Government Law Section

of the State Bar of Texas



February 28, 2018

This month's article has been submitted by Victor Flores and examines the Texas Supreme Court Case of *Paxton v City of Dallas* where the Court determined the attorney/client privilege constitutes a compelling reason against release under the Texas Public Information Act. Victor is the Deputy City Attorney for the City of Denton. If you are interested in reading this article, please click here.

The TMCEC Prosecutor Conference is happening on March 21-23 in Houston. Register while you can. Space is limited. For more information, click here.

We hope you enjoy this monthly article installment, which is just one of the benefits of being a member of the Government Law Section.

John Grace, Chair
Government Law Section
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- **City immune from suit alleging negligent use of Vac Truck to clear blockage in sewer line** *The City of The Colony, Texas v. Mark and Kim Rygh* 02-17-00080-CV (Tex.App. – Fort Worth, December 14, 2017)

  The City used a "Vac" truck to clear a blocked sewer line. Plaintiffs allege the use of the truck caused their home to flood with sewage. However, the evidence in the plea established the truck pushed sewage downstream, when the Plaintiff's home was located upstream.

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- **DFW may have waived immunity regarding contract for credit-card fee analysis due to presence of "good faith" revision clause.** *Dallas/Fort Worth International Airport Board v. Vizant Technologies, LLC Formerly known as P.E. Systems, LLC* (Tex. App. – Dallas, December 15, 2017)

  DFW Airport Board authorized staff to execute contracts up to $50,000 without Board approval. Staff entered into a contract for consulting services, but the consultant racked up $300,000. When the Board only paid $50,000 the consultant sued. The court held the contract as governmental, not proprietary. However, the contract had a good faith clause for additional services was an additional service, which was entered into so immunity may be waived.

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- **Tenant's lease language meant it did not have standing in condemnation suit** *Pizza Hut of America, LLC v. Houston Community College System*, 01-17-00101-CV (Tex. App. – Houston [1st Dist.], December 19, 2017).

Pizza Hut was a tenant of shopping center when community college condemned the property. A lessee generally has standing in condemnation proceedings and is entitled to share in a condemnation award. However, it operated with no change in profit and did not establish the "uncertainty" had any impact on its operation.

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- **El Paso Court of Appeals holds non-appearance jurors failed to show waiver of immunity in contempt/fee challenge case but should be allowed to amend.** *Joshua Luttrell, et al v. El Paso County, et al.,* 08-16-00090-CV (Tex. App. – El Paso, December 20, 2017).

  Plaintiffs challenge El Paso County's use of a special assignment judge who would issue and handle all contempt proceedings when a juror would fail to appear for duty. In this 39-page opinion, the court ultimately determined the County retained immunity based on the pleadings, but the Plaintiff should be afforded the opportunity to amend.

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- **Beaumont Court of Appeals holds assignee to contract proceeds established waiver of immunity, even though contractor was paid** *The City of Beaumont, Texas v. Interflow Factors Corporation* 09-17-00284-CV (Tex. App. – Beaumont, Texas December 21, 2017)

  Barnett had a landscaping contract with the City. It assigned the invoices to Interflow for payment and it obtained a portion of the collection. A dispute arose over $11,000 worth of invoices as the City paid Barnett directly for some invoices. The City did not have a contract with Interflow. Texas Local Government Code §271.152 waiver of immunity for contracts for services came into question as it relates to assignments. The court held the statute does not limit who can sue under the contract, just that suit must be for amounts due and owed. As a result, immunity was waived.

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- **Dallas Court of Appeals disagrees with El Paso Court of Appeals and holds civil service commission dismissal of grievance is still subject to appeal to district court** *Rodney D. Bailey v. Dallas County, et al.,* 05-16-00789-CV (Tex. App. – Dallas, December 21, 2017)

  Civil service officer timely grieved his termination after being indicted. The indictment was later dismissed, but the hearing had not occurred due to a reset. County requested the Commission dismiss the grievance because he did not request a hearing timely under the local rules after dismissal of an indictment. The Commission dismissed the grievance and the County asserted the district court had nothing to review, since no order sustaining the termination existed. However, the district court's jurisdiction to hear mandamus to compel a hearing be provided may or may not be proper dependent upon whether the Commission is a separate jural entity. Since the County has the burden under a plea to the jurisdiction, and it did not negate the jural existence of the Commission, the district court had jurisdiction to hear the issue.

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- **Tyler Court of Appeals holds even though it was established more than 100 years ago and no street has been built, mere non-use of a dedicated road easement does not amount to abandonment.** *The Jesus Christ Open Altar Church, et al. v. City of Hawkins*, 12-17-00090-CV (Tex. App. – Tyler, December 21, 2017).

  Property owner dedicated a right-of-way to the City in 1909. The City never built a road on the area. When the current owner, a church, sought to declare the dedication abandoned litigation ensued. The court held once a road is dedicated to public use, that road remains subject to that use unless it is expressly abandoned. There is no evidence that it would be impossible or highly improbable to build a street on the disputed property or that the object of the easement wholly fails. Although it was established more than 100 years ago, and no street has been built, mere nonuse of the easement does not amount to abandonment.

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Waco Court of Appeals holds property owner was precluded from bringing further claims for disannexation *Karen Hall v. City of Bryan*, 10-16-00044-CV (Tex. App. –- Waco, January 3, 2018)

Plaintiff's fourth lawsuit to obtain disannexation was rejected by the court. The court analyzed the evidence submitted in the City's summary judgment and noted the Plaintiff's second suit expressly asserted she was complaining the City was not conducting routine and preventative police patrols. However, she lost that suit and cannot avoid *res judicata* by arguing the City failed to conduct such patrols in "good faith" in her present suit. Artful pleadings does not prevent the preclusive effect of the prior judgment.

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- **Dallas Court of Appeals holds ex-police officer failed to establish his termination was in retaliation for whistleblower report of "pronoun confusion" in PD assault report** *Michael Hackbarth v. University of Texas at Dallas* 05-16-01250-CV (Tex. App. – Dallas, January 4, 2018)

Police had been notified of violent tendencies of Rana and investigators requested notification if any altercations occurred between Rana and his girlfriend. Hackbarth was called to a disturbance but did not make any domestic violence arrests and did not report to investigators. Hackbarth later insisted the investigators made incorrect assertions in their reports in order to obtain an arrest and reported it to the Chief of Police. Rana was arrested and later plead guilty to assault. An investigation revealed the investigators actions were proper. However, such started an additional investigation into Hackbarth, who was later terminated. The court noted the documented reports show Hackbarth had attitude problems and other performance issues which justified termination. The supervisors with control over Hackbarth's employment did not instruct the investigator to open an investigation. No evidence established a causal connection between his report and his termination.

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- **Trial Court could not properly issue TRO to enjoin city from considering annexation ordinance**

In Re City of Pearland, 14-17-00921-CV (Tex. App. – Houston [14th Dist.], January 9, 2018)

Senate Bill 6, which requires a city to obtain consent by a majority of the property owners in an area before it can annex, went into effect December 1, 2017. The City of Pearland attempted to annex an area prior to the effective date. Property owners subject to annexation sought and obtained an injunction to prevent the City from considering annexation at the meetings. The City obtained mandamus relief lifting the injunction. A property owner, whose property has been annexed in violation of the Texas Open Meetings Act, has a legal a remedy to prevent enforcement. As a result, injunction was improper.

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Water District property entitled to tax exempt status even though District rents to private business on river front *Tarrant Appraisal District v. Tarrant Regional Water District* 02-17-00042-CV (Tex. App. – Fort Worth, January 25, 2018)

A water district owns and uses property as part of a public purpose for flood control. However, a section of the property was not used, so the district rented it to a restaurant in order to promote river and public walking trail use. The appraisal district asserted the property was not tax exempt because it was leased to a private business. The court held the text of the Tax Code provision does not required "exclusive" use for solely public purposes. Further, the economic and public facility development use is a public use and part of the district's creation statute. Therefore, it is entitled to tax exempt status of the property section.

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Notice of water in alcove is not actual notice under TTCA of water in adjoining hallways says Fort Worth Court of Appeals *Tarrant County, Texas v. Margielene Carter-Jones* 02-17-00177-CV (Tex. App. – Fort Worth, January 25, 2018)

A courthouse worker notices water in front of a closed bathroom, which was separate from the hallway with public traffic. The water showed no signs of spreading and appeared contained within the alcove. The worker reported it to maintenance. However, about an hour later and before maintenance arrived in the alcove, Plaintiff slipped and fell on water in the hallway. The court held

knowledge of water in the alcove is not actual knowledge of a dangerous condition in the hallway. The County therefore retained immunity.

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- **Supervisor's directive that employee "snitch" on anything going wrong is not "criminal activity" under the Texas Whistleblower Act** *Metropolitan Transit Authority of Harris County, Texas v. Ronald Williams* 01-17-00724-CV (Tex. App. – Houston, January 25, 2018)

  Plaintiff was a track maintenance worker. Supervisor's request than an employee let him know if any improper activity was occurring at a field location is not "criminal activity" prohibited under the Whistleblower Act. The fact the supervisor was later accused of separate criminal activity by a different employee does not entitle the Plaintiff to protection for alleged "snitch" request.

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- **Under PIA, school could reasonably anticipate litigation even though it was given only a "conditional" threat of suit** *Appellant, B. W. B.// Cross-Appellant, Eanes Independent School District v. Appellee, Eanes Independent School District// Cross-Appellee, B. W. B*. 03-16-00710-CV (Tex. App.– Austin, January 10, 2018)

  Parent of student requested records from the school district. While a single phone conversation where litigation was mentioned is insufficient to establish reasonably anticipated litigation, the analysis is more of a totality of circumstances analysis. Given the various aspects together, the school could reasonably anticipate litigation entitling it to withhold information.

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- **Failure to drive school bus to hospital instead of waiting for ambulance to assists non-responsive child is a non-use of property, which does not waive immunity says Beaumont Court of Appeals.** *Nathan Delameter et. al, v. Beaumont Independent School District* (Tex. App. – Beaumont, February 1, 2017).

  The school district was held to be immune after a disabled student went into distress while riding on the bus and died. The bus driver followed District policies and awaited EMS instead of driving the bus to a hospital. Such is not the negligence use of motor driven equipment and therefore immunity is not waived.

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- **Home-rule city's franchise contract and right-of-way ordinance trumps pro-forma provision in a tariff, so utility must bear costs of relocation** *City of Richardson v Oncor Electric Delivery Company, LLC,* 15-1008 (Tex. February 2, 2018)

  City and Utility had a contract under the City's right-of-way ordinance requiring the Utility to pay for the cost of facility relation during a street widening project. However, as part of a separate rate dispute, the City, after PUC authorization, adopted a tariff. The Utility tried to argue the tariff trumped the franchise contract and ROW ordinance. However, the court held the tariff applied to end users (customers) and not the City. The Utility must, therefore, pay the costs of relation.

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- **U.S. 5th Circuit remands excessive force case holding fact question exists as to whether suspect who died during arrest was resisting or not** *Darden v. City of Fort Worth*, 16-11244, — F3d. –, 2018 WL 525640 (5th Circ. January 24, 2018)

  In this excessive force case, the U.S. 5th Circuit determined a fact question exists as to an officer's qualified immunity. When the Plaintiff showed up to a buy/sell drugs, it turned out to be a law enforcement sting operation. When his vehicle was surrounded by police vehicles and officers, he attempted to drive through the blockage. A fact question exists as to whether an officer drove in front of the car in order to shoot and stop the suspect, or whether he was already in its path and shot the suspect in self-defense.

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- **City did not act in bad faith under PIA in cost estimate calculation; City established it produced all records discovered** *Mark Rines v. City of Carrollton* 05-15-01321-CV (Tex. App. – Dallas, February 13, 2018)

  Requestor under the Texas Public Information Act asserted the City acted in bad faith when it provided him the initial cost estimate and in not producing all records. The City established the process the records custodians used to search for records and the production of all responsive documents. The Requestor could not establish documents were missing. Further, the Requestor did not provide the basis behind the City's original calculation for costs, so could not establish the City acted in bad faith. Simply because ending costs were not as much as originally estimated does not mean the City acted in bad faith.

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CLE for the month of March:

March 1-2(Austin) Advanced Employment Law Course 2018

March 1-2 (Houston) Advanced Employment Law Course 2018

March 1-2 (Dallas) Litigation Update Institute 2018

March 2 (Denton) Rolling Stoned: Investigating & Prosecuting the Drugged Driver

March 14 (Pecos) Effective Courtroom Testimony

March 15-16 (Dallas) Advanced Real Estate Drafting Course

March 16 (Carrizo Springs) Rolling Stoned: Investigating & Prosecuting the Drugged Driver

March 16 (Dallas) Women in the Law 2018: Forging Your Path to Success

March 21 (Midland) Rolling Stoned: Investigating & Prosecuting the Drugged Driver

March 21 (Austin) Land Use Fundamentals

March 22-23 (Austin) Land Use Conference

March 23 (Littlefield Effective Courtroom Testimony

March 28 (Montague) Effective Courtroom Testimony