

IN THE SUPREME COURT OF TEXAS

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No. 99-0231
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THE BLAND INDEPENDENT SCHOOL DISTRICT, BOARD OF TRUSTEES OF THE
BLAND INDEPENDENT SCHOOL DISTRICT, AND SUPERINTENDENT OF THE BLAND
INDEPENDENT SCHOOL DISTRICT, PETITIONERS

v.

DOUGLAS BLUE AND CAROLYN BLUE, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS
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Argued on January 5, 2000

CHIEF JUSTICE PHILLIPS filed a dissenting opinion in which JUSTICE ENOCH and JUSTICE HANKINSON joined.

Our jurisdiction to consider this interlocutory appeal depends on the existence of a conflict between the court of appeals' opinion below and some prior decision from another court of appeals or this Court. TEX. GOV'T CODE § 22.225. Such a conflict must be well-defined "upon a question of law involved and determined and such that one decision would overrule the other if both were rendered by the same court." *Garcia v. American Nat'l Ins. Co.*, 78 S.W.2d 170, 170 (Tex. 1935); *see also Christy v. Williams*, 298 S.W.2d 565, 567 (Tex. 1957) (rulings in the two cases must be so far upon the same state of facts that decision in one is necessarily conclusive in the other). Because the Court mistakenly concludes that the decision of the court below conflicts with our opinion in *F/R Cattle Company, Inc. v. State*, 866 S.W.2d 200 (Tex. 1993), I respectfully dissent.

The court of appeals in this case holds that the trial court should determine its subject matter

jurisdiction solely from the allegations in the plaintiffs' pleadings. The Blues' took this position in the trial court, and they objected when BISD attempted to use extrinsic evidence to show that the trial court lacked subject matter jurisdiction. In contrast, the plaintiff in *F/R Cattle* did not object when the defendant used extrinsic evidence to contest the plaintiff's allegations of subject matter jurisdiction. The court of appeals distinguished *F/R Cattle* on this basis, noting that we decided the case only "in the procedural posture in which it was presented." 989 S.W.2d 441, 447. Because no one objected to the extrinsic evidence, we never considered whether it was proper or not. But this distinction does not necessarily foreclose conflicts jurisdiction. We recently explained that the conflicts standard does not require factual identity between the two opinions, so that factual distinctions that are immaterial to the respective holdings may be ignored. *See Coastal Corp. v. Garza*, 979 S.W.2d 318, 320 (Tex. 1998).

The Court apparently considers the plaintiff State's failure to object to extrinsic evidence in *F/R Cattle* to be an immaterial factual distinction, irrelevant to the deciding legal pronouncements. In part, the Court reaches this conclusion by explaining that "[t]he State could not, simply by waiving an objection to the consideration of evidence, require the courts to take such evidence into account if such evidence were impermissible." ___ S.W.3d at ___. But the failure to object to "impermissible" evidence can have just that effect. For example, if the State failed to object to impermissible, hearsay testimony would we not "take such evidence into account"? Our rules say that we would. *See* TEX. R. EVID. 802. In a summary judgment appeal, on the other hand, we do not consider oral testimony on appeal, even if admitted without objection, because our summary judgment rule expressly forbids its use. TEX. R. CIV. P. 166a(c) ("No oral testimony shall be received at the hearing."); *see also Richards v. Allen*, 402 S.W.2d 158, 161 (Tex. 1966)

(supplementation of summary judgment evidence should be by affidavit or deposition rather than oral testimony). I am not sure which situation is closer to this case, but I would prefer some analysis to decision by fiat.

The Court also suggests today that *F/R Cattle* conflicts because “our judgment would have been different if consideration of such evidence had been improper.” ___ S.W.3d at ___. Even if this were true, a judgment alone cannot create a conflict with another opinion or another judgment. We have never gone behind the opinions to determine whether a conflict exists; instead we have considered only the facts and law actually set out in the respective opinions. See *Boxwell v. Ladehoff*, 400 S.W.2d 303, 304 (Tex. 1966); *Employers Cas. Co. v. National Bank of Commerce*, 166 S.W.2d 691, 693 (Tex. 1942); *Dockum v. Mercury Ins. Co.*, 135 S.W.2d 700, 701 (Tex. 1940). The Court here concedes that “we did not discuss in *F/R Cattle Co.* whether evidence could be considered in deciding a plea to the jurisdiction”. ___ S.W.3d at _____. If we did not discuss this in *F/R*, how can there be a conflict apparent on the face of the two opinions? See *John Farrell Lumber Co. v. Wood*, 400 S.W.2d 307, 309 (Tex. 1966); *Torrez v. Maryland Cas. Co.*, 363 S.W.2d 235, 236 (Tex. 1962); *State v. Wynn*, 301 S.W.2d at 76, 79 (Tex. 1957).

Whether or not we agree with the court of appeals’ limited evidentiary view, its opinion does not necessarily conflict with *F/R Cattle*, and therefore we lack jurisdiction to consider the issue. I realize that it is difficult to resist “the desire to remedy significant errors” arising in interlocutory appeals. *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 441 (Tex. 2000)(Enoch, J. dissenting). But as a Court of limited appellate jurisdiction, we must wait until issues are properly before us before we address them by judicial decision.

Because we do not have general appellate jurisdiction over interlocutory appeals of this

nature and because any alternative basis for our jurisdiction has not been demonstrated, I would dismiss the petition for want of jurisdiction. For these reasons, I dissent.

Thomas R. Phillips
Chief Justice

OPINION DELIVERED: December 7, 2000