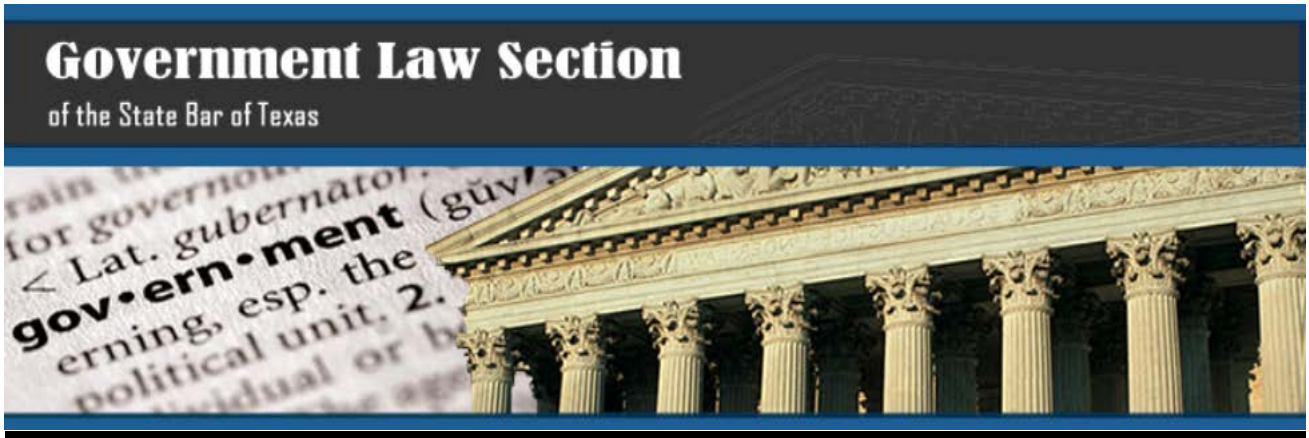


July 31, 2018

This month's article is Guns in Courthouses. It is submitted by Scott Houston, a Deputy Executive Director and General Counsel of the Texas Municipal League and the Texas City Attorneys Association. If you are interested in reading this article, please click here.

Enid Howard, Chair
Government Law Section
State Bar of Texas

Recent Case Updates

- **Texas Supreme Court holds county commissioner has no authority over plats, so is an improper party to suit by developer** *W.A "Andy" Meyers, individually and in his capacity as Fort Bend County Commissioner v. JDC/Firethorne, LTD., a Texas limited partnership; from Fort Bend County; 14th Court of Appeals District* (14-15-00860-cv, 514 sw3d 279, 12-22-16)

  In this land development suit, the Texas Supreme Court held because an individual county commissioner lacks legal authority to receive, process, or present a completed plat application the developer failed to show a substantial likelihood that the injunction will remedy its alleged injury and therefore no jurisdiction exists.

  Expanded summary here.

- **City of Houston can be sued by pension board for non-compliance with statutory pension provision and PIA** *City of Houston, et. al. v. Houston municipal employees pension system*, 17-0242, — S.W. 3d — (Tex. June 8, 2018).

  City of Houston created several local government corporations to which it transferred some of its employees. City reclassified individuals of the pension system. Specifically, at issue is the adoption of resolutions by the Houston Municipal Employees Pension System's Board of Trustees (the board) related to those employees, their status, and the City's obligation to contribute to the pension fund. The Court held the requirements of the statute. The City must still follow the statutory requirements for funding the pension plan, so the system can bring an *ultra vires* claim to compel compliance with the statute. However, the Court interpreted the pleadings to read the system seeking prospective relief only.

  Expanded summary here.

- **City retained ability to revoke non-consent tow permit says U.S. 5th Circuit** *Rountree v. Dyson* No. 17-40443 (5th Cir. June 11, 2018)

  After tow company was removed from non-consent tow list, it sued. The U.S. 5th Circuit held the City

was entitled to remove the company. Class-of-one claims are inapposite "to a local government's discretionary decision to include or not include a company on a non-consent tow list." If a city has the discretion to choose from whom it contracts private services, then it must equally retain the discretion to choose when to terminate such relationship.

Expanded summary here.

- **City's affidavit failed to show how a reasonable ambulance driver would have acted similarly, so plea was properly denied** *City of Dallas v Duressa*, 05-17-01238-CV (Tex. App. — Dallas, June 13, 2018)

  While transporting a patient to the hospital ambulance was in an intersection accident. Regarding the City's plea to the jurisdiction, the court held there must be evidence addressing "what a reasonable officer could have believed under the circumstances" substantiated with facts showing the officer assessed each of the need/risk balancing factors. The needs and risk analysis, however, demonstrated the lights and sirens were not active and there was no immediate need for a rush. The affidavits do not set out facts explaining the seriousness of the accident, the extent of any injuries, or any other circumstances requiring urgent transport of the patient to the hospital. Trial court properly denied the plea.

  Expanded summary here.

- **Zoning amendment was not retroactive and property owner had no vested interest in perpetual use of his property for a specific purpose says Dallas Court of Appeals** *Hinga Mbogo, et al. v. City of Dallas, et al.* 05-17-00879-CV (Tex. App. – Dallas, June 19, 2018)

  Repair shop with non-conforming use rights sued after City passed an ordinance terminating rights after a set number of years. The court held there are strong policy arguments and a demonstrable public need for the fair and reasonable termination of nonconforming property uses. City provided sufficient notice and opportunities for owner to recover investment and come into compliance.

  Expanded summary here.

- **Developer's asserted causal link between use of bulldozers and inability to timely sell lots is insufficient to establish waiver of immunity says 13th Court of Appeals** *City of Weslaco v. Raquel Trejo and Roberto Trejo*, 13-18-00024-CV (Tex. App. – Corpus Christi, June 21, 2018)

  After development of a subdivision failed and lost funding, developers sued the City asserting it unreasonably delayed in extending water and sewer services, making it impossible to sell the lots during the delay. The court held the negligence use delaying using the bulldozers was not a waiver under the Texas Tort Claims Act.

  Expanded summary here.

- **Texas Supreme Court holds City plastic bag ban preempted under the Solid Waste Disposal Act City** *of Laredo v Laredo Merchants Association*, 16-0748, — S.W.3d. – (Tex. June 22, 2018)

  In order to curb the litter in the downtown area, the City banned vendors and stores from giving customers plastic bags. The local merchants sued. The Texas Supreme Court held the City's ordinance was preempted by the Texas Solid Waste Disposal Act.

  Expanded summary here.

- **State trial court lacks jurisdiction over property dispute when U.S. government has a potential interest in the property** *Rio Grande City Consolidated Independent School District v. City of Rio Grande, et al.,* 04-17-00346-CV (Tex. App. – San Antonio, June 27, 2018)

  Real property was transferred back and forth over the course of several decades between the school district, city, and a short time with the U.S. Government. When the district and city sued each other over who had proper title. The United States came into the suit as well. Pursuant to 28 U.S.C. § 1346(f), federal district courts have exclusive original jurisdiction in trespass to try title claims where the U.S. government has an interest in property. As a result, the state trial court lacked jurisdiction to hear the title claim.

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- **Negligent maintenance of school bus is not negligent operation or use of bus for immunity purposes says 4th Court of Appeals** *San Antonio Independent School District v. Maria Hale, et al.* 04-18-00102-CV (Tex. App. – San Antonio, June 27, 2018)

  Hale's son was riding on the bus when the rear exit door opened, and he fell out. She sued the district, which filed a plea to the jurisdiction. The court held mere involvement or proximity of a school bus to injury does not mean the injury arises from the use or operation of the bus to waive immunity. Hale does not allege any affirmative acts or omissions by the bus driver, nor does she allege the bus driver's actions or inaction caused the injury. As a result, the claims were dismissed.

  Expanded summary here.

- **Texas Supreme Court holds county official removal statute is subject to Texas Citizens Participation Act and sovereign immunity is waived for attorney's fees of losing party** *State of Texas ex Rel. George Darrell Best v Paul Reed Harper*, 16-0647, — S.W.3d – (Tex. July 29, 2018).

  County resident sought to remove a county official, Harper, based, primarily on the Harper's financial policies. Harper countered his actions were protected by the Texas Citizens Participation Act, which protects free speech rights and mandates attorney's fees be awarded to a prevailing party. The Texas Supreme Court held the TCPA applies in a removal case and the trials court was mandated to award Harper attorney's fees against the citizen. However, it could not award such fees against the state, which joined the original removal action.

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- **City could not use Family Code legitimation to challenge standing in wrongful death case** *City of Austin d/b/a Austin Energy v. Maria Del Rosario*, 03-18-00107-CV (Tex. App. – Austin, July 3, 2018)

  In this wrongful death case, the City asserts to have standing under the Wrongful Death Act, an illegitimate child must comply with the requirements of Texas Family Code §160.201(b), thereby establishing a father-child relationship. However, the Court held it is inappropriate to incorporate the requirements of the Family Code for legitimation into the Wrongful Death Act.

  Expanded summary here.

- **A police officer's subjective preference for assignment is insufficient to prove a materially adverse personnel action says Dallas Court of Appeals** *City of Dallas v. Christopher Worden*, 05-17-00490-CV)Tex. App. – Dallas, July 3, 2018).

  In this Whistleblower Act case, the court held an employee can sue only for adverse employment actions. The test for adverseness under the Act is an objective one: the action taken "must be material, and thus likely to deter a reasonable, similarly situated employee from reporting a violation of the law." The officer was unable to establish an adverse action occurred. The court declined to apply a conduit theory of liability due to alleged animus from other officers.

  Expanded summary here.

- **University retains immunity from suit after chemistry student accidentally ingested sodium cyanide from lab** *Texas A&M University v. Kevin Taylor, et. al*, 10-17-00288-CV (Tex. App. – Waco, July 3, 2018)

  After the University provided a lab key, a student accidentally ingested sodium cyanide and died. On appeal from the denial of the University's plea to the jurisdiction, the court held a governmental unit does not "use" tangible personal property "when it merely allows someone else to use it." Further, the injury must be contemporaneous with the use of the tangible personal property, which is not present here.

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CLE August – September 2018

Effective Courtroom Testimony, August 10, 2018 (Clarendon)

Advanced Texas Administrative Law, August 16-17, 2018 (Austin) (Live Webcast Available)

Effective Courtroom Testimony, August 17, 2018 (Mineral Wells)

Advanced Real Estate Law Course 2018, August 22-24, 2018 (Houston) (video)

Advanced Workers Compensation 2018, August 23-24, 2018 (Austin)

Advanced Personal Injury Law Course 2018, August 29-31, 2018 (Dallas)

Advanced Real Estate Law Course 2018, August 29-31, 2018 (Dallas) (video)

Advanced Government Law 2018, August 30-31, 2018 (Dallas) (video)

Civil Appellate Practice 101: 2018, September 5, 2018 (Austin)

Advanced Civil Appellate Practice Course 2018, September 6-7, 2018 (Austin)

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