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Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433 (Tex. 2009)

STATUTORY INTERPRETATION AND PROPER USE OF LEGISLATIVE HISTORY

This case is included in this Newsletter because it is a veritable gold mine for any appellate practitioner looking for enunciations of rules and authorities for statutory interpretation and proper use of legislative history.

The issue presented was whether Section 406.121(1) of the Workers' Compensation Act excludes a premises owner from serving as its own general contractor for the purpose of asserting the exclusive-remedy defense. The decision turned on the Court's examination of what the Legislature meant by the term cgeneral contractorc in the statute. In answering this question, each of the four opinions (majority, two concurring and one dissent) delved deeply into statutory interpretation and legislative history. Notably, all four opinions espoused essentially the same rules of statutory interpretation in support of their differing results. The following are excerpts from the four opinions.

From Justice Green's Opinion of the Court:

The meaning of a statute is a legal question, which we review *de novo* to ascertain and give effect to the Legislature's intent. *F.F.P. Operating Partners., L.P. v. Duenez,* 237 S.W.3d 680, 683 (Tex.2007). Where text is clear, text is determinative of that intent. *State v. Shumake,* 199 S.W.3d 279, 284 (Tex.2006) (c[W]hen possible, we discern [legislative intent] from the plain meaning of the words chosen.c); *see also Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson,* 209 S.W.3d 644, 651-52 (Tex.2006). This general rule applies unless enforcing the plain language of the statute as written would produce absurd results. *Fleming Foods of Tex., Inc. v. Rylander,* 6 S.W.3d 278, 284 (Tex.1999). Therefore, our practice when construing a statute is to recognize that cthe words [the Legislature] chooses should be the surest guide to legislative intent.c *Fitzgerald v. Advanced Spine Fixation Sys., Inc.,* 996 S.W.2d 864, 866 (Tex.1999). Only when those words are ambiguous do we cresort to rules of construction or extrinsic aids.c *In re Estate of Nash,* 220 S.W.3d 914, 917 (Tex.2007).

[W]e do not resort to . . . extrinsic aides [such as legislative history] unless the plain language is ambiguous. *See, e.g., Nash,* 220 S.W.3d at 917 (cIf a statute is clear and unambiguous, we apply its words according to their common meaning without resort to rules of construction or extrinsic aides.c); *Sheshunoff,* 209 S.W.3d at 652 n. 4.

Bills that failed to pass

The legislative history that supports [Respondent's] outcome is apparent only in bills that *failed* to pass, yet cwe attach no controlling significance to the Legislature's failure to enact [legislation],c *Texas Employment Comm'n v. Holberg,* 440 S.W.2d 38, 42 (Tex.1969), for the simple reason that c[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.c *Dist. of Columbia v. Heller,* ___ U.S. ___, ___, 128 S.Ct. 2783, 2796, 171 L.Ed.2d 637 (2008); *see also Dutcher v. Owens,* 647 S.W.2d 948, 950 (Tex.1983) (discerning legislative intent from failed bills would be mere cinferencec that cwould involve little more than conjecturec).

Deletion of language in a statute

We give weight to the deletion of the phrase cwith another partyc from the amended definition since we presume that deletions are intentional and that lawmakers enact statutes with complete knowledge of existing law. *See Acker v. Tex. Water Comm'n,* 790 S.W.2d 299, 301 (Tex.1990). It is, of course, axiomatic that the deletion of language better indicates the Legislature's intent to remove its effect, rather than to preserve it. . . . . Enforcing the law as written is a court's safest refuge in matters of statutory construction, and we should always refrain from rewriting text that lawmakers chose, but we should be particularly unwilling to reinsert language that the Legislature has elected to delete. *See Simmons v. Arnim,* 110 Tex. 309, 220 S.W. 66, 70 (1920) (cCourts must take statutes as they find them.c).

Lawmakers' post-hoc statements as to what a statute means

Just as we decline to consider failed attempts to pass legislation, we likewise decline consideration of lawmakers' post-hoc statements as to what a statute means. It has been our consistent view that c[e]xplanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended.c *In re Doe,* 19 S.W.3d 346, 352 (Tex.2000) (citations and quotations omitted).

From Justice Hecht's Concurring Opinion:

Statements made during and after the legislative session

[I]n the search for the meaning of a statutory provision, courts will grasp at all sorts of statements made before, during, and after the process of enactment, whether by legislators or others, as relevant or even authoritative. The Legislature does not speak through individuals – even its members – in committee hearings, in bill analyses and reports, in legislative debate, or in pre-and post-enactment commentary; it speaks through its enactments.

From Justice Willett's Concurring Opinion:

There is one building-block principle this Court has declared repeatedly and emphatically: the csurest guidec to what lawmakers intended is what lawmakers enacted. *Leland v. Brandal,* 257 S.W.3d 204, 206 (Tex.2008) (quoting *Fitzgerald v. Advanced Spine Fixation Sys.,* 996 S.W.2d 864, 866 (Tex.1999)). We are interpreting words, and where those words are not doubtful, even though their wisdom may be, we are bound to honor them. . . . Indeed, it is displacing the concreteness of what was actually said with the conjecture of what was allegedly meant that invites activism, a mischievous way for courts to put a finger on the scale (or in the wind) and thus substitute judicial intent for legislative intent. Our place in the constitutional architecture requires fidelity to what lawmakers actually passed.

Legislative intent v. legislative history

Many observers, including lawyers, often conflate legislative intent with legislative history. They are distinct. Under our cases, determining intent is the objective, and where text is clear, text is determinative. Legislative history is a device some judges use to discern intent when text is unclear.

Failed bills pre-dating and post-dating a statute's enactment carry no interpretive force.

Precedent from both the United States Supreme Court and from this Court counsel against supplanting unequivocal enacted text with equivocal unenacted inferences drawn from

failed legislation. As the United States Supreme Court recently explained: cIt is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.c *District of Columbia v. Heller,* ___ U.S. ___, ___, 128 S.Ct. 2783, 2796, 171 L.Ed.2d 637 (2008). We cannot bestow all Far more probative than proposed legislation is passed legislation, what the people's elected representatives actually enacted as a collective body. We eschew guesswork, and a bill's failure to pass sheds no light because, as even casual Capitol observers know, bills fall short for countless reasons, many of them cwholly unrelatedc to the bill's substantive merits or cto the Legislature's view of what the original statute does or does not mean.c *Tex. Employment Comm'n v.Holberg,* 440 S.W.2d 38, 42 (Tex.1969) (cwe attach no controlling significance to the Legislature's failure to enact the proposed amendmentc); *see also El Chico Corp. v. Poole,* 732 S.W.2d 306, 314 (Tex.1987); *Dutcher v. Owens,* 647 S.W.2d 948, 950 (Tex.1983) (warning against gleaning legislative intent from failed bills: cAny such inference would involve little more than conjecture.c). Bills rise and fall for reasons both incalculable and inscrutable, and courts' reluctance to draw inferences from subsequent legislative inaction is deeply rooted, as explained by the United States Supreme Court a half-century ago: cSuch non-action by Congress affords the most dubious foundation for drawing positive inferences.... Whether Congress thought the proposal unwise ... or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act.c *United States v. Price,* 361 U.S. 304, 310-11, 80 S.Ct. 326, 4 L.Ed.2d 334 (1960). *See also Perez v. United States,* 167 F.3d 913, 917 (5th Cir.1999) (cdeductions from congressional inaction are notoriously unreliablec). We, too, reject searching for confirmation or contradiction in later sessions' unsuccessful bill drafts. *Nat1 Liab. & Fire Ins. Co. v. Allen,* 15 S.W.3d 525, 527 (Tex.2000) (cIf possible, we must ascertain the Legislature's intent from the language it used in the statute and not look to extraneous matters for an intent the statute does not state.c). As non-adoption infers nothing authoritative about an earlier statute's meaning, we do not consult failed bills to divine what a previous Legislature intended.

It is imprudent for courts to draw forensic truths from legislative machinations, ascribing intent and motivations based on nothing more than a judge's hunch as to what 181 autonomous lawmakers collectively had in mind.

Post-enactment statements by legislators

Nor, as the Court stresses, can post-hoc statements by legislators shed light on what a statute means. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) (disregarding such statements about an earlier-passed statute: "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). The Legislature is composed of 181 diverse members representing diverse areas with diverse priorities; one lawmaker's perspective may be radically different than that of his or her 180 colleagues. *See AIC Mgmt. v. Crews*, 246 S.W.3d 640, 650 (Tex.2007) (Willett, J., concurring) ("The statute itself is what constitutes the law; it alone represents the Legislature's singular will, and it is perilous to equate an isolated remark or opinion with an authoritative, watertight index of the collective wishes of 181 individual legislators, who may have 181 different motives and reasons for voting the way they do."); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex.1993) ("[T]he intent of an individual legislator, even a statute's principal author, is not legislative history controlling the construction to be given a statute."). This explains our consistent view – reinforced by the U.S. Supreme Court, *see, e.g., Heller*, 128 S.Ct. at 2805 – that post-passage actions and comments are immaterial:

> [C]ourts construing statutory language should give little weight to post-enactment statements by legislators.

> Explanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended.

In re Doe, 19 S.W.3d 346, 352 (Tex.2000) (quoting *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 328-29 (Tex.1994) (Hecht, J., concurring and dissenting) (citations omitted)). The very notion of "subsequent legislative history" is oxymoronic. After-the-fact comments may constitute history, and they may concern legislation, but they are not part of the legislative history of the original enactment. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir.1980). Judge Posner offers a grave caution: Judges who credit "subsequent expressions of intent not embodied in any statute may break rather than enforce the legislative contract." Richard A. Posner, THE FEDERAL COURTS 270 (1985). Judges also risk getting snookered. *See, e.g., Am. Hosp. Ass'n v. NLRB*, 899 F.2d 651, 657 (7th Cir.1990) ("Post-enactment legislative history ... is sometimes a sneaky device for trying to influence the interpretation of a statute, in derogation of the deal struck in the statute itself among the various interests represented in the legislature. Courts must be careful not to fall for such tricks and thereby upset a legislative compromise.") (citations omitted). Finally, even proponents of legislative history, even those proponents willing to consider legislators' post-enactment comments, disregard statements from legislators who did not hold office when the disputed statute was enacted.

From Justice O'Neill's Dissent:

In construing a statute, our overarching purpose is to determine and effectuate the Legislature's intent. *State v. Shumake,* 199 S.W.3d 279, 284 (Tex.2006) (citing *City of San Antonio v. City of Boerne,* 111 S.W.3d 22, 25 (Tex.2003)). The surest guide to that intent is, of course, the plain and common meaning of the language the Legislature has employed. *City of Houston v. Clark,* 197 S.W.3d 314, 318 (Tex.2006) (citing *McIntyre v. Ramirez,* 109 S.W.3d 741, 745 (Tex.2003)).

The Legislature itself has mandated that c[w]ords and phrases shall be ... construed according to ... common usage,c and that c[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.c TEX. GOV'T CODE § 311.011(a), (b).

[T]he Legislature is presumed to act with knowledge of existing laws, *Acker v. Tex. Water Comm'n,* 790 S.W.2d 299, 301 (Tex.1990), and deletions in existing laws are presumed to be intentional. *In re Ament,* 890 S.W.2d 39, 42 (Tex.1994).

I agree with Justice Willett that failed legislation is an unsound guide to legislative intent.

In re Columbia Medical Center of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204 (Tex. 2009)

TRIAL COURTS CAN NO LONGER GRANT NEW TRIAL SIMPLY "IN THE INTEREST OF JUSTICE AND FAIRNESS." MUST GIVE SPECIFIC WRITTEN EXPLANATION

Although perhaps limited in application, this 5-4 decision is interesting in that the Supreme Court changed well-established law in a *mandamus* proceeding, where presumably appellate courts will not act unless a lower court has committed a clear abuse of discretion.

The specific holding was this: just as appellate courts that set aside jury verdicts are required to detail reasons for doing so, trial courts must give a specific written explanation for setting aside a jury verdict and granting a new trial.

This was a med mal case. After a four-week trial, the jury returned a verdict in favor of all defendants. Plaintiff moved for a new trial, arguing that the evidence conclusively proved the defendants' negligence, the verdict was against the great weight and preponderance of the evidence, the verdict was manifestly unjust

and conflicted with evidence that established Columbia's negligence as a matter of law, and a new trial was warranted in the interests of justice and fairness. The motion contained 28 evidentiary points, including a challenge to the reliability of Columbia's expert testimony. The trial court granted the motion as to some but not all of the defendants cin the interests of justice and fairness,c presumably on the grounds urged in the new trial motion.

Trial courts have historically been afforded broad discretion in granting new trials, and the appellate courts have consistently approved the practice of trial courts not specifying reasons for setting aside jury verdicts. *See e.g., Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916, 918 (Tex.1985). And for the most part, orders Having no avenue for appellate review of the order granting new trial, Columbia and the remaining defendants sought review by mandamus. Relying on the established precedent, the court of appeals denied mandamus and held that the trial court's explanation for granting the new trial was sufficient. Columbia then sought a writ of mandamus directing the trial court to specify why it granted a new trial and, in the alternative, directing the trial court to enter judgment on the jury verdict.

The Supreme Court grated mandamus and held that "on balance, the significance of the issue – protection of the right to jury trial – convinces us that the circumstances are exceptional and mandamus review is justified," citing *In re Prudential*, 148 S.W.3d at 136.

Acknowledging the different standards and circumstances between review of jury verdicts by trial judges and appellate courts (e.g., trial judges see and observe the parties, witnesses, and juries in person), the Supreme Court nevertheless concluded that "there is no meaningful difference to the parties between an appellate court reversing a judgment based on a jury verdict and a trial court setting the verdict aside or disregarding it." And a trial court's actions in not disclosing the reasons it set aside or disregarded a jury verdict is no less arbitrary to the parties and public than if an appellate court did so. Acknowledging that it held in *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex. 1985) that a trial court may grant a granting new trials are not reviewable on appeal. Moreover, even if Columbia could obtain appellate review of the new trial orders following a second trial, it would be in much the same situation as the relator in *In re Prudential*, 148 S.W.3d 124, 138 (Tex. 2004). If the new trial resulted in an unfavorable verdict, Columbia could not obtain reversal unless it convinced an appellate court that the granting of the new trial was reversible error. And even if Columbia won the appeal of the second trial, it would have lost the benefit of a final judgment based on the first jury verdict without ever knowing why and would have endured the time, trouble, and expense of the second trial. The Supreme Court found that under these circumstances, Columbia did not have an adequate appellate remedy.

new trial simply cin the interest of justice,c the Court nevertheless held in this case that setting aside a jury verdict with such a vague explanation "does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury." The "parties and public are entitled to an understandable, reasonably specific explanation why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried."

Four justices dissented from this decision. The dissenting opinion was written by Justice O'Neill, who objected that "declaring such a rule by judicial fiat on interlocutory review, and issuing mandamus relief against the trial court for not following it, turns our mandamus jurisprudence on its head." According to the dissent, this case presents neither exceptional circumstances nor a departure from controlling law, as the trial court followed well-established law. The majority simply changes the rule and jettisons the law upon which the trial court relied. "After today, I see no principled basis for denying mandamus review of any potentially dispositive but unexplained interlocutory ruling."

Noting that the majority justifies its decision on the principle that trial courts may not substitute their judgment for that of the jury, the dissent observes that "it is equally true that an appellate

court may not substitute its discretion for that of the trial court, which is charged with ensuring the fairness of the proceedings and safeguarding the integrity of the judicial process. Because trial courts are in a unique position to observe the proceedings and participants first hand, we have afforded them broad discretion in assessing whether cin the interests of justice and fairnessc a new trial is warranted. Rule 320 expressly permits a trial court to grant a new trial on its own motion for any good cause. Presuming, as the majority does, that a change in procedure is warranted, it would be far more appropriate to effect that change by amending the rules rather than implementing new law on mandamus. "Because the Court ventures far beyond the boundaries of our mandamus jurisprudence, I respectfully dissent."

***In re Morgan Stanley & Co. Inc.*, S.W.3d _____, 2009 WL 1901635, 52 Tex. Sup. Ct. J. 1072 (Tex. 2009)**

The Federal Arbitration Act (cFAAc) generally governs arbitration provisions in contracts involving interstate commerce. Where the FAA ostensibly controls, an agreement to arbitrate is valid except on grounds as exist at law or in equity to revoke the contract. Section 4 of the FAA provides that a court may consider only issues relating to the making and performance of the agreement to arbitrate. Thus, once a party seeking to compel arbitration has established that there is a valid agreement to arbitrate and that the plaintiff's claims are within the agreement's scope, the trial court must compel arbitration.

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the U. S. Supreme Court established the cseparabilityc doctrine, explaining that an arbitration provision was separable from the rest of a contract under Section 4 of the FAA and that the issue of the contract's validity was to be determined by the arbitrator unless the challenge was to the agreement to arbitrate itself. The issue in *Prima Paint* was whether the court or an arbitrator should decide a claim of fraud in the inducement of the entire contract.

CAPACITY OF A PARTY TO AN ARBITRATION AGREEMENT IS A QUESTION FOR THE COURT, NOT THE ARBITRATOR

The guardian of account holder's estate brought an action against Morgan Stanley for breach of fiduciary duty, negligence, violations of the Security Act, and breach of contract. Morgan Stanley moved to compel arbitration. The trial court denied the motion. On petition for writ of mandamus, the Supreme Court held that the issue of whether the account holder lacked the mental capacity to contract when she signed the account agreements with arbitration clauses was a matter for the court, not the arbitrator, to decide.

The Texas Supreme Court has followed *Prima Paint* and held that defenses attacking the validity of a contract as a whole, and not specifically aimed at the agreement to arbitrate, are for the arbitrator and not the court. *See In re RLS Legal Solutions, LLC,* 221 S.W.3d 629, 631-32 (Tex.2007). But the Court has also recognized that the presumption favoring arbitration arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex.2003).

On the issue of the defense of mental incapacity, the Court looked to decisions of the federal courts. The federal courts of appeals are split on whether the mental capacity defense is an attack on the validity of the contract as a whole, and therefore a matter for the arbitrator, or a gateway matter concerning the existence of an agreement, and therefore a matter for the court. The U.S. Supreme Court has not yet settled this conflict but rather expressly reserved the question in *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444 n. 1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

Buckeye concerned the defense of illegality of the contract, and the Supreme Court applied the doctrine of separability and compelled

arbitration. Noting the Supreme Court in *Buckeye* grouped illegality with fraudulent inducement for purposes of *Prima Paint's* separability doctrine and expressly excluded the issue of mental capacity along with other contract-formation issues from that analysis, the Texas Supreme Court in *Morgan Stanley* did so, too. The formation defenses identified in *Buckeye* are matters that go to the very existence of an agreement to arbitrate and, as such, are matters for the court, not the arbitrator. *Prima Paint* reserves to the court issues like the one here, that the signor lacked the mental capacity to assent. Accordingly, the trial court did not abuse its discretion in declining to yield the question to the arbitrator.

***Crites v. Collins*, 284 S.W.3d 839 (Tex. 2009)**

NONSUIT DOES NOT PRECLUDE LATER MOTION & ORDER FOR SANCTIONS FOR FAILURE TO TIMELY SERVE A MEDICAL EXPERT REPORT

BECAUSE NONSUIT ORDER WAS NOT FINAL, NOTICE OF APPEAL WAS TIMELY

The Court looked to its decision in *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 199-200 (Tex.2001) for guidance. In *Lehman*, the Court held that when there has been no traditional trial on the merits, no presumption arises regarding the finality of a judgment. To determine whether an order is final, courts and parties must examine the express language of the order and whether the order actually disposes of all claims against all parties. If neither examination indicates that the order is final, then the order is interlocutory and unappealable. A judgment dismissing all of a plaintiff's claims against a defendant, such as an order of nonsuit, does not necessarily dispose of any cross-actions, such as a motion for sanctions, unless specifically stated within the order. If other claims remain in the case, "an order determining the last claim is final."

In this med mal lawsuit, the plaintiffs voluntarily nonsuited their claims against the doctor after failing to serve a medical expert report within the 120-day deadline required by the Medical Liability statute (Chapter 74 of the Civil Practice and Remedies Code). Before the trial court entered an order of nonsuit, the doctor filed a motion for sanctions for noncompliance with the expert report deadline. A month after the trial court signed the order of nonsuit, it issued an order denying the doctor's motion. The court of appeals affirmed, concluding that the filing of a notice of nonsuit precludes consideration of the subsequent motion for statutory sanctions.

Prior to reaching the merits, the Texas Supreme Court considered *sua sponte* whether the appellant doctor timely filed her notice of appeal and, therefore, whether the court of appeals had jurisdiction. The doctor filed her notice of appeal more than 30 days after the trial court signed the order of nonsuit, but less than 30 days after the trial court signed the order denying the motion for sanctions. The question here was whether the order of nonsuit or the order denying sanctions triggered the 30-day filing period in TRAP 26.1.

In this case, the operative language in the order of nonsuit was: "a notice of non-suit having been received by the court, the above entitled and numbered cause is hereby dismissed. . . as to Def[endant] Frances B. Crites only." The order was silent as to the doctor's then pending motion for sanctions. In construing the intent of the trial court's order, the Supreme Court found instructive the fact that the trial court held a hearing on the doctor's motion for sanctions 36 days after signing the order of nonsuit. Because the order of nonsuit itself did not unequivocally express an intent for the order to be a final and appealable order, and because it did not address all pending claims, the order was not final. As a result, the doctor's notice of appeal, which she filed 30 days after the order denying sanctions, was timely.

As to the merits, when the plaintiffs filed the notice of nonsuit, the doctor had not yet filed her

motion for sanctions. She filed the sanctions motion in the interim between the filing of the notice of nonsuit and the trial court's ministerial task of signing the order of nonsuit. The court of appeals determined the filing of the nonsuit "took effect immediately, extinguishing the plaintiffs' claims the moment it was filed." Because the doctor filed her motion for sanctions after this occurred, the court of appeals determined that she "waived her entitlement to that relief."

In *Villafani v. Trejo*, which issued after the court of appeals' opinion in this case, the Supreme Court held that a defendant physician can appeal a trial court order denying a motion for sanctions for failure to timely file an expert report, despite a later nonsuit by the plaintiff. In contrast to *Villafani*, in this case, the doctor's motion for sanctions was not filed until after the plaintiffs' nonsuit, which the Court has held is effective immediately. A nonsuit does not affect a motion for sanctions "*pending* at the time of dismissal." Tex. R. Civ. P. 162. Nevertheless, Rule 162 merely acknowledges that a nonsuit does not affect the trial court's authority to act on a pending sanctions motion; it does not purport to limit the trial court's power to act on motions filed after a nonsuit. *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex.1996). As such, the fact that the doctor filed her motion for sanctions after the plaintiffs had already filed their effective-immediately nonsuit does not affect whether the trial court had the power to grant sanctions, so long as the trial court's plenary authority had not expired. Thus, the court of appeals erroneously held that the doctor's notice of nonsuit prevented her from seeking sanctions under the Medical Liability statute.

The Court then held that the defendant doctor's failure to pursue an interlocutory appeal did not waive his right to appeal the trial court's denial of his motion to dismiss. As a result, the court of appeals had jurisdiction over the appeal; and the case was remanded back to the court of appeals to consider the merits of the appeal.

Thus, the failure to file an interlocutory appeal of an order denying an expert report dismissal motion does not waive the right to an appeal after nonsuit by the plaintiff.

***Hernandez v. Ebrom*, 289 S.W.3d 316 (Tex. 2009)**

MED MAL DEFENDANT MAY APPEAL DENIAL OF EXPERT REPORT DISMISSAL MOTION AFTER NONSUIT BY PLAINTIFF EVEN THOUGH DEFENDANT DID NOT SEEK INTERLOCUTORY APPEAL

In this med mal case, the defendant doctor challenged the sufficiency of the plaintiff's expert report and sought dismissal and attorney's fees. The trial court denied the doctor's motion to dismiss. The doctor did not challenge the denial of his motion by interlocutory appeal as permitted by Section 54.014(a)(9), Civ. Prac. & Rem. Code. Six months later and before trial, the plaintiff filed a notice of nonsuit; and the trial court dismissed with prejudice. The doctor then appealed, re-urging the deficiency of the expert report and seeking attorney's fees.

The court of appeals dismissed the appeal for lack of jurisdiction because the order denying the motion to dismiss was rendered moot by the subsequent nonsuit and order of dismissal. Citing its decision in *Fillafani v. Trejo*, 251 S.W.3d 466 (Tex. 2008), decided after the Court of Appeals' decision, the Supreme Court held that the nonsuit did *not* render the subsequent appeal moot.

In case you are pondering whether a health care defendant can appeal an order denying a motion to dismiss after a final judgment for the plaintiff on the merits, the Supreme Court stated in *dicta* that it cannot.

***Basaldua v. Hadden*, ___ S.W.3d ___, 2009 WL 1010906 (Tex. App.–San Antonio 2009)**

SEPARATE NOTICE OF APPEAL NOT REQUIRED TO CHALLENGE DENIAL OF INDIGENCY AFFIDAVIT

Appeal by alleged indigent. The trial court sustained the contest to appellant's affidavit of indigence. Appellees filed a motion to dismiss for lack of jurisdiction contending that appellant did not file a separate notice of appeal as to the trial court's order sustaining the contest of his indigency affidavit. Appellees relied on holdingd to this effect by the Waco, Corpus Christi, and Texarkana Courts of Appeals. *Gonzales v. State*, No. 13-05-690-CR, 2008 WL 4152002, at * 1 (Tex. App.–Corpus Christi 2008, no pet.); *Duncan v. State*, 158 S.W.3d 606, 607 (Tex. App.–Waco 2005, no pet.); *Rodgers v. Mitchell*, 83 S.W.3d 815, 817-18 (Tex. App.–Texarkana 2002, no pet.); *Baughman v. Baughman*, 65 S.W.3d 309 (Tex. App.–Waco 2001, pet. denied); *Nelson v. State*, 6 S.W.3d 722, 725-26 (Tex. App.–Waco 1999, no pet.), *rev'd on other grounds*, *Duncan v. State*, 158 S.W.3d 606, 607 (Tex. App.–Waco 2005, no pet.).

Siding with contrary opinions by the Amarillo Court of Appeals, the San Antonio Court of Appeals held that a separate notice of appeal is not required to appeal a trial court's order sustaining a contest to an indigency affidavit. *In re Marriage of Gary*, No. 07-01-0466-CV, 2002 WL 1806800 (Tex. App.–Amarillo Aug. 7, 2002 order); *see Ramirez v. State*, Nos. 04-00-00031-CR, 04-00-00037-CR & 04-00-00199-CR, 2000 WL 794157, at *1 (Tex. App.–San Antonio June 21, 2000, order) (not designated for publication) (stating separate notice of appeal is not required to secure review of a trial court order denying a free record).

Marks v. St Luke's Episcopal Hospital, ____ S.W.3d ____, 52 Tex. Sup. J. 1184, 2009 WL 2667801 (Tex. 2009)

HOSPITAL BED CLAIM WAS IN THE NATURE OF A PREMISES LIABILITY CLAIM RATHER THAN A HEALTH CARE LIABILITY CLAIM

The issue before the Court (again) was whether a patient's fall, allegedly caused by a negligently maintained hospital bed, stated a health care liability claim under Article 4590i (the predecessor Medical Liability statute).

Mr. Marks, an elderly patient, suffered injuries when he fell from his hospital bed. At the time, Marks was sitting upright near the foot of his bed attempting to stand. As Marks did so, he placed his hand on the hospital bed's footboard to bring himself to a standing position. The hospital bed's footboard fell off causing Marks to fall to the floor.

The procedural history of this case is lengthy. Originally, the trial court, on the hospital's motion, ruled that Marks pled a health care liability claim and dismissed the case for his failure to provide an expert report within the 180 day deadline set forth in the statute. The court of appeals initially reversed, concluding that Marks' allegations concerned "an unsafe condition created by an item of furniture" and thus related to "premises liability, not health care liability[.]" The Supreme Court, without considering the merits, then vacated the court of appeals' judgment and remanded for the court of appeals to consider the nature of the claims in light of the Court's decision in *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex.2005). On remand, the court of appeals (with one justice dissenting) affirmed the trial court's decision, holding that all of Marks' claims, including the claim regarding the bed's disrepair, were health care liability claims. The Supreme Court then granted Marks' petition for review.

As an aside, when we previously reported on the initial court of appeals' opinion, we wondered in shameless editorial fashion whether the "unsafe condition" is arguably within the ambit of "standards of medical care, or healthcare, or *safety*" set forth in the statute's definition of a health care liability claim. We noted the opinion was silent regarding whether the footboard was intended to be removable or adjustable by a nurse or hospital staff member, but posited that an affirmative finding on those facts would seem to suggest that the footboard is at least, in part, a safety mechanism.

That question presented itself this time around. As the Supreme Court noted in its 2009 decision:

> The meaning of this term is squarely presented here as the parties dispute what the Legislature intended to include as a health care liability claim involving a "departure from accepted standards of . . . safety."

Marks advanced a narrow reading of the term "safety" to include only those safety concerns "directly related to the patient's care of treatment." Meanwhile the Hospital argued for a broader definition to include "any patient injury negligently caused by an unsafe condition at a health care facility."

The Supreme Court rejected the Hospital's proposed definition and reiterated the definition it adopted in *Diversicare v. Rubio*, that "an accepted standard of safety is implicated under [4590i] when the unsafe condition or thing is an inseparable or integral part of the patient's care or treatment." 185 S.W.3d 842, 855 (Tex. 2005).

The Court then analyzed Marks' four separate counts of negligence under the several factors to determine whether the claim concerned was inseparable from the rendition of medical services.

The first three were: (1) failing to properly train and supervise its agents, employees, servants and nursing staff when caring for him (2) failing to provide him with the assistance he required for daily living activities; and (3) failing to provide him a safe environment in which to receive treatment and recover. The Court likened those claims to those alleged in *Diversicare* and found that they implicated patient supervision and staff training, and therefore professional expertise. Thus, those allegations stated health care liability claims.

However, the claim which concerned the condition of the hospital bed, which the Court characterized as involving the failure of a piece of equipment at its core, was not a health care liability claim. The Court reasoned as follows:

> No evidence shows that the assembly of Marks' hospital bed involved any medical or professional judgment, or that the bed's footboard or its assembly were related to, or affected by, Marks' care or treatment. To the contrary, Marks presented some evidence that the assembly of the hospital bed was solely the responsibility of the Hospital's maintenance staff. Presumably, tasks performed by the maintenance staff do not require any specialized health care knowledge, and evaluation of whether those tasks were performed negligently would not require expert medical testimony.

The Court qualified its holding by noting that there are certainly circumstances where the assembly of a hospital bed could involve professional judgment, such as when a physician or other provider specifically orders that a bed (or other equipment) be used and that bed is "integral to the patient's care or treatment." However, when a piece of equipment is unrelated to any professional judgment and is merely incidental to the patient's care, its disrepair does not implicate a health care liability claim.

The Court affirmed in part, reversed in part, and remanded to the trial court for further proceedings. It bears noting that four Justices dissented, three of whom wrote separately. Thus we expect this issue will likely be before the Court again.

***Dual D. Healthcare Operations, Inc., v. Kenyon*, 291 S.W.3d 486 (Tex. App.-Dallas 2009, no pet. hist.)**

SLIP AND FALL IN A NURSING HOME WAS NOT A HEALTH CARE LIABILITY CLAIM UNDER THE NEW STATUTE

This interlocutory appeal to the Dallas Court of Appeals was from the denial of a health care provider's motion to dismiss for plaintiff's failure to file an expert report. The Court of Appeals affirmed the trial court's denial of the nursing home's motion to dismiss. The issue, as in *Marks v. St. Luke's Hospital*, was whether the plaintiff pled a health care liability claim.

Kenyon was a nursing home patient and fell while walking through a hallway. He sued, alleging that he slipped and fell because of liquid or slippery substance that created an unreasonably dangerous condition on the floor. That condition was allegedly created by the facility's workers who were "stripping and rewaxing" the floor. Kenyon's claim arose in 2005; therefore, to the extent it is a health care liability calim it would be governed by the Medical Liability statute at Chapter 74 of the Civil Practice and Remedies Code (the successor to Article 4590i).

The Court of Appeals applied the following definition of a "health care liability claim:"

> If the act or omission that forms the basis of the complaint is an inseparable part of the rendition of health care services, or if it is based on a breach of the standard of care applicable to health care providers, then the claim is a health care liability claim.

In a footnote, the Court of Appeals noted the difference between the former and current medical liability statutes. The current statute added a phrase to restrict claims arising from safety issues to those "directly related to health care." This change coupled with the alleged facts made for a much less onerous analysis than the Supreme Court's decision in *Marks*.

The Court of Appeals determined that Kenyon's claim arose from a slippery substance on the floor without any allegation, nor facts of record, to implicate a failure of a safety standard related to the rendition of medical care.

***Daniels v. Balcones Woods Club, Inc.*, 2009 Tex.App. LEXIS 3776, 2009 WL 1423925 (Tex. App.–Austin 2009, no pet. hist.)**

VEXATIOUS LITIGANT STATUTE

In this case the Austin Court of Appeals reviewed the trial court's finding that plaintiff Daniels is a vexatious litigant. In deciding this case the Court of Appeals had occasion to consider the finality of judgment stemming from a motion for nonssuit.

The underlying facts are interesting though not necessarily pertinent to the holding. In 2002, Daniels had been in litigation with his neighborhood association who successfully sought and obtained injunctive relief to enforce a restrictive covenant which forbade Daniels from parking his car on his lawn. After a bench trial, the trial court issued a permanent injunction against Daniels. Daniels appealed that decision (which was affirmed) claiming the trial court was not fair and impartial.

In 2004, during the pendency of the appeal, Daniels, proceeding pro se, sued Balcones Woods Club, one of his neighbors, multiple board members, the Club's counsel, and counsel's firm. Among the vexing allegations was civil conspiracy by and between the neighborhood association defendants. Daniels further alleged that counsel's firm "made judicial campaign contributions for the purpose of obtaining improper influence over the district judge" and that such influence was used to fabricate cases against him. Vexing indeed, however, each of the defendants filed special exceptions and ultimately earned dismissal upon Daniels' failure to correct the pleading deficiencies.

In 2005, Daniels filed essentially the same suit again, from which this appeal arose. In the underlying case, each of the defendants moved to declare Daniels a vexatious litigant. The district court granted the motions and ordered Daniels to post a $100,000 security bond to proceed. The district court dismissed for Daniels' failure to post bond.

In this appeal, one of the questions before the Court of Appeals was whether the prior litigation had been "finally determined" against Daniels as required under the vexatious litigant statute at Chapter 11 of the Civil Practice and Remedies Code. CPRC § 11.054(2) provides that the

> after a litigation has been ***finally determined*** against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, in propria persona, either:
>
> (A) the validity of the determination against the same defendant as to whom the litigation was ***finally determined***; or
>
> (B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the ***final determination*** against the same defendant as to whom the litigation was ***finally determined***.

Daniels argued that because the dismissal of his 2004 lawsuit was "without prejudice" that it did not constitute a "final determination." However, the Court of Appeals explained that the judgment became final "by operation of law" because no appeal was taken. The Court reasoned that Daniels' position would improperly read into Chapter 11 a requirement that there have been a determination on the merits, rather than merely a final judgment (i.e. "determination"). The statute simply requires that the prior determination was "final," not that it adjudicated the merits of the claim.

The Court of Appeals found no abuse of discretion and affirmed the trial court's judgment.

district court may determine that the plaintiff is a vexatious litigant if the moving party demonstrates that there is not a reasonable probability that the plaintiff will prevail in the litigation and (emphasis added):