Government Law Section

of the State Bar of Texas



August 27, 2018

This month's article analyzes the U.S. Supreme Court redistricting case of *Abbot v. Perez*, 138 S.Ct. 2305 (2018). It is written by Ben Stephens, a public law attorney in the Houston office of Husch Blackwell, LLP. If you are interested in reading this article, please click here.

Enid Howard, Chair
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Recent Case Updates

- **City's denial of plat application citing inconsistencies with "general plan" of city, without more, is insufficient and therefore vested rights are implicated** *The Village of Tiki Island, et al. v. Premier Tierra Holdings Inc.,* 14-18-00014-CV (Tex. App. – Houston [14th Dist.], Jul. 10, 2018)

  The City changed its subdivision ordinances after the submission of the preliminary plat application by Premier Tierra Holdings. Premier brought a vested rights suit. Chapter 212 of the Texas Local Government Code governs plat approval and requires plats to conform to the "general plan" of the city for extensions of utilities and roadways. The City's assertion that it relied on a pre-existing "general plan" of the City in denying the original plat application was rejected as the City did not provide, in the record, evidence of such a plan or what its framework would have been.

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- **Fort Worth Court of Appeals holds candidate on ballot for two separate offices resigned second office by law, not the first, once taking oaths** *City of Forest Hill, et al. v. Michielle Benson, et. al.,* 02-17-00346-CV (Tex. App. – Fort Worth, Jul. 12, 2018).

  Candidate signed up and ran for both a city council position and a position on the local library district board. She won both races. The offices are constitutionally incompatible. The question was which office was vacated. Under the Texas Election Code §141.033, the second application is invalid for an election (then arguably she could only have been elected to the first office) and §201.025 states that the first office is vacated upon being qualified for the second. The Court held that §141.033 controls, so her second candidacy (for library district) was invalid. She, therefore, only legally ran for the first position, which was on the city council.

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- **Employee failed to establish valid comparators in equal protection/employment discrimination case, so individuals entitled to qualified immunity says U.S. 5th Circuit** *Mitchell v. Mills* No. 17-40737 (5th Cir. Jul. 13, 2018)

Mitchell, an African-American man in the Public Works Department, alleged that the defendants paid him less than two similarly situated Caucasian coworkers. However, the two coworkers were not deemed to be similarly situated. Both coworkers shared some overlapping duties with Mitchell, but they were in a different department and also had additional duties and skills, including experience in operating street-related heavy equipment, including a motor grader.

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- **4th Court of Appeals holds VIA bus system not immune from bus accident, notwithstanding common carrier heightened standard of care argument** *VIA Metropolitan Transit Authority v. Shantinia Reynolds,* 04-18-00083-CV (Tex. App. – San Antonio, Jul. 18, 2018)

  Reynolds was injured when the VIA bus he was riding as a passenger rear-ended another driver. VIA filed a plea to the jurisdiction on the basis that immunity is not waived in a cause of action based on a "high degree of care" standard and the TTCA only waives immunity for general negligence. The appellate court disagreed, holding the TTCA does not address the standards or duties in vehicle accident cases, so includes all standards.

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- **Claims against City for Sex-Offender Residency Registration Ordinance is moot after passage of Tex. Loc. Gov't Code §341.906** *Texas Voices for Reason and Justice, Inc. v. The City of Meadows Place,* 14-17-00473-CV (Tex. App. – Houston [14th Dist.] Jul. 19, 2018).

  City ordinance prohibited certain sex offenders from permanently or temporarily residing within 2,000 feet of any premises where children commonly gather. Texas Voices sued the City to declare the ordinance unconstitutional because, as a general-law city, it had no authority to enact it. But, H.B. 1111 created Texas Local Government Code § 341.906, which allows general-law cities to enact such ordinances. The case was determined to be moot.

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- **Trial court properly awarded attorney's fees to school district as plaintiffs should have reasonably known the individual officials were absolutely immune** *Farr et. al. v Arlington ISD,* 02-17-00196-CV (Tex. App. – Fort Worth, Jul. 19, 2018)

  The Plaintiffs comprise of students, employees, and parents who asserted they were exposed to poor air quality at the school causing dizziness, nausea, and a host of other ailments. They sued individual school officials in addition to the district. The school district officials counterclaimed for attorney's fees. The appellate court held given the officials retain absolute immunity from suit, a reasonable attorney should have known a suit against them was improper.

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- **5th Court of Appeals holds mandatory third-party venue provision controls over TTCA venue provision** *Pioneer Natural Resources USA, Inc. v. Texas Department of Transportation*, 05-17-01245-CV (Tex. App. – Dallas, Jul. 20, 2018).

  In this vehicle accident case, TxDOT was brought in by the vehicle manufacturer. It argued immunity was not waived, but due to improper venue. Two mandatory venue provisions conflict: 1) TTCA mandatory venue and 2) third-party claim mandatory venue. The court held the third-party mandatory venue provision controls.

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- **City wins breach of lease claim against FBO, but quantum meruit claims were remanded** *Laredo Jet Center, LLC v. City of Laredo*, 04-17-00316-CV (Tex. App. – San Antonio, Jul. 25, 2018)

  Laredo Jet was a fixed-based operator ("FBO") at the Laredo International Airport. Its lease with the City required it to construct a new hanger and remove an older hanger. Laredo Jet asserted the City kept promising to give them a forty-year-lease in exchange but never followed through. Laredo Jet stopped hanger construction asserting its financiers would not provide payments until the forty-years is secured and sued. The appellate court held JP court has exclusive jurisdiction for forcible entry and

detainer cases, so the district court lacked jurisdiction to determine immediate possession rights. The City is immune from estoppel and breach of contract claims. However, an exception for "building or construction contracts" claims exists for quantum meruit claims, which was not addressed in City's MSJ. Quantum meruit claims were remanded.

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- **Sheriff's deputy unable to sue for TCHRA, Whistleblower Act, and collective bargaining claims says Beaumont Court of Appeals** *Jefferson County, Texas v. Cherisse Jackson,* 09-17-00197-CV (Tex. App. – Beaumont, Jul. 26, 2018).

  Jackson sued the County alleging the sheriff retaliated against her after she failed to cooperate in an investigation against another county employee. Jackson failed to establish a causal connection between the failure to cooperate and the adverse actions. Further, none of the evidence established Jackson had been treated differently than other, similarly situated, employees. The collective bargaining agreement did not provide a protected property interest in rank. Finally, since Jackson failed to follow the mandatory arbitration provision of the collective bargaining agreement, she cannot sue for breach.

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- **City ordinance allowed to make additional criteria for dangerous animal determination says Amarillo Court of Appeals** *Shannon Nicole Washer, et al. v. City of Borger,* 07-16-00413-CV (Tex. App. – Amarillo, Jul. 31, 2018).

  Dog owner sued the City to prevent the application of its dangerous animal ordinance against her dog. She argued it was preempted by Texas Health & Safety Code § 822.047. The appellate court held the ordinance was not in conflict with state law or the constitution. An ordinance which is more specific or requires the providing of additional information for a dangerous animal determination is not a contradiction. State law does not limit the investigation to sworn testimony. Further, state law is silent on whether a presumption exists of dangerousness after an authority decides an animal is dangerous.

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- **Plaintiff ordered to pay attorney fees after non-suiting claims against individual governmental officials under Texas Citizens' Participation Act** *Shillinglaw v. Baylor Univ.,* 05-17-00498-CV, 2018 WL 3062451, at *1 (Tex. App.—Dallas Jun. 21, 2018, no pet. h.) (mem. op).

  This is a Texas Citizens' Participation Act ("TCPA) case where the individual governmental officials were awarded fees and costs after the Plaintiff non-suited them individually in an employment dispute. Shillinglaw, a director of football operations, sued various officials asserting claims of "libel, slander, tortious interference with existing contract" regarding his termination. The individuals were not bound by the employment contract, were not the employers, and were entitled to dismissal. Their publications are protected under the TCPA, which requires a mandatory aware of attorney's fees to a prevailing party.

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- **In defamation suit 1st District Court of Appeals holds employees responding to city council questions in open meeting were acting within course and scope of employment for § 101.106(f) purposes** *Elias v Griffith, et al*, 01-17-00333-CV, 2018 WL 3233587 (Tex. App. – Houston [1st Dist.], Jul. 3, 2018.)

  Tow truck company brought suit against individual officials (police chief and assistant city manager) for libel and slander after the company was not placed on non-consent tow list. Chief and assistant city manager responded to questions from city council at a public meeting regarding the list. The appellate court held the chief and assist. city manager was acting within the scope of their employment, in a tort applicable to a city, so were entitled to immediate dismissal under §101.106(f).

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- **Billboard owner unable to establish waiver of immunity in suit against village** *Triple BB, LLC v.*

The Village of Briarcliff, Texas, 03-17-00149-CV (Tex. App. – Austin, Aug. 15, 2018).

City entered into a lease with the marina allowing the marina to put up a billboard on its property in exchange for a maintenance easement to a sewer/water line. The City later sold the lot and the new owner required the marina to remove the billboard. Marina owner sued the City. The appellate court held that actions of offering consideration in exchange for an easement for a sewer line is a governmental function, not proprietary. As a general rule, when the government "is made a party defendant to a suit for land," immunity bars the suit.

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CLE August – September 2018

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

Advanced Criminal Law Course 2018, September 5-7 (Dallas) (video)

Advanced Personal Injury Law Course 2018, September 5-7 (Houston)

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

Advanced Consumer and Commercial Law 2018 September 13-14, 2018 (Austin)

Effective Courtroom Testimony September 17, 2018 (League City)

Free VAWA Grant Domestic Violence Training, September 18 (Galveston)

Advanced Criminal Law Course 2018, September 19-21 (Houston) (video)

2018 Annual Criminal & Civil Law Update September 19-21, 2018 (Galveston)

Firearms Law 2018: What Every Texas Lawyer Needs to Know, September 20-21 (San Antonio)

Government Enforcement Institute September 20-21, 2018 (Dallas)

ABA Section of State and Local Government Law October 4-7, 2018 (San Antonio)

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IMLA's 83rd Annual Conference October 17 - October 21, 2018 (Houston)

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