

Shirley Ison-Newsome, a Dallas Independent School District administrator, filed this lawsuit contending that General Superintendent Yvonne Gonzalez,¹ Associate and Assistant Superintendents Robby Collins, Robert Hinkle, and Robert Payton, and Executive Director of Media Relations John Dahlander, conspired to defame her and intentionally inflict emotional distress on her when they spoke to the press about a controversy surrounding renovation of Ison-Newsome's offices. The defendants moved for summary judgment, claiming that they were immune from liability under section 22.051(a) of the Education Code, which provides:

A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

TEX. EDUC. CODE § 22.051(a). The trial court denied the motion, and the defendants filed an interlocutory appeal from the trial court's order. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(5) (allowing an interlocutory appeal from the denial of a summary-judgment motion asserting immunity by an officer or employee of the state or a political subdivision of the state).

In the court of appeals, the parties focused on whether the defendants were acting incident to or within the scope of their duties when they made the allegedly defamatory statements to the press. The defendants argued that their summary-judgment evidence conclusively established that they were acting within the scope of their duties because their affidavits established that they committed the allegedly

¹ Ison-Newsome has since nonsuited her claims against Gonzalez.

wrongful acts while discharging duties generally assigned to them. Ison-Newsome, on the other hand, argued that an intentional tort can never be within the scope of an employees' duties. The court of appeals did not decide whether the Education Code provides immunity for any act of a professional school-district employee. Instead, it held that the defendants were not entitled to summary judgment because their affidavits did not conclusively prove that they were acting within the scope of their duties. Accordingly, the court of appeals unanimously affirmed the trial court's order. ___ S.W.3d at ___. The defendants petitioned for review.

Our jurisdictional analysis begins with the basic principle that we do not have jurisdiction in the absence of an express constitutional or legislative grant. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996). The Legislature has determined that jurisdiction over interlocutory appeals is generally final in the courts of appeals. TEX. GOV'T CODE § 22.225(b)(3). However, the Legislature created exceptions to that general rule for certain interlocutory appeals, including those meeting the conflicts standard of Government Code § 22.001(a)(2). That standard is met and this Court has conflicts jurisdiction over interlocutory appeals when "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case." *Id.* § 22.001(a)(2); *see id.* § 22.225(c).

The defendants assert that we have conflicts jurisdiction in this case, claiming that the court of appeals' decision here conflicts with *Enriquez v. Khouri*, 13 S.W.3d 458 (Tex. App.—El Paso 2000, no pet.), and *Williams v. Chatman*, 17 S.W.3d 694 (Tex. App.—Amarillo 1999, pet. denied). The defendants also identified two unpublished opinions involving the same immunity statute. As Texas Rule

of Appellate Procedure 47.7 mandates that unpublished opinions “have no precedential value and must not be cited as authority by counsel or by a court,” we limit our jurisdictional analysis to whether the court of appeals’ opinion in this case conflicts with *Enriquez* or *Williams*. We conclude that neither *Enriquez* nor *Williams* creates a conflict sufficient to confer jurisdiction on this Court.

Enriquez cannot support conflicts jurisdiction because it was decided after the court of appeals decided this case. *See Enriquez*, 13 S.W.3d at 458. We have conflicts jurisdiction only when “one of the courts of appeals holds differently from a prior decision of another court of appeals” TEX. GOV’T CODE § 22.001(a)(2); *see id.* § 22.225(c). Because *Enriquez* is not a “prior decision” of another court of appeals, under the statute’s plain language, the court of appeals in this case could not have “held differently” than the court in *Enriquez* when it issued its opinion in this case. *See* TEX. GOV’T CODE § 311.011 (directing courts to give words and phrases their ordinary meaning under the rules of grammar and common usage).

Nor does this case conflict with *Williams*. In *Williams*, the parents of a student who drowned at a school-sponsored pool party sued several school-district employees, among others, claiming that the employees were negligent and grossly negligent in supervising the students. The school employees moved for summary judgment claiming immunity under section 22.051 of the Education Code. The parents argued that the employees were not acting within the scope of their duties and were therefore not protected by immunity because: “(1) the party was not on school property, (2) it occurred after normal school hours, (3) [the employees] were not required to attend, and (4) [the employees] were not paid for attending the party.” *Williams*, 17 S.W.3d at 698.

Without stating a specific test to determine if the employees were acting within the scope of their duties, the court of appeals in *Williams* analyzed the school-district employees' summary-judgment evidence and concluded that they established as a matter of law that they were acting within the scope of their duties when the incident occurred. *Id.* at 697-99. The court noted that the defendants' summary-judgment proof showed that the employees were requested to attend the party to supervise the students and that employees were expected to attend school-sponsored functions outside of normal school hours at the principal's request. *Id.* at 698-99. The court stated that "the purpose of [the employees'] attendance was to supervise the students, an obligation they would not have but for their employment with the school district." *Id.* at 699. Therefore, the court of appeals concluded that the employees' summary-judgment evidence conclusively established that they were acting within the scope of their duties. *Id.*

The defendants here argue that this case conflicts with *Williams*. They argue that the court of appeals in this case used an inappropriately narrow common-law *respondeat superior* analysis to determine whether the defendants' acts were within the scope of their duties under section 22.051(a). That analysis, they argue, conflicts with the more expansive approach to immunity taken by the court of appeals in *Williams*, which they claim is the proper approach under this Court's decisions in *Hopkins v. Spring Independent School District*, 736 S.W.2d 617 (Tex. 1987), and *Barr v. Bernhard*, 562 S.W.2d 844 (Tex. 1978). Ison-Newsome responds that this case does not conflict with *Williams* because the court of appeals here expressly declined to interpret section 22.051, which was the basis for the court's holding in *Williams*, and because this case involves intentional-tort claims and *Williams* did not. We agree with Ison-Newsome that the decision in this case does not conflict with *Williams*.

For this Court to have conflicts jurisdiction, the rulings in the two cases must be “so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other.” *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998). Cases conflict for jurisdictional purposes only if the conflict is upon the very question of law actually decided. *Id.* Likewise, while factual identity between the cases is not required, cases do not conflict if “a material factual difference legitimately distinguishes their holdings.” *Id.* at 320.

We find no inconsistency between the holding in *Williams* and the holding in this case. The courts of appeals in these cases did not announce conflicting rules of law. In *Williams*, the court of appeals was evaluating whether the defendants, in response to negligence claims, had proven the statutory immunity elements. The court held, without stating any particular test for how to determine if the employees were acting within the scope of their duties, that the employees’ and school superintendent’s testimony established that accompanying and supervising the students on school-sponsored activities, including field trips, was part of each employee’s job. Thus, the employees were acting within the scope of their duties while at the party.

Here, the court of appeals was presented with different kinds of claims from those presented in *Williams*. Ison-Newsome claims damages from defamation, civil conspiracy, and intentional infliction of emotional distress — all intentional torts. Thus, the court was faced with deciding whether the immunity provision should apply at all in the intentional-tort context. But instead of reaching the more general question of “whether the education code provides absolute immunity for *any* act of a school district professional employee,” it limited its holding to the conclusion that the affidavits before it did not establish as a matter

of law that the defendants were acting within the scope of their duties. ___ S.W.3d at ___. In the absence of guiding precedent in the specific context of professional school employees' duties or immunity, it analyzed the affidavits using well-established agency law on when an employee's intentional tort falls within the scope of employment under the *respondeat superior* doctrine. *Id.* Because the court in each case based its holding specifically on the sufficiency of the summary-judgment evidence, a highly fact-specific inquiry driven by the different nature of the claims in each case, we cannot conclude that the decision in *Williams* is "necessarily conclusive" of the decision in this case. *Coastal Corp.*, 979 S.W.2d at 319. Moreover, we cannot conclude that the outcome in this case would have been different if the court in this case had used the same approach, to the extent possible given the differing facts, as did the court in *Williams*.

We note that the defendants here point to language in *Williams* stating that "immunity applies without regard to the plaintiff's theory of liability," 17 S.W.3d at 701, to support their contention that the fact that intentional torts were alleged here and not in *Williams* is not a material distinction. But the court did not make that statement in its discussion of the scope of the employees' duties. Rather, it made that statement in response to the parents' argument that even if the elements of an immunity defense under Education Code § 22.051(a) had been established, the Education Code does not provide immunity for the employees' breaches of the common-law duty of *in loco parentis* or their duty to follow the facility's rules. *Williams*, 17 S.W.3d at 700-01. When the court noted that the liability theory was irrelevant to immunity claims, it had already held that the employees had established all three of the statutory elements of their immunity defense – the only question at issue in this case. *Id.* at 699-701. Because the court of appeals

here determined that the defendants' affidavits presented "mere legal conclusions" and did not meet the *respondeat superior* test, it did not reach the question whether breach of various duties would defeat a properly established immunity defense. ___ S.W.3d ___.

We now address the dissenting opinion's view that we have jurisdiction over this interlocutory appeal. The dissenting opinion agrees that "because this is an interlocutory appeal . . . this Court's jurisdiction is limited," ___ S.W.3d ___, but then argues for the exact opposite proposition – that the legislative limits on our jurisdiction over interlocutory appeals are meaningless, and that the only limit on our jurisdiction is essentially the failure of four justices to take an interest in a case at any particular time. This argument defies the Legislature's clear and express limits on our jurisdiction.

First, Petitioners' view that we have jurisdiction is not a judicial determination that we do, whether urged in its papers or at oral argument. The view of the four justices who voted to grant the petition is also not a judicial determination that we have jurisdiction. While Canon 3(B)(11) of the Code of Judicial Conduct prevents the Court from revealing the votes and positions taken during the eight months this case has been pending, the dissenting opinion's statement that "the issue [of jurisdiction] had been resolved," and intimation that the Court has deliberately put the parties to greater expense, ___ S.W.3d at ___, are not true. Although the votes of only four justices are needed to grant a petition for review, five votes are needed to render a judgment; thus when conflicts is the sole basis for jurisdiction over an interlocutory appeal, jurisdiction remains an issue until five justices agree that a case meets the conflicts standard. The author of the dissenting opinion has written previously that we should take a broader approach to the conflicts-jurisdiction standard. *See, e.g., Coastal Corp. v. Garza*, 979 S.W.2d 318, 323-24 (Tex. 1998)

(Hecht, J., dissenting); *Wagner & Brown v. Horwood*, ___ S.W.3d ___ (Hecht, J., dissenting from denial of motion for rehearing of petition for review). But a majority of the Court continues to abide by the Legislature’s clear limits on our interlocutory-appeal jurisdiction.

Second, the dissenting opinion’s reading of Government Code § 22.225(c) conflates conflicts jurisdiction with dissent jurisdiction, thereby erasing any distinction between these two separate bases for jurisdiction. The Legislature identified them as distinct bases for jurisdiction in sections 22.001(a)(1) and (a)(2), and section 22.225(c) refers specifically to the two separate provisions of section 22.001(a) providing for conflicts and dissent jurisdiction. *See* TEX. GOV’T CODE §§ 22.001(a)(1)-(2), 22.225(c). The dissenting opinion offers no reason why the Legislature might have created two independent provisions to provide the same basis for jurisdiction; at least one of them would be superfluous. Moreover, both section 22.225(c) and section 22.001(a)(1) refer to a disagreement material to “the decision.” *Id.* §§ 22.001(a)(1), 22.225(c). How that can mean anything other than a disagreement among the justices who decide a single case is not apparent. Again, we cannot simply ignore the legislative limits on our jurisdiction, and not even Petitioners argue that we should do so on this basis.

Finally, we address the dissenting opinion’s view that conflicts jurisdiction may be established by citing to unpublished opinions. First, as Petitioners acknowledge, Texas Rule of Appellate Procedure 47.7 plainly states that unpublished opinions “have no precedential value and must not be cited as authority by counsel or by a court.” TEX. R. APP. P. 47.7. If a case has no precedential value, by definition it cannot “operate to overrule” a later case, *Christy v. Williams*, 298 S.W.2d 565, 569 (Tex. 1957), and thus cannot be the basis for conflicts jurisdiction. While the Court is currently considering amending rule 47.7

to eliminate unpublished opinions, until we do so it would be patently unfair to those litigants who followed rule 47.7 to now tell them that if they had violated the rule, they would have had a better chance of obtaining review. As we have said, we do not amend rules of procedure by opinion. *See, e.g., State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) (Hecht, J.); *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex. 1992) (Hecht, J.).

Moreover, if the standards for publication set out in rule 47.4 are carefully followed, there will likely not be many conflicts among unpublished opinions that meet the conflicts-jurisdiction standard, because unpublished opinions will be reserved for applying established law to highly fact-specific cases. *See* TEX. R. APP. P. 47.4. If an opinion establishes a new rule of law, modifies an existing rule, applies a rule to a novel fact situation likely to recur, involves an issue of continuing public interest, criticizes existing law, or resolves a conflict, then the opinion meets the standards for publication. *Id.* The standards are open to some degree of interpretation, but the guidelines they contain do suggest that rule 47.7's prohibiting citation of unpublished opinions was not designed to defeat or circumvent this Court's jurisdiction. The dissenting opinion's view turns unpublished opinions into precedent, which is directly contrary to the plain language of rule 47.7.

The dissenting opinion's view is also based on the assumption that unpublished opinions from all the courts of appeals are equally available. That is not true. The courts of appeals have different policies, over different time periods, on how unpublished opinions are made available. For example, the Twelfth Court of Appeals sent unpublished opinions to Westlaw and Lexis for the first time on September 1, 2001. The Eighth Court of Appeals has been sending unpublished opinions to computer services for two years;

the Third Court of Appeals has been sending them for six years. Unpublished opinions are not currently available even on the websites for some of the courts of appeals; unpublished opinions from the Second Court of Appeals are available only on request. Our conflicts jurisdiction over interlocutory appeals cannot rest on opinions that are not equally available to everyone.

We conclude that *Enriquez* cannot be considered for purposes of conflicts jurisdiction because it is not a prior decision of another court of appeals. We also conclude that the court of appeals' decision here does not conflict with *Williams*. Therefore, we do not have jurisdiction to decide this case. Accordingly, we withdraw our order granting the petition as improvidently granted and dismiss the petition for want of jurisdiction.

DEBORAH G. HANKINSON
JUSTICE

OPINION DELIVERED: December 13, 2001