

IN THE SUPREME COURT OF TEXAS

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No. 10-0960
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IN RE XL SPECIALTY INSURANCE COMPANY AND CAMBRIDGE INTEGRATED
SERVICES GROUP, INC., RELATORS

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ON PETITION FOR WRIT OF MANDAMUS
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JUSTICE WILLETT, dissenting.

Just seven days ago, this Court held that a common-law “bad faith” claim (and certain statutory claims) are inconsistent with the Legislature’s hermetic workers’ compensation regime.¹ Today the Court answers a vexing question of attorney-client privilege—a question I concede is important (after all, we granted the petition)—but the question, albeit weighty, arises possibly from a claim that no longer exists.

I say “arises possibly” because it’s impossible to tell really, as the *mandamus* record before the Court is not the *full* record. So we really have no idea if Jerome Wagner has any viable claim(s) remaining post-*Ruttiger*—for example, an Insurance Code claim for misrepresenting the comp policy.²

¹ *Tex. Mut. Ins. Co. v. Ruttiger*, __ S.W.3d __ (Tex. 2012).

² See TEX. INS. CODE § 541.061.

Today's decision is undeniably instructive and finely reasoned. But I respectfully take issue with issuing something on a non-issue. Rather than venture what may be a purely advisory opinion springing from a now-defunct lawsuit, I would instead simply have the parties advise the Court on whether Wagner has any actionable claims remaining.

Since 1793, when Chief Justice Jay declined President Washington's request for advice on twenty-nine questions regarding America's duties under various treaties, the bar on advisory opinions has become firmly embedded in American law.³ Two hundred and nineteen years later, and lacking ample assurance that any live controversy exists here, I respectfully dissent.

Don R. Willett
Justice

OPINION DELIVERED: June 29, 2012

³ See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50–52 (6th ed. 2009); see also *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) (“Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.”).