

# IN THE SUPREME COURT OF TEXAS

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No. 05-0892  
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IN RE MCALLEN MEDICAL CENTER, INC., D/B/A  
MCALLEN MEDICAL CENTER AND UNIVERSAL HEALTH SERVICES, INC., RELATOR

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ON PETITION FOR WRIT OF MANDAMUS  
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**Argued December 5, 2006**

JUSTICE BRISTER delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON and JUSTICE WILLETT joined.

JUSTICE WAINWRIGHT filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON and JUSTICE O'NEILL joined.

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. Like “instant replay” review now so common in major sports, some calls are so important — and so likely to change a contest’s outcome — that the inevitable delay of interim review is nevertheless worth the wait.

Although mandamus review is generally a matter within our discretion, our place in a government of separated powers requires us to consider also the priorities of the other branches of Texas government.<sup>1</sup> One of those is implicated here — repeated findings by the Legislature that

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<sup>1</sup> See, e.g., *In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005) (holding mandamus available to protect legislative continuance); *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004) (holding mandamus available to protect exclusive jurisdiction of executive agency and prevent disruption of “orderly processes of government”).

traditional rules of litigation are creating an ongoing crisis in the cost and availability of medical care.<sup>2</sup> To meet this crisis, the Legislature declared that plaintiffs must support health care claims with expert reports shortly after filing,<sup>3</sup> something they have long had to do at trial.<sup>4</sup> This expedited deadline will of course never accomplish the purposes of the Texas Legislature unless it is enforced by Texas courts.

Four years ago, this Court denied several petitions seeking mandamus relief when the statutorily required reports were allegedly inadequate. The courts of appeals have disagreed since then whether this action means that mandamus review is never available in such cases — several concluding that it does,<sup>5</sup> and several concluding that it does not.<sup>6</sup> We granted the petition here to

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<sup>2</sup> TEX. REV. CIV. STAT. art. 4590i, § 1.02 (repealed 2003).

<sup>3</sup> See *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001).

<sup>4</sup> *Bowles v. Bourdon*, 219 S.W.2d 779, 782 (Tex. 1949) (“It is definitely settled with us that a patient has no cause of action against his doctor for malpractice, either in diagnosis or recognized treatment, unless he proves by a doctor of the same school of practice as the defendant: (1) that the diagnosis or treatment complained of was such as to constitute negligence and (2) that it was a proximate cause of the patient’s injuries.”).

<sup>5</sup> *In re Methodist Healthcare Sys. of San Antonio, Ltd.*, No. 04-05-00304-CV, 2005 WL 1225376, at \*1 (Tex. App.—San Antonio May 25, 2005, orig. proceeding [mand. pending]) (not designated for publication); *In re Schnieder*, 134 S.W.3d 866, 869 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding); *In re Esparza*, No. 13-04-054-CV, 2004 WL 435241, at \*1 (Tex. App.—Corpus Christi March 10, 2004, orig. proceeding).

<sup>6</sup> *In re Clinica Santa Maria*, No. 13-06-00256-CV, 2007 WL 677736, at \*1 n.2 (Tex. App.—Corpus Christi March 6, 2007, orig. proceeding [mand. pending]) (refusing mandamus relief but stating that availability of mandamus relief must be made on a case-by-case basis pending a definitive ruling from this Court); *In re Samonte*, 163 S.W.3d 229, 238 (Tex. App.—El Paso 2005, orig. proceeding); *In re Watumull*, 127 S.W.3d 351, 354–55 (Tex. App.—Dallas 2004, orig. proceeding); *In re Tenet Hosps. Ltd.*, 116 S.W.3d 821, 827 (Tex. App.—El Paso 2003, orig. proceeding); *In re Rodriguez*, 99 S.W.3d 825, 828 (Tex. App.—Amarillo 2003, orig. proceeding), mand. denied, *In re Woman’s Hosp. of Tex., Inc.*, 141 S.W.3d 144, 149 (Tex. 2004) (refusing mandamus relief but stating “a remedy by direct appeal was inadequate and mandamus would be available in a proper case.”); *In re Morris*, 93 S.W.3d 388, 390 (Tex. App.—Amarillo 2002, orig. proceeding) (refusing mandamus relief but stating “because the statute expressed a specific purpose of addressing frivolous claims filed against medical practitioners by requiring dismissal if a proper expert report was not filed, a remedy by direct appeal was inadequate and mandamus would be available in a proper case.”); *In re Collom & Carney Clinic Ass’n*, 62 S.W.3d 924, 928–30 (Tex. App.—Texarkana 2001, orig. proceeding).

settle the question. We now hold that mandamus relief is available when the purposes of the health care statute would otherwise be defeated.

### **I. Background**

The relator hospital, McAllen Medical Center, granted credentials to Dr. Francisco Bracamontes to perform thoracic surgery at the hospital. Dr. Bracamontes got his medical education in Mexico, was licensed to practice medicine in Texas, and had completed a three-year fellowship at the Texas Heart Institute in Houston. But he was not board certified in thoracic surgery, as only physicians who have completed residencies at accredited U.S. hospitals are eligible for such certification.

In 1999, competing mass-tort cases involving treatment by Dr. Bracamontes were filed — one as a class action,<sup>7</sup> and this case by 400 plaintiffs representing 224 former patients.<sup>8</sup> As required by statute, the plaintiffs in this case submitted expert reports regarding all 224 patients, all signed by Dr. Jetta Brown. The hospital moved to dismiss on the basis (among others) that Dr. Brown was not qualified to comment on the issues here. After sitting on the motion for four years, the trial court finally denied it. The hospital then sought mandamus relief in the Thirteenth Court of Appeals, which was denied.<sup>9</sup>

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<sup>7</sup> See *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227 (Tex. 2001).

<sup>8</sup> The plaintiffs here also sued Dr. Lester Dyke, Dr. Hector Urrutia, and Cardiovascular Consultants of McAllen, none of whom are involved in this proceeding.

<sup>9</sup> *In re McAllen Med. Ctr., Inc.*, No. 13-05-441-CV, 2005 WL 2456602 (Tex. App.—Corpus Christi Oct. 5, 2005, orig. proceeding).

The hospital now requests mandamus relief in this Court. To be entitled to such relief, a petitioner must show that the trial court clearly abused its discretion and that the relator has no adequate remedy by appeal.<sup>10</sup> We address each in turn.

## **I. Clear Abuse of Discretion**

### **A. Negligent Credentialing**

In her initial reports, Dr. Brown addressed a single claim against the hospital: that it had been negligent in “hiring, retention and supervision of Dr. Francisco Bracamontes.” We have held that such claims are health care liability claims.<sup>11</sup> Thus, they had to be supported within 180 days of filing by an expert report signed by a person with knowledge, training, or experience concerning the applicable standard of care.<sup>12</sup>

The curriculum vitae the plaintiffs submitted for Dr. Brown was a model of brevity. It lists where she went to high school and college, but not medical school. It discloses a “general surgery internship,” but not when it took place or how long it was. For employment, it shows two years practicing emergency medicine (1978–80), twenty years in solo family practice (1980–2000), five years “specializing in medical-legal issues” (1995–2000), and a “house call business in general

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<sup>10</sup> *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)).

<sup>11</sup> *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 544–46 (Tex. 2004).

<sup>12</sup> *See* TEX. REV. CIV. STAT. art. 4590i, § 13.01(r)(5)(B) (“‘Expert’ means . . . with respect to a person giving opinion testimony about a nonphysician health care provider, an expert who has knowledge of accepted standards of care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim.”) (repealed 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 74.351(r)(5)(B)); TEX. R. EVID. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.”).

medicine” since 2000. It lists no hospitals where she is on staff, or has been for twenty years, though in her reports Dr. Brown says she has worked as a “surgical assistant” and attended “heart catheterizations” [sic] regarding some of her patients. There is nothing else in either the CV or the reports to suggest she has special knowledge or expertise regarding hospital credentialing.

On this record, the plaintiffs have not established Dr. Brown’s qualifications. “The standard of care for a hospital is what an ordinarily prudent hospital would do under the same or similar circumstances.”<sup>13</sup> Nothing in the record here shows how Dr. Brown is qualified to address this standard. Nor can we infer that she may have some knowledge or expertise that is not included in the record.<sup>14</sup>

Moreover, “a negligent credentialing claim involves a specialized standard of care” and “the health care industry has developed various guidelines to govern a hospital’s credentialing process.”<sup>15</sup> Dr. Brown’s reports contain no reference to any of those guidelines, or any indication that she has special knowledge, training, or experience regarding this process. Nor was Dr. Brown qualified merely because she is a physician; “given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question.”<sup>16</sup>

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<sup>13</sup> See *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 880 (Tex. 2001).

<sup>14</sup> *Bowie Mem’l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002) (“We cannot infer from this statement, as the Wrights ask us to, that Bowie’s alleged breach precluded Barbara from obtaining a quicker diagnosis and treatment for her foot. Rather, the report must include the required information within its four corners.”).

<sup>15</sup> *Garland Cmty. Hosp.*, 156 S.W.3d at 546.

<sup>16</sup> *Brodgers v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996).

As the plaintiffs' only reports supporting the credentialing claims against the hospital were submitted by a doctor who was not qualified for that purpose, the trial court committed a clear abuse of discretion by concluding these reports were adequate.<sup>17</sup>

### **B. Other Causes of Action**

In addition to their credentialing claim, the plaintiffs pleaded that Dr. Bracamontes was the hospital's agent, and thus was vicariously liable for his negligence. This claim is viable only if the doctor was negligent, so it too is a health care liability claim and must be supported by an expert report. But nothing in Dr. Brown's reports suggest the hospital controlled the details of his medical tasks (a requirement for hospital liability),<sup>18</sup> and the plaintiffs do not argue otherwise on appeal.

But they do argue that even if their expert reports were inadequate, dismissal would be improper as to their fraud, fraudulent concealment, civil conspiracy, and misrepresentation claims as these do not involve health care.<sup>19</sup> Their pleadings show otherwise. The civil conspiracy they alleged was that the defendants "conspired to commit malicious physician credentialing and fraud"; the fraud, fraudulent concealment, and misrepresentations they pleaded related to "material facts regarding Dr. Bracamontes' qualifications to perform cardiac surgery." These are simply clandestine credentialing claims.

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<sup>17</sup> *Am. Transitional Care Ctrs.*, 46 S.W.3d at 880.

<sup>18</sup> *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 543 (Tex. 2003).

<sup>19</sup> The plaintiffs also say they alleged the hospital violated the Texas Deceptive Trade Practices Act, but no such allegations appear in their pleadings in the record before us.

Finally, the plaintiffs asserted that the hospital advertised all its heart surgeons as board certified, and sought economic damages “because Dr. Bracamontes performed cardiac surgery when he was not qualified as represented, and the Defendants failed to provide the promised quality of medical services.” “Health care liability claim” does not include claims unrelated to a departure from accepted standards of medical care, health care, or safety.<sup>20</sup> But as the plaintiffs’ advertising claims specifically related to whether Dr. Bracamontes was “qualified as represented” and attacked the “quality of medical services” they received, they were inseparable from a health care claim regarding the standards of hospital care.<sup>21</sup>

A person cannot avoid the statutory expert-report requirements by artful pleading.<sup>22</sup> As all the acts and omissions the plaintiff alleged against the hospital concerned its credentialing decision, they are governed by our conclusion above that their reports were inadequate.

### **III. No Adequate Remedy by Appeal**

Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review.<sup>23</sup> As this balance depends heavily on

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<sup>20</sup> TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4) (“‘Health care liability claim’ means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant’s claim or cause of action sounds in tort or contract.”) (repealed 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 849–54 (Tex. 2005); *Earle v. Ratliff*, 998 S.W.2d 882, 885 n.10 (Tex. 1999).

<sup>21</sup> *Diversicare*, 185 S.W.3d at 849 (holding claim that negligent supervision caused assault was health care liability claim because it was “inseparable from the health care and nursing services provided”).

<sup>22</sup> *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004).

<sup>23</sup> *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004).

circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories.<sup>24</sup>

The most frequent use we have 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. Thus we have held appeal is not an adequate remedy when it will mean:

- forcing parties to trial in a case they agreed to arbitrate;<sup>25</sup>
- forcing parties to trial on an issue they agreed to submit to appraisers;<sup>26</sup>
- forcing parties to a jury trial when they agreed to a bench trial;<sup>27</sup>
- forcing parties to trial in a forum other than the one they contractually selected;<sup>28</sup>
- forcing parties to trial with an attorney other than the one they properly chose;<sup>29</sup>
- forcing parties to trial with an attorney who should be attending the Legislature;<sup>30</sup> and
- forcing parties to trial with no chance for one party to prepare a defense.<sup>31</sup>

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<sup>24</sup> *Id.* at 137.

<sup>25</sup> *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272–73 (Tex. 1992).

<sup>26</sup> *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002).

<sup>27</sup> *In re Prudential*, 148 S.W.3d at 138.

<sup>28</sup> *In re AIU Ins. Co.*, 148 S.W.3d 109, 115 (Tex. 2004); *accord*, *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 558 (Tex. 2004).

<sup>29</sup> *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 383 (Tex. 2005); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004); *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 52 (Tex. 1998); *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996).

<sup>30</sup> *In re Ford Motor Co.*, 165 S.W.3d 315, 322 (Tex. 2005).

<sup>31</sup> *In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007).

In each of these cases, it was argued that no harm would come from the trial — perhaps the case would settle, and perhaps fee and interest awards could remedy the expense and delay of trying the case twice. But in each case we granted mandamus relief. Some fee and interest reimbursements are uncollectible, and some sunk costs (such as time taken from other work) are unrecoverable regardless. Further, a legal rule that no harm could possibly accrue to anyone so long as the attorneys get paid to try the case twice appears at least a little self-interested.

Of course, mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion. But parties are not “entitled” to summary judgment in the same way they are entitled to arbitration, their chosen attorney, or an expert report like those here. Summary judgments were unknown at common law,<sup>32</sup> and appeared in Texas cases only with adoption of the rule in 1949.<sup>33</sup> Even if the merits could be decided only one way, jury trials may still be important both for justice and the appearance of doing justice. Moreover, trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice — as it will if the first trial is conducted in the wrong time, place, or manner. By contrast, insisting

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<sup>32</sup> *Tobin v. Garcia*, 316 S.W.2d 396, 400 (Tex. 1958).

<sup>33</sup> Commentators recognize the influence of English and other states’ summary-judgment procedures on Texas’s rules of civil procedure:

[W]hen the Advisory Committee of the Supreme Court of Texas began its labors in 1940 on the Texas Rules of Civil Procedure, there was ample experience to warrant the recommendation of a summary judgment rule for the state . . . . During the following years there was persuasive advocacy of a rule authorizing summary judgment. This was rewarded in the amendments of 1949, which became effective March 1, 1950.

Roy W. McDonald, *Summary Judgments*, 30 TEXAS L. REV. 285, 285–86 (1952).

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.<sup>34</sup>

Here, the Legislature has already balanced most of the relevant costs and benefits for us. After extensive study, research, and hearings, the Legislature found that the cost of conducting plenary trials of claims as to which no supporting expert could be found was affecting the availability and affordability of health care — driving physicians from Texas and patients from medical care they need.<sup>35</sup> Given our role among the coordinate branches of Texas government, we are in no position to contradict this statutory finding. If (as appears to be the case here) some trial courts are either confused by or simply opposed to the Legislature's requirement for early expert reports, denying mandamus review would defeat everything the Legislature was trying to accomplish.<sup>36</sup>

The plaintiffs point out that when the Legislature mandated interlocutory review of expert reports in 2003, it did not make those procedures retroactive.<sup>37</sup> But the Legislature's decision to

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<sup>34</sup> See Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1935 (1997) (“In America today, the civil jury trial too often resembles the expensive and outmoded automobile produced by a flagging state-run industry in a once centrally planned economy. Few people buy it unless they have to, although there remain die-hard supporters, mostly among the work force on the assembly line.”).

<sup>35</sup> TEX. REV. CIV. STAT. art. 4590i, § 1.02 (repealed 2003).

<sup>36</sup> See *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) (noting that “one purpose of the expert-report requirement is to deter frivolous claims” and that “[t]he Legislature has determined that failing to timely file an expert report, or filing a report that does not evidence a good-faith effort to comply with the definition of an expert report, means that the claim is either frivolous, or at best has been brought prematurely”).

<sup>37</sup> Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.03, 2003 Tex. Gen. Laws 847, 849 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9)–(10)).

forego interlocutory review of *all* pending cases in no way suggests it intended interlocutory review of *none* of them. Some appellate courts had already begun reviewing such cases by mandamus before 2003,<sup>38</sup> and retroactive application might have raised constitutional challenges to the statute that prospective application did not.<sup>39</sup> Moreover, for cases about to go to trial in 2003, mandating interlocutory review could have slowed disposition rather than expediting it. So we disagree that the Legislature's provision for mandatory review in future cases suggests it intended to prohibit review in cases already pending.

For many of the same reasons, we acknowledge that mandamus review should not be granted in every pre-2003 case. The statute was intended to preclude extensive discovery and prolonged litigation in frivolous cases; review by mandamus may actually defeat those goals if discovery is complete, trial is imminent, or the existing expert reports show a case is not frivolous. But if the legislative purposes behind the statute are still attainable through mandamus review, Texas courts should not frustrate those purposes by a too-strict application of our own procedural devices.

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<sup>38</sup> See, e.g., *In re Rodriguez*, 99 S.W.3d 825 (Tex. App.—Amarillo 2003, orig. proceeding), *mand. denied*, *In re Woman's Hosp. of Tex., Inc.*, 141 S.W.3d 144 (Tex. 2004) (denying mandamus relief but stating that “a remedy by direct appeal was inadequate and mandamus would be available in a proper case”); *In re Morris*, 93 S.W.3d 388, 390 (Tex. App.—Amarillo 2002, orig. proceeding) (denying mandamus relief but stating that “because the statute expressed a specific purpose of addressing frivolous claims filed against medical practitioners by requiring dismissal if a proper expert report was not filed, a remedy by direct appeal was inadequate and mandamus would be available in a proper case”); *In re Hendrick Med. Ctr., Inc.*, 87 S.W.3d 773, 775 n.3 (Tex. App.—Eastland 2002, orig. proceeding) (holding that the trial court did not abuse its discretion in granting a 30-day grace period, but noting that “[a]lthough we do not reach the question of whether Relators have an adequate remedy at law, see *In re Collom* . . . for a discussion of this requirement for a writ of mandamus”); *In re Collom & Carney Clinic Ass'n*, 62 S.W.3d 924, 930 (Tex. App.—Texarkana 2001, orig. proceeding).

<sup>39</sup> See, e.g., *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) (noting that a retroactive statute violates Texas Constitution “if, when applied, it takes away or impairs vested rights acquired under existing law”).

Applying those principles here, we hold that appeal would not be an adequate remedy in this case. This appears to be precisely the kind of case the Legislature had in mind when it enacted the expert report requirements. The 224 patients initially involved in this consolidated suit had nothing in common other than their doctor. The plaintiffs assert no precedent for consolidating hundreds of malpractice claims by different patients with different health problems and different courses of treatment; their only explanation is that they wanted to save money on filing fees. The hospital promptly objected to the plaintiffs' expert reports, but the trial judge refused to rule on the objection for four years, even though the hospital repeatedly reminded the judge and asked for a ruling in the interim. Meanwhile, the hospital's attorneys had to attend numerous docket calls and status conferences, and moved for summary judgment against 200 plaintiffs whose claims were barred by limitations — motions the trial court granted, but which the hospital should never have had to file. Unquestionably, the hospital could have avoided significant expense and delay had the trial court followed the law as set out in the statute; unquestionably, the hospital will continue to incur costs and delay in the future if we deny relief today. Accordingly, we hold the hospital has shown it has no adequate remedy by appeal.

This holding is not (as the dissent argues) a sudden departure from *Walker v. Packer*.<sup>40</sup> That case was not “seminal” as it represented not the seed of Texas arbitration jurisprudence (which

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<sup>40</sup> 827 S.W.2d 833 (Tex. 1992).

stretches back almost two centuries)<sup>41</sup> but an effort in 1992 to prune some of its branches.<sup>42</sup> The seminal case was actually *Bradley v. McCrabb*, issued while Texas was still a republic, which held that mandamus was not limited to cases where there was “no other legal operative remedy,” but would issue when “other modes of redress are inadequate or tedious” or when mandamus affords “a more complete and effectual remedy.”<sup>43</sup>

We mentioned this “more lenient standard” in *Walker*, but found it unworkable as it “would justify mandamus review whenever an appeal would arguably involve more cost or delay than mandamus.”<sup>44</sup> But while rejecting a standard allowing mandamus almost always, we did not adopt a standard allowing it almost never. To the contrary, we said there would be “many situations” in which mandamus would be appropriate:

Nor are we impressed with the dissenters’ claim that strict adherence adherence to traditional mandamus standards will signal an end to effective interlocutory review for some parties or classes of litigants. There are many situations where a party will not have an adequate appellate remedy from a clearly erroneous ruling, and appellate courts will continue to issue the extraordinary writ.<sup>45</sup>

In describing when an appeal would be “inadequate,” we listed several situations “[i]n the discovery context alone” that “come to mind”:

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<sup>41</sup> See generally 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, 48–94 (2007).

<sup>42</sup> See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2064 (1981) (defining “seminal” as “derived from . . . seed”).

<sup>43</sup> *Bradley v. McCrabb*, Dallam 504, 507 (Tex. 1843); see Flint, *supra* note 41, at 49–53.

<sup>44</sup> *Walker*, 827 S.W.2d at 842.

<sup>45</sup> *Id.* at 843.

- when disclosure of privileged information or trade secrets would “materially affect the rights of the aggrieved party”;
- when discovery “imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party”;
- when 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”; and
- when “the missing discovery cannot be made part of the appellate record . . . and the reviewing court is unable to evaluate the effect of the trial court’s error.”<sup>46</sup>

By mentioning these instances only as ones that “come to mind,”<sup>47</sup> the Court clearly did not limit mandamus to them. And almost immediately after *Walker* we began recognizing additional instances in which an appeal would be inadequate, including:

- when a trial court refused to compel arbitration;<sup>48</sup>
- when an appellate court denied an extension of time to file an appellate record;<sup>49</sup>
- when a trial court refused to compel discovery until 30 days before trial;<sup>50</sup>
- when a trial court denied a special appearance in a mass tort case;<sup>51</sup> and
- when a trial court imposed a monetary penalty on a party’s prospective exercise of its legal rights.<sup>52</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992).

<sup>49</sup> *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ninth Court of Appeals*, 864 S.W.2d 58, 61 (Tex. 1993).

<sup>50</sup> *Able Supply Co. v. Moyer*, 898 S.W.2d 766, 772 (Tex. 1995).

<sup>51</sup> *CSR Ltd. v. Link*, 925 S.W.2d 591, 596-97 (Tex. 1996).

<sup>52</sup> *In re Ford Motor Co.*, 988 S.W.2d 714, 723 (Tex. 1998).

The problem with defining “inadequate” appeals as each situation “comes to mind” was that it was hard to tell when mandamus was proper until this Court said so. So almost four years ago we tried to describe the public and private interest factors that courts should balance in deciding whether the benefits of mandamus outweighed the detriments in each particular case.<sup>53</sup> There is no reason this analysis should entangle appellate courts in incidental trial court rulings any more than *Walker*’s *ad hoc* categorical approach. For example, some privileged or confidential matters may be so innocuous or incidental that the burden of reviewing an order to produce them outweighs the benefits of such a review; in such cases, a balancing approach would prevent entanglement while *Walker*’s categorical approach might require it. The balancing analysis we have followed for some years now merely recognizes that the adequacy of an appeal depends on the facts involved in each case.

The facts in this case do not involve delay and expense alone, as the dissent alleges. The Legislature determined that cases like this one were rendering health care unavailable or unaffordable in areas of Texas like the one where this case was filed. The Legislature’s insistence that plaintiffs produce adequate expert reports is almost as old as this Court’s attempt in *Walker* to define adequate appeals.<sup>54</sup> We disagree with the dissent that this Court’s priorities should trump those adopted by the people through their legislative representatives.

#### **IV. Remand or Render?**

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<sup>53</sup> *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004).

<sup>54</sup> *See* Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 986 (requiring expert reports); Act of May 25, 1993, 73d Leg., R.S., ch. 625, § 3, 1993 Tex. Gen. Laws 2347, 2347 (requiring expert reports or cost bonds).

Finally, the plaintiffs argue if mandamus relief is granted, we should remand for a full evidentiary hearing as to whether they should be given an additional 30-day “grace period” to amend their expert reports. Under the facts and statute at issue here, that option is not available.

Unlike the current statute, the statute applicable before 2003 allowed a grace period to correct inadequate reports only if the inadequacy was the result of an accident or mistake:

Notwithstanding any other provision of this section, if a claimant has failed to comply with a deadline established by Subsection (d) of this section and after hearing the court finds that the failure of the claimant or the claimant’s attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to permit the claimant to comply with that subsection.<sup>55</sup>

In a motion filed the morning of the hearing on their reports, the plaintiffs requested such an extension for two reasons. First, they sought an additional 30 days to get the medical records of 11 plaintiffs, none of whom remain in the case. And as negligent credentialing caused harm to the plaintiffs only if Dr. Bracamontes’s privileges should have been revoked *before* they were treated, their own medical records could not establish that claim.

Second, the plaintiffs alleged that any inadequacies in their reports were the result of accident or mistake rather than conscious indifference. In *Walker v. Gutierrez*, we held that a report that completely omitted one of the elements required by statute could not be an accident or mistake because “a party who files suit on claims subject to article 4590i is charged with knowledge of the statute and its requirements.”<sup>56</sup> Here, the plaintiffs’ attorneys are charged with knowledge that they

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<sup>55</sup> TEX. REV. CIV. STAT. art. 4590i, § 13.01(g) (repealed 2003).

<sup>56</sup> 111 S.W.3d 56, 62 (Tex. 2003).

needed an expert in hospital credentialing, and with the qualifications (or lack thereof) of Dr. Brown. Her curriculum vitae showed she was a solo family practitioner, and revealed neither experience in hospital administration nor even staff privileges at any hospital. At the hearing on the hospital's motion to dismiss, the trial court admitted deposition testimony by Dr. Brown that she had not had staff privileges at any hospital for several years. On this record, the trial court would have no discretion to conclude that the plaintiffs thought Dr. Brown was qualified due to an accident or mistake.

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Because the trial court abused its discretion in failing to grant the hospital's motion to dismiss, we conditionally grant the writ of mandamus and order the trial court to vacate its order and enter a new order dismissing the plaintiffs' claims against the hospital. We are confident the trial court will comply, and our writ will issue only if it does not.

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Scott Brister  
Justice

OPINION DELIVERED: May 16, 2008