IN THE SUPREME COURT OF TEXAS

NO. 08-0751

TEXAS MUTUAL INSURANCE, COMPANY, PETITIONER,

v.

TIMOTHY J. RUTTIGER, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

CHIEF JUSTICE JEFFERSON, joined by JUSTICE GREEN and JUSTICE LEHRMANN, dissenting.

Timothy Ruttiger allegedly sustained a work-related injury. Because of various complaints about how the Texas Mutual Insurance Company (TMIC) processed his workers' compensation claims, Ruttiger sued under the common law and chapters 541 and 542 of the Insurance Code, alleging that TMIC breached its duty of good faith and fair dealing.

TMIC and its amici ask us to hold that the Texas Workers' Compensation Act is the exclusive remedy for all work-related injuries, thus precluding Ruttiger's suit. We have previously concluded that both the Insurance Code and common law claims are viable—indeed, that they complement the workers' compensation system. Even after the 1989 overhaul, the Act's express language makes plain the Legislature's intent that common law bad faith claims remain available to litigants. As for Ruttiger's Insurance Code claims, the Code's language makes clear that they

apply, and the Act's exclusivity provision does not apply to insurance carriers. Far from having precluded such claims, then, the Legislature has continued to recognize actions like Ruttiger's.

Today the Court holds that most of Ruttiger's Insurance Code claims (and, as a result, his dependent DTPA claims) are no longer viable. A majority of the Court then remands Ruttiger's common law good-faith-and-fair-dealing claim to the court of appeals, so that it can decide this purely legal issue in the first instance. Rather than ask the court of appeals to answer whether claims this Court has previously recognized still exist, or whether our precedent still controls, I would hold today that both claims survived the Legislature's 1989 workers' compensation overhaul and would affirm the court of appeals' judgment. Because the Court does otherwise, I respectfully dissent.

I. The Old Workers' Compensation System

In 1987, we first considered whether a workers' compensation claimant could sue a carrier who engaged in a deceptive trade practice. *AETNA Casualty & Surety Co. v. Marshall*, 724 S.W.2d 770 (Tex. 1987). Interpreting former article 21.21 of the Insurance Code, the predecessor to chapter 541, we said that claims under that article were not foreclosed by the existence of the workers' compensation system. *Id.* at 772. We held that the statute's text "provide[d] a cause of action to a person who has been injured by an insurance carrier who engage[d] in" a deceptive trade practice. *Id.* As to the carrier's arguments that the workers' compensation system barred the employee's claim, we held that the "mere fact that Marshall was injured while working should not be used as a shield" to preclude Marhall's recovery for the separate injury he suffered as the result of the carrier's deceptive practices. *Id.*

The next year, in *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210 (Tex. 1988), we considered the more controversial question of whether an employee could sue a workers' compensation carrier for a breach of the common law duty of good faith and fair dealing. We held that such claims were viable. *Id.* at 215. Interpreting the former workers' compensation statute's exclusivity provision, we held that it "was not intended to shield compensation carriers from the entire field of tort law" and that it could not "be read as a bar to a claim that is not based on a job-related injury." *Id.* at 214. Expanding on this point, we emphasized that the workers' compensation statute was exclusive only as to job-related injuries, which are separate from injuries suffered as the result of a carrier's breach of duty:

> Liability as a result of a carrier's breach of the duty of good faith and fair dealing or intentional misconduct in the processing of a compensation claim is distinct from the liability for the injury arising in the course of employment. Injury from the carrier's conduct arises out of the contractual relationship between the carrier and the employee and is *sustained after the job-related injury*.

Id. (emphasis added). "A claimant," we held, "is permitted to recover when he shows that the carrier's breach . . . is separate from the compensation claim and produced an independent injury." *Id.* We also concluded that the possibility of administrative penalties did not suggest that common law claims were precluded because the penalties did not afford relief from the particular injuries the claimant alleged. *Id.* at 215.

II. The New Workers' Compensation Act

The Legislature overhauled our workers' compensation scheme in 1989. The Legislature examined the successes and failings of the previous system, commissioning a number of studies and reports to address what was driving the system's high cost. Several of these studies suggested

legislative displeasure with *Aranda*, which was cited as a source of rising costs. One legislative report noted that "Texas law allows more cases to be adjudicated outside the scope of the workers' compensation law than laws of other states." JOINT SELECT COMMITTEE ON WORKERS' COMPENSATION INSURANCE, A REPORT TO THE 71ST LEGISLATURE 3 (Dec. 9, 1988). As such, the report suggested that the Legislature "[p]rovide that bad faith handling of claims is not grounds for a suit outside the workers' compensation act." *Id.* at 16. Another report addressed the issues raised by *Marshall*, suggesting that the Legislature "[e]liminate extra contractual liability resulting in treble damage suits under the Deceptive Trade Practices-Consumer Protection Act and the Unfair Claim Settlement Practices Act." HOUSE SELECT INTERIM COMMITTEE ON WORKERS' COMPENSATION INSURANCE, INTERIM REPORT TO THE 70TH LEGISLATURE 41 (Jan. 1987).[1]

The first draft of the new Act adopted the Joint Select Committee's recommendation that common law claims be precluded. The bill as introduced permitted an administrative penalty to be assessed against carriers for "malice or bad faith" in claims-processing, and it made clear that this penalty constituted "the employee's exclusive remedy against the employer *or carrier*" for such conduct. Tex. H.B. 1, 71st Leg., R.S., § 11.12 (1989) (emphasis added). However, the committee substitute removed that provision, opting instead for language that simply limited *Aranda*. Tex. C.S.H.B. 1, 71st Leg., R.S., §§ 10.41, 10.42 (1989). It was this limiting language that ultimately

[1] Similarly, a report published after the passage of the new Act by Senator John Montford, the primary author of the overhaul legislation, made clear that the Legislature, in passing the new law, had considered *Aranda*'s impact: "Following *Aranda*, a rational and common response for carriers was less resistance not only to paying questionable claims, but also to paying more to settle comp claims than their reasonable value." 1 JOHN T. MONTFORD, ET AL., A GUIDE TO WORKERS' COMP REFORM § 4.2(a)(7) (1991); *see also id.* § 4.2(b)(7) ("In sum, *Aranda* dramatically shifted the relative negotiating positions between the claimant and carrier.").

passed, with some changes, as part of the new Act. Texas Workers' Compensation Act, 71st Leg., 2d C.S., ch. 1, 1989 Tex. Gen. Laws 1 (codified at TEX. LAB. CODE 401-19)).[2]

III. The Common Law Claims

The plurality's analysis of common law claims can only properly be considered in light of *Aranda* and with deference to the Legislature's express recognition, in chapter 416 of the Labor Code, that this avenue of relief endures. The question presented in this case is whether the Legislature intended to abrogate entirely a common law bad faith remedy when it enacted the Workers' Compensation Act. Given the existence of chapter 416, it is impossible to conclude that the Legislature had such an intent.

We have repeatedly addressed situations in which common law claims and statutory remedies seem to overlap, and we have embraced a framework to guide our analysis in such cases. The touchstone of this analysis, as in all statutory interpretation, is legislative intent. We start with the proposition that statutes abrogating common law causes of action are disfavored. *Cash America Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000). A statute banishing a common law right "'will not be extended beyond its plain meaning or applied to cases not clearly within its purview.'" *Id.* (quoting *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969)). Abrogation by implication is disfavored. *Id.* For that reason, courts must examine whether the statute's language "indicate[s] clearly or plainly that the Legislature intended to replace" a common law claim with an exclusive

[2] The language limiting *Aranda* was codified as chapter 416 of the Labor Code.

statutory remedy, and we "decline[] to construe statutes to deprive citizens of common-law rights unless the Legislature clearly expressed that intent."[3] *Id.*

We must decide, then, whether there is "clear legislative intent," *Dealers Elec. Supply*, 292 S.W.3d at 660, to extinguish entirely this settled common law remedy. As amended by the Workers Compensation Act, the Labor Code provides:

> An action taken by an insurance carrier under an order of the commissioner or recommendations of a benefit review officer under Section 410.031, 410.032, or 410.033 may not be the basis of a cause of action against the insurance carrier *for a breach of the duty of good faith and fair dealing*.

TEX. LAB. CODE § 416.001 (emphasis added). The fact that certain bad faith claims are thereby eliminated requires the logical inference that others survive. Likewise, the Code's limits on exemplary damages "[i]n an action against an insurance carrier for a breach of the duty of good faith and fair dealing," *id.* § 416.002, implies that other damages remain available. In the context of our precedent, there is but one conclusion to be drawn from these provisions: the Legislature *did not*

[3] We have applied this framework repeatedly. For example, in *Lopez*, which the Court cites but then seems to forget about, we noted that "[w]hether a regulatory scheme is an exclusive remedy depends on whether 'the Legislature *intended* for the regulatory process to be the exclusive means for remedying the problem to which the regulation is addressed." *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008) (quoting *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 624–25 (Tex. 2007)) (emphasis added). Likewise, in *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 802 (Tex. 2010), we held that "the legislative creation of a statutory remedy is not presumed to displace common-law remedies. To the contrary, abrogation of common-law claims is disfavored." Acknowledging the centrality of legislative intent, *see id.* at 809 n.66, we looked at the statute's "meticulous legislative design," *id.* at 805. Similarly, we have held that "absent *clear legislative intent* we have declined to construe statutes to deprive citizens of common-law rights." *Dealers Elec. Supply Co. v. Scoggins Constr. Co.*, 292 S.W.3d 650, 660 (Tex. 2009) (emphasis added). We have also written that "statutes can modify common law rules, but before we construe one to do so, *we must look carefully to be sure that was what the Legislature intended*." *Energy Serv. Co. of Bowie v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 (Tex. 2007) (emphasis added); *see also, e.g., Employees Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 919 (Tex. 2009) (the proper inquiry is legislative intent); *Pruett v. Harris Cnty. Bail Bond Bd.*, 249 S.W.3d 447, 454 (Tex. 2008) (same); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 208 (Tex. 2002) (same).

intend to abrogate the common law claims. To the contrary, the Legislature, in the clearest way possible, *limited Aranda*-type claims, rather than abolished them.[4]

The inquiry ends there. If the Legislature limited certain *Aranda*-type claims, it could not logically have also intended to eliminate them. The Act's structure further supports this conclusion.

The exclusivity provision of the new Act provides that "[r]ecovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . . . *against the employer* . . . [for] a work-related injury sustained by the employee." TEX. LAB. CODE § 408.001 (emphasis added). This clause thus emphasizes two important aspects of the old law: (1) it provides that workers' compensation is exclusive *only with respect to the employer*, and (2) it retains the distinction, important to our decisions in *Aranda* and *Marshall*, between a "work-related injury" and an injury caused by a carrier's misconduct. *See id.* A logical inference from this provision, which bars claims against employers, is that claims against carriers may proceed. Indeed, *Aranda*, analyzing the old Act's exclusivity provision, recognized exactly this, holding that the injury alleged in a common law suit is wholly separate, both conceptually and temporally, from the job-related injury to which the exclusivity provision, and the workers' compensation system as a whole, applied. *Aranda*, 748 S.W.2d at 214 ("Injury from the carrier's

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[4] The House Committee that considered the Act referred to the provisions as "provid[ing] *limitations* in actions against a carrier for breach of duty." HOUSE COMM. ON BUS. & COMMERCE, BILL ANALYSIS, S.B. 1, 71st Leg., 2d C.S. (1989) (emphasis added). Senator Montford was even more explicit, noting that the provisions were meant to "temper" *Aranda*:

> In the very important Article 10 of the 1989 Workers' Compensation Act are provisions . . . provid[ing] procedures and implementing provisions assessing . . . administrative penalt[ies] . . . [and] temper[ing] the liability of a comp carrier for breach of good faith/fair dealing under *Aranda* . . . .

2 MONTFORD,§ 10.0 (footnotes omitted).

conduct arises out of the contractual relationship between the carrier and the employee and is sustained after the job-related injury.").

The existence of administrative penalties that can be assessed against workers' compensation carriers does not mandate the contrary. *See* TEX. LAB. CODE ch. 415 (creating administrative penalties for certain acts by employers, carriers, and other parties). The Insurance Code allows for the assessment of substantially similar administrative penalties against insurers operating outside of the workers' compensation system, *see* TEX. INS. CODE § 84.021 (providing for the imposition of administrative penalties for violations of the insurance code and other insurance laws), but we have never held the existence of those penalties precludes the claims at issue here when made against those insurers.[5]

As shown by the presence of chapter 416, not to mention the Act's legislative history and the language of its exclusivity clause, the Legislature pointedly recognized the availability of claims outside of the Act. Therefore, we cannot legitimately conclude that the Legislature intended for the Act to be an exclusive remedy with regard to carriers. If the Act's "comprehensive" administrative scheme had been intended to preclude the common law claims permitted in *Aranda*, there would

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[5] Indeed, each of the particular penalties that the Court says may be assessed against workers' compensation carriers may also be assessed against other insurers. Insurers may be fined for any violation of the Insurance Code, TEX. INS. CODE § 84.021, and that Code specifically prohibits unfair settlement practices. *Compare* TEX. LAB. CODE §§ 409.021, 415.002 (permitting administrative penalties for unfair claims-settlement practices), *with* TEX. INS. CODE § 541.060 (prohibiting unfair settlement practices).

Moreover, the existence of the penalty regime actually clarifies the Legislature's intent *not* to broadly preclude claims under the common law and Insurance Code against workers' compensation carriers. As the Court notes, ___ S.W.3d at ___, failure to comply with a Division order is grounds for an administrative penalty, and a claimant may bring suit to enforce such an order and may be awarded attorney's fees and a twelve percent penalty. TEX. LAB. CODE § 410.208. It is in this lone context—where judicial enforcement is expressly permitted—that the Legislature by statute prohibited claimants from bringing common law claims. *Id.* § 416.001 (barring claims against a workers' compensation carrier for breach of the duty of good faith and fair dealing if the claims are based on actions taken by the carrier pursuant to Division orders).

have been no need for the Legislature to enact chapter 416. *Cf. Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 ("[I]f the Act already excluded [the] defendants who do not furnish the goods or services, . . . there would have been no need for the legislature to exempt media defendants from liablity . . . ."). Indeed, it appears that the penalty provisions and the limitations on *Aranda* were seen as complementary. The 1989 Act, then, did not repudiate, but rather acknowledged, the viability of extra-contractual claims against workers' compensation insurance carriers. This is enough to decide the case before us.

IV. The Insurance Code Claims

TMIC's primary argument against the Insurance Code's applicability to its conduct is the same argument it made with regard to the common law: that the workers' compensation system is so comprehensive that all remedies outside of the Act are necessarily excluded.[6] This is

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[6] Though the Court credits this argument, I believe that TMIC failed to properly preserve this issue and that it therefore should not be considered in this Court. Texas Rule of Appellate Procedure 53.2(f) provides that the petition for review

> must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

See also TEX. R. APP. P. 33.1 (preserving issues for appellate review); *id.* 38.1(f) (requiring appellant to "state concisely all issues or points presented for review" in the court of appeals). TMIC, however, did not raise this argument in the court of appeals, instead challenging the judgment on the Insurance Code violations based only on the sufficiency of the evidence. *Cf. Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 868 (Tex. 2007) (holding that the defendant's no-evidence objections at the trial court did not preserve error as to its related legal arguments). Indeed, in the court of appeals, TMIC only argued that Ruttiger's common law claims—and not his Insurance Code claims—were not legally cognizable. TMIC's arguments about the unavailability of remedies under the Insurance Code was raised for the first time on appeal in its Reply Brief in Support of the Petition for Review. As such, they do not meet the requirements of Rule 53.2(f). *See* TEX. R. APP. P. 53.2(f). The Court holds that TMIC's legal sufficiency challenge preserved error on this point (although, inexplicably, the Court holds that error was not preserved as to another of TMIC's Insurance Code claims). If that is enough, there is little that a legal sufficiency challenge will *not* preserve. For the sake of argument, I presume the issue is properly before us.

unconvincing. In addition to the fact that the Act is not, by its terms, an exclusive remedy with respect to carriers, *see* TEX. LAB. CODE § 408.001, the Legislature's recognition of extra-contractual common law claims in chapter 416 makes clear that it did not intend to preclude all claims against carriers for proven misconduct. *See Lopez*, 259 S.W.3d at 153 (holding that we look for legislative intent that a claim be precluded). The Legislature was aware of—and concerned with—our decisions in both *Aranda* and *Marshall*, but it did not endeavor to override them. If the Workers' Compensation Act is not exclusive with respect to carriers, there is no basis upon which to hold that Insurance Code claims are now precluded in this context. Moreover, though we were concerned with the issue of exclusivity in *Aranda*, we decided *Marshall* primarily on the basis of the Insurance Code's text. We held, quite plainly, that the Insurance Code "provides that a person who has sustained actual damages as a result of another's deceptive acts or practices may maintain a suit for treble damages." 724 S.W.2d at 772. Nothing in the Workers' Compensation Act overcame the Insurance Code's plain language, and, therefore, we held that a carrier could not use the act "as a shield" from liability. *Id.* Notwithstanding the Court's overruling of *Marshall* today, the Insurance Code's provisions still apply, and, as such, the Court's preemption approach is without merit.[7]

V. Conclusion

[7] TMIC additionally argues that Ruttiger's claims are precluded by *Aranda*'s independent injury requirement and that they are not among a narrow class of injuries recognized by *Aranda*. Neither of these contentions is correct. In *Aranda*, we wrote that an "[i]njury from the carrier's conduct arises out of the contractual relationship between the carrier and the employee and is sustained after the job-related injury." 748 S.W.2d at 214. Thus, a "claimant is permitted to recover when he shows that the carrier's breach of the duty of good faith and fair dealing . . . is separate from the compensation claim and produced an independent injury." *Id.* The jury found that Ruttiger was injured when the carrier breached its duty, and it found that he sustained damages as a direct result of his injuries. Moreover, Ruttiger's damages are not the sort of "lost compensation benefits" we said could not be recovered in *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607, 612 (Tex. 1996). I agree with the court of appeals on this issue for the reasons stated in its decision. 265 S.W.3d 651. Finally, I agree with this Court that Ruttiger exhausted his administrative remedies, and the trial court had jurisdiction over this suit.

Whether allowing extra-contractual claims makes sense is a different question than whether the laws, as written, permit their pursuit. Because the Legislature has not made the Act exclusive with respect to extra-contractual claims, I would hold that Ruttiger's claims are not barred and would affirm the court of appeals' judgment. Because the Court does otherwise, I respectfully dissent.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 26, 2011