can be summarized in a single word: *Prudential*. According to some, *Prudential* has rewritten the law of mandamus in Texas—and not for the better. It supposedly has changed the mandamus process from one employing objective standards to one relying upon subjective analyses. It has allegedly converted (some might say “perverted”) the mandamus system from one of certainty to uncertainty, from rules to whims.

Or maybe not. Has *Prudential* really inflicted all these changes on mandamus jurisprudence, or has it merely recognized that *Walker v. Packer* never actually supplied the law of mandamus the certainty that it promised? Is it revolutionary, or merely a more accurate reflection of what has been occurring with mandamus in the years since *Walker*?

This paper will look at the *Prudential* decision, the *Walker* decision, and the Supreme Court jurisprudence in the years between those two decisions. This discussion will attempt to answer the question: Is *Walker* dead; or, like Mark Twain, has its death been greatly exaggerated? This paper will also look at the decisions since *Prudential* to see if appellate courts have changed their basic approach to mandamus in light of *Prudential*.

I. WALKER V. PACKER – THE ROOTS OF THE CONTROVERSY

To appreciate the *Prudential* decision, one must start with the court’s previous decision in *Walker v. Packer*. 827 S.W.2d 833 (Tex. 1992). The primary thrust of the *Walker* decision was to reinsert one of the two criteria for granting mandamus back into the mandamus process.

There were two general criteria for granting mandamus. The first was that the trial court had committed a “clear abuse of discretion.” The court explained that a “trial court clearly abuses its discretion if ‘it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.’” 827 S.W.2d at 839 (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)). The court warned that the “trial court has no ‘discretion’ in determining what the law is or applying the law to the facts.” *Id.* at 840. “Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.” *Id.*

The court spent the bulk of its time discussing the second criteria for granting mandamus—whether the

party seeking mandamus had an adequate remedy by appeal. The court noted that it had sometimes failed to discuss or analyze that criteria in deciding whether to grant mandamus in the past. 827 S.W.2d at 840-41. The court took the opportunity to reaffirm that requirement: “The requirement that mandamus issue only where there is no adequate remedy by appeal is sound, and we reaffirm it today.” *Id.* at 842.

In reemphasizing the second criteria, the Court gave some general descriptions of what did, and did not, constitute an adequate remedy by appeal. First, it began with situations that did not demonstrate an inadequate remedy by appeal. The Court stated that “an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.” 827 S.W.2d at 842. The court further rejected a sometimes-used “lenient” standard that the “remedy by appeal must be ‘equally convenient, beneficial and effective as mandamus.’” *Id.* at 842 (quoting *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984) and *Crane v. Tunks*, 328 S.W.2d 434, 439 (Tex. 1959)).

The court then focused primarily on what constituted an inadequate remedy at law in the discovery context. It gave three categories of various examples of what it considered to be an inadequate remedy by appeal:

First, “a party will not have an adequate remedy by appeal when the appellate court would not be able to cure the trial court’s discovery error.” 827 S.W.2d at 843. Examples of this exist where the trial court “erroneously orders the disclosure of privileged information” such as documents protected by the attorney-client privilege. *Id.* It also exists when trade secrets are ordered to be produced without adequate protections to maintain confidentiality. *Id.* In both cases, the court pointed out that it would be of little comfort to have a favorable ruling on appeal after the privileged and secret information had been disseminated.

In the same category, the court also stated that the appellate court might not be able to cure the error “where a discovery order compels the production of patently irrelevant or duplicative documents, such that it clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party.” 827 S.W.2d at 843.

Second, the court stated that an appeal “will not be an adequate remedy where a party’s ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court’s discovery error.” 827 S.W.2d at 843. The court insisted that the order must effectively deny “a reasonable opportunity to develop the merits” of the case so that “the trial would be a waste of judicial resources.” However, the party must show more than mere “delay,

inconvenience or expense of an appeal.” The court gave as an example of this category, the entry of death penalty sanctions unless the sanctions are imposed simultaneously with the rendition of a final appealable judgment. Here, because the sanctions preclude a decision on the merits of a party’s claims, the remedy by “eventual” appeal is inadequate. Therefore, mandamus is appropriate.

Third, there can be an inadequate remedy by appeal when the court disallows discovery and the missing discovery cannot be made a part of the record so that the reviewing court “is unable to evaluate the effect of the trial court’s error on the record before it.” 827 S.W.2d at 843-44.

Walker has defined the landscape in mandamus jurisprudence. Since its issuance in 1992, the opinion has been cited over 3000 times.

Whether, because of *Walker* or otherwise, the Texas Supreme Court did not grant a large number of mandamus petitions in the years following *Walker*. For the administrative years ending on August 31 of the given year, the statistics concerning the consideration of and granting of mandamus petitions in the Texas Supreme Court are as follows:

YEAR	CONSIDERED	ACCEPTED OR GRANTED ¹
1996	305	15
1997	326	10
1998	439	6
1999	289	7
2000	288	6
2001	246	7
2002	269	9
2003	264	3
2004	237	7

In the time since the Supreme Court has handed down its decision in *Prudential*, the Supreme Court has granted mandamus 18 times.

¹ Information on the number of mandamus granted is given when available. Otherwise, the number listed are the numbers of mandamus “accepted” without regard to whether they were granted or denied. These statistics come from the Annual Report on the Judiciary provided by the Office of Court Administration. Those reports are available for the stated years on the internet. The reporting years for the purposes of these reports runs from September 1 of one year through August 31 of the following year.

II. *IN RE PRUDENTIAL* – THE SUPREME COURT’S MOST RECENT INTERPRETATION OF TEXAS’S MANDAMUS STANDARDS

A. The *Prudential* Majority Decision

Prudential dealt with an agreement between a landlord and its tenant that both parties waived a jury trial of any actions or proceedings between them. *In re The Prudential Ins. Co.*, 148 S.W.3d 124, 127-28 (Tex. 2004). The trial court had refused to enforce that provision. The Texas Supreme Court took the issue on mandamus and determined that the provision was enforceable.

Had the Supreme Court simply conditionally granted mandamus, the case would be little-noticed except by those with similar clauses in their agreements. Instead, the Supreme Court, in a 5-4 decision, engaged in a lengthy discussion of what is considered to be an “adequate remedy at law.” And that is where the decision has attracted so much attention.

The court first concluded that it needed to give greater definition to the word “adequate” in connection with what constitutes an adequate remedy by way of appeal. That definition is that “[a]n appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments.” 148 S.W.3d at 136. “When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.” *Id.*

The majority announced that the determination of whether there is an adequate remedy by appeal should be determined, not through formulas, but through pragmatism. 148 S.W.3d at 136. It eschewed “rigid rules” which are “necessarily inconsistent with the flexibility that is the remedy’s principal virtue.” *Id.*

The court coupled these new standards with the observation that “[m]andamus 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.” 148 S.W.3d at 136. On the other hand, “[m]andamus 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.*

Part of the pragmatism that seemed to drive the majority decision is the legislature’s tendency to “fix” things when the Texas Supreme Court has declared

that certain rulings can be adequately reviewed on appeal. 148 S.W.3d at 137. The court observed that in the wake of various mandamus rulings in the past, where the court had found that the parties had an adequate remedy by way of appeal, the legislature had added statutory interlocutory relief either by interlocutory appeal or by mandamus. *Id.* at 137-38. Specific examples included the legislative authorization of mandamus review of decisions involving mandatory venue provisions; interlocutory appeals of denials of special appearances; and interlocutory appeals from the denial of dismissals despite a claimed insufficiency of expert reports in medical malpractice cases. *Id.*; see Tex. Civ. Prac. & Rem.Code §15.0642; Tex. Civ. Prac. & Rem.Code §§51.014(a)(7, 9). Each of these legislative enactments followed various failures by the Texas Supreme Court to handle the particular issues by way of mandamus—either because the Texas Supreme Court found the remedy by way of appeal to be adequate or because it otherwise refused to consider mandamus challenges.

B. The *Prudential* Dissent

The dissent felt uncomfortable setting a more ambiguous standard for when mandamus would be appropriate. Writing for the dissent, Chief Justice Phillips stated that “I see no need to inject even greater uncertainty into an already difficult and frequently subjective process.” 148 S.W.3d at 143. Chief Justice Phillips did not attempt to say that *Walker* had provided black-letter rules or absolutely certainty into the mandamus process. Instead, he allowed that “[a]lthough the Court’s mandamus jurisprudence has not always strictly adhered to these tenets, we have endeavored to apply them more consistently since our decision in *Walker*.” *Id.* at 141.

Justice Phillips stated that the majority “now surprisingly suggests that the second prong of our mandamus standard has no fixed meaning.” 148 S.W.3d at 142. He also stressed that “[i]n the past, we have emphasized that the writ of mandamus should not issue absent ‘compelling circumstances.’” *Id.* at 143 (quoting *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996)).

As the dissent pointed out, the majority opinion did not have to redefine mandamus standards in order to reach the conclusion that mandamus could issue in *Prudential*. It noted that “although the Court ultimately does not apply its new ad hoc balancing test here, it calls into question much of our jurisprudence in this area.” 148 S.W.3d at 143. “Whether today’s ruling has fundamentally altered these traditional rules, or is merely an anomaly, remains to be seen.” *Id.*

This debate between the majority and dissent gives rise to various questions:

How closely did the Texas Supreme Court adhere to its *Walker* standards? (Even Justice Phillips allowed for the fact that the Court had not been consistent in this regard.)

Did the Court actually change the standards that were being employed to decide mandamus cases, or did it merely acknowledge what the Court was doing anyway despite the seemingly objective standards?

What effect has the *Prudential* decision had thus far on mandamus jurisprudence?

III. MANDAMUS IN THE TEXAS SUPREME COURT BETWEEN *WALKER V. PACKER* AND *PRUDENTIAL*

The mandamus cases in the Texas Supreme Court following *Walker v. Packer* made one thing clear: other than mandamus actions pursued to enforce arbitration rights, the justices on the court frequently disagreed as to when mandamus should issue and when it shouldn’t. If *Walker v. Packer* set objective standards for courts to follow, those objective standards were lost on the members of the Texas Supreme Court. The many dissents—either to the grant or to the denial of mandamus—display a great difference of opinion as to what would constitute an adequate remedy by way of appeal.

The following is a smattering of the decisions that followed *Walker v. Packer*:

A. Jack B. Anglin Co. v. Tipps

In that case, the Texas Supreme Court found that the parties had agreed to arbitration under the federal arbitration act, but that there was no interlocutory appeal to address trial courts’ failures to stay trial pending arbitration when the Federal Arbitration Act applied to the case. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992). As a result, the court had to determine whether mandamus was an available remedy. The court observed, “Although mandamus relief will not issue merely because an appellate remedy may be more expensive and time-consuming than mandamus, it will issue when the failure to do so would vitiate and render illusory the subject matter of an appeal.” “Absent mandamus relief, Anglin would be deprived of the benefits of the arbitration clause it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated.” 842 S.W.2d at 272-73.

B. Canadian Helicopters v. Wittig

Not long after its decision in *Walker*, the Texas Supreme Court stuck to its “adequate remedy by appeal” guns—even when the issue was personal jurisdiction. *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304 (Tex. 1994). The case arose out of a helicopter crash in Canada involving a helicopter piloted by a Canadian and owned by a Canadian

corporation with its main offices in Canada. The Canadian corporation had never done business in Texas. The plaintiffs were not Texas residents. The Canadian corporation filed a special appearance contesting personal jurisdiction. The trial court denied the special appearance.

Without considering whether the trial court erred in denying the special appearance, the Supreme Court denied mandamus on the basis that the Canadian company had an adequate remedy by way of appeal. Emphasizing that mandamus is proper only “when parties are in danger of permanently losing substantial rights,” the Supreme Court relied upon its authorities refusing mandamus after courts had denied pleas to the jurisdiction. 876 S.W.2d 306 (citing *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990); *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969)). The court allowed that situations involving sovereign immunity, comity, and foreign affairs might involve different concerns. *Id.* at 306. The court also acknowledged that situations involving child custody cases are unique in that “the remedy by appeal is frequently inadequate to protect the rights of children and parents in family law situations.” *Id.* at 307. The court further stated that it did “not foreclose the possibility that a trial court, in denying a special appearance, may act with such disregard for guiding principles of law that the harm to the defendant becomes irreparable, exceeding mere increased cost and delay.” *Id.* at 308-09. Nevertheless, the average special appearance involving even a foreign national having to defend itself in a foreign country did not satisfy the “inadequate remedy by appeal” criteria.

The dissent would have held that the parties lacked an adequate remedy by way of appeal and would have ruled that it was a clear abuse of discretion to deny the special appearance. 876 S.W.2d at 311. The dissent also noted the third exception concerning situations where the trial court acted with “such disregard” that the “harm to the defendant becomes irreparable.” It observed that the exception created a standard whereby “there are different degrees of abuse of discretion, clear and super-clear.” *Id.* at 310. It further noted that it was a new concept “that a super-clear abuse of discretion can make appeal an inadequate remedy when a merely clear abuse cannot.” *Id.*

Canadian Helicopters stands in contrast to the court’s previous decision in *Jack B. Anglin*. Both situations involve important notions regarding the problems of putting parties through entire trials in legally incorrect settings and jurisdictions. In both situations, one can determine as a matter of law from the outset that the case should be dismissed and that everything that occurs with regard to the trial is likely to be a waste of time. The dissent pointed out the inconsistency in the court’s approach to these very

similar situations and suggested that, in both situations, appeal should be determined to be an inadequate remedy. 876 S.W. at 311. The dissent further suggested that the court instead concentrate on whether there was a clear abuse of discretion, and would have found such an abuse in this case.

C. *Nat’l Indus. Sand Ass’n v. Gibson*

Only a year after *Canadian Helicopters*, over a vigorous dissent, the court applied one of the exceptions that the majority had identified in *Canadian Helicopters* to grant mandamus in a case involving a special appearance. *Nat’l Indus. Sand Ass’n. v. Gibson*, 897 S.W.2d 769 (Tex. 1995). In that case, the plaintiff was relying upon conspiracy allegations to assert jurisdiction over a party that otherwise lacked minimum contacts with Texas. The court held that conspiracy allegations could not provide minimum contacts necessary for personal jurisdiction. *Id.* at 773. The majority then relied upon the exception that allowed mandamus when “the trial court’s assertion of personal jurisdiction is ‘with such disregard for guiding principles of law that the harm to the defendant becomes irreparable.’” *Id.* at 771 (quoting *Canadian Helicopters*, 876 S.W.2d at 308).

The majority said little to explain why there was an inadequate remedy by way of appeal. It merely noted that “[t]he trial court was not faced with a voluminous record filled with contradictory evidence” and that “[t]here was no basis on which to assert specific jurisdiction.” 897 S.W.2d at 776. It then concluded that “the ‘total and inarguable absence of jurisdiction’ justifies extraordinary relief,” citing *Canadian Helicopters*. *Id.* After that it simply stated that an “ordinary appeal is inadequate . . .” *Id.*

On the other hand, the dissent had plenty to say on the topic of whether an appeal was an adequate remedy. The dissent was authored by Justice Cornyn, joined by Chief Justice Phillips, and Justices Enoch and Gammage. It pointed out that the exception relied upon was that the trial court might act with such disregard for guiding principles “that the harm to the defendants becomes irreparable.” 897 S.W.2d at 777. The dissent protested that this language “does not in any way dispense with the required showing of inadequate appellate remedy.” *Id.* It argued that neither the majority nor the party seeking mandamus presented any reasons why an appeal would be inadequate. Complaining that the court had ignored the requirement that appeals be inadequate, it ominously warned that “[I]f the Court is free to ignore that tenet in this case, it may as well begin issuing extraordinary writs to correct denials of summary judgments.” *Id.*

D. *Tilton v. Marshall*

Just one year after Justice Cornyn's dire prediction, Chief Justice Phillips—who had concurred in the *National Industrial Sand* dissent—authored an opinion in which the court accomplished Justice Cornyn's "worst case" scenario: the court granted mandamus to correct the denial of a summary judgment. *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996). The case was based upon claims that Tilton had promised on his televised evangelical shows that if people called a prayer line and sent a donation, he would "personally and actually read, touch and pray over each of these requests." *Id.* at 676. Plaintiffs claimed that the assertions were fraudulent, made in bad faith, and that Tilton had intentionally inflicted emotional distress on the plaintiffs. *Id.* Tilton opposed certain discovery requests and asked the trial court to dismiss the claims against him. *Id.*

The Supreme Court granted mandamus with regard to discovery matters, then also granted mandamus that the intentional infliction of emotion distress claims must be dismissed, along with damage claims for unfilled prayers. On the merits, the court noted that "[r]esolving whether Tilton has intentionally inflicted emotional distress through the making of insincere religious representations would inevitably require an inquiry into whether Tilton's religious beliefs are true or false." 925 S.W.2d at 681. The court continued, "no conscientious fact finder would make such a determination without at least considering the objective truth or falsity of the defendants' beliefs." *Id.*

The inadequacy of the appeal arose out of the constitutional nature of the problem confronting the court. "Adjudication of the claims for intentional infliction of emotional distress would necessarily require an inquiry into the truth or falsity of religious beliefs that is forbidden by the Constitution." 925 S.W.2d at 682. "The trial itself, therefore, and not merely the imposition of an adverse judgment, would violate relator's constitutional rights." *Id.*

The dissent protested that "until now, this Court has never held that mandamus is available to review the denial of a motion for summary judgment." 925 S.W.2d at 695. The dissent continued to note the seemingly extreme result in the case:

There is good reason for not reviewing the denial of summary judgments on petitions for writ of mandamus. This case is it, and woe to the bench and bar. The solution wrought by the Court today must certainly leave the parties and the trial court slack-jawed.

Id. The dissent argued that the majority, to reach its result, had elevated religious constitutional rights

above other constitutional rights such as the right to free speech. *Id.*

E. *CSR Ltd. v. Link*

That same year, the Texas Supreme Court returned again to the topic of whether to grant mandamus with regard to special appearance. This time, the court very nearly reached a consensus. In this case, an Australian company (CSR) with its principal place of business in Australia sold asbestos to Johns-Manville F.O.B. Fremantle, Australia so that title passed to Johns-Manville in Australia. *CSR Ltd. v. Link*, 925 S.W.2d 591, 593-94 (Tex. 1996). Between thirty and forty years later, CSR was sued in Texas in several different asbestos cases. It filed a special appearance in the Master Asbestos File and the special appearance was overruled. *Id.* at 594.

The Texas Supreme Court granted mandamus, citing *Canadian Helicopters* and *National Industrial Sand* for the proposition that there may be "other 'extraordinary situations' in which the denial of a special appearance cannot be adequately remedied on appeal." 925 S.W.2d at 596. Unlike the *National Industrial Sand* opinion, however, the Court made a significant attempt to explain why the remedy by way of appeal was inadequate in *CSR*. The court emphasized that getting caught up in mass tort litigation placed "significant strains" on defendants and creates "considerable pressure to settle. . . ." *Id.* "The large number of lawsuits to which CSR could potentially be exposed is significant to our determination that appeal is not an adequate remedy in this case." *Id.* The court also noted that judicial resources would be affected. Quoting a court from Arizona, the court noted that "in cases of this magnitude, the interests of all parties and of the public demand that serious questions of law pertaining to jurisdiction be decided by this court and settled at the earliest possible moment." *Id.* at 597.

The only dissenting judge was Judge Baker. Judge Baker was of the view that CSR had failed to show that it would suffer irreparably if mandamus was not granted and that, without such proof, its remedy by way of appeal was adequate. 925 S.W.2d at 600-01. To address the court's problematic special appearance/mandamus jurisprudence, Judge Baker advocated that there be rule changes or statutory changes allowing interlocutory appeals with regard to special appearances. *Id.* at 601-02. The legislature complied not long thereafter, creating an interlocutory appeal when a trial court "grants or denies the special appearance of a defendant under Rule 120a. . . ." Tex. Civ. Prac. & Rem. Code §51.014(a)(7).

Interestingly, Judge Gonzales filed a concurring opinion decrying the court's jurisprudence in this area, essentially agreeing with Baker that it was befuddled. "Although the holdings in *Canadian Helicopters* and

National Industrial Sand are superficially consistent, it is clear that the application of the law to the facts in the two opinions is not reconcilable.” 925 S.W.2d at 598. Contrary to Judge Baker, however, Judge Gonzales advocated that the court overrule *Walker v. Packer* and *Canadian Helicopters* “to the extent they hold that a foreign defendant with no ties to Texas must make a separate showing of harm before mandamus will issue to correct an order denying a special appearance.” *Id.* at 599.

Thus, four short years after *Walker v. Packer*, members of the court openly decried the confused state of mandamus jurisprudence and invited either the overruling of *Walker* or entreated that the problems be resolved outside of the judicial process.

F. In Re Ford Motor Co.

This mandamus action addressed whether parties have an adequate remedy at law when a court grants attorneys’ fees to a party in the event that the opposing party seeks mandamus. *In re Ford Motor Co.*, 988 S.W.2d 714 (Tex. 1998). The trial court had rendered sanctions for perceived discovery abuses by ordering certain evidence to be excluded at trial, ordering the defendant to pay \$10 million to the plaintiffs within 10 days, awarding \$25,000 in attorneys’ fees and awarding another \$25,000 in fees if the defendant sought mandamus. *Id.* at 718. The court of appeals had granted mandamus with regard to the \$10 million. Thus, the issues before the Supreme Court were the exclusion of the evidence and the two awards of attorneys’ fees.

As is relatively typical in these cases, the Supreme Court found that all of the trial court’s actions constituted an abuse of discretion. 988 S.W.2d at 721. In fact, it is not uncommon for the dissent to agree with this conclusion, as occurred in this case. *Id.* at 723. Where the two sides parted, once again, is on the issue of adequate remedy at law.

The majority held that Ford lacked an adequate remedy at law only with regard to the \$25,000 in attorneys’ fees that it would owe for taking a mandamus. The court held that an “appeal is not an adequate remedy when a court imposes a monetary penalty on a party’s prospective exercise of its legal rights.” 988 S.W.2d at 723. The majority pointed out that an appeal could not restore “the unfettered right to seek any relief that may be available by mandamus.” *Id.* at 722. The appeal could restore the penalty improperly imposed but could not “free the party of the chilling effect the penalty has had on the exercise of the party’s legal rights.” *Id.*

The dissent authored by Justice Enoch pointed out that Ford hadn’t been chilled in the slightest: it had gone straight to the appellate courts with a mandamus action. 988 S.W.2d at 723. In fact, the heavy \$10 million fine was almost calculated to force Ford to

move right past any chilling effect that the \$25,000 attorneys’ fee award might caused. This dissent stated an appeal would only be inadequate when the attorney’s fees sanction must be paid before final judgment and the award threatens to prevent a party from continuing the litigation. *Id.* at 724.

In a separate dissent, Justice Baker also would have found an adequate remedy by way of appeal, but went on to trace what he perceived as the serious departures from *Walker*. He accused the court of setting “a course down a road of no return.” 988 S.W.2d at 727. Justice Baker traced the history of mandamus jurisprudence after *Walker* and concluded that the court was ignoring its own rules and precedent. *Id.*

In re Ford Motor Co. is a good example of a case that foreshadows the *In re Prudential* standard of what constitutes an inadequate appellate remedy. As Justice Enoch pointed out, the concern about Ford being chilled by having to pay \$25,000 as punishment for seeking mandamus was purely academic. Ford had sought mandamus, and was richly rewarded for doing so, since the court of appeals granted mandamus with regard to the required \$10 million payment. Nevertheless, the majority granted mandamus, most probably because it wanted to make sure that the process of forcing parties to pay extra attorneys’ for merely seeking mandamus (even if the mandamus was successful) should be nipped in the bud. It was, as Justice Hecht later described in *Prudential*, a situation that “allow[ed] the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments. . . .” *In re Prudential*, 148 S.W.3d at 136.

G. Discovery Cases

Walker v. Packer was a discovery mandamus case, and that is reflected in the depth of thought that the Supreme Court gave to discovery mandamus issues. As a result, as the Court showed deep divisions over other mandamus issues, it tended to have fewer disagreements over discovery issues. A couple of examples:

- *Remington Arms Co. v. Canales*, 837 S.W.2d 624 (Tex. 1992). The Supreme Court held that the trial court abused its discretion in failing to permit the late filing of objections to a discovery requests. *Id.* at 624. Because Remington had previously responded to an identical request, the Court found that the trial court abused its discretion in failing to find good cause for the late responses. Because Remington was going to have to produce privileged information if mandamus

did not issue, Remington lacked an adequate remedy at law.

- *Able Supply Co. v. Moye*, 898 S.W.2d 766 (Tex. 1995). In this case, the trial court refused to compel answers to an 8-year old interrogatory question concerning the identification of physicians who had attributed the plaintiff's injuries to the defendants' products. *Id.* at 767-68. The plaintiffs had worked at a steel plant and the case involved over 3000 plaintiffs and nearly 300 defendants. The court noted that the defendants lacked an adequate remedy at law because the case involved a "denial of discovery going to the heart of a party's case. . ." *Id.* at 772. The court found that the defendants were "prevented from developing essential elements of their defense." *Id.*

These are just two examples of discovery-based mandamus decisions during the early days after *Walker v. Packer*. But, unlike the other decisions that the Supreme Court was making at the time, these lacked dissents. Both these cases flowed from the court's decision in *Walker*, which addressed some of the most common situations that develop in discovery mandamus situations.

What these cases show, more than anything, is that *Walker* was very effective at creating a sense of certainty and consensus in the discovery context. Outside of that context, however, the case was not as effective. Thus, for some time, the members of the Supreme Court engaged in heartfelt debates concerning what would constitute and what would not constitute an adequate remedy at law.

Stepping back from *Walker* and looking at the post-*Walker* jurisprudence, the opinions attempting to follow that case created contradictions. For example, it would seem to make little sense to use mandamus to compel answers to interrogatories more than 30 days before trial, but to refrain from using it to prevent a Canadian company from having to endure an entire lawsuit including discovery and trial in Texas when the accident giving rise to the claims occurred in Canada and involved no Texans. Yet the court easily agreed that the interrogatories needed to be answered and quarreled until the legislature stepped in concerning whether parties having no connection with Texas should be forced to undergo the entirety of a trial process before obtaining a definitive ruling on appeal that Texas lacked jurisdiction to try the claims against them.

IV. MANDAMUS IN THE TEXAS SUPREME COURT THUS FAR FOLLOWING *IN RE PRUDENTIAL*

A natural question following *In re Prudential* is whether courts are granting mandamus more frequently following that decision, or embracing the standards set out in that case to grant mandamus in situations where mandamus would normally be denied.

Thus far, it appears that, post-*Prudential*, the Texas Supreme Court has been granting mandamus in greater numbers than in recent years. Since the time that it handed down its decision in *Prudential*, the Court has handed down 20 decisions in mandamus actions and granted mandamus in 18 of those cases. Compare that with the administrative year 2003, when the Court handed down 5 mandamus decisions.² Since *Prudential*, the court has handed down the following mandamus decisions:

1. *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004). This case was decided on the same day as *Prudential*. It granted mandamus to enforce a forum-selection clause. As with *Prudential*, the case contains an lengthy explanation concerning why the parties lack an adequate remedy by way of appeal and there is dissenting opinion similar to the one accompanying *Prudential*.
2. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203 (Tex. 2004) (per curiam). As with *AIU*, this case was handed down on the same day as *Prudential*. The Supreme Court granted mandamus because the trial court abused its discretion in consolidating the claims of 20 plaintiffs against 9 defendants in a case involving exposure to a variety of chemicals. The petitioners lacked an adequate remedy by way of appeal because "juror confusion and prejudice" was "almost certain" and "it would be impossible for an appellate court to untangle the confusion or prejudice on appeal." *Id.* at 211.

² The Office of Court Administration reported 3 mandamus decisions during the year September 1, 2002 through August 31, 2003. A Westlaw search for mandamuses granted by the Texas Supreme Court during that same period, however, reveals that the Court granted mandamus in five cases during that time period. In three of the cases, the case was argued and decided within the same reporting year. In one case, it was argued during the previous reporting year. In another case, there was no oral argument, and the case was filed during the previous reporting year. The author is uncertain of the source of the discrepancy in numbers between the results of the Westlaw research and the Annual Report on the Judiciary published by the Office of Court Administration.

3. *In re Newton*, 146 S.W.3d 648 (Tex. 2004). This case is a classic situation requiring mandamus treatment. It involved a TRO obtained two days after the start of early voting preventing a political party PAC from engaging in certain activities for the following two weeks. The Court found that the TRO changed, rather than preserved, the status quo and granted mandamus.
4. *In re Automated Collection Tech., Inc.*, 156 S.W.3d 557 (Tex. 2004) (per curiam). The court granted mandamus to enforce a forum selection clause.
5. *In re Sanders*, 153 S.W.3d 54 (Tex. 2004) (per curiam). The court granted mandamus to overturn an erroneous order disqualifying counsel. The husband in a divorce proceeding could not afford to pay his lawyer, and so he performed remodeling work for the lawyer instead. The court held that this work did not disqualify the lawyer because the wife failed to prove that the lawyer was a necessary witness as an “employer” for the divorce and custody case.
6. *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004). The husband in a divorce case, who had not superseded the judgment, sought writs of prohibition and mandamus. The court held that the lower courts could entertain motions for contempt when the judgment was not superseded, but the appellate court had reversed the maintenance award. As a result, the court issued a writ of habeas corpus because the criminal contempt sentence had become improper and unenforceable.
7. *In re U.S. Silica Co.*, 157 S.W.3d 434 (Tex. 2005) (per curiam). The court granted mandamus to resolve conflicting transfer orders in Cameron County. It held one of the orders to be improper under the local rules and granted mandamus accordingly.
8. *In re Terex Corp.*, 159 S.W.3d 630 (Tex. 2005) (per curiam). This case was a follow-up decision to the Court’s decisions in *Gonzales v. Reliant Energy, Inc.*, 159 S.W.3d 615 (Tex. 2005) and *In re Reliant Energy, Inc.*, 159 S.W.3d 624 (Tex. 2005). In those two cases, the court determined that a probate court could not transfer a wrongful death case to itself when venue is improper in the county where the probate court is located and a party objects. This case involved the same issue, and the court issued mandamus based on its *Reliant* decisions.
9. *In re Wilson N. Jones Memorial Hospital*, 159 S.W.3d 629 (Tex. 2005) (per curiam). This is just the same as the *Terex* decision and mandamus was granted on the same basis.
10. *In re Reliant Energy, Inc.*, 159 S.W.3d 624 (Tex. 2005) (per curiam). This is the case that gave rise to the previous two decisions. The court granted mandamus for the same reason described in *Terex*.
11. *In re Omni Hotels Mgmt. Corp.*, 159 S.W.3d 627 (Tex. 2005) (per curiam). This case is related to the previous cases, with the exception that the Supreme Court found concurrent jurisdiction and that venue was proper in the probate court. Accordingly, it denied the request for mandamus relief.
12. *In re AdvancePCS Health L.P.*, ___ S.W.3d ___, 2005 WL 856961 (Tex. April 15, 2005) (per curiam). In this case, the trial court denied the motion to compel arbitration. This is a typical area for mandamus, since the court’s opinion in *Jack B. Anglin*. The court granted mandamus, enforcing the arbitration agreements.
13. *In re Texas Ass’n of Sch. Boards, Inc.*, ___ S.W.3d ___, 2005 WL 1124983 (Tex. May 13, 2005). This was another action concerning venue. In this case the insurance agreement had a venue provision. The Court decided that this was not a “major” transaction within the venue provisions and denied mandamus.
14. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379 (Tex. 2005) (per curiam). The trial court disqualified the relator’s counsel based on a conflict of interest. However, the party that sought disqualification had executed a written waiver of any potential conflict. As a result, the Supreme Court granted mandamus with regard to the disqualification order.
15. *In re Kellogg Brown & Root, Inc.*, ___ S.W.3d ___, 2005 WL 1187775 (Tex. May 20, 2005). The question in this case was whether Kellogg Brown & Root, as a non-signatory to a contract containing an arbitration clause was required to arbitrate its claims against the two signatories to the contract. The trial court said “no”; the court of appeals said “yes.” The Texas Supreme Court said “no” and granted mandamus relief to Kellogg Brown & Root.
16. *Powell v. Stover*, 165 S.W.3d 322 (Tex. 2005). This case involved a divorce and child custody dispute. The father lived in Tennessee; the mother had moved back to Texas two weeks before filing for divorce. The father filed divorce proceedings in Tennessee two weeks after the mother filed

in Texas. Because the child had lived with his parents in Tennessee for the 10 months prior to his return to Texas, that was determined to be his “home state” under the Uniform Child custody Jurisdiction and Enforcement Act. The Supreme Court granted mandamus to stay the Texas proceedings pending resolution of the jurisdiction issue in Tennessee.

17. *In re Ford Motor Co.*, 165 S.W.3d 315, (Tex. 2005) (per curiam). The plaintiffs were involved in an accident and sued both Ford, the tire manufacturer, and the tire repair shop. One of the plaintiffs was a quadriplegic because of the accident, and trial was set for less than nine months after the suit was filed. Forty-five days before the scheduled trial, Ford hired a state legislator and moved for continuance. The trial court denied the continuance. The quadriplegic plaintiff argued that she needed to go to trial to obtain money for her continued treatment. The Supreme Court noted that Ford would not have to pay that money until after trial, judgment, and appeals at any rate. Thus, the plaintiff did not show that her substantial rights would be defeated by a trial delay.

This is one of the few Supreme Court mandamus cases since *Prudential* that cited *Prudential* or discussed adequate remedy by appeal, rather than merely citing to previous authorities that also granted mandamus in a similar context.

18. *In re Nexion Health at Humble, Inc.*, ___ S.W.3d ___, 2005 WL 1252271 (Tex. May 27, 2005) (per curiam). In this case, the Court held that there was a sufficient showing of interstate commerce for the Federal Arbitration Act to apply. Thus, it granted mandamus to require that the claims be arbitrated. This case also cites to *Prudential*.
19. *In re McKinney*, ___ S.W.3d ___, 2005 WL 1537221 (Tex. July 1, 2005) (per curiam). The court granted mandamus to compel arbitration with regard to a brokerage agreement.
20. *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, ___ S.W.3d ___, 2005 WL 1537078 (Tex. July 1, 2005). In this case, there was a question as to whether a judgment was final or interlocutory. Burlington sought mandamus complaining that the trial court allowed execution to issue when the judgment was not yet final. The Supreme Court agreed that the judgment was interlocutory. The court further held that there was no adequate remedy by appeal

when a court allows execution to issue before a final judgment has been entered because litigants should have a right to supersede the judgment. This was one of the few mandamus cases that had a dissent, which disagreed on the merits of whether the judgment was final.

There are several noteworthy overall trends in the Supreme Court’s actions since its decision in *Prudential*:

- It appears, that at least temporarily, the Court is taking a greater number of mandamus cases and granting mandamus at a higher rate. Whether that is because of a change in standards in *Prudential*, because there is a temporary flood of mandamus decisions on topics that the court has been wishing to discuss, or whether it is pure coincidence is not known at this point. We will have to watch the court over time to see if this trend is temporary or a predictor of things to come.
- The Supreme Court has not cited to *Prudential* very much since it was decided. Instead, in these twenty mandamus decisions, the Supreme Court has cited to *Prudential* in only three of those cases. See *In re Nexion Health at Humble, Inc.*, ___ S.W.3d ___, 2005 WL 1252271 (Tex. May 27, 2005); *In re Ford Motor Co.*, 165 S.W.3d 315 (Tex. 2005); *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004). Rather than citing *Prudential*, the Court has tended to make little direct mention of the “inadequate remedy at law” standard. Instead, the court tends to cite to previous cases stating that mandamus is appropriate under that particular set of circumstances.
- The Court has been issuing a lot of per curiam decisions. Thirteen of the twenty mandamus decisions were per curiam decisions.
- Along the same lines as the multitude of per curiam decisions, there have been far fewer dissenting opinions in connection with the mandamus rulings. The court’s decision in *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004) was issued on the same day as *Prudential* and contains much of the same debate between the majority and dissents. Other than that is the dissenting opinion in *In re McKinney*, ___ S.W.3d ___, 2005, WL 1537221 (Tex. July 1, 2005). This dissent was on the merits of whether there was an abuse of discretion and did not address the

question of adequate remedy on appeal. Other than those two opinions, the remaining 18 mandamus decisions did not have dissents.

- As with the question about whether the increase in mandamus opinions out of the Texas Supreme will hold, we will have to wait and see whether the greater agreement with regard to mandamus jurisprudence holds or whether the court recommences its internal disagreements concerning whether parties have adequate remedies by way of appeal.
- More in the vein of a weather report than a legal analysis, May 2005 may be one of the heaviest mandamus months on record in the Texas Supreme Court. The court issued decisions in 6 mandamus cases, granting mandamus in 5 of those cases. In fact, in the four month period between March 11, 2005 and July 1, 2005, the Court issued decisions in 13 mandamus actions, granting mandamus in 11 of those cases.

V. MANDAMUS IN THE COURTS OF APPEALS THUS FAR FOLLOWING *IN RE PRUDENTIAL*

Of course, the next question is how *Prudential* is affecting the decision-making in the courts of appeals. If the number of times that courts have cited a decision could be considered to be “voting with your feet,” then *Prudential* is not doing very well. Since September 1, 2004 (two days before the *Prudential* decision), Texas courts have cited to *Walker v. Packer* 227 times. The Texas Supreme Court accounts for 9 of those citations. Thus, the courts of appeals have cited *Walker* approximately 218 times since the time that *Prudential* was decided. In the meanwhile, *Prudential* has been cited a total of 21 times since it was handed down, 3 of those times by the Texas Supreme Court. So, the *Prudential* decision has been cited just 18 times (for any reason) in the Texas courts of appeals.

The following courts of appeals decisions have cited *Prudential* in the context of a mandamus action:

1. *In re Zenith Elec. Corp.*, No. 13-04-00420-CV, 2004 WL 2367236 (Tex. App.—Corpus Christi Oct. 21, 2004, orig. proceeding) (memorandum opinion). The court granted mandamus to vacate an order denying a motion to compel discovery in a toxic tort case. The court cites to *Prudential* for its balancing test, but relies primarily upon the principles set out in *Walker* concerning when mandamus is appropriate in a discovery setting. *Id.* at *1.
2. *In re Landmark Org. L.P.*, No. 13-04-00527-CV, 2004 WL 2471809 (Tex. App.—Corpus Christi Nov. 1, 2004) (memorandum opinion). The court granted mandamus to compel the trial court to rule on the relator’s motion to compel arbitration. The court quoted the balancing test from *Prudential*, but did not elaborate. *Id.* at *1.
3. *In re Siemens Corp.*, 153 S.W.3d 694 (Tex. App.—Dallas 2005, orig. proceeding). The court granted mandamus to force the district court to transfer the case to county court, where a related case was pending. This decision cites *Prudential* for the “balancing language” concerning the adequacy of an appeal. *Id.* at 698-99. The court held that this was a question of first impression involving local rules, but was a question likely to recur. It concluded that the trial court’s erroneous ruling could have a far-reaching impact so that mandamus was warranted.
4. *In re West Texas Positron, Ltd.*, No. 07-04-0506-CV, 2005 WL 146968 (Tex. App.—Amarillo Jan. 20, 2005, orig. proceeding) (memorandum opinion). This opinion denied mandamus in an action seeking to vacate an order compelling production of documents. The case cites *Prudential* only for the proposition that mandamus is not issued as a matter of right, but as a matter of discretion. *Id.* at *3.
5. *In re Deponte Investments, Inc.*, No. 05-04-01781-CV, 2005 WL 248664 (Tex. App.—Dallas Feb. 3, 2005, orig. proceeding) (memorandum opinion). The court granted mandamus in a situation in which the trial court had required Deponte to deposit funds into the registry of the court on an interlocutory basis for “safe-keeping.” The court found that the real party in interest failed to show that there was a danger that the funds would be lost or depleted. The court’s citation to *Prudential* is merely a cite to the effect that Deponte did not have an adequate remedy at law, without any further explanation or discussion of *Prudential*. *Id.* at *2.
6. *In re Dominion Resources, Inc.*, No. 13-04-00536-CV & 13-04-00622-CV, 2005 WL 310778 (Tex. App.—Corpus Christi Feb. 10, 2005, orig. proceeding) (memorandum opinion). The court granted mandamus to vacate the trial court’s stay order preventing scientific tests that the defendants stated they needed in connection with their defenses to a toxic tort case. The court cited *Prudential*

- for the language that an appeal is adequate when the benefits to mandamus review are outweighed by its detriments. *Id.* at *1. The court's discussion of *Prudential* was limited to that single statement.
7. *In re Brunin*, No. 04-04-00893-CV, 2005 WL 839531 (Tex. App.—San Antonio April 13, 2005, orig. proceeding) (memorandum opinion). The court granted mandamus with regard to a court's order declaring void an earlier order in a divorce proceedings concerning the continuance of spousal maintenance. The court cited and quoted *Prudential* at length in issuing mandamus. The mandamus issued after the court had originally held that a severance by the trial court would provide an adequate remedy by appeal. The trial court, however, had refused to sever. Thus, mandamus issued.
 8. *In re Pena*, No. 13-05-316-CV, 2005 WL 1120127 (Tex. App.—Corpus Christi May 12, 2005, orig. proceeding) (memorandum opinion). The court denied mandamus in a case in which the trial court had limited the testimony of an expert witness and had refused to permit him to testify to matters on which he was not qualified and for which there was insufficient factual predicate. The court cited *Prudential* several times with regard to the balancing test, but held that the relator had an adequate remedy by appeal.
 9. *In re Unitec Elevator Serv. Co.*, ___ S.W.3d ___, 2005 WL 1309049 (Tex. App.—Houston [1st Dist.] June 2, 2005, orig. proceeding). The court refused to grant mandamus in a case involving a trial court's denial of late-filed motions to add responsible third parties. The court cited and quoted *Prudential* at length. *Id.* at **3, 811. The court found that mandamus relief was not available in part because the relators might win at trial and because other errors (rather than these errors) might necessitate a new trial. *Id.* at *10. The court concluded that the benefits to mandamus review were outweighed by the detriments.
 10. *In re Kroupa-Williams*, No. 05-05-00375-CV, 2005 WL 1367950 (Tex. App.—Dallas June 10, 2005, orig. proceeding) (memorandum opinion). In a divorce proceeding, the court granted mandamus because the trial court abused its discretion in canceling lis pendens filed on three pieces of real property. The court cited *Prudential* in support of finding that there was no adequate remedy by appeal, but without discussion or explanation. *Id.* at *5.
 11. *In re Allstate Texas Lloyd's*, No. 05-05-00373-CV, 2005 WL 1385236 (Tex. App.—Dallas June 13, 2005, orig. proceeding) (memorandum opinion). The court granted mandamus to set aside the trial court's order denying an insurance company's motion to abate and sever the action against it from the main underlying action. The court cited *Prudential* in support of finding that there was no adequate remedy by appeal, but without discussion or explanation. *Id.* at *2.
 12. *In re Weir*, ___ S.W.3d ___, 2005 WL 1412385 (Tex. App.—Beaumont June 16, 2005) (orig. proceeding). Mandamus issued in this case to set aside an order that would have forced an expert to testify to the percentage of the expert's income that came from litigation-related work and the total amount of that income. The court cited *Prudential* together with *Walker* solely for the proposition that mandamus issues when the trial court abuses its discretion and there is no adequate remedy at law. *Id.* at *3.
 13. *In re Oliver*, No. 10-05-00213-CV, 2005 WL 1531712 (Tex. App.—Waco June 29, 2005, orig. proceeding) (memorandum opinion). Mandamus issued in this case to vacate an order denying a motion for continuance. The motion for continuance had been filed because the relator's expert had withdrawn and relator needed to retain another expert. *Id.* at *1. The court cited and quoted *Prudential* at length, holding that relator lacked an adequate appellate remedy because the case involved child support and the child would likely reach the age of majority before the case would be re-tried upon remand. *Id.* at *3.
 14. *In re Routh*, No. 10-05-00251-CV, 2005 WL 1654580 (Tex. App.—Waco July 13, 2005, orig. proceeding) (memorandum opinion). The court denied mandamus because the trial court had not clearly abused its discretion. Because the relator had not cited the proper statute in her motion, the court could not say that the trial court had "clearly abused" its discretion. *Id.* at *1. *Prudential* was cited only for the abuse of discretion standard. *Id.*
- Several other cases have cited *Prudential*, but not in the mandamus context. See *First Union Nat'l Bank v. Richmond Capital Partners I, L.P.*, ___ S.W.3d ___, 2005 WL 1799326 (Tex. App.—Dallas August 1, 2005, no pet. hist.) (*Prudential* cited only for contract principles); *In re C-Span Entertainment, Inc.*, 162 S.W.3d 422 (Tex. App.—Dallas 2005, orig. proceeding) (this case involved an agreement

containing a jury waiver much like the one at issue in *Prudential*; the court cited *Prudential* repeatedly, but for the jury waiver contractual issues); *San Saba Energy L.P. v. McCord*, __ S.W.3d __, 2005 WL 851017 (Tex. App.—Waco April 13, 2005, pet. filed) (citing *Prudential* for contract principles); *Cotter v. Tobey, Jr.*, No. 04-04-00082-CV, 2005 WL 291462 (Tex. App.—San Antonio Feb. 9, 2005, no pet.) (memorandum opinion) (citing *Prudential* only for contract principles).

Several observations can be made from these cases.

- Although the courts of appeals did not cite *Prudential* much initially, they are citing to the case with more frequency as time has gone by. Of the 14 cases citing *Prudential* in the mandamus context, 5 of those cases were decided in June 2005.
- During that same month when courts of appeals cited *Prudential* 5 times, the courts of appeals cited *Walker* 27 times. Thus, although the citations to *Prudential* are growing, the appellate courts still seem to prefer relying upon *Walker* in their decisions.
- There are relatively few cases in which *Prudential* is cited and discussed at length in the court's decision to grant mandamus. See, e.g., *In re Brunin*, No. 04-04-00893-CV, 2005 WL 839531; *In re Oliver*, No. 10-05-00213-CV, 2005 WL 1531712. In most decisions, the citations to *Prudential* are brief or perfunctory.
- In several decisions, the courts discuss *Prudential* at length in deciding that, despite *Prudential's* balancing test, mandamus would not issue because the relator had an adequate remedy by way of an appeal. See, e.g., *In re Pena*, No. 13-05-316-CV, 2005 WL 1120127; *In re Unitec Elevator Serv. Co.*, __ S.W.3d __, 2005 WL 1309049. Thus, court discussions of *Prudential* do not inevitably lead to the granting of a mandamus; sometimes the balancing test results in the conclusion that mandamus should *not* be granted.
- All in all, *Prudential* does not appear to have had a significant effect on mandamus jurisprudence in the courts of appeals. Reports are not available yet to show whether there has been an overall increase in the number of mandamus filings or the number of mandamuses granted. With time, we will be better able to determine whether *Prudential* is leading to an increase either in the filing of or the granting of mandamuses.