NO. 01-17-00493-CV

IN THE FIRST COURT OF APPEALS
HOUSTON, TEXAS

JEFFERSON COUNTY, TEXAS,
Appellant,

v.

ELLARENE FARRIS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF JAMES FARRIS,
Appellee.

Appeal from the 11th District Court of Harris County, Texas,
Trial Court Cause 2005-09580
Honorable Mark Davidson Judge Presiding

BRIEF OF *AMICUS CURIAE* TEXAS TRIAL LAWYERS ASSOCIATION

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BRIEF OF AMICUS CURIAE TEXAS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF MOTION FOR *EN BANC* RECONSIDERATION

To the Honorable First Court of Appeals:

Amicus curiae The Texas Trial Lawyers Association tenders this brief in support of the motion for *en banc* reconsideration made by Appellee Ellarene Farris, Individually and as Personal Representative of the Heirs and Estate of James Farris. A panel of this Court issued its opinion on August 31, 2018. *See Jefferson Cnty. v. Farris*, – S.W.3d –, No. 01-17-00493-CV, 2018 WL 4176856, at *1 (Tex. App.–Houston [1st Dist.] Aug. 31, 2018) (designated, but not released, for publication). Farris made her motion on October 12, 2018.

INTEREST OF AMICUS CURIAE AND DISCLOSURES PURSUANT TO TEX. R. APP. P. 11

TTLA is a statewide trade association formed to advance the cause of those who are damaged in person and property and who must seek redress therefor at law; to resist the constant efforts to curtail the rights of such persons; to encourage cooperation between lawyers engaged in the furtherance of such objectives; to promote justice and human welfare; and to protect the rights of the citizens of the State of Texas. TTLA is committed to the balanced and impartial administration of justice and seeks to ensure that the judicial system produces results that are fair to

all parties, not only the plaintiffs. TTLA believes the citizens of Texas are entitled to no less.

No fee was paid or promised in association with the preparation and filing of this brief. TTLA's amicus briefs are prepared by its members, purely on a volunteer basis. None of those involved in the preparation of this brief have any pecuniary interest in the outcome of this case.

ARGUMENT AND AUTHORITY

Nine days after he was diagnosed with mesothelioma in 2004, Jefferson County District Judge James Farris died from the disease, which is cause by exposure to and inhalation of asbestos particles. He had been last exposed to asbestos in 1996, when he retired from the bench. Within six months of his death, his heirs gave to Jefferson County the requisite Texas Tort Claims Act notice of their wrongful death claim. The majority of a panel of this Court held that the notice should have been given eight years earlier, immediately after Judge Farris's last exposure, but well before he had knowledge of any of the elements required to be included in the notice.

The relevant section of the Texas Tort Claims Act provides:

> (a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably

describe:

(1) the damage or injury claimed;

(2) the time and place of the incident; and

(3) the incident.

Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (West). The panel majority focused entirely on the main text of (a), the six month deadline for giving notice. In so doing, the panel majority completely ignored the statute's requirements for the contents of the notice–the substantive elements of the claim. As the panel dissent notes, notice can only be given after a claim has accrued, or after there has been "damage or injury." *Farris*, 2018 WL 4176856, at *3. The exposure to asbestos is one "incident" giving rise to a claim, and the suffering of damage or injury is another. *Id.* (citing *Univ. of Tex. Sw. Med. Ctr. at Dall. v. Loutzenhiser*, 140 S.W.3d 351, 356 (Tex. 2004), *superseded by statute on other grounds*, Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen. Laws 3783 (codified at Tex. Gov't Code Ann. § 311.034)). The timing of the deadline for the notice is dependent on the later of the two incidents. Otherwise, the statute would require Farris to have given notice of a nonexistent claim.

If the panel majority had followed this Court's methodological precedent, it would have avoided that absurd result by construing the statute as a whole. *See Jones v. Foundation Surgery Affiliates of Brazoria Cnty.*, 403 S.W.3d 306, 317 (Tex.

App.–Houston [1st Dist.] 2012, pet. denied) *(*in enacting statute, legislature intends entire statute to be effective and to reach "a just and reasonable result") (citing Tex. Gov't Code Ann. § 311.021 (Vernon 2005)); *Rivera v. State*, 363 S.W.3d 660, 677 (Tex. App.–Houston [1st Dist.] 2011, no pet.) ("Generally, we construe statutes as written and, when possible, ascertain the legislative intent from the language used within the statute. . . We also construe the statute as a whole and will not give one provision a meaning which is out of harmony or inconsistent with other provisions of the statute.")(citing *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002)). Mentions of "methodological stare decisis" generally occur in discussions of whether a particular court's mode of statutory interpretation is textualist, purposivist, or dynamic. *See, e.g.*, Connie Pfeiffer, *Methodological Stare Decisis: Different Approaches in the Lone Star State*, 71 The Advocate (Tex.) 8 (2015) (attached hereto at App. A); *Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 435, 440 (Tex. 2011) (concurring ops. by Jefferson, CJ, and Willett, J). But the underlying principles also obtain with respect to more elemental aspects of statutory construction, such as reading the statute as a whole, and not privileging one clause over another so as to distort the statute's meaning.

CONCLUSION

Accordingly, *amicus curiae* Texas Trial Lawyers Association urges this Court to grant rehearing, either by panel or *en banc*, and adopt Justice Jennings's dissent as the opinion of the Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirement of TEX. R. APP. P. 9.4(e) because it has been prepared in conventional typeface no smaller than 14-point for text and 12-point for footnotes. This brief also complies with the word-count limitations of TEX. R. APP. P. 9.4(i) because it contains **926** words, excluding any parts exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ Peter M. Kelly
Peter M. Kelly

CERTIFICATE OF SERVICE

I hereby certify that, a true and correct copy of this Brief of *Amicus Curiae* was served on October 16, 2018, electronic filing service to the following counsel of record.

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APPENDIX

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The Advocate (Texas)
Summer, 2015

Symposium: Statutory Interpretation
Connie Pfeiffer [a1]

*8 METHODOLOGICAL STARE DECISIS: DIFFERENT APPROACHES IN THE LONE STAR STATE

A COURT'S PRIMARY OBJECTIVE WHEN CONSTRUING a statute is to ascertain and give effect to the legislature's intent. But how does one governmental branch ascertain the intent of another branch? And once a court decides on an answer to this question, is its answer binding in the next case? Is a court's statutory interpretation methodology fixed or flexible?

Whether a court is weakly or strongly committed to any one theoretical path, perhaps to the point of giving an approach stare decisis effect, depends entirely on the court. The United States Supreme Court, for example, is not committed to a single interpretive methodology. [1] An interpretive rule used in one case is not "law" for the next case, and the Justices appear to believe that they cannot bind each other and future Justices to certain methodological choices. [2]

Scholars who divide on whether this way of approaching statutory interpretation is problematic nevertheless all agree on two things about the U.S. Supreme Court's approach: "that a single controlling approach does not currently exist and that prior methodological statements do not carry into future cases with the force of precedent." [3]

In stark contrast, many states have reached different methodological choices. [4] Every state legislature has enacted into law statutory canons of construction. [5] Yet some state courts have flouted the statutory rules in favor of their own interpretive preferences. [6]

With two high courts and a vibrant legal system, Texas makes for a fascinating study. The Texas Legislature's canons of construction endorse a wide array of interpretive tools, yet the highest courts are much more committed to particular interpretive methods. The Texas Court of Criminal Appeals has explicitly committed itself to textualism. And the Texas Supreme Court employs different approaches but nevertheless seems to have achieved "some methodological agreement." *See Ojo v. Farmers Group, Inc.*, 356 S.W.3d 421, 435 (Tex. 2011) (Jefferson, C.J. concurring).

This article explores the different approaches on display in the Texas Legislature, the Court of Criminal Appeals and the Texas Supreme Court.

I. The Different Approaches to Statutory Interpretation

The competing methodological approaches break naturally into three categories that can be generally described as textualist, purposivist, or dynamic. The basic difference between the different approaches to statutory interpretation

is the scope of materials that are legitimately included when seeking the Legislature's intent and the relative weight to place on them.

A. Textualists

Textualists embrace the most restrained approach, placing emphasis solely on the statutory text. They look only to the words of the statute because it is only these words that were voted on by both houses and signed into law by the Executive. The collection of legislative materials like committee reports, bill analyses and testimony at committee hearings are deemed unreliable evidence of legislative intent because they were not voted on by the entire legislative body. In addition, these materials are not as accessible to the general public, raising concerns about whether a statute interpreted by these guides gives fair notice of what is permissible and what is prohibited.

Critics of this approach find the literal language of a statute's text too limited a toolbox when trying to apply the statute to myriad real-life scenarios. If legislative intent is really a fiction, because a legislative body as a whole could hardly be presumed to have contemplated all the ramifications of its words or the scenarios to which they might apply, perhaps a broader look at what the legislature was trying to accomplish or remedy would help to more accurately divine the intent.

*9 B. Purposivists

Purposivists seek to understand legislative intent by considering both the statute's text and also legislative sources extrinsic to the statute and the legislature's general purpose in enacting the statute. These theorists consider legislative history as legitimate evidence of legislative intent and will rely on statutory canons of construction. They might also attempt to discern the legislature's purpose by focusing on the evil, the harm and the remedy.

Critics of this theory claim that it is impossible to understand the collective will of the legislature by examining the singular intent of individual legislators or committees. To them, floor debate, committee reports and the like cannot clarify unambiguous statutory text.

C. Dynamic

The most flexible theorists uphold pragmatic and dynamic values, finding no single source authoritative and considering all arguments in their analysis. These theorists believe that statutory intent is not fixed the day the statute is enacted; instead, it can be interpreted to accommodate changed circumstances. They might consider social-science studies or account for developments not before the legislature when it was choosing its words.

When the statutory text clearly answers the interpretive question, these theorists normally consider the text the most important consideration. But where the text is ambiguous, they view the legitimate interpretive sources expansively.

Critics of this approach emphasize the structural role of the two branches and argue that the judiciary has a narrower role when interpreting statutes than when interpreting other texts or laws.

II. The Texas Legislature Rejects Textualism.

The Texas Legislature expressed its interpretive preferences when it enacted the Code Construction Act to guide courts on permissible tools for statutory construction. TEX. GOV'T CODE § 311.001 *et seq.*

A few provisions of the Act clearly reject a textualist approach to interpretation and embrace a purposivist and even dynamic approach. Section 311.023 is particularly noteworthy because it expressly blesses the use of legislative history and other extrinsic sources and considerations.

Right after the Code Construction Act is a chapter with additional construction rules exclusively for civil statutes. *See* TEX. GOV'T CODE § 312.001 *et seq.* Certain provisions in this chapter expressly mandate a purposivist approach by instructing courts to consider "the old law, the evil and the remedy," and to construe statutes liberally "to achieve their purpose and to promote justice." *E.g.*, *id.* § 312.005, 312.006. Unlike the permissive considerations set forth in § 311.023, these provisions use the word "shall" and thereby impose a duty on the courts. *See* TEX. GOV'T CODE § 311.016(2) ("'Shall' imposes a duty."). One of the more dramatic provisions in this chapter allows courts to "transpose" words and clauses to correct a grammatical error that renders a sentence or clause meaningless. *Id.* § 312.012.

In short, the Texas Legislature is decisively non-textualist. The Code Construction Act specifically allows courts to consider legislative history, purpose and other contextual considerations-- even when a statute's text is unambiguous. Chapter 312 directs courts to "liberally construe" civil statutes to "achieve their purpose and promote justice." By instructing the courts to consider, at all times, the old law, the evil, and the remedy, the Legislature invites courts to stand in its shoes and discern intent based on what the Legislature was trying to achieve, and perhaps even to go beyond that by interpreting intent in light of changed circumstances in order to "promote justice."

III. The Texas Court of Criminal Appeals Is Strictly Textualist.

The Court of Criminal Appeals has officially rejected the use of extrinsic aids when statutory text is clear. *See Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991). "Although Section 311.023 of the Texas Government Code invites, but does not require, courts to consider extratextual factors when the statutes in question are *not* ambiguous, such an invitation should be declined for the reasons stated in the body of this opinion." *Id.* at 786 n.4. Hence, in Texas criminal cases, a textualist model has stare decisis effect. In the two decades since *Boykin* was decided, the Court of Criminal Appeals has frequently cited the decision as binding on its interpretive analysis. [7]

IV. The Texas Supreme Court Displays a More Nuanced Methodology.

The Texas Supreme Court has embraced different theories in different cases, and no methodological approach has been officially adopted or rejected. But the Court frequently embraces a statute's text as its primary consideration and often will not rely on extrinsic aids unless it finds the text ambiguous. It nevertheless considers it permissible to ***10** discuss extrinsic aids to contextualize its analysis.

A. Textualist

The Texas Supreme Court's textualist leanings manifest itself in frequent statements about clear text being determinative and reliance on extrinsic aids "inappropriate" unless a statute is ambiguous. For example:

- "Where text is clear, text is determinative of [legislative] intent." [8]

- "When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language." [9]

• "[O]ver-reliance on secondary materials should be avoided, particularly where a statute's language is clear. If the text is unambiguous, we must take the Legislature at its word and not rummage around in legislative minutiae." [10]

But the frequency with which the Court adheres to these propositions does not mean that the Court is committed invariably to textualism. The Court also employs a purposivist methodology and has even used the dynamic model.

B. Purposivist

There are a number of examples that fall into a purposivist analysis, employing broader interpretive principles than can be gleaned from the text alone. *See, e.g.*, *Helena Chem Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001) (emphasizing Act's purpose and overall statutory objective); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000) (emphasizing purpose of the statute); *Harris Co. Dist. Atty's Office v. J.T.S.*, 807 S.W.2d 572 (Tex. 1991) (using canons of construction to override plain text).

The *J.T.S.* opinion is especially interesting because the Court began with the proposition that the Code Construction Act "controls" its interpretation; it reaffirmed § 311.023 as providing guidance even when a statute is not ambiguous; and it employed several canons of construction to override the plain text of the statute. None of this was controversial; the Court's opinion was unanimous, and anyone reading it would likely conclude that the Court reached the right result and avoided a plain-text loophole that was unlikely to have been intended.

In fact, the most controversial extrinsic aid--legislative history--sometimes appears in the Court's opinions without the Court first holding that the statute is ambiguous. *E.g.*, *Klein v. Hernandez*, 315 S.W.3d 1, 6 (Tex. 2010). The Court's discussion of legislative history in *Klein* is not anomalous. A number of the Court's recent opinions cite or discuss legislative history without finding the statute ambiguous. [11]

C. Dynamic

One might be hard pressed to find a Texas Supreme Court case embracing a dynamic theory of interpretation, but at least one example exists. The Court used this model when interpreting the Texas Wrongful Death Act to allow additional remedies for the death of a minor child: "It is time for this court to revise its interpretation of the Texas Wrongful Death statutes in light of present social realities and expand recovery beyond the antiquated and inequitable pecuniary loss rule." *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983) (Spears, J.).

While readers might distinguish *Sanchez* as a product of the Texas Supreme Court in another era, the Court's decision is a thoughtful decision grounded in the traditional role of the courts to develop tort law. Justice Spears had previously relied on the teachings of tort expert Dean Leon Green to draw these institutional lines: Because of the difficulties of reducing tort law doctrines into statutory form, which often results in statutes that are over or underinclusive and frequently ambiguous, judicial decision is the best way to develop tort law, and courts should not feel bound by legislative inaction. *See Bedgood v. Madalin*, 600 S.W.2d 773, 780 (Tex. 1980) (Spears, J., concurring, joined by Steakley and Campbell, JJ.).

V. The Texas Supreme Court Describes Itself As Achieving "Some Methodological Agreement."

The foregoing cases show that the Texas Supreme Court is not strictly committed to a particular approach. Its approach lies in between the strict textualism of its sister high court and the flexibility of its federal counterpart. The Court's

opinions exhibit regard for interpretive guidance while placing great, and usually dispositive weight on the statute's text. Further, the Court does not wear blinders when reading a statute, so even where extrinsic aids are not utilized to interpret the statute, they are not banished from the discussion.

All of this is much to the chagrin of one Justice, who ***11** has vocally disagreed on whether legislative history and other extrinsic aids may even be discussed in the Court's analysis. Justice Willett has voiced these sentiments through concurrences lamenting extrinsic-aid analysis that he finds extraneous.

The overarching theme of Justice Willett's concurrences is his view that, where text is unambiguous, the Court's analysis should begin and end with the statutory text. [12] He believes it is inappropriate to discuss other extrinsic aids that support the conclusion. Justice Willett's concurrences have set forth his views quite comprehensively, but they have not yet reshaped the Court's more moderate approach, which often includes some discussion of extratextual considerations.

These concurrences went unanswered for several years, until then-Chief Justice Jefferson wrote separately and defended a broader analytical perspective with his own counterpoints. *See Ojo v. Farmers Group, Inc.*, 356 S.W.3d 421, 435 (Tex. 2011) (Jefferson, C.J. concurring). The Jefferson and Willett concurrences in *Ojo* put the views of two Justices vividly on display and give a thoughtful overview of the Court's approaches.

While disclaiming any binding interpretive methodology, Chief Justice Jefferson describes the Court as having "reached some methodological agreement": "[T]his Court usually applies a text-centric model when it construes a statute. We look first to the text. When the text is not clear, we explore extrinsic aids, including legislative history." [13] He explains the animating principle behind this standard is a reluctance to use legislative history to *interpret* a clear statute. Hence, he explains that while extrinsic aids are inappropriate "to construe" an unambiguous statute, they may legitimately be cited to help the court to explain the context for its decision. His opinion even extols some of the virtues of legislative history and urges that judges can be trusted with fairly interpreting the text even when extrinsic sources have entered the analysis. [14]

The most interesting aspect of Justice Willett's response is new language suggesting that the Court's interpretive methodology has stare decisis effect. [15] He describes the Court has having a "concretized rule," "longstanding interpretive precedent," and a "text-centric" approach that is "mighty settled." [16] He concedes there is no overarching methodology but insists the text controls unless the statute is ambiguous: "This Court has not adopted an overarching interpretive methodology to govern all statutory-interpretation cases, but we have agreed on one elemental rule: Definitive text equals determinative text, the singular index of legislative will. In other words, ambiguity is a prerequisite for wielding the extratextual tools listed in the Code Construction Act." [17]

Both Justices have valid points: The Court appears committed to the proposition that the statute's text is the first and foremost consideration in discerning legislative intent, even calling a plain-text proposition its "prime" canon. *Texas Lottery Commission v. First Bank of DeQueen*, 325 S.W.3d 628, 639 (Tex. 2010). Two other opinions have added a new label for extrinsic considerations, calling them "secondary construction aids." This label first appeared in a footnote in *Galbraith Engineering Consultants v. Pochucha*, 290 S.W.3d 863 (Tex. 2009) and was reiterated in Justice Willett's *Ojo* concurrence. If this expression takes root, it may reinforce the idea of a two-step statutory interpretation analysis, only allowing a purposivist approach where the first step fails.

VI. Conclusion

Many courts across the nation and particularly the U.S. Supreme Court do not subscribe to a binding interpretive methodology, but the Court of Criminal Appeals explicitly does, and the Texas Supreme Court has achieved "some methodological agreement."

This leaves Texas in an ironic posture: its highest courts tout their interpretive restraint, yet they reject statutory canons of construction that they view as passé or unwise. The courts aim to respect the legislature and their distinct spheres by limiting their interpretive role, yet flouting statutory canons provokes a different separation of powers question: which branch gets to choose how statutes will be interpreted? For now, Texas courts have claimed this role for themselves.

Footnotes

a1 *Connie Pfeiffer is a board-certified appellate specialist and partner at Beck Redden LLP in Houston. Her approach to statutory interpretation always starts with caffeine.*

1 *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1765 (2010).

2 *Id.*

3 *Id.* at 1765-66; *see also* Nicholas Quinn Rozenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2144 (2002).

4 Gluck, *supra* n.1, at 1756.

5 *Id.* at 1754.

6 *Id.*

7 *See, e.g.*, *Ex Parte Hernandez*, 275 S.W.3d 895, 898 n.14 (Tex. Crim. App. 2009); *State v. Young*, 242 S.W.3d 926, 928 (Tex. Crim. App. 2008); *State v. Colyandro*, 233 S.W.3d 870, 875 (Tex. Crim. App. 2007); *State v. Cowsert*, 207 S.W.3d 347, 350 (Tex. Crim. App. 2006); *Getts v. State*, 155 S.W.3d 153, 157 (Tex. Crim. App. 2005).

8 *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (Green, J.).

9 *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008).

10 *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 n.4 (Tex. 2006).

11 *See Franka v. Velasquez*, 332 S.W.3d 367, 381 n. 66 (Tex. 2011) (citing and quoting at length from a law review article discussing legislative history of House Bill 4); *Robinson v. Crown Cork & Seal Co. Inc.*, 335 S.W.3d 126 (Tex. 2010) (extensively discussing legislative history, including floor statements and defeated amendments); *Tex. Comptroller of Pub. Accounts v. Atty. Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010) (citing, for background and contextual information, legislative report); *Univ. of Tex. v. Herrera*, 322 S.W.3d 192, 198 n.39 (Tex. 2010) (citing legislative history); *City of Waco v. Kelley*, 309 S.W.3d 536, 548 (Tex. 2010) (noting that "[n]othing in the current language of the statute or the legislative history indicates legislative intent to ...."); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384-85 (Tex. 2010) (citing legislative history).

12 *Ojo v. Farmers Group, Inc.*, 356 S.W.3d 421, 439 (Tex. 2011) (Willett, J., concurring); *Klein v. Hernandez*, 315 S.W.3d 1, 9 (Tex. 2010) (Willett, J. concurring); *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 649-50 (Tex. 2008) (Willett, J., concurring).

13 *Ojo*, 356 S.W.3d at 435 (Jefferson, C.J., concurring).

14 *Id.* at 437-38 (Jefferson, C.J., concurring).

15 *Id.* at 440 (Willett, J., concurring).

16 *Id.* at 440-41, 454 (Willett, J. concurring).

17 *Id.* at 442 (Willett, J., concurring).

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