IN THE SUPREME COURT OF TEXAS

NO. 09-0544

JEREMY MOLINET, PETITIONER,

v.

PATRICK KIMBRELL, M.D. AND JOHN HORAN, M.D., RESPONDENTS

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

Argued October 13, 2010

JUSTICE LEHRMANN, joined by JUSTICE MEDINA, dissenting.

As the Court acknowledges, we have repeatedly recognized that certain constitutional restrictions and common law doctrines may override the two-year limitations period established by section 74.251(a) of the Civil Practice and Remedies Code and its statutory predecessors. *See, e.g.*, *Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292, 298 (Tex. 2010); *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985); *Borderlon v. Peck*, 651 S.W.2d 907, 909 (Tex. 1983). Nevertheless, the Court concludes that the deadline is "absolute," trumping the statutory override the Legislature established in section 33.004(e) of the Texas Civil Practice & Remedies Code. ___ S.W.3d at ___. The same legislative Act that implemented the current version of section 33.004(e) also enacted a ten-year statute of repose which "contemplates it is at least possible for certain [health care liability] claims to be brought up to eight years after limitations expires." *Walters*, 307 S.W.3d at 298; *see*

TEX. CIV. PRAC. & REM. CODE § 74.251(b). In my view, the Legislature's simultaneous adoption of a provision allowing for the post-limitations initiation of health care liability claims and a provision allowing joinder of responsible third parties against whom limitations has run, at a minimum, clouds the purportedly unambiguous, "[n]otwithstanding any other law" language of section 74.251(a) the Court relies on. And, with several specified exceptions not relevant here, chapter 33 applies to "*any cause of action* based on tort." TEX. CIV. PRAC. & REM. CODE § 33.002(a)(1) (emphasis added). Viewing the Act as a whole and absent any other expression of legislative intent to exclude health care liability claims from section 33.004(e)'s purview, I respectfully dissent.

Before the 2003 amendments to chapter 33 of the Civil Practice and Remedies Code, adopted as part of the sweeping tort reform implemented by House Bill 4,[1] defendants in tort suits, including health care liability defendants, were permitted to attempt to shift liability to responsible third parties by joining them as third-party defendants. Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972–73, amended by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.02–4.04, 2003 Tex. Gen. Laws 847, 855–56; *see* Gregory J. Lensing, *Proportionate Responsibility and Contribution Before and After the Tort Reform of 2003*, 35 TEX. TECH L. REV. 1125, 1186 (2004). Like the present version of chapter 33, a claimant was permitted to assert a claim against a responsible third party a defendant had joined under chapter 33 within sixty days of the party's joinder, even if limitations had expired. Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995

[1] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.03, 2003 Tex. Gen. Laws 847, 855–56.

Tex. Gen. Laws 971, 973, amended by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.04, 2003 Tex. Gen. Laws 847, 855–56. A responsible third party could be joined only if the party (1) was or might have been liable to the claimant for all or part of the claimant's damages; (2) was subject to the court's jurisdiction; and (3) could have been sued by the claimant, but was not. Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972, amended by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.04, 2003 Tex. Gen. Laws 847, 855–56.

The 2003 amendments to chapter 33, however, dramatically altered this third-party practice. Under the current version of the statute, the trier of fact may allocate a percentage of responsibility to a third party designated by a defendant, even if the party has not been made a party to the lawsuit. TEX. CIV. PRAC. & REM. CODE §§ 33.003, 33.004. A jury's allocation of responsibility to a designated third party has no legal impact upon the designee: adverse findings impose no liability, and "may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory . . . ." TEX. CIV. PRAC. & REM. CODE § 33.004(i)(2). But the defendant has "much to gain strategically by designating a responsible third party because the defendant has a possibility of shifting a large percentage of responsibility onto the responsible third party, thereby avoiding joint and several liability," Jas Brar, *Friend or Foe? Responsible Third Parties and Leading Questions*, 60 BAYLOR L. REV. 261, 275 (2008), or possibly evading any liability at all. *See* Elaine A. Carlson, *Tort Reform: Redefining the Role of the Court and the Jury*, 47 S. TEX. L. REV. 245, 259 (2005) (hereinafter Carlson); TEX. CIV. PRAC. & REM CODE § 33.001. As the concurring justice in the court of appeals in this case observed, the designee has no legal incentive to vigorously contest liability or attempt to assign responsibility to the defendant. 284 S.W.3d 464, 470 (SIMMONS, J., concurring);

see also Carlson at 261. Read in light of proper canons of construction, the relevant provisions do not dictate the imbalanced scheme stemming from the Court's decision.

In construing a statute, our ultimate goal is to determine the meaning the Legislature intended. *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010). We begin with the statute's text, and "'examine the *entire act* to glean its meaning.'" *Id.* (quoting *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001)) (emphasis added). We also presume that the Legislature intended a just and reasonable result. *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010); *see* TEX. GOV'T CODE § 311.021(3).

The Court grounds its decision on the assumption that the language of section 74.251(a), providing for a two-year limitations period "[n]otwithstanding any other law," is clear and unambiguous, and mandates the application of the limitations period to Molinet's claims against Kimbrell. But section 33.002 of the Code unambiguously provides that chapter 33 applies to "any cause of action based on tort" and Deceptive Trade Practices Act claims, and specifies the claims to which it does not apply. TEX. CIV. PRAC. & REM. CODE § 33.002. More importantly, the Court reads section 74.251(a)'s language in isolation. House Bill 4, the source of both sections 74.251(a) and 33.004(e), also enacted section 74.251(b), a provision that clearly allows some health care liability claims to be brought after limitations has run.[2] *Walters*, 307 S.W.3d at 298. While the

[2] That section provides:

> (b) A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred. TEX. CIV. PRAC. & REM. CODE § 74.251(b).

Legislature could have conceivably enacted subsection (b) to give effect to previously recognized common law or constitutionally mandated exceptions to limitations, as the Court posits, no language in House Bill 4 supports that assumption. On the other hand, section 33.004(e) was a portion of the very bill enacting the ten-year repose statute; thus, the Legislature's own words undermine the Court's conclusion that section 74.251(a) imposes an absolute deadline. *See Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (construing statutes "passed at the same time as part of the same tort-reform bill [House Bill 4]" in harmony).

This Court has been reluctant to look to legislative history to divine the Legislature's meaning, and rightly so when the statute's words clearly convey legislative intent. *See In re Collins*, 286 S.W.3d 911, 918 (Tex. 2009) (citing *Alex Sheshunoff Mgmt. Servs., L.P. v Johnson*, 209 S.W.3d 644, 652 n.4 (Tex. 2006)). In this instance, however, the Legislature's simultaneous adoption of a ten-year repose period for medical liability claims and its amendments to chapter 33 create an ambiguity that justifies consideration of legislative history bearing on the specific issue before us. *See HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 356 (Tex. 2009) (looking to legislative history to determine meaning of term that lent itself to two equally plausible interpretations); *see also Robinson v. Crown Cork & Seal Co.*, ____ S.W.3d ___, ___ (Tex. 2010) (looking to legislative record to determine public interest Legislature sought to serve in enacting Chapter 149 of the Civil Practice and Remedies Code).

In the Senate proceedings to consider the Conference Committee Report on House Bill 4, the following exchange between Senator Hinojosa and Senator Ratliff, House Bill 4's sponsor and a

member of the conference committee that crafted the substitute that was ultimately enacted, is recorded in the Senate Journal:

> Senator Hinojosa: When a defendant names a responsible third party, as I understand it, the plaintiff has 60 days to bring the third party into the suit, even if limitations would otherwise have run against that person. . . . Is that true in a medical malpractice claim too, because on page 63 of the bill it seems to say that the two-year statute in those cases applies notwithstanding any other law?
>
> Senator Ratliff: Yes, if health care providers are going to have the benefit of the designation of responsible third parties, then they have to abide by the same rules as everyone else. This 60-day provision would apply in health care liability claims.

78th Leg., R.S., Journal of the Texas Senate 5005 (citations omitted). That exchange, which addresses the precise issue before the Court, was "ordered reduced to writing and printed in the Senate Journal" by unanimous consent "to establish legislative intent regarding HB4." *Id.* at 5003.

According to the Court, its reading of the statute does not create an absurd or nonsensical result, and if it does, it is the Legislature's doing. ___ S.W.3d at ___. But the Legislature crafted a scheme that permits defendants to attempt to minimize their liability by designating other responsible parties, while allowing plaintiffs to join the designees even if limitations have run. Under the Court's reading of the statute, which ignores the impact of section 74.251(b), health care liability defendants will be in a position to force plaintiffs to "prove the liability of the party defendant (or defendants), while at the same time defending the empty chair." Wes Christian & Alexandra Mutchler, *Musical Chairs: Apportioning Liability*, 44 THE ADVOC. 118, 123 (2008). The distortion inherent in such a procedure has been noted:

> "A plaintiff . . . has no knowledge, possession, or control of evidence that a [responsible third party] could use to protect himself from a finger-pointing defendant. The empty chair defense, therefore . . . places an impossible burden

> upon plaintiffs to represent [the responsible third party's] interests as well as their own, while giving defendants a great advantage in diminishing their own liability by allowing them to allocate fault to [the responsible third party]. The result would likely be an inaccurate diminution of fault allocated to defendants and an increase of fault attributed to unrepresented [responsible third party]."

Id. at 124 (quoting Nancy A. Costello, *Allocating Fault to the Empty Chair: Tort Reform or Deform*, 76 U. DET. MERCY L. REV. 571, 597 (1999)). According to the sponsor of House Bill 4, Representative Joe Nixon, the bill's purpose was "'to establish an equitable and efficient system of justice in Texas that provides meaningful remedies for those who have been wronged while protecting the rights of those who have done no wrong.'" Carlson at 248–249 (quoting Press Release, House Chairman Joe Nixon Files Legislation to Curb Medical Lawsuit Abuse (Feb. 12, 2003) (http:// www.house.state.tx.us/news/release.php?id=91 (web page no longer available)); *see also Leland v. Brandal*, 257 S.W.3d at 208 (noting that the reforms applicable to health care liability claims House Bill 4 effected were intended to be implemented "in a manner that will not unduly restrict a claimant's rights") (citing Act of June 2, 2003, 78th Leg., R. S., ch. 204, § 10.11(b)(3), 2003 Tex. Gen. Laws 847, 884)). The Court's decision today disrupts the balance the Legislature sought to implement in section 33.004(e).

Moreover, contrary to the fundamental purposes of the reforms implemented in House Bill 4, the Court's reading of the statute will have the unintended consequence of encouraging lawsuits against health care providers. In the wake of today's decision, cautious health care liability claimants will be motivated to sue every health care provider involved in the patient's care, no matter how minimal their involvement, in order to circumvent an empty-chair defense by more likely responsible defendants.

Finally, the posture of this case differs significantly from *Texas Lottery Commission v. First State Bank of DeQueen*, 325 S.W.3d 628 (Tex. 2010). In that case, we were called upon to resolve an apparent conflict between provisions of the Lottery Commission Act and the Uniform Commercial Code. We gave effect to the UCC provision, declining to resort to canons of construction that might have eliminated the conflict, instead applying a section of the UCC providing "that 'a rule of law, statute, or regulation that prohibits [or] restricts' an assignment of a prize won in a state lottery 'is ineffective.'" *Id.* at 638 (quoting TEX. BUS. & COM. CODE § 9.406(f)). The Act implementing the UCC provision at issue in that case, unlike House Bill 4, contained no explicit exceptions; any exception would have had to have been imported from a distinct piece of legislation, the bill amending the Lottery Act.

Further, strong policy considerations dictated by the Legislature necessarily shape our decisions interpreting the UCC; while our opinion did not discuss them, those considerations made the application of otherwise-applicable canons of construction inappropriate in *Lottery Commission*. The UCC is intended to simplify, clarify, and modernize commercial practices. *See Sw. Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104, 110 (Tex. 2004); TEX. BUS. & COM. CODE § 1.103. Our decision in *Lottery Commission* is consistent with the mandate that the UCC "is to be regarded as particularly resistant to implied repeal." TEX. BUS. & COM. CODE § 1.104 cmt. 1. The considerations that precluded our application of canons of construction in *Lottery Commission* are simply not present in this case.

It is apparent from the context in which section 74.251(a) and section 33.004(e) were enacted that section 74.251(a)'s "[n]otwithstanding any other law" language is not unambiguous. The

Court's construction ignores section 74.251(b)'s impact, gives no effect to section 33.004(e)'s joinder provision in health care liability claims, and disrupts a carefully constructed scheme balancing the interests of both defendants and claimants, despite explicit expressions of contrary legislative intent. Accordingly, I respectfully dissent.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: January 21, 2011