MCALLEN– ROADSHOW 2017 CASE LAW UPDATE

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LOTS OF FUN FUN CASES LAST YEAR

- Over 160 cases of potential interest to government lawyers
- Presentation focuses on just the highpoints

FEDERAL

U.S. SUPREME COURT HOLDS SIGN CODE ORDINANCE UNCONSTITUTIONAL

- ***Reed v. Town of Gilbert*** **135 S. Ct. 2218 (2015)**

- Sign regulation case
- Ordinance prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including "Ideological Signs", "Political Signs", and "Temporary Directional Signs".
- Church held service in different locations, but would put up signs noting the church, time of service, and location.
- Sign ordinance elevated political signs higher than religious signs – content based.
- See Tex. Loc. Gov't Code Ann. § 216.903 (West 2003) – prohibiting regulations of political signs by cities
- *Auspro enterprises, LP v. Texas Department of Transportation*,03-14-00375-CV (Tex. App— Austin , August 26,2016) (Texas Highway Beautification Act held unconstitutional)

U.S. SUPREME COURT HOLDS, IN MATTER OF FIRST IMPRESSION, POLICE OFFICER IS PROTECTED BY 1ST AMENDMENT EVEN THOUGH HE DID NOT ENGAGE IN PROTECTED ACTIVITY

- *Heffernan v. City of Paterson* 136 S. Ct. 1412 (2016)
- Heffernan was seen delivering Spagnolia campaign yard flyers (which he asserted he delivered to his mother)
- Next day he was fired
- Trial and COA held since he was not actually engaged in protected activity, no 1st Amendment protection applied
- U.S. Supreme Court held government's reason for demoting Heffernan is what counts.
- When an employer demotes an employee out of a desire to prevent him from engaging in political activity, the employee is entitled to 1st Amendment protection

U.S. SUPREME COURT HOLDS OFFICER ENTITLED TO QUALIFIED IMMUNITY FOR SHOOTING SUSPECT AFTER ARRIVING LATE TO AN ALTERCATION WITH OTHER OFFICERS

RAY WHITE, ET AL. V. DANIEL T. PAULY, NO.16-67 (U.S. JANUARY 9, 2017)

- Officer White was investigating a road rage incident with two other officers
- White arrived at Paulys' house to see other officers under cover, with guns drawn, facing house.
- White heard "[w]e have guns" and saw someone point a weapon in his direction. He shot and killed Samuel Pauly
- Family sued asserting brothers in house thought robbers were trying to breach the house and officers did not identify themselves
- Whether identification occurred or not is not material as to White
- Clearly established law does not prohibit a reasonable officer who arrives late to an ongoing police action from assuming proper procedures, such as officer identification, occurred.
- Officer not required to second-guess the earlier steps already taken by his or her fellow officers

NOT UNCONSTITUTIONAL FOR OFFICE TO USE NON-DEADLY PUNCHES TO GAIN CONTROL OF THE ARMS OF A DRUNKEN, ACTIVELY RESISTING SUSPECT.

GRIGGS V. BREWER, NO. 16-10221 (5TH CIR. OCT. 28, 2016)

- Brewer attempted to arrest Griggs for DWI
- Griggs kicked and struggled when officers attempted to put him in the patrol car.
- So, Brewer punched him in the face
- Griggs sued for excessive force
- Issue was not whether Griggs was or was not resisting – question is whether Brewer reasonably believed he was resisting.
- "may not have been as restrained as we would like to expect from model police conduct, but qualified immunity 'protect[s] officers from the sometimes hazy border between excessive and acceptable force.'"

CITY NOT REQUIRED TO ADOPT FORMAL CRITERIA FOR NON-CONSENT TOW LIST AND MAY CONSIDER INTANGIBLE/SUBJECTIVE FACTORS

- *Integrity Collision Center v. City of Fulshear,* No. 15-20560 (5th Cir. September 20, 2016)
- Police Chief created a non-consent tow list of private companies
- Two companies not on the list sued
- 5th Circuit compared such contracts to employment matters where "class-of-one" suits are not allowed
- Further, equally important factors that are not reasonably measurable, such as reputation, personal experience, and the particularities of how the City wishes to operate its non-consent tow program.
- Cities are not constitutionally required to develop a formal process with constitutionally measurable criteria for determining from whom they will purchase towing services.

U.S. 5TH CIRCUIT HOLDS THE "LOSS OF CHANCE" DOCTRINE IS NOT APPLICABLE IN A §1983 WRONGFUL DEATH ACTION

- *Slade v. City of Marshall* **814 F.3d 263 (5th Cir. 2016)**
- Police were called and found Slade in a physical altercation
- Took several tasers and multiple officers to handcuff him
- Upon arriving at jail, officers realized he was nonresponsive – later died
- Death later determined to be PCP overdose
- Slade's family asserted "loss of chance" doctrine = not necessary to prove that a plaintiff would have survived if proper treatment had been given, but only that there would have been a chance of survival.
- Court said no - the traditional causation requirement is a reasonable way to identify when liability is appropriate.

BORDER PATROL AGENT ENTITLED TO QUALIFIED IMMUNITY AFTER SHOOTING FLEEING SUSPECT

- ***Mendez v. Poitevent*** **823 F.3d 326 (5th Cir. 2016)**
- Border Patrol Agent Poitevant fought a fleeing suspect who was trying to jump a fence and return to Mexico
- Poitevent was hit in head and dazed. Mendez moved away and witnesses stated he again tried to move to fence
- Poitevent shot and killed him
- True question was "…whether an officer violates the Fourth Amendment by shooting a suspect who just fought the officer at length; disarmed him of his baton; prevented him from using his radio to call for backup; potentially attempted to obtain his gun; concussed and disoriented him; and broke free of his grasp; at the precise moment the officer's vision is impaired and he fears losing consciousness—and the evidence indicates that it was not apparent to Poitevent that Mendez was running away."
- Officer entitled to qualified immunity

CITIZEN THROWN OUT OF CITY COUNCIL MEETING ALLOWED TO GO FORWARD WITH SOME, BUT NOT ALL CLAIMS AGAINST PRESIDING COUNCIL MEMBER AND POLICE OFFICER

HEANEY V. ROBERTS, NO. 15-31088 (5TH CIR. JANUARY 23, 2017)

- During citizens to be heard, Heaney had used 3 of his 5 minutes when interrupted by presiding officer.
- After City Attorney provided input, Heaney requested his remaining 2 minutes. Presiding officer refused.
- Had provided recouped time to other citizens who were interrupted.
- Fact question exists as to whether presiding officer's actions were motivated by viewpoint discrimination
- Granted MSJ for officer who was ordered to remove Heaney as he was simply following orders

STATE

TEXAS SUPREME COURT HOLDS ATTORNEY/CLIENT PRIVILEGE, BY ITSELF, IS A COMPELLING REASON NOT TO RELEASE UNDER THE PIA EVEN IF AN ENTITY BLOWS A DEADLINE

P*AXTON, V. CITY OF DALLAS* NO. 15-0073 (TEX. FEBRUARY 3,2017)

- City failed to request AG opinion regarding attorney/client privileged information within PIA
- AG asserted the privileged documents were public due to PIA non-complaint and no additional compelling reason exists for keeping records from release.
- Texas Supreme Court disagreed.
- The Court held certain exceptions (not all but some) can be compelling reasons *in their own right*.
- Failing to follow PIA deadlines does not waive privilege and the privilege compels the documents remain non-disclosed. AG's interpretation violates plain language of statute.

QUOTE FROM JUSTICE GUZMAN

- "Robotic perfection by a governmental body's public information officer is a statutory ideal, not an absolute requirement. To err is human, but to conduct a City's legal affairs without the occasional error would require divinity".

TEXAS SUPREME COURT CHANGES THE STANDARDS FOR TERMINATING POLICE OFFICERS UNDER CHAPTER 614

COLORADO COUNTY, ET AL., V MARC STAFF, NO. 15-0912 (TEX., FEBRUARY 3, 2017)

- Deputy Sheriff Marc Staff was terminated – given deficiency notice and opportunity to appeal
- Assistant County Attorney forwarded video of traffic stop where Staff's actions were criticized
- Staff did not address underlying complaints, but complained of procedural issues under Chapter 614.
- Supreme Court held the person making the complaint does not need to be the "victim" of the alleged conduct.
- Nothing in Ch. 614 requires the complaint to be served before discipline is imposed or precludes disciplinary action while an investigation is ongoing.
- County could terminate at will when no complaint is filed without following Ch. 614

SINCE TROOPER WAS ENTITLED TO OFFICIAL IMMUNITY IN CAR ACCIDENT CASE, SO IS DPS

TEXAS DEPARTMENT OF PUBLIC SAFETY V. ANISTY MIRASOL, 03-15-00300-CV (TEX. APP— AUSTIN, SEPTEMBER 29,2016)

- Trooper pulled pickup truck over for speeding
- Turned into parking lot and hit by oncoming vehicle
- Trooper unsure if the driver was going to pull over or "flee or bail" – explained why he did what he did
- Troop stated when assessing the risks, described the clear weather, dry pavement, light traffic, lack of pedestrian traffic, daylight conditions, unobstructed view, low-speed pursuit, his belief that it was clear for him to make the turn, and his subsequent realization that Mirasol was traveling "too fast."
- Entitled to official immunity for car accident

CITY PLASTIC BAG BAN ORDINANCE HELD PREEMPTED BY SOLID WASTE DISPOSAL ACT

- *Laredo Merchants Association v. City of Laredo, Texas,* 04-15-00610-CV (Tex. App—San Antonio, August 17, 2016)

- City ordinance made it unlawful for stores to provide checkout bags.
- §361.0961 of the Solid Waste Disposal Act
- Under the rules of statutory construction, a plastic bag is a "container" for purposes of the Act.
- Act preempts a checkout bag ordinance

TRIAL COURT ORDERED TO RULE ON PLEA TO THE JURISDICTION WITHIN ONE DAY OF ORDER BY COURT OF APPEALS SINCE IT FAILED TO RULE FOR TEN MONTHS

IN RE: TEXAS HEALTH RESOURCES, 05-16-01135-CV (TEX. APP. – DALLAS, OCT 12, 2016)

- THR sued and filed PTJ
- Court rescheduled ruling and waited 10 months
- Court set a new hearing one day before bench trial to rule on THR's motion to rule
- THR filed mandamus
- 5th COA held "A ruling the day before trial is insufficient and unreasonable because a plea to the jurisdiction should be heard and determined well before the trial date…"
- COA ordered trial court to rule within 24 hours of its order

CITY CHARTER AMENDMENT BALLOT LANGUAGE INSUFFICIENT TO GIVE VOTERS ENOUGH INFORMATION, SO COULD BE INVALID SAYS TEXAS SUPREME COURT

- *Allen Mark Dacus, et al v Annise D. Parker and City of Houston*. 466 S.W.3d 820 (Tex. June 12, 2015)
- "Pay-as-you-go" ordinance imposed charges on properties directly benefitting from the drainage system.
- Language on the ballot merely stated the amendment was relating to the creation of the dedicated funding source for enhancement, improvement, and renewal of drainage system.
- Court held the ballot language must capture the essence of the measure and substantially submit the question with enough certainty voters are not misled.
- The ballot measure in this case lacked the character descriptions noting charges to be imposed by specific landowners

TEXAS SUPREME COURT CHANGES TAKINGS ANALYSIS, THEN TAKES IT BACK

- *Harris County Flood Control District and Harris County, Texas v Edward A. And Norma Kerr, Et Al.,*13-0303, (Tex. June, 12, 2015)
- *Harris County Flood Control Dist. v. Kerr., -- S.W.3d --* 13-0303, 2016 WL 3418246 (Tex. June 17, 2016)
- *CITY OF SOCORRO, Texas v. SAMUEL CAMPOS, et al*, 08-14-00295-CV (Tex. App— El Paso, September 14, 2016)(Homeowners properly pled a taking by flooding due to channel reconstruction and temporary embankments says El Paso Court of Appeals)
- *City of Magnolia, et al. v. David Smedley*, 09-15-00334-CV (Tex. App—Beaumont. July 28, 2016)(City not substantially certain it was causing flooding from parking lot of Chicken Express)

TEXAS SUPREME COURT ENDS SPLIT IN CIRCUITS AND HOLDS PROPRIETARY-GOVERNMENTAL DICHOTOMY EXISTS IN BREACH OF CONTRACT CASES

- *WASSON INTERESTS, LTD. v. CITY OF JACKSONVILLE,* 14-0645, 2016 WL 1267697 (Tex. April 1, 2016)
- Wasson assumed an existing 99-year lease of lakefront property owned by the City
- Later began doing day rentals. City asserted he breached the lease. After eviction sometime later Wasson sued
- City held it was immune. Wasson argued contract was proprietary
- Split in circuits exists as to whether proprietary/governmental dichotomy exists in contracts
- Supreme Court held it does exist
- Case remanded to determine if contract was proprietary or not

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)

- Apartment complex disagreed with City's assessment of water charges.
- Court proceedings, including injunction ensued. In end, Gatesco paid under protest, to get water turned on, but paid two hours late.
- City charged $35,000 in late fees.
- 14th COA held trial court did not address "oppressive" analysis under *Patel* so MSJ improper.

TEXAS SUPREME COURT HOLDS GENERAL LAW CITY CANNOT EXTEND BUILDING CODES INTO ETJ

- *Town of Lakewood Village v Bizios*, 2016 WL 3157476 (Tex. May 27, 2016)
- Harry Bizios purchased a lot in the subdivision which is located entirely within the Town's ETJ
- The Town's ordinances adopt building codes and make them enforceable within its ETJ
- The Town filed this suit after Bizios ignored its orders to stop construction and failed to get permits
- The Court held, without statutory authority, a general law municipality cannot extend its building codes into the ETJ
- The Court held "building codes" do not relate to plats and subdivisions so cannot be part of that extension

BEING SUBJECTED TO AN INVESTIGATION WHICH DID NOT LEAD TO DISCIPLINARY ACTION IS NOT AN ADVERSE EMPLOYMENT ACTION SAYS 5TH COURT OF APPEALS

- *City of Dallas v. Ronald Giles,* 05-15-00370-CV, 2016 WL 25744 (Tex. App. – Dallas, January 4, 2016)
- Giles is a police officer for the City of Dallas who filed separate discrimination lawsuit in federal court
- PD Internal Affairs Department received a complaint against Giles from a citizen and started an investigation = ultimately complaint was not sustained
- Giles later reassigned along with most of dispatch center – Giles sued
- Court held being subject to investigation which clears you is not discrimination
- Further, nearly every manager in the Communications Division was reassigned, which demonstrates it was not retaliatory.

ATTORNEY'S NOTICE OF CLAIM LETTER INSUFFICIENT TO GIVE CITY STATUTORY NOTICE OF CAR ACCIDENT CLAIM SAYS BEAUMONT COURT OF APPEALS

- *City of Beaumont, Texas v Chiquita Armstead,* 09-15-00480-CV, 2016 WL 1053953 (Tex. App. – Beaumont, March 17, 2016).
- Armstead alleged that she was a passenger in a motor vehicle which collided with a City vehicle.
- The collision report stated little damage and only an ambiguous reference to a uniform injury to all drivers and passengers.
- Armstead's attorney sent letters advising he represented Armstead regarding a car accident which occurred on a specific date and that she was injured in some fashion. No further information was provided
- Court held, while there is a reference to an accident date, the letter fails to provide any time or description of the incident or the place of the incident or the injury or the fault.

IMMUNITY IS NOT WAIVED FOR UDJA CASE AGAINST CITY EVEN IF RELATED TO CONTRACT FOR SERVICES SAYS 4TH COURT OF APPEALS

- *City of Pearsall v. Robert Tobias,* 04-15-00302-CV, 2016 WL 1588400 (Tex. App. – San Antonio, April 20, 2016)
- Tobias was fired as City Manager after six months
- Contract had six month severance package – Tobias sued for breach of contract but as a UDJA case
- Plaintiffs cannot circumvent immunity by characterizing a suit for money damages, such as a contract dispute, as a declaratory judgment claim
- Tobias asserts the UDJA is a claim for declaration of rights of a contract under TLGC §271.152 (waiver of immunity in contracts for goods or services)
- Court held determining rights of the parties in a contract do not fall under Chapter 271

AUSTIN COURT OF APPEALS GRANTS TABC PLEA TO THE JURISDICTION IN PIA LAWSUIT

MCLANE COMPANY, INC. V. TEXAS ALCOHOLIC BEVERAGE COMMISSION, ET AL., NO.03-16-00415-CV (TEX. APP. – AUSTIN, FEBRUARY 1, 2017).

- McLane Company filed PIA and Texas Alcoholic Beverage Commission sought AG opinion.
- TABC sued after AG opined records must be released. McLane intervened
- McLane's declaratory judgment relief requested orders beyond whether records were subject to exceptions from disclosure
- Requested order on method to search for records, scope of searches, etc.
- Court held TABC and Commissioner were immune from all relief beyond PIAs scope of whether records are public or subject to exceptions.
- Granted plea as to everything except PIA matter.

"WET FLOOR" WARNING SIGN SUFFICIENT AS A MATTER OF LAW TO WARN OF DRIED BUT SLIPPERY WAX ON FLOOR UNDER TTCA SAYS BEAUMONT COURT OF APPEALS

MONTGOMERY COUNTY V. DAVID LANOUE, 09-16-00195-CV (TEX. APP— BEAUMONT, DECEMBER 29,2016)

- Courthouse floor recently mopped and waxed. Warning sign stated "wet floor"
- Photos of Plaintiff in mid-fall right next to sign
- Lanoue argued floor did not look wet so was not a proper warning. Should have said wax or slippery
- Court held under TTCA warning of the specific material causing a condition is not required, so long as the existence of the condition itself is conveyed.
- The warning need not identify the specific substance that made the floor wet.

THE END

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