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Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659 (Tex. 2008)

SUPREME COURT HAS CONFLICT JURISDICTION IN INTERLOCUTORY APPEAL WHEN COURT OF APPEALS DECISION CONFLICTS WITH U.S. SUPREME COURT DECISION

In this case, the Texas Supreme Court held that it has jurisdiction over an interlocutory appeal if the Court of Appeals' decision conflicts with a decision of the United States Supreme Court.

The union sued DART for breach of contract as to a grievance over wages and benefits. DART is a regional public transportation authority that performs only governmental functions and is ordinarily immune from suit under Texas law. DART brought an interlocutory appeal from the trial court's determination that a federal statute preempts DART's immunity from suit under state law. The Court of Appeals affirmed, holding that the federal statute, as interpreted by the U. S. Supreme Court in *Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), preempted DART's immunity from suit. DART sought review by the Texas Supreme Court contending that it had jurisdiction because the Court of Appeals' decision conflicted with the federal statute and *Jackson Transit Authority*.

After a lengthy discussion tracing the origins and history of the Texas Supreme Court's conflict jurisdiction, the Court held that it has conflict jurisdiction in interlocutory appeals when the Court of Appeals' decision conflicts with a decision of the U. S. Supreme Court. Specifically, the Court held that under Article V, Sections 1 and 3 of the Constitution of Texas, it "possesses the power, and thus the duty, to correct a decision of a court of civil appeals that conflicts with the 'supreme law of the land' as established by the Congress and Supreme Court of the United States."

Of course, neither Article V, Section 1 nor Section 3 of the Texas Constitution say anything directly about conflict jurisdiction or interlocutory appeals. Texas Article V, Section 1 the Texas Constitution states in part:

> "The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law."

Article V, Section 3 states in part:

> "The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution.... Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law."

Noting that the statutes governing its jurisdiction do not address conflicts between the courts of appeals and the U. S. Supreme Court, the Court cited and relied on its 1979 decision in *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex.1979). *Eichelberger* was a divorce case. At that time, decisions in divorce cases were still final in the courts of civil appeals absent conflicts among Texas courts. The court of civil appeals had held that federal law did not preempt a divorce court's division of future railroad retirement benefits between spouses. While the case was pending in the Texas Supreme Court, the U. S. Supreme Court reached the opposite conclusion. Although there was no statutory basis for the Texas Supreme Court to take jurisdiction of the case, it concluded that it was constitutionally required to do so, citing Article V, Sections 1 and 3 of the Texas Constitution.

The Court then noted that it had not invoked its constitutional jurisdiction to remove a conflict between a Texas appellate court and the U. S. Supreme Court in the 30 years since *Eichelberger*. Nevertheless, "it is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts. We have no less authority to ensure that the lower courts follows the United States Supreme Court." Moreover, its holding in *Eichelberger* applies with equal force in interlocutory appeals.

***In re Joanne Lovito-Nelson*, ___ S.W.3d ___, 2009 WL 490067 (Tex. 02/27/09) (08-0482)**

MOTION FOR NEW TRIAL IS NOT GRANTED WITHOUT A SIGNED, WRITTEN ORDER EXPLICITLY GRANTING IT –- A SCHEDULING ORDER FOR TRIAL ON MERITS IS NOT SUFFICIENT

The trial court determined that its scheduling order had the effect of granting a motion for new trial. The Supreme Court disagreed.

A motion for new trial was filed after final order had been signed in this suit affecting the parent-child relationship. At the hearing on the motion for new trial, the trial court initialed this handwritten entry on the docket sheet: "New trial granted. DHL." On the same date the trial court and counsel for all parties signed an agreed "Pre-Trial Scheduling Order." The order set various pretrial deadlines and a final trial date and time, certainly implying that the motion for new trial had been granted.

After 105 days had passed, the non-movant sent a letter to the trial court noting that the court never signed a written order granting a new trial as required by Rule 329b and stating that the initial signed Order was therefore final. The trial court disagreed and signed an order reciting that the court had granted the motion for new trial at the hearing and made a note to that effect on the docket sheet. The order further recited that the court had determined that the agreed scheduling order "set aside the Final Order" and "satisfied the requirements of Tex. R. Civ. P. 329b(c) ... for the granting of a Motion for New Trial."

The Court of Appeals denied the ensuing petition for writ of mandamus. The Supreme Court granted it, holding that the trial court's scheduling order did not satisfy the requirement that a new trial must be granted only by a written and signed order for a new trial. In so doing the Supreme Court noted the importance of having a bright-line rule and thereby avoiding the uncertainty that would otherwise carry over to appellate deadlines.

***Matbon, Inc. v Gries*, ___ S.W.3d ___, 2009 WL 96775 (Tex. App.–Eastland 01/15/09) (11-06-00259-CV)**

APPELLANTS LACKED STANDING TO CHALLENGE SANCTIONS AGAINST THEIR ATTORNEY WHO WAS NOT LISTED AS AN

APPELLANT IN THE NOTICE OF APPEAL

This was an appeal from the trial court's postjudgment order imposing sanctions against The Court of Appeals dismissed for want of jurisdiction, holding appellants lacked standing to challenge the sanctions order on appeal because appellants were not harmed by the imposition of sanctions against their attorney. Because the attorney had not filed or joined in a notice of appeal, the Court of Appeals had no jurisdiction to consider the sanctions order.

Texas Custom Pools, Inc. v. Clayton, ___ S.W.3d ___, 2009 WL 656280 (Tex. App.–El Paso 03/12/09) (08-07-00197-CV)

CONTEST TO SUPERSEDEAS BASED ON CLAIM OF NEGATIVE NET WORTH AND APPELLATE REVIEW THEREOF

Plaintiffs obtained a $1,269,829 judgment against defendant pool contractor. In perfecting its appeal, defendant deposited $125 and filed a certificate of cash in lieu of supersedeas bond, supported by the affidavit of its chief financial officer asserting that defendant had a negative net worth of ($165,182). Plaintiffs filed a motion contesting defendant's assertion of negative net worth. After a two-day hearing, the trial court granted plaintiffs' motion and set aside the certificate of cash in lieu of supersedeas bond. Defendant then filed a motion asking the Court of Appeals to review the trial court's order. The Court of Appeals granted defendant's motion and issued an informative opinion discussing the supersedeas process, burdens of proof, and standard of review.

TRAP Rule 24.1 sets forth the ways in which a judgment debtor may supersede a judgment. When the judgment is for money, the amount of the bond, deposit, or security must not exceed the lesser of 50% of the judgment debtor's current net worth or $25 million. Tex. R. App. P. 24.2(a)(1); CPRC §52.006(b).

A judgment debtor who provides a bond, deposit, or security in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's asset and liabilities from which net worth can be ascertained. Tex. R. App. P. 24.2(c)(1). The affidavit is *prima facie* evidence of the debtor's net worth. *Id.* A judgment creditor may file a contest to the debtor's affidavit of net worth. Tex. R. App. P. 24.2(c)(2). Net worth is calculated as the difference between total assets and total liabilities as determined by generally accepted accounting principles (GAAP).

At the hearing on the judgment creditor's contest, the judgment debtor has the burden of proving net worth. Tex. R. App. P. 24.2(c)(3). The trial court is required to issue an order that states the debtor's net worth and states with particularity the factual basis for that determination. *Id.* The trial court is also authorized to enjoin the judgment debtor from dissipating or transferring assets to avoid satisfaction of the judgment. Tex. R. App. P. 24.2(d). On the motion of a party, an appellate court may review the sufficiency or excessiveness of the amount of security. Tex. R. App. P. 24.4(a);CPRC §52.006(d).

In reviewing the trial court's determination of the amount of security, the court of appeals applies the abuse of discretion standard of review. In conducting this review, the appellate court engages in a two-pronged analysis: (1) did the trial court have sufficient information upon which to exercise its discretion; and (2) did the trial court err in its application of discretion?

Perry v. Cohen, 272 S.W.3d 585 (Tex. 2008)

EVEN THOUGH APPELLANTS DID NOT CHALLENGE SPECIAL EXCEPTIONS ORDER IN NOTICE OF APPEAL OR ISSUES LISTED IN THEIR BRIEF, THEY PRESERVED ERROR BY CHALLENGING THE

ORDER IN THE BODY OF THEIR BRIEF

The trial court dismissed the suit with prejudice after determining that the plaintiffs' amended pleadings failed to comply with an order granting The Court of Appeals held that the plaintiffs waived error as to the merits of the order sustaining special exceptions because they did not separately challenge the order on appeal. The Court of Appeals applied the rule announced in *Cole v. Hall* that "for the merits of a trial court's order sustaining special exceptions and dismissing the suit to be subject to appellate review, both the interlocutory order granting special exceptions and the order of dismissal must be challenged." 864 S.W.2d 563 (Tex. App.–Dallas, 1993 writ dism'd w.o.j.) The Supreme Court agreed with the statement of the rule but not its application.

The Supreme Court held that the plaintiffs preserved error by challenging the merits of the special exceptions order in the body of their appellate brief. The Court noted that the plaintiffs were not required to state in their notice of appeal that they were challenging the interlocutory order granting special exceptions; rather, they were required only to state the date of the judgment or order appealed from – in this instance the order dismissing their suit. Tex. R. App. P. 25.1(d)(2). The Court also noted that disposing of appeals for harmless procedural defects is disfavored. That policy is reflected in Tex. R. App. P. 38.1(f) which provides that the statement of an issue will be treated as covering every subsidiary question that is fairly included. The issue stated in appellants' brief did not specify that they were challenging the trial court's interlocutory order granting special exceptions, but the arguments under the issue did.

***Sonat Exploration Co. v. Cudd Pressure Control, Inc.*, 271 S.W.3d 228 (Tex. 2008)**

REVERSAL IN FAVOR OF APPEALING PARTY MAY REQUIRE REVERSAL AS TO NON-APPEALING PARTY IF INTERESTS ARE INTERWOVEN

defendants' special exceptions. In their notice of appeal and in the issues listed in their appellate brief, the plaintiffs only referenced the order of dismissal, not the order sustaining special exceptions.

In this case, an insurer argued on appeal a choice-of-law issue that its insured had waived. The Supreme Court ultimately agreed with the insurer's choice-of-law argument and held that remand is required as to both the insurer ***and*** its insured.

Here's what happened. Sonat Exploration Company and Cudd Pressure Control, Inc. entered into a multi-state contract whereby Cudd was to perform oilfield services for Sonat. The contract required each company to indemnify the other for claims brought by their respective employees. It also required on jobs in Louisiana that Cudd name Sonat as an additional insured on its insurance policies. An explosion occurred at one of Sonat's Louisiana wells killing seven workers, including four Cudd employees. When the survivors of those four employees sued Cudd and Sonat in Texas, Sonat demanded indemnity and also demanded coverage as an additional insured from Cudd's insurer, Lumbermens Mutual Casualty Company. When those were refused, Sonat filed an indemnity claim against Cudd in the survivors' suit and a separate lawsuit asserting claims against Lumbermens as an additional insured and alternatively against Cudd for failing to name Sonat as an additional insured. Eventually Sonat paid about $28 million to settle the claims, for which it seeks indemnity from Cudd. The trial court found the parties' indemnity agreement enforceable under Texas law and entered judgment for $20 million for Sonat and against Cudd. Cudd filed a notice of appeal, and Lumbermens as its insurer posted $29 million as security.

Before filing its appellate brief, Cudd signed a Rule 11 agreement with Sonat waiving its argument that Louisiana law applied, in return for which Sonat agreed to nonsuit its separate contract suit. Lumbermens then moved to intervene in the appeal. The Court of Appeals denied the insurer's intervention; but the Supreme Court in a separate mandamus proceeding ordered that the insurer be allowed to intervene and argue the choice-of-law issue

that its insured had waived. *See In re Lumbermens Mutual Casualty Co.*, 184 S.W.3d 718 (Tex.2006). The Supreme Court recognized that Sonat and Cudd intended their agreement to shift all potential liability to Lumbermens, Cudd's insurer. *Id.* at 728 ("[I]f Lumbermens is not permitted to intervene and the choice-of-law issue is meritorious, Cudd will have essentially foisted liability for uninsured claims onto its insurer.").

The Court of Appeals agreed with Lumbermens' choice-of-law arguments, reversed the trial court's application of Texas law, and then remanded for further proceedings. From that It is of course true that an appellate court cannot reverse on a ground an appellant has never raised. But while Cudd did not raise the choice-of-law issue, Lumbermens did so on its behalf. Generally, reversal in favor of a party that appealed does not require reversal in favor of another who did not. But an exception applies when the rights of appealing and non-appealing parties are so interwoven or dependent on each other as to require a reversal of the entire judgment. If Cudd (which waived the choice of law issue on appeal) was still bound to the trial court judgment, so was Lumbermens (which did raise the choice of law issue on appeal) as its liability insurer. The $29 million Lumbermens pledged to secure the trial court judgment during this appeal was payable to Sonat unless Lumbermens' successful appeal applied not just to itself but also to its insured. The exception extending reversals to non-appealing parties has most often been applied when indemnity claims or other dependent claims are involved, which was the case here.

In Re General Electric, 271 S.W.3d 681 (Tex. 2008)

MANDAMUS REMAINS THE REMEDY FOR FORUM NON-CONVENIENS . . .

Appeal is not an adequate remedy to rectify an erroneously denied motion to dismiss for forum non conveniens, and mandamus is therefore proper.

As we reported in the Spring 2008 Newsletter, *In Re Pirelli* held mandamus is the proper remedy judgment, Sonat appealed claiming its indemnity was valid under Texas law, and Lumbermens responded that it was invalid under Louisiana law. The Supreme Court agreed with Lumbermens and the Court of Appeals and held that Louisiana law applies.

Sonat argued that even if Louisiana law applies, Cudd should not benefit from such a holding because, in accordance with their Rule 11 agreement, Cudd had waived that issue on appeal. The Supreme Court disagreed under these cirumsatances.

for denial of a forum non-conveniens motion. That case concerned the Supreme Court's review of a denial of a motion where a valid forum-selection clause was the basis of the motion.

In this case, the Supreme Court applied the same rule in the context of a forum non-conveniens motion founded upon Tex. Civ. Prac. & Rem. Code §71.051(b). The Court noted that decisions on such motions are reviewed for abuse of discretion and found such abuse in this case.

The Court reasoned that by using the word "shall" in the 2003 amendments to §71.051(b), the Legislature essentially defined the terms "interest of justice" and "convenience of the parties" and thereby defined the scope of the trial court's analysis in ruling on a forum non-conveniens motion. By its use of the word "shall," the statute further requires dismissal of the claim or action if the statutory factors weigh in favor of the claim or action being heard outside Texas. The Court stated that with the 2003 amendment, the Legislature now mandates dismissal if the trial court finds that the case would be more properly heard in another forum.

Ginn v. Forrester, ___ S.W.3d ___, 2009 WL 795527 (Tex. 03/07/09) (08-0163)

AFFIDAVITS FROM DISTRICT CLERK AND COUNSEL AVERRING THAT NOTICE WAS NEITHER GIVEN NOR

RECEIVED DO NOT SUPPORT A RESTRICTED APPEAL

This was a restricted appeal from a dismissal for want of prosecution. A restricted appeal requires error that is apparent on the face of the record; error that is merely inferred will not suffice. In this case, the clerk's record contained a notation that the clerk's office was unable to locate documents indicating notice was sent or a hearing was held on the trial court's dismissal. Before a case may be properly dismissed for want of prosecution, c[n]otice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record.c Tex. R. Civ. P. 165a(1). The Court of Appeals construed the clerk's notation as affirmative evidence that the trial court failed to provide notice. The Supreme Court disagreed, holding that because the clerk had no affirmative duty to record the giving of notice, a statement that the The Court of Appeals initially denied the plaintiffs' restricted appeal for failure to demonstrate error apparent on the face of the record, but suggested that this requirement might be satisfied by a notation from the trial court clerk indicating that no documents were available to show the notice allegedly not given or the record of the hearing allegedly not had. Apparently relying on the Court of Appeals' suggestion, the plaintiffs requested a supplemental clerk's record containing (1) certain documents indicating that notice was sent or a hearing was held on the dismissal for want of prosecution or (2) an indication in writing that the documents were not contained in the clerk's file. The clerk provided a supplemental record that concluded with the statement: cNOTE: Unable to locate other items requested.c

Concluding on rehearing that the clerk's notation affirmatively demonstrated the trial court's failure to notify the plaintiffs of the impending and subsequent dismissal, the Court of Appeals reversed and remanded the case for further proceedings.

The Supreme Court reversed and rendered judgment dismissing the case.

When a party claims in a restricted appeal that required notice was not given or a required hearing was never held, the error must appear on the face of the record. *See* Tex. R. App. P. 30. When extrinsic evidence is necessary to challenge a judgment, the appropriate remedy is by motion for new trial or by bill of review filed in the trial court so that the trial court has the opportunity to consider and weigh factual evidence. Accordingly, affidavits filed for the first time in the appellate court from the district clerk and its counsel averring, respectively, that notice was neither given nor received constitute extrinsic evidence and do not support a restricted appeal.

As to what does constitute error on the face of the record, silence is not enough. The Supreme Court failed to see any distinction between a record that is silent and a record that contains a written notation that the record is silent. Either way, proof of error is absent. The clerk's notation reflected nothing more than affirmation of a silent record, which was insufficient to establish reversible error in a restricted appeal.

record reflects none cannot establish error on the face of the record.

The plaintiffs filed suit against the defendants for damages arising out of a traffic accident. On May 18, 2005, the trial court notified all parties that, unless either a judgment or scheduling order was signed or a verified motion to retain was filed by June 27, the case would be dismissed for want of prosecution. On June 17, the plaintiffs filed a verified motion to retain the case, which the trial court granted after inserting the words "for 60 days" at the end of the paragraph ordering retention. The trial court subsequently granted the plaintiffs' motion to substitute counsel, but the record reflects no further activity until December 2 when the trial court dismissed the case for want of prosecution. Six months later, the plaintiffs filed a notice of restricted appeal.

***Rodriguez v. Icon Benefit Administrators, Inc.*, 269 S.W.3d 172 (Tex. App.–Amarillo 2008)**

ERRONEOUS DISMISSAL "WITH PREJUDICE" SUPPORTS RES JUDICATA

The Amarillo Court of Appeals considered whether the errantly drafted order indicating dismissal "with prejudice" would support an affirmative defense of res judicata in a later suit which ostensibly would not have been barred had the order been correct (i.e. without prejudice).

This was the second appeal between these parties stemming from a second-filed suit arising out of the same facts or controversy. In the first case, the trial court entered an order of dismissal to enforce the parties' agreement to mediate rather than litigate their dispute. The lower court errantly signed the dismissal order "with prejudice." Though it is not apparent from this opinion who drafted the order in question, it is clear that no party complained of the error. Further, the Amarillo Court affirmed that order on appeal.

Thereafter, Rodriguez filed suit again arising out of the same facts though the second suit set forth additional causes of action. Icon asserted the res judicata defense and obtained summary judgment securing a dismissal in its favor. This appeal followed.

The Court of Appeals determined that because the order stated "with prejudice" and no party lodged any objection, the dismissal with prejudice became final for purposes of applying the doctrine of res judicata.

The Court followed the holding from *Sommers v. Concepcion* that "[a] final judgment settles not only issues actually litigated, but also any issues that could have been litigated. That the judgment may have been wrong or premised on a legal principle subsequently overruled does not affect application of res judicata." 20 S.W.3d 27, 40 (Tex. App.–Houston [14th Dist] 2000, pet. denied) *citing Segrest v. Segrest*, 649 S.W.2d 610, 612 (Tex. 1983).

The Court also noted, presumably in deference to the lengthy dissenting opinion, that those cases from a few sister courts which suggest the language in the judgment is irrelevant if it nonetheless appears that the case was not an adjudication on the merits have seldom been cited and are in conflict with the Supreme Court precedent in *Segrest* and cases following it.

***Harris Methodist Ft. Worth v. Ollie*, 270 S.W.3d 720 (Tex. App.–Fort Worth 2008)**

HEALTH CARE LIABILITY CLAIM IS DEFINED (AGAIN)

In this interlocutory appeal from the trial court's denial of a motion to dismiss, the Second Court of Appeals was charged with the same task faced by many sister courts in recent years – to determine what constitutes a "health care liability claim."

Plaintiff was a hospital patient three days into recovery from a knee replacement surgery when she slipped and fell in a hospital bathroom. Plaintiff injured her shoulder and sued the hospital alleging the slippery, wet bathroom floor was a "dangerous condition." Plaintiff initially pleaded causes of action for premises liability and medical negligence, though she later amended to pursue only the premises theory of recovery. The supporting allegations were essentially the same for both causes of action.

The Second Court applied the analysis announced in *Diversicare v. Rubio*: "To determine whether [Plaintiff's] allegations constitute a health care liability claim, we look to the underlying nature of the claim and are not bound by the form of the pleading." *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005). The Court also noted that a health care liability claim is defined as follows: "If the act or omission alleged in the complaint is an inseparable part of the rendition of health care services, then the claim is a health care liability claim." *Id*.

In this case, the plaintiff's petition asserted the following under a "general negligence theory:"

> Defendant owed Plaintiff and others the duty to provide a safe environment maintained properly, so as to not cause harm and/or injury. Defendant breached said duty by failure to maintain and warn Plaintiff of the dangerous and hazardous condition.

The petition then asserted a "medical malpractice theory" as follows:

> Defendant breached said duty of medical malpractice by failing to provide a safe environment, maintained properly, so as to not cause harm and/or injury. Defendant breached said duty of medical malpractice by failure to maintain and warn Plaintiff of the dangerous and hazardous condition.

In its analysis the Court relied on *Diversicare*'s dicta that "[t]here may be circumstances that give rise to premises liability claims in a healthcare setting that may not be properly classified as health care liability claims." *Id.* at 854. However, in this case the Court found the facts distinguishable from *Diversicare* because here the plaintiff alleged that the defendant failed to maintain and warn of the hazardous condition of the slippery, wet floor, rather than alleging that some provider or servant of the defendant hospital failed to supervise plaintiff or provide her with some type of care while she bathed.

Sections of the statute that were designed to thwart the filing of unmeritorious claims, have the incidental effect of making it a fiscally sound decision to seek the refuge of the damages caps as well as a strategically advisable course given the more demanding evidentiary burden and expense of maintaining a viable health care liability claim. Prudence demands that defendants attempt to pigeon-hole any cause of action arising in a health care setting into Chapter 74. Moreover, the statute allows an interlocutory appeal from a denial of a motion to dismiss. Thus, this case is not expected to be the final word on what constitutes a "health care liability claim." Stay tuned.

The majority held simply that the allegations in the case sounded in premises liability, rather than medical negligence.

Curiously, the opinion did not reveal how the floor became wet and slippery. Yet those facts would seem essential to determining whether the case truly sounded in a dangerous condition of the premises, or a failure to furnish some modus of medical treatment or equipment that would have ostensibly prevented the injury.

As an aside, the dissenting opinion essentially attempted to fill in the blanks which presumably existed in the plaintiff's petition. The dissent analyzed the nature of the claim on the assumption that a health care provider (e.g. a nurse) would necessarily have had some culpability in the "slippery" condition of the bathroom floor and that expert testimony would therefore be required to ascertain the provider's duties (i.e. medical responsibility) under these circumstances and whether those duties had been breached. Although the issue of whether expert testimony would be required to support the allegations in the petition is relevant to the question of whether a health care liability claim has been asserted, those allegations must have been pled. The scenario envisioned by the dissent seems extraneous to the case.

We have had occasion to report on the definition of a health care liability claim in many instances recently and expect to continue to do so because provisions of Chapter 74, the Medical Liability Statute, compel defendants to argue that any case remotely related to a medical care setting is a "health care liability claim."

***Southwestern Bell Telephone Co. v. Mitchell*, 276 S.W.3d 443 (Tex 2008)**

***STARE DECISIS* – SOMETIMES WE MUST LET THE DECISION FALL; *DOWNS* IS OVERTURNED.**

In this case, the Supreme Court revisited its construction of Tex. Lab. Code § 409.021(a). In *Continental Casualty Co. v. Downs*, the Court held that section would preclude a comp carrier from contesting the compensability of an employee's injury unless, within seven days of receiving notice of injury, it either began to pay benefits or gave written notice of its refusal to do so. 81 S.W.3d 803 (2002).

The Court of Appeals affirmed the decision below (rendered by the hearing officer) based on the holding in *Downs*. However, the Legislature was also considering *Downs*. For more than a decade preceding *Downs*, the Workers Compensation Commission had consistently applied the rule that the carrier had a 60 day window to contest compensability, rather than the seven-day deadline pursuant to the Court's construction of the statute. Less than nine months after *Downs* was final, the Legislature amended the statute to make it clearer that a carrier who failed to comply with §409.021(a) did not waive the right to contest the compensability of the injury.

In this appeal, the employer contended that in light of the amendment, *Downs* should be overturned. The Supreme Court agreed:

> "Generally, the doctrine of *stare decisis* dictates that once the Supreme Court announces a proposition of law, the decision is considered binding precedent," (citation omitted) but we have long recognized that the doctrine is not absolute. "[W]e adhere to our precedents for reasons of efficiency, fairness, and legitimacy" (citation omitted) and "when adherence to a judicially-created rule of law no longer furthers these interests," and 'the general interest will suffer less by such departure, than from a strict adherence,' we should not hesitate to depart from a prior holding." (citation omitted) "[U]pon no sound principle do we feel at liberty to perpetuate an error, into which either our predecessors or ourselves may have unadvisedly fallen, merely upon the ground of such erroneous decision having been previously rendered." (citation omitted)

Interestingly, Chief Justice Jefferson – who dissented in *Downs* – also dissented in this case arguing that *Downs* should be given *stare decisis* effect:

> A Court's decision on statutory construction is not infallible, but it must be final so that Texas citizens know how to conduct their affairs and can engage the political process to modify policy that has purportedly gone awry. Such is the case here.

The Court continued with its reasoning as follows:

> [W]hen the Legislature does not acquiesce in the court's construction, when instead it immediately makes clear that the proper construction is one long adopted by the agency charged with enforcing the statute, judicial adherence to the decision in the name of *stare decisis* may actually disserve the interests of "efficiency, fairness, and legitimacy" that support the doctrine. It is hardly fair or efficient to give effect to a judicial construction of a statute for a brief period of time when the Legislature has reinstated for future cases the same rule that had been followed before the court's decision. The doctrine of *stare decisis* does not justify inequity and confusion in such a narrow gap of time.

Ultimately, the Court held that *Downs* could easily be remedied without violating the principles of *stare decisis* and overruled that case characterizing it as an "an anomaly in the law." *Stare decisis* does not warrant obstinate insistence on precedent that appears to be plainly incorrect.

The Supreme Court reversed the judgment of the Court of Appeals and remanded the case to the trial court for further proceedings.