EL PASO – ROADSHOW 2016 CASE LAW UPDATE

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LOTS OF FUN FUN CASES LAST YEAR

- Over 170 cases of potential interest to government lawyers
- Presentation focuses on just the highpoints

CITY ORDINANCE REQUIRING HOTELS TO PROVIDE CERTAIN DATA TO LAW ENFORCEMENT EQUATES TO UNCONSTITUTIONAL SEARCH AND IS FACIALLY INVALID SAYS U.S. SUPREME COURT

- ***Los Angeles v. Patel*** **135 S. Ct. 2443 (2015)**
- The City of Los Angeles requires hotel operators to record and keep specific information about their guests on the premises for a 90-day period
- Have to give to Law Enforcement whenever asked
- Facial challenge - does not require a plaintiff to establish the law unconstitutional in all situations, only that it is unconstitutional in the situations it actually authorizes or prohibits conduct.
- Ordinance constituted an unconstitutional search

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)

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.'"

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.

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

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

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 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.

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)
- Wassons 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

TEXAS SUPREME COURT HELD THE TEXAS REGULATION FOR LICENSING OF EYEBROW THREADERS IS NOT RATIONALLY RELATED TO HEALTH AND SAFETY.

- *ASHISH PATEL, et al v. TEXAS DEPARTMENT OF LICENSING AND REGULATION, et al,* 469 S.W.3d 69 (Tex. 2015)
- Eyebrow threading involves the removal of eyebrow hair and shaping of eyebrows with cotton thread
- Tex. Occ. Code §1602.002 regulates as a cosmetology practice
- 42% of regulations place senseless burdens on eyebrow threaders and threading businesses without any actual benefit to public health and safety
- Federal "rational basis" test is inapplicable because Texas Constitution Article I, §19 provides more protection
- Regulations can not be so burdensome as to be oppressive in light of the governmental interest
- Regulations deemed "oppressive" in this instance

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

TEXAS SUPREME COURT HOLDS ONCE CITY SECRETARY CERTIFIED REFERENDUM PETITION, CITY COUNCIL HAD MINISTERIAL DUTY TO REPEAL OR SUBMIT ON ELECTION BALLOT REGARDLESS OF FORGERY ALLEGATIONS

- *In Re Jared Woodfill et al*, 470 S.W.3d 473 (Tex. 2015)
- Referendum petition signed to repeal Houston's equal rights ordinances
- City Secretary reviewed the petition, certified the results
- The City Secretary determined the signatures complied, but the City Attorney determined the signatures did not comply.
- Court held City Attorney's actions not authorized
- Once City Secretary certified the petition, council had ministerial duty to place on ballot

AN INSPECTION ALONE IS NOT SUFFICIENT EVIDENCE OF ACTUAL KNOWLEDGE OF SWING SET DEFECT SAYS AUSTIN COURT OF APPEALS

- *City of Bastrop v. Chyanne M. Bryant*, 03-14-00591-CV, 2015 WL 5097250 (Tex. App. – Austin, Aug 27, 2015)
- 19 year old was injured on a swing when the chain broke throwing her to the ground
- Bryant argued the swing set was inspected the day of the accident so City should have known it was dangerous
- Bryant's pleadings mainly focus on the constructive knowledge of the City, not the actual knowledge required to waive immunity
- Court seemed to believe it important that the City showed a consistent record of inspections, documentation of observable problems and repairs.
- No evidence existed the swing on the day in question was observably defective.

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

THE END

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