Government Law Section

of the State Bar of Texas



March 28, 2018

This month's article is a refresher on handling appeals to and out of a municipal board of adjustment, with some recent case law updates. It is submitted by Ryan Henry, a municipal attorney out of San Antonio. If you are interested in reading this article, please 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
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- **Filing a timely motion for new trial under the wrong cause number still invoked extended deadline for notice of appeal.** *Fort Bend County v. Melissa Ann Norsworthy, et al.* 14-17-00633-CV (Tex. App. – Houston [14th Dist.] February 15, 2018)

  While this is a Texas Tort Claims Act case on the merits, the court of appeals question was the timely appeal. Fort Bend County was sued by multiple plaintiffs. At one point, the County filed a motion for new trial after a summary judgment motion but attached the wrong cause number by mistake. So as long as the appellant's efforts constituted a bona fide attempt to invoke appellate jurisdiction courts should construe them as successful. Filing a timely motion for new trial under the wrong cause number or in the wrong case evinces a bona fide attempt to invoke appellate jurisdiction when no one is confused about or misled as to the judgment in question.

  Expanded summary here.

- **State immune from suit asserting failure to follow forfeiture procedures.** *The State of Texas v. Antonio Menchaca Jr. and Perla Nevarez* 13-16-00602-CV (Tex. App. – Corpus Christi February 15, 2018)

  DA investigator sent notice of potential money laundering, so the banks froze Menchaca's accounts. The State file a civil forfeiture, but later non-suited. Although bogged down in language, Menchaca actually sought *ultra vires* declaratory relief against the State of Texas for failing to comply with the law related to civil forfeitures. However, no officials were sued and the State retains its immunity.

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- **Dallas Court of Appeals upholds jury verdict holding circumstantial evidence can establish actual knowledge of a dangerous condition.** *Texas Department of Transportation v. Brian Milton* 05-16-00955-CV (Tex. App. – Dallas, February 14, 2018)

  Milton, a motorcyclist, was injured in a single-vehicle accident when his tire hit a groove in the roadway and sued TxDOT. A TxDoT maintenance supervisor had ordered "rough road ahead" signs

put out at that location due to previous problems with soil expansion and contraction, but no direct evidence existed of TxDOT's knowledge of the groove. Actual knowledge can be found if supported by circumstantial evidence. Given the photos, testimony and record, the court held a reasonable jury could conclude TxDOT had actual knowledge, irrespective of a lack of direct evidence.

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- **Beaumont Court of Appeals holds incident report of inmate injury due to power tools was insufficient to establish actual knowledge under TTCA.** *Texas Department of Criminal Justice v. Neftali Cisneros* 09-17-00161-CV (Tex. App. – Beaumont March 1, 2018)

  Cisneros was injured in an accident involving a commercial grade woodworking power saw while incarcerated by the TDCJ. Cisneros failed to file a notice of claim within the statutory time period. Knowledge he had an accident or was injured is not subjective awareness of TDCJ's fault in causing or contributing to the injury.

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- **14th Court of Appeals holds employee does not have to file TWC charge of retaliation if the employee asserts retaliation for filing discrimination charge.** *Metropolitan Transit Authority of Harris County, Texas v. Viola M. Douglas* 14-17-00176-CV (Tex. App – Houston [14th Dist.] February 27, 2018)

  Douglas was denied promotion to captain at the Metro PD. She filed a discrimination charge. Afterwards, she asserts she was subjected to retaliation so amended her lawsuit. Court held a plaintiff cannot rely upon a continuing violation theory for retaliatory conduct which occurred prior to the original charge, but when the retaliatory conduct is allegedly in response to the original charge (i.e. retaliation grows out of a discrimination charge filed), the plaintiff need not exhaust a new set of administrative remedies.

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- **U.S. Supreme Court holds officers at scene were not required to believe innocent explanations of suspects given circumstances – probable cause therefore exists for arrests.** *District of Columbia, et al. v Wesby, et al*, No. 15–1485., — U.S. – (January 22, 2018).

  Police arrived at a vacant house due to neighbors' complaints about noise. They discovered a make-shift strip club going on and arrested the partygoers. The charges were later dismissed and the partygoers sued. While the police discovered the owner had not given consent to use the vacant house, the partygoers asserted they did not know that and were told by the party organizer, Peaches, permission had been given. The U.S. Supreme Court held the court of appeals reviewed each explanation in isolation and such was error under a totality of circumstances review. The U.S. Constitution does not require the officers to believe the partygoers given the circumstances. Probable cause "does not require officers to rule out a suspect's innocent explanation for suspicious facts." The condition of the house and the conduct of the partygoers allowed the officers to make several "common-sense conclusions about human behavior."

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CLE for the month of April-July:

April 4, 2018 (Fort Stockton) Rolling Stoned: Investigating & Prosecuting the Drugged Driver

April 6, 2018 (Georgetown) Rolling Stoned: Investigating and Prosecuting the Drugged Driver

April 16, 2018 (central) Oil and Gas Development in Town: How Does House Bill 40 Set the Rules?

Apr 27, 2018 (Houston) Choosing and Courting a Jury 2018: Stars of the Courtroom

May 2-4, 2018 (Austin) Conference on Criminal Appeals

Jun 7-8, 2018 (Austin) Advanced Administrative Law Course 2018

Jun 8, 2018 (Dallas) Choosing and Courting a Jury 2018: Stars of the Courtroom

Jun 13-15, 2018 (Cedar Creek) Texas City Attorneys Association Summer Conference

Jun 14-15, 2018 (Austin) Conference on State and Federal Appeals

Jun 25-27, 2018 (San Antonio) Prosecutors & Court Administrators Seminar

Jul 12-13, 2018 (Denver) Advanced Patent Litigation 2018

Jul 18, 2018 (San Antonio) Government Law 101: 2018

Jul 18-20, 2018 (San Antonio) Advanced Civil Trial Course 2018

Jul 19-20, 2018 (San Antonio) Advanced Government Law 2018

Jul 22, 2018 (San Antonio) Criminal Law 101: 2018

Jul 23-26, 2018 (San Antonio) Advanced Administrative Law Course 2018