

Texas Supreme Court Advisory

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ORDERS AND OPINIONS ISSUED DECEMBER 19, 2008

LINKS TO FULL-TEXT OPINIONS FOLLOW SUMMARIES.

NOTE: *Summaries are prepared by the Court's staff attorney for public information and reflect his judgment alone on facts and legal issues. These summaries are not part of the Court's opinion in the case.* Links are to Adobe's PDF format (duplication of the document) and to HTML documents (rendition). [Click here to download a free Adobe Reader.](#)

[DECEMBER 19 ORDERS](#) (in HTML)

[Decisions in cases \(motions, requests, etc.\) from December 11 through Wednesday](#) (PDF)

OPINIONS

05-0171

Southwestern Bell Telephone Co. L.P. v. William C. Mitchell
from Bexar County and the Fourth District Court of Appeals, San Antonio

For petitioner: Susan A. Kidwell, Austin

For respondents: Alan D. Tysinger, San Antonio

Justice Green did not participate

REVERSED AND REMANDED, opinion by Justice Hecht:

The principal issues in this action to recover workers' compensation death benefits is whether the Court should overrule *Continental Casualty v. Downs*, which holds that a workers' comp carrier waives its right to contest a claim if it does not initiate payments or contest the claim within seven days after notice of an injury. In this case a workers' comp hearing officer ruled that, based on *Downs*, Southwestern Bell waived its right to contest Mitchell's death-benefit claim because the company disputed it 43 days after Mitchell filed notice that his wife suffered a work-related injury. The company sued for judicial review after the hearing officer's ruling was upheld. In that review, the trial court affirmed the administrative decision. The court of appeals affirmed the trial court, holding that *Downs* applied.

The Supreme Court HOLDS that *Downs* should be overruled. In the session after *Downs* was decided, the Legislature amended the workers comp law to restore the rule the Texas

Workers' Compensation Commission had applied for a decade. *Downs* is simply an anomaly in the law. Prior cases unaffected by *Downs* and cases controlled by the amendment are all treated alike. The rule for them is the same. Were the Court to adhere to *Downs*, a different rule would apply only in those cases caught in the *Downs* gap. \fs24plain *Stare decisis* does not warrant an obstinate insistence on precedent that appears to be plainly incorrect.

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Chief Justice Jefferson DISSENTING, joined by Justices O'Neill and Medina:

Noting his dissent in *Downs*, Chief Justice Jefferson notes also that a dissent is not the law. 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. To continue to press a dissent after the Legislature has had occasion to change the law essentially refutes the constitutional principle, laid down in *Marbury v. Madison*, that the *Court* ultimately declares the law's meaning.

[Jefferson dissent in HTML](#)
[Jefferson dissent in PDF](#)

06-0034

Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338
from Dallas County and the Fifth District Court of Appeals, Dallas

For petitioner: Jeffrey C. Londa, Houston

For respondent: Hal K. Gillespie, Dallas

REVERSED AND DISMISSED, opinion by Justice Hecht:

The issue is whether federal law preempts the transit authority's immunity in a suit seeking money damages to enforce a grievance resolution when federal money to the transit agency is conditioned on "fair and equitable arrangements" for transit employees. In this case the union alleges that DART, the transit agency, breached an agreement for a pay increase for DART employees. The trial court denied the transit agency's jurisdictional plea, based on governmental immunity. The court of appeals held that the fair-and-equitable-arrangements language in the federal Urban Mass Transportation Act preempted state immunity.

The Supreme Court HOLDS that federal law does not preempt state law providing DART immunity. The Court determines that it has jurisdiction to resolve a conflict presented by the court of appeals on preemption and the U.S. Supreme Court's decision in *Jackson Transit Authority v. Local 1285, Amalgamated Transit Union*, on which the appeals court relied. In *Jackson Transit Authority*, the union sued the authority in federal court for breach of both the 13(c) arrangement and the collective-bargaining agreement, but the U.S. Supreme Court held that section 13(c) did not create a federal cause of action for breach of either the 13(c) arrangement or the collective-bargaining agreement. It was not confronted with any issue of federal preemption of state governmental immunity and emphasized that Congress intended

section 13(c) arrangements and agreements under them to be governed by state law, not federal law. The union argues that for DART to be immune from this suit makes the collective-bargaining resolution pointless, but its complaint is with the 13(c) arrangement approved by the Labor secretary in 1991, not state immunity law. That arrangement gave the union no judicial recourse and DART's immunity from suit takes nothing away from the union to which it was entitled under section 13(c). The resolution itself contemplates that if DART unilaterally failed to comply with its terms, the union could simply file another general grievance and invoke the process provided by the arrangement.

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06-0987

United States Fidelity and Guaranty Co. v. Louis Goudeau
from Harris County and the First District Court of Appeals, Houston

For petitioner: David W. Holman, Houston

For respondent: Otto D. Hewitt III, Alvin

REVERSED IN PART AND JUDGMENT RENDERED, opinion by Justice Brister:

The issue is whether the claimant was “occupying” an insured vehicle when he was caught between his truck and another vehicle that was struck by a third vehicle as he was walking to check on a previous roadside accident. In this case Goudeau sued to collect from uninsured/underinsured motorist coverage on his truck. Goudeau was walking between his pickup truck and the car in the first accident he stopped to check when his truck and the car were hit by a hydroplaning SUV. He was crushed when he was caught between the vehicles and a freeway retaining wall. The policy language defined an insured as a person occupying the insured vehicle and defined occupying as someone “in, upon, getting in, on, out or off” the insured vehicle. The trial court granted summary judgment for the insurance company because it determined Goudeau was not occupying the truck when he was injured. The court of appeals reversed, in part reasoning that the police report described Goudeau as being crushed between the vehicles and the retaining wall, suggesting he was touching the covered truck when he was injured.

The Supreme Court HOLDS that the policy does not cover Goudeau, who left the vehicle and walked around to its front when it was hit and he was crushed. The standard-form policy defined “occupying” as “in, upon, getting in, on, out or off.” Goudeau argues that USF&G admitted coverage in response to a request for admission. But as the court of appeals correctly recognized, the carrier appeared in two different capacities and a request sent to it in one capacity cannot be used against it in another. Carriers must sometimes assert conflicting positions through different counsel. If they can be bound by an admission in one capacity that was sent to them in another, they can be made to forfeit every case regardless of the merits.

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Justice Green DISSENTING, joined by Chief Justice Jefferson and Justice Johnson:

In the trial court, the insurer admitted to the claimant that he was insured under the policy. That admission binds the insurer even in an unusual case like this where the insurer made the admission while purporting to act not as defendant, but as intervenor. Because such an admission relieves the claimant's burden of proving insured status, and prevents the insurer from arguing otherwise, the Court should hold that the insurer's motion for summary judgment should have been denied.

[Green dissent in HTML](#)
[Green dissent in PDF](#)

07-0484

In the Matter of Rolando Caballero
from the Board of Disciplinary Appeals
For appellant: Royal K. Griffin, San Antonio
For appellee: Linda A. Acevedo, Austin
DISBARMENT AFFIRMED, opinion by Justice Green:

The issue is whether an attorney may be disbarred for a federal mail-fraud conviction when his sentence was fully probated. Under [Rule of Disciplinary Procedure 8.05](#), an attorney convicted of an intentional crime that has become final must be disbarred unless, under [Rule 8.06](#), the board suspends a lawyer for conviction of a serious crime for the length of his probation. Caballero argues that Rule 8.06 is mandatory in a case, like his, of a fully probated sentence.

The Supreme Court HOLDS that Rule 8.05 mandates disbarment for conviction of an intentional crime unless, in its discretion, the Board of Disciplinary Appeals suspends the lawyer under Rule 8.06. If the board chooses suspension, Rule 8.06 requires the suspension to be as long as a fully probated sentence. The starting point is disbarment because the board is instructed by Rule 8.05 that it "shall" disbar.

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Justice Willett DISSENTING, joined by Justice Medina:

The rules should be reconciled to honor the mandatory "shall" used in both, by holding that when mandatory discipline is warranted, Rule 8.06 applies if the sentence is fully probated, and Rule 8.05 applies if the attorney's sentence is less-than-fully probated. BODA must disbar under Rule 8.05 if the attorney is sentenced to jail or to a combination of jail and probation, and BODA must suspend under Rule 8.06 (up to the length of the probated sentence) if the sentence

is *fully* probated.

[Willett dissent in HTML](#)

[Willett dissent in PDF](#)

08-0268

Craig Gardner And Thelma Gardner v. U.S. Imaging Inc., et al.

from Bexar County and the Fourth District Court of Appeals. San Antonio

REVERSED AND REMANDED, per curiam opinion:

The issue is whether the court of appeals erred by dismissing because of a deficient expert report in a medical-malpractice case. The Supreme Court acknowledges the deficient report, but orders a remand to the trial court in light of [Leland v. Brandal](#), 257 S.W.3d 204 (Tex. 2008)(issued June 13).

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07-0919

In re Reza Zandi

from Denton County and the Second District Court of Appeals, Fort Worth

SUPPLEMENTAL OPINION IN REHEARING, per curiam opinion:

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ISSUES SUMMARY ON PETITION GRANTED

ORAL ARGUMENT IN TODAY'S ORDERS

07-1065

Raoul Hagen v. Doris J. Hagen

from Bexar County and the Fourth District Court of Appeals, San Antonio

Oral argument set January 14

The issue is whether an action to determine if a 1976 divorce decree award of “Army Retirement Pay or Military Retirement Pay” includes disability benefits is a collateral attack barred by res judicata.

[Briefs](#)

[Court of appeals opinion](#)