Dallas Court of Appeals Denies En Banc Review Over a Once Rare Dissent - The Texas Lawbook

David Coale

After the election of the "Slate of Eight" new Democratic justices to the Dallas Court of Appeals in 2018, conventional wisdom focused on two topics.

First, the new Democratic majority was viewed as favoring trial court discretion, and thus less likely to intervene on topics such as rulings about the admissibility of evidence. Second, the new justices were seen as pro-jury trial, and not inclined to expand rules or processes that would resolve cases in other ways.

The recent case of *McPherson v. Rudman*, an appeal of a defense verdict in a medical malpractice case, directly pits those two ideas against each other and provides valuable insight into the philosophy of the new Democratic majority. It is also the second ruling within a month by the full Dallas Court with a concurrence and a dissent – a remarkable development for a court traditionally known for its uniformity.

Cameron McPherson sued for medical malpractice involving the placement of a pain pump after foot surgery. After the surgery, McPherson was treated by Dr. Norma Melamed, a neurologist. At trial, Melamed testified favorably for the defense on the issue of causation. McPherson objected to this testimony as a new, previously-undisclosed opinion. The trial court overruled the objection, and the jury returned a verdict for the defense.

The panel opinion found no abuse of discretion. Justice David Schenck, joined by Justice Bill Whitehill and then-Justice David Evans, found that the testimony was not inconsistent with Melamed's earlier statements about her beliefs and that the testimony was within the scope of her designation as a witness.

McPherson sought en banc review, and after requesting a response, the Court's thirteen Justices denied his request by a razor-thin margin.

Six of the thirteen justices – all newly-elected Democrats – joined a dissent by Justice Robbie Partida-Kipness. It concluded that Melamed's testimony was beyond the scope of her designation as witness and should have been excluded under Texas Rule of Civil Procedure 193(b).

A strongly-worded concurrence by Justice Schenck (the author of the panel opinion) focused on the abuse-of-discretion standard of review, arguing that "[e]ven the most ephemeral application of the standard immediately foreclosed the only conceivable ground for reconsideration here . . . ."

The issue in *McPherson* – the admissibility of Dr. Melamed's trial testimony about causation – required the justices to balance the proper roles of a trial court and the

jury. While "conventional wisdom" associates the court's Democratic majority with deference to trial court discretionary rulings, six of the court's eight Democrats would have found an abuse of discretion in the trial court's handling of this issue.

In their view, Melamed's testimony should have been addressed as a matter of law by the trial court, rather than a matter of weight by the jury. And by rejecting *en banc* review, all the court's Republicans chose the side of deference to trial court discretion. They thus accepted the jury's verdict that considered Melamed's testimony.

McPherson reminds that the Dallas Court of Appeals should no longer be seen as thirteen justices with the same basic view of the legal system. As shown by its other recent *en banc* opinions, the court has active, ongoing dialogue about fundamental issues.

McPherson also teaches that there is far more to the actual decision of cases than conventional wisdom might suggest. General principles will give way to specific facts, as shown here by the justices' "unconventional" views about abuse-of-discretion review after a jury trial.

David Coale *is a partner at Lynn, Pinker, Cox and Hurst specializing in appellate matters.*

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