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Government Law Section

of the State Bar of Texas



January 24, 2017

It is always the latest song that an audience applauds the most.
- Homer, The Odyssey

Chair's Message

Happy New Year! What's in store for 2017?

If you liked the El Paso Government Law Section Road Show in December 2016, there's more to come in 2017. We are working on another road show for McAllen in February, and Tyler and Amarillo later in the year. We've learned from El Paso that the local bar associations and TYLA are great partners in providing useful and entertaining CLE for our members at no cost to you. We're excited about the success of the El Paso event and about bringing CLE to other parts of the state over time.

If you liked last year's great Advanced Government Law Seminar and Government Law Boot Camp in July 2016, there's another one scheduled for July 26-28 and, based on feedback from last year's attendees, we're moving it to the DoubleTree Hotel in Austin. Our planning committee met on January 19 and I think we have put together an entertaining program that will emphasize the enhancement of practical skills for government law practitioners. There will also be opportunities at the seminar to meet and socialize with other section members, and we will be giving our awards for the year's outstanding government lawyer and for the year's rising advocate in government law.

If you liked our e-blasts in 2016, they're getting even better this year. In addition to Ryan Henry's excellent case summaries, our Council will be contributing government law articles that will be interesting and helpful. The first article for 2017 is from yours truly, and it's a step-by-step approach to conducting legislative history research. For many good reasons (not the least of which is the upcoming session of the Legislature), it is often really important to be able to find that video of a senator explaining the value of raising the sorghum tax, or a representative explaining the reason why he voted against it. I hope you find it practical and informative.

Finally, look for more from the website in the coming months. We're taking this Section to the next level, and I think the website is

going to grow with us.

Good luck in the coming New Year, and we look forward to seeing you at one of the Government Law Section events soon.

Scott Durfee, Chair (Houston)
Government Law Section
State Bar of Texas

Upcoming CLE

Breath and Blood Evidence in Impaired Driving Prosecutions, January 27 (Houston)	Worst Case Scenario: Impaired Driving Crashes from Crash to Courtroom, February 1 (Gatesville) & February 10 (Buchanan Dam)	Effective Courtroom Testimony, February 8 (Conroe)
Law Enforcement Basics for the City Attorney, February 10 (Austin)	2017 Newly Elected Boot Camp "Part 2", February 23-24 (Austin)	Advanced Employment Law (video), February 23-24 (Houston)
School Law Conference (live & webcast), February 23-24 (Austin)	Water Rights 101, February 22 (San Antonio)	Changing Face of Water Rights, February 23-24 (San Antonio)

Caselaw Updates

Note: *If you have a case that you believe is important and should be addressed in our regular caselaw updates, please email the details to Ryan Henry.*

Appraisals/Tax Code: City loses its suit to hold Tax Code provisions unconstitutional, *City of Austin v. Travis Central Appraisal District, et al., 03-16-00038-CV (Tex. App.—Austin, November 10, 2016)*

City sued Appraisal District, essentially asserting that since the District settled appraisal disputes so low, it changed the taxable value, improperly impacting City's revenues. The City challenged certain Tax Code provisions which "have incentivized taxpayer protests and led to widespread diminution of appraised property values to a 'median value' that is below market value." The Court held the Tax Code's comprehensive legislative scheme generally excludes taxing units, like the City, from the appraisal process and for good reason. The Court ultimately determined the City failed to establish an injury sufficient to confer standing. Further, the Tax Code is a pervasive regulatory scheme, vesting appraisal review boards with exclusive jurisdiction to decide protests. The Court held that by affirmatively requesting the review board deny its challenge petition (so it could move forward to an appeal), the City failed to "appear," as required under the law. Expanded summary here.

City Charter Amendment Petition: Petitioner did not conclusively establish charter amendment petition was valid; but city did not prove it was not valid so case remanded, *City of Galena Park, Et Al. v. Barry Ponder, 14-15-00708-CV (Tex. App.— Houston [14th Dist.] October 25, 2016)*

Ponder delivered a set of papers to Galena Park City Secretary Mayra Gonzales that purported to be a petition in support of city charter amendments proposed by a local group. The number of valid signatures exceeded the charter requirements. However, the City Attorney asserted the petition did not constitute a proper petition primarily due to form requirements. Trial court granted Ponder's summary judgment motion, but the Court of Appeals held neither party carried their burden to establish entitlement to a ruling. Expanded summary here.

Condemnation: City not responsible for prosecuting condemnation suit unless and until served with citation by objecting property owner says 6th Court of Appeals, *James B. Bonham Corp. v. City of Corsicana, 06-16-00026-CV (Tex. App.—Texarkana, November 29, 2016)*

After the property owner appealed the eminent domain commissioner's award, the case sat with no activity for seven years. After the trial court dismissed the case for want of prosecution, the property owner appealed asserting the condemning entity has the burden to prosecute the case under the Texas Civil Practices and Remedies Code. The Court of Appeals held that the condemning entity's duty to prosecute is not triggered until and unless the entity is properly served. Service on the City is only proper if served on the mayor, clerk, secretary, or treasurer. Since that service did not happen, no duty to prosecute was triggered. Expanded summary here.

Constitutionality (City Late Fees and Deposit): City's summary judgment reversed and remanded under failure to address Patel due-course-of-law analysis; dismissal of all other constitutional challenges to utility late fee ordinance affirmed, *Gatesco Q.M. Ltd d/b/a Quail Meadows Apartments, a Texas Limited Partnership v. City of Houston, 14-14-01017-CV (Tex. App— Houston [14th Dist.], October 20, 2016)*

The 14th Court of Appeals affirmed-in-part and reversed-in-part the granting of the City's summary judgment motion in this constitutional challenge to the City utility charging late fees and shutting off a customer's water service. The apartment complex disagreed with the water late fees. The procedural history shows that the complex was unsuccessful with an injunction so decided to pay the fees. Within two hours Gatesco paid the Late Fee. The City shut off the water to the entire complex 17 minutes after Gatesco paid the fee, but turned the water on later that afternoon. But, because the water had been turned off, the City required a cash security deposit of $35,200.00, an estimate of three months of water bills to turn it back on. Court of Appeals affirmed the dismissal of all of the complex's claims, but one. Specifically, the court held the trial court did not analyze the City's actions under a Patel v. Texas Dep't of Licensing and Regulation. See 469 S.W.3d 69 (Tex. 2015) ("oppressive" analysis for a substantive due process claim). Expanded summary here.

Employment: City initiated termination procedure by suspending employee, so no causal link for report made after suspension but before termination letter, *David Jones v. City of Port Arthur, Texas, 09-14-00442-CV (Tex. App—Beaumont, November 21, 2016)*

Garbage truck operator sued the City for Whistleblower Act claims asserting he was fired when he refused to drive his truck after the City performed only a minor repair on a leaking hose. He was suspended indefinitely and told to go home until a formal hearing. During the suspension, he reported the event to OSHA and TCEQ. He was later terminated. Driver had two associates degrees. He served in the United States Marine Corps and was assigned to a supply unit. He does not have training as a mechanic. Court held that Plaintiff failed to present evidence it was reasonable, in light of his training and experience and the circumstances presented, for him to believe the conduct he reported was a violation of the law. Both reports to outside agencies were made after he was sent home indefinitely. The start of the adverse action was the indefinite suspension, not the final date on the termination letter, so no causal connection existed for the reporting. Expanded summary here.

Employment: Texas Supreme Court holds subjective intent in performing job has no bearing on entitlement to §101.106(f) defense, *Laverie v. Wetherbe, 15-0217 (Tex., December 9, 2016)*

One university professor sued a colleague, who was on a search committee for a specific associate dean position, for defamation when the colleague allegedly stated the Plaintiff had been seen using some kind of listening device to ease drop on conversations. The Colleague, Laverie, filed a §101.106(f) motion to dismiss asserting the actions were in the course and scope of employment. The court of appeal held Laverie did not conclusively establish that she operated only in the scope of her employment and did not

intend to have other motives. The Texas Supreme Court disagreed, holding nothing in the election-of-remedies provision or the statutory definition of "scope of employment" suggests subjective intent is a necessary component of the scope-of-employment analysis. Whether Laverie had personal motives, ultimately does not change her job responsibilities and whether the statement was in performance of them. The Court dismissed Laverie. Expanded summary here.

Employment/Texas Whistleblower Act: Austin Court of Appeals holds supervisor without law-enforcement powers can still qualify as appropriate law enforcement authority for Whistleblower Act purposes, *Rebekha Montie v. Bastrop County, 03-16-00123 (Tex. App.—Austin, October 19, 2016)*

Animal shelter worker asserts she was fired after she asserted her supervisor failed to timely euthanize animals that were injured or ill and failed to provide adequate water and food in violation of Tex. Penal Code §42.092 (prohibiting cruelty to non-livestock animals). The County filed a plea to the jurisdiction which was granted. The Court of Appeals held a report to an employee who does not have law-enforcement powers but works for an entity with outward-looking enforcement powers can qualify for protection. Since this was at a plea stage, the Plaintiff properly alleged a violation of the Texas Whistleblower Act. Expanded summary here.

Excessive Force/Qualified Immunity: U.S. 5th Circuit holds it was constitutionally permissible for officer to use non-deadly punches to gain control of actively resisting suspect, *Griggs v. Brewer, No. 16-10221 (5th Cir., October 28, 2016)*

Officer Brewer attempted to arrest Griggs for DWI but Griggs resisted and struggled against being put into the patrol car. After a struggle lasted for some time and Griggs had kicked Brewer in the chest, Brewer punched Griggs in the head to subdue him. Griggs later sued for excessive force. In analyzing Brewer's qualified immunity, the U.S. 5th Circuit held it was unreasonable for an officer to use non-deadly punches to gain control of the arms of a drunken, actively resisting suspect. Expanded summary here.

Injunction/Contract: Trial court improperly issued injunction requiring customer to continue paying for City water under contract at higher rate, *G-M Water Supply Corporation v. City of Hemphill, Texas, 12-16-00129-CV(Tex. App.— Tyler, November 22, 2016)*

City and water supply company had a disagreement on proper calculation of price per gallon under a contract. City sought and received an injunction requiring the company to pay the City a higher rate. However, trial court's order altered the status quo. The last, actual, peaceable, non-contested status between the parties that preceded the controversy was the lower rate calculation. Trial court improperly issued injunction. Expanded summary here.

Injunction/Comprehensive Plan: Trial court properly denied injunctive request to prohibit City from relocating administrative offices, *Leslie E. Barras and Historic Orange Preservation Empowerment, Inc. v. City of Orange, Texas, et al., 09-16-00073-CV (Tex. App—Beaumont, November 17, 2016)*

In 1996, in the City's Comprehensive Master Plan, the City determined its administrative offices should be centralized in the Old Town Center of the City. In 2016, the City changed its mind and began moving offices outside of Old Town via Council resolution directive. Historic Orange Preservation Empowerment, Inc., ("HOPE") sued for injunctive relief to prevent the move. Court of Appeals held (1) Master Plan is a guideline only, not a mandatory set of rules; and (2) City Charter requiring compliance with Master Plan applied only to ordinances, not resolutions. Expanded summary here.

Mandamus: **Trial court in error for denying defendant's designation of responsible third party even after Statute of Limitations deadline says San Antonio Court of Appeals,** *In re Cleo Bustamante, Jr., 04-16-00333-CV (Tex. App.— San Antonio, November 23, 2016)*

This is a mandamus case of interest to litigators who primarily deal with proper designations for responsible third parties. The Fourth Court of Appeals, sitting en banc, determined it was error to deny the Defendant the ability to designate a responsible third party beyond the statute of limitations. Expanded summary here.

Official Immunity: **Plaintiff's expert created fact issue as to officer's recklessness preventing the granting of City's plea to the jurisdiction,** *Bay City, Texas v. Wade McFarland, 13-15-00122-CV (Tex. App.—Corpus Christi, October 13, 2016)*

While responding to a dispatch, Officer proceeded through the intersection without stopping at a stop sign and struck a motorcyclist. Officer asserted an emergency responder defense. Plaintiff's expert testified the dash cam contradicted Kunz's affidavit testimony regarding her slowing before entering the intersection. The expert concluded that the Officer's operation of her vehicle was reckless and that no reasonably prudent officer could believe that her conduct was necessary. The Court of Appeals held that while the evidence is undisputed the Officer was responding to an emergency call and had her lights and siren on, the evidence before the trial court contained a material fact issue as to whether she slowed before entering the intersection. Additionally, the issue regarding whether Officer Kunz slowed down is material to the third "need-factor" under official immunity defense. As a result, the plea to the jurisdiction was properly denied. Expanded summary here.

Plea to the Jurisdiction: **Plaintiff failed to request opportunity to amend pleadings before ruling on plea to the jurisdiction so waived argument says 2nd Court of Appeals,** *Arthur Delgado, Jr. v. River Oaks Police Department and City of River Oaks, 02-15-00205-CV (Tex. App.—Fort Worth, November 23, 2016)*

Delgado sued the City and the Police Department for claims arising from an allegedly involuntary blood draw. The City filed a plea to the jurisdiction, which the trial court granted. On appeal, Delgado asserted he should have been given the chance to replead. The Fort Worth Court of Appeals held that he did not request an opportunity to replead, so he cannot ask for it on appeal. Further, "[h]e does not contend that, nor does he articulate how, any amendment would have cured the jurisdictional defects…" As a result, the plea was properly granted. Expanded summary here.

Tort Claims Act (Tangible Property v. Premise Defect Claims): **Falling item in room was a premise defect case, not a tangible personal property case under TTCA says Dallas Court of Appeals,** *Laura Constantino v. Dallas County Hospital District d/b/a Parkland Health & Hospital System a/k/a Parkland Memorial Hospital, 05-15-01273-CV (Tex. App.— Dallas, October 24, 2016)*

Plaintiff sued hospital after wall-mounted TV fell and injured her. First interlocutory appeal held that this was a premise defect, not a negligent use of personal property case. A defect must be one or the other, but cannot be both. Upon remand, the court held that the "lack of an integral safety component" argument applies to tangible property claims, not premise defect claims. And since she was unable to establish actual knowledge of the dangerous condition, the plea was properly granted. Expanded summary here.

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