

Ben Mesches in Texas Lawbook: Splintered En Banc Fifth Court of Appeals Withdraws 2018 Panel Opinion after Settlement

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PRACTICES Litigation, Appellate

Just two weeks ago, a deeply splintered *en banc* Fifth Court of Appeals made the unusual decision to withdraw a panel opinion in a case that settled after the panel's decision. This case involves interesting questions about the Texas Election Code, judicial power and the public interest in *stare decisis*.

The merits question is this: Does the Texas Election Code permit a trial court to render a default judgment in a suit challenging a candidate's eligibility for office? In December 2018, the panel answered no and issued mandamus relief requiring the judgment to be set aside as void.

The en banc majority, however, construed the governing statutes differently. It concluded the suit was not yet ripe, and vacated and withdrew a December 2018 panel opinion authored by Justice David Bridges (and joined by justices Ada Brown and Jason Boatright, who are no longer on the court). Of note, the parties settled their dispute after the panel decision but before the *en banc* court's ruling.

The 7-5 decision resulted in five writings:

- a memorandum majority opinion penned by Chief Justice Robert Burns on the withdrawal of the panel opinion;
- a concurring opinion authored by Justice Ken Molberg (joined by the chief justice and justices Leslie Osborne, Robbie Partida-Kipness, Amanda Reichel, Erin Nowell and Cory Carlyle) focused on the Texas Election Code;
- a concurring and dissenting opinion issued by Justice Bridges (joined by justices Lana Myers, David Evans, Bill Whitehill and David Schenck) also on the statutory questions;
- a dissenting opinion written by Justice Whitehill (joined by Justice Bridges) regarding withdrawal of the panel opinion;
- and a dissenting opinion registered by Justice Schenck (joined by justices Bridges and Evans) on both issues.

Excerpted from [The Texas Lawbook](#). (Subscription required)

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