

IN THE SUPREME COURT OF TEXAS

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No. 97-0884
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IN RE MASONITE CORP., ABITIBI-PRICE CORP., AND MG BUILDING MATERIALS,
INC., RELATORS

- consolidated for oral argument with -

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No. 97-0885
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IN RE MASONITE CORP., ABITIBI-PRICE CORP., AND MG BUILDING MATERIALS,
INC., RELATORS

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ON PETITIONS FOR WRITS OF MANDAMUS
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Argued on October 20, 1998

JUSTICE BAKER, joined by CHIEF JUSTICE PHILLIPS, JUSTICE O'NEILL, and JUSTICE GONZALES, dissenting.

Today the Court holds that the trial court abused its discretion and that the circumstances in this case are so exceptional that Masonite does not have an adequate appellate remedy. I agree with the Court that the trial court abused its discretion in issuing the transfer orders on its own motion. But I cannot agree that this case involves exceptional circumstances rendering Masonite's appellate remedy inadequate and warranting mandamus relief. Accordingly, I respectfully dissent.

I. ADEQUATE REMEDY AT LAW -- APPEAL

Mandamus will not issue when there is a clear and adequate remedy at law, such as a normal appeal. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Mandamus should issue only in situations involving manifest and urgent necessity and not for grievances where other remedies may apply. *See Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989). The requirement that a person seeking mandamus relief establish the lack of an appellate remedy is a “fundamental tenet” of mandamus practice. *Walker*, 827 S.W.2d at 840; *Holloway*, 767 S.W.2d at 684.

An appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining mandamus. *See CSR, Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996); *Walker*, 827 S.W.2d at 842; *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990). But on rare occasions, exceptional circumstances may render a generally adequate appellate remedy inadequate. *See, e.g., CSR*, 925 S.W.2d at 596-97; *Nat’l Indus. Sand Ass’n v. Gibson*, 897 S.W.2d 769, 776 (Tex. 1995); *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1994); *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 59-60 (Tex. 1991). An appeal is inadequate when the trial court acts with such disregard for guiding principles of law that the relator’s harm becomes irreparable, such as the permanent loss of substantial rights. *See Nat’l Indus. Sand*, 897 S.W.2d at 771; *see also Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 398 (Tex. 1997); *Canadian Helicopters*, 876 S.W.2d at 306; *Walker*, 827 S.W.2d at 842; *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958).

Extraordinary circumstances do not exist when a trial court’s ruling is merely incidental to the trial process and does not permanently deprive a party of substantial rights. *See Polaris Inves. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex. 1995); *Canadian Helicopters*, 876 S.W.2d at

306; *Hooks*, 808 S.W.2d at 59-60. This Court lacks jurisdiction to issue writs of mandamus to supervise or correct incidental trial rulings when there is an adequate remedy by appeal. *See Bell Helicopter*, 787 S.W.2d at 955. Incidental rulings include venue determinations. *See Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals*, 929 S.W.2d 440, 441 (Tex. 1996); *Montalvo v. Fourth Court of Appeals*, 917 S.W.2d 1, 2 (Tex. 1995); *Polaris*, 892 S.W.2d at 862; *Bell Helicopter*, 787 S.W.2d at 955; *see also Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969).

Additionally, the mere fact that a trial court's erroneous order will result in an eventual reversal on appeal does not mean that a trial will be a "waste of judicial resources" as *Walker* uses that term. *See Canadian Helicopters*, 876 S.W.2d at 308 n.11 (citing *Walker*, 827 S.W.2d at 843). To hold otherwise would mean that virtually any reversible error by a trial court would be a proper subject for mandamus review. *See Canadian Helicopters*, 876 S.W.2d at 308 n. 11. Such a result is inconsistent with the rule that mandamus is an extraordinary remedy to be used only in limited circumstances. *See Canadian Helicopters*, 876 S.W.2d at 308 n. 11.

II. ANALYSIS

A. ABUSE OF DISCRETION

I agree with the Court that the trial court abused its discretion in issuing the transfer orders on its own motion. Masonite carried its burden to establish proper venue for its requested transfer. A trial court cannot change venue on its own motion in civil suits. *See City of LaGrange v. McBee*, 923 S.W.2d 89, 90 n.1 (Tex. App.--Houston [1st Dist.] 1996, writ denied); *Robertson v. Gregory*, 663 S.W.2d 4, 5 (Tex. App.--Houston [14th Dist.] 1983, orig. proceeding); *Humphrey v. Rollins*, 88 S.W.2d 776 (Tex. Civ. App.--Dallas 1935, orig. proceeding).

B. ADEQUATE APPELLATE REMEDY

Masonite asserts that it is entitled to mandamus relief regardless of whether it has an adequate remedy on appeal because: (1) the trial court's orders are void; and (2) this case presents "exceptional circumstances." The majority properly rejects Masonite's first argument. *See Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex.1990).

The majority recognizes that, as a rule, venue determinations are not reviewable by mandamus, citing both *Polaris* and *Bell Helicopter*. But the Court agrees with Masonite's argument that it does not have an adequate appellate remedy and grants mandamus relief based on this conclusion. In doing so, the Court rejects precedent on this specific issue, circumvents public policy, retreats to where the law was before *Walker*, and reinstates a principle of law *Walker* specifically disapproved.

The majority asserts it does not retreat from *Walker's* requirement that there be no adequate appellate remedy before mandamus will issue. But the majority then focuses on preserving judicial and public resources instead of the parties' rights. The majority does not explain why mandamus relief should not be granted in each case where reversible error exists, because doing so would certainly preserve judicial and public resources. Additionally, the majority expresses discomfort to being an "accomplice to sixteen trials that will amount to little more than a fiction." What if, instead of sixteen trials, there were just ten? Five? How much "waste of judicial and public resources" should be tolerated before a Court grants mandamus relief? The fallacy in the majority's decision is that the Court no longer has, nor does it provide, guidance on this issue for future cases.

In reaching its conclusion that "exceptional circumstances" exist in this case, the majority relies on *CSR*. *See CSR*, 925 S.W.2d at 597. In *CSR* we issued mandamus to correct a trial court's

erroneous order denying a defendant's special appearance. *See CSR*, 925 S.W.2d at 596-97. Like the venue orders here, an order denying a special appearance is not typically subject to mandamus. *See CSR*, 925 S.W.2d at 596-97. In *CSR* the Court granted mandamus because of "exceptional circumstances." *See CSR*, 925 S.W.2d at 596-97.

But the circumstances in *CSR* are distinguishable from the circumstances here. Indeed, in *CSR*, the Court emphasized that in granting mandamus because of the "extraordinary circumstances," the Court was not relaxing or retreating from the requirement that a relator must show an inadequate appellate remedy. *See CSR*, 925 S.W.2d at 597. And the Court identified several circumstances that made *CSR*'s appellate remedy uniquely inadequate.

First, in *CSR* thousands of potential claimants existed based on possible exposure to pipes containing *CSR* asbestos. *See CSR*, 925 S.W.2d at 596. Here, the number of plaintiffs is fixed and the number of suits that Masonite must defend is likewise fixed. Moreover, Masonite has not presented any evidence showing that there are any potential claimants who have yet to sue.

Second, in *CSR* we were influenced by the significant strain that mass tort litigation places on a defendant's resources and the considerable pressure to settle such cases regardless of the underlying merits. *See CSR*, 925 S.W.2d at 596. This case is different because venue remains proper over the plaintiffs in the Jim Hogg and Duval County suits, and nothing prevents these cases from going forward and being tried on their merits. Moreover, the number of trials that Masonite might face nowhere approaches the magnitude of mass tort litigation that *CSR* faced in Texas.

Third, in *CSR* we were concerned about an inefficient use of the state's judicial resources. *See CSR*, 925 S.W.2d at 596. Efficiency concerns do not render an appeal inadequate here. All the plaintiffs' claims, both resident and non-resident, were properly brought in Texas. It is true that the

claims that were improperly transferred, if tried, will have built-in reversible error. But here this factor does not equate to “exceptional circumstances.” The mere fact that a trial court’s erroneous order will result in an eventual reversal on appeal does not mean that the trial will be a waste of judicial resources. *See Canadian Helicopters*, 876 S.W.2d at 308 n. 11. The claims in *CSR* were asbestos claims. Those claims were complicated, potentially involved multitudes of parties, and the trials were expected to be quite lengthy. *See CSR*, 925 S.W.2d at 597. But nothing in this record shows that the plaintiffs’ claims involve complicated issues, additional multitudes of parties, or lengthy trials.

Finally, in *CSR* there were constitutional implications that are not present here. In *CSR* the Court found that the trial court exceeded the limitations imposed by the Federal Constitution’s due process clause. *See CSR*, 925 S.W.2d at 596. Here, there is no indication that the transfer orders violate Masonite’s constitutional rights. The trial court’s error in this case is procedural, not constitutional.

In addition to improperly relying on *CSR*, the Court insists that the trial court’s “built-in” reversible error is an “exceptional circumstance” that should not be allowed to strain the parties’ resources or the Texas Courts. This conclusion is directly contrary to *Canadian Helicopters*. *See Canadian Helicopters*, 876 S.W.2d at 308 n. 11; *see also Walker*, 827 S.W.2d at 843.

C. PUBLIC POLICY

This State’s public policy is another reason why mandamus should not issue here to control the trial court’s order determining the motion to transfer. Our Legislature, and indeed, this Court, has mandated that no interlocutory appeal lies from the trial court’s determination of a motion to

transfer. See TEX. CIV. PRAC. & REM. CODE § 15.064(a); TEX. R. CIV. P. 87(6); *Ogburn v. Blackburn*, 697 S.W.2d 822, 823 (Tex. App.--Amarillo 1985, orig. proceeding); *Hendrick Med. Center v. Howell*, 690 S.W.2d 42, 45 (Tex. App.--Dallas 1985, orig. proceeding). To grant mandamus, as the majority does here, permits the very interlocutory appeal the statute was enacted and the rule was promulgated to prohibit. *Ogburn*, 697 S.W.2d at 823-824; *Hendrick Med. Center*, 690 S.W.2d at 45-46.

III. ON THE ROAD AGAIN - “OTRA VEZ CON SENTIMIENTO”¹

The majority asserts that I view *Walker's* inadequate appellate remedy requirement as inflexible. Guilty as charged. When engaged in the judicial function of applying the law to a particular case, I am inflexible. But that inflexibility is based upon a sound judicial policy. It's called stare decisis.

Only five years ago, this Court decided *Walker* and *Canadian Helicopters*. Only four years ago, this Court stated that we adhere to our precedents for reasons of efficiency, fairness, and legitimacy. *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995). From today's opinion it is obvious that the Court continues to pay only lip service to “stare decisis as a sound policy.” *Weiner*, 900 S.W.2d at 320. As the *Weiner* dissent advocates, we should not succumb to a temptation to continually revisit prior decisions as new fact situations arise. See *Weiner*, 900 S.W.2d at 332. Mandamus should not issue simply because we disagree with the trial court's ruling. See *CSR, Ltd.*, 925 S.W.2d at 604 (Baker, J., dissenting); *Buller*, 806 S.W.2d at 226.

¹ See *In re Ford Motor Co.*, ___ S.W.2d ___ 1998 WL 387537 (Tex. 1998)(Baker, J., dissenting); *Travelers Indem. Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 595 (Tex. 1996)(Baker, J., dissenting); *CSR*, 925 S.W.2d at 603 (Baker, J., dissenting).

IV. CONCLUSION

That the majority opinion mounts a collateral attack on the dissent instead of directly attacking controlling precedent exposes its weaknesses. The Court's decision here revives an overruled, more lenient standard--the appellate remedy must be "equally convenient, beneficial, and effective as mandamus." See e.g., *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984); *Crane v. Tunks*, 328 S.W.2d 434, 439 (Tex. 1959); *Cleveland v. Ward*, 285 S.W. 1063, 1068 (Tex. 1926). The Court expressly disapproved of this standard in *Walker*. See *Walker*, 827 S.W.2d at 842. I would hold that an appeal is adequate and deny mandamus relief. Because the Court holds to the contrary, I respectfully dissent.

James A. Baker,
Justice

OPINION DELIVERED: June 17, 1999