IN THE SUPREME COURT OF TEXAS

═══════════
NO. 07-0787
═══════════

SPECTRUM HEALTHCARE RESOURCES, INC., AND
MICHAEL SIMS, PETITIONERS,

v.

JANICE MCDANIEL AND PATRICK MCDANIEL, RESPONDENTS

═══
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS
═══

Argued September 11, 2008

CHIEF JUSTICE JEFFERSON, joined by JUSTICE O'NEILL and JUSTICE MEDINA, dissenting.

It is, therefore, ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiffs will designate all expert witnesses that they intend to call at the trial . . . , and shall provide a written report and curriculum vitae of all retained experts in this case on or before **January 11, 2006**;

. . . .

It is further *ORDERED to the extent these deadlines may be in conflict with deadlines set by rule or statute, the deadlines established by this Docket Control Order shall take precedence*.

It is further ORDERED that the parties shall conduct discovery as soon as practicable, notwithstanding the limiting provisions found in Chapter 74 of the Texas Civil Practices and Remedies Code.

This is the order announcing the date by which McDaniel was required to serve her medical expert report, *irrespective of any statutory deadline*. Had she known that following the trial court's order would lead to dismissal of her claim, she could have taken steps to preserve her rights. Instead, having complied with the order, she now finds herself without recourse because "[a]n agreed docket control order that includes only a general discovery deadline for the production of expert reports is ineffective to extend the statute's specific threshold expert report requirement." ___ S.W.3d ___. I accept the value of the Court's bright-line rule, but I disagree with applying it to McDaniel's claim. I would apply today's decision prospectively, making it inapplicable to McDaniel or others who complied with trial court orders that altered the statutory deadline in healthcare liability suits. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-09 (1971);[1] *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991) (plurality opinion) (defining pure prospectivity); *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir. 2004) ("A court in a civil case may apply a decision purely prospectively, binding neither the parties before it nor similarly situated parties in other pending cases . . . .").

---

[1] The United States Supreme Court in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (plurality opinion), rejected a modified prospectivity approach—when a court "appl[ies] a new rule in the case in which it is pronounced, [but] then return[s] to the old one with respect to all others arising on facts predating the pronouncement." *Beam*, 501 U.S. at 537; *see also Sw. Bell Tel. Co., L.P. v. Mitchell*, 276 S.W.3d 443, 450-52 (Tex. 2008) (Jefferson, C.J., dissenting) (rejecting modified prospectivity in a statutory construction case). The Supreme Court's approach to pure prospectivity remains to be seen. *See Harper*, 509 U.S. at 115 (O'Connor, J., dissenting) ("[N]o decision of this Court forecloses the possibility of pure prospectivity."); *Beam*, 501 U.S. at 544 ("We do not speculate as to the bounds or propriety of pure prospectivity."); *see also Educ. Credit Mgmt. Corp. v. Mersmann*, 505 F.3d 1033, 1051-52 (10th Cir. 2007); *Crowe v. Bolduc*, 365 F.3d 86, 93-94 (1st Cir. 2004); *Toms v. Taft*, 338 F.3d 519, 529 (6th Cir. 2003); *Glazner v. Glazner*, 347 F.3d 1212, 1216-19 (11th Cir. 2003); *Holt v. Shalala*, 35 F.3d 376, 380 n.3 (9th Cir. 1994). And, states are free to limit the retroactive operation of their own interpretations of state law. *Harper*, 509 U.S. at 100; *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177 (1990) (plurality opinion).

This approach makes sense because, before today, litigants were operating under the expectation that the only requirement for extending the Chapter 74 deadline was a "written agreement," much like the agreed docket control order in this case. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) (failing to mandate a specific format or to require a specific reference to section 74.351). Thus, today's decision involves an issue of first impression whose resolution was not clearly foreshadowed (and on which our courts of appeals are in conflict).[2] Retroactive application of the Court's rule will produce substantial inequitable results. *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4-5 (Tex. 1999). To avoid that injustice, *see Chevron Oil*, 404 U.S. at 107-08, I would hold that the Court's decision is applicable "to all conduct occurring after the date of [this] decision," *Beam*, 501 U.S. at 536.

I would affirm the court of appeals' judgment. Because the Court does otherwise, I respectfully dissent.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 12, 2010

[2] *See, e.g.*, *Shelton v. Univ. of Tex. Med. Branch at Galveston*, No. 14-07-00994-CV, 2009 Tex. App. LEXIS 2543, at *12-*16 (Tex. App.–Houston [14th Dist.] Apr. 14, 2009, pet. filed) (mem. op.); *Lim v. West*, No. 01-08-00469-CV, 2008 Tex. App. LEXIS 8065, at *3-*6 (Tex. App.–Houston [1st Dist.] Oct. 23, 2008, pet. denied) (mem. op.); *Care Ctr., Ltd. v. Sutton*, No. 09-07-469-CV, 2008 Tex. App. LEXIS 2743, at *6-*12 (Tex. App.–Beaumont Apr. 17, 2008, pet. filed) (mem. op.); *King v. Cirillo*, 233 S.W.3d 437, 440-41 (Tex. App.–Dallas 2007, pet. filed); *Lal v. Harris Methodist Fort Worth*, 230 S.W.3d 468, 474-76 (Tex. App.–Fort Worth 2007, no pet.); *Brock v. Sutker*, 215 S.W.3d 927, 929 (Tex. App.–Dallas 2007, no pet.); *Rugama v. Escobar*, No. 04-05-00764-CV, 2006 Tex. App. LEXIS 2697, at *6-*8 (Tex. App.–San Antonio Apr. 5, 2006, no pet.) (mem. op.); *Hall v. Mieler*, 177 S.W.3d 278, 281-82 (Tex. App.–Houston [1st Dist.] 2005, no pet.); *Olveda v. Sepulveda*, 141 S.W.3d 679, 683-84 (Tex. App.–San Antonio 2004, pet. denied); *Cigna Healthcare of Tex., Inc. v. Pybas*, 127 S.W.3d 400, 408 (Tex. App.–Dallas 2004), *judgm't vacated & case dism'd pursuant to settlement*, 2004 Tex. App. LEXIS 2666 (Tex. App.–Dallas Mar. 25, 2004, no pet.) (mem. op.); *Tesch v. Stroud*, 28 S.W.3d 782, 787-89 (Tex. App.–Corpus Christi 2000, pet. denied); *Finley v. Steenkamp*, 19 S.W.3d 533, 539-40 (Tex. App.–Fort Worth 2000, no pet.).