Government Law Section

of the State Bar of Texas



September 27, 2018

This month's article addresses recent changes by the Legislature and confidentiality of settlements with governmental entities. Within certain number ranges, a condition of a settlement cannot include confidentiality on the part of a non-governmental entity. It is submitted by Michael Shaunessy, who is a partner with McGinnis Lockridge. If you are interested in reading this article, please click here.

Enid Howard, Chair
Government Law Section
State Bar of Texas

Recent Case Updates

- **First District Court of Appeals holds evidence that the City could have done more to warn the licensee does not show actual knowledge of a dangerous condition under Texas Tort Claims Act** *The City of Stafford, Texas v. Joe Svadlenak* 14-18-00089-CV, 2018 WL 3734021 (Tex. App – Houston [1st Dist.], Aug. 7, 2018)

  When a claims adjustor slipped and fell in a stairway, he sued under the Texas Tort Claims Act for improper lighting creating a premise defect. The court held evidence that the premises owner could have done more to warn does not show awareness of a dangerous condition. Similarly, evidence showing only that a premises owner "knew of a safer, feasible alternative design" does not indicate that the owner had actual knowledge of a dangerous condition. "[A] condition is not unreasonably dangerous simply because it is not fool proof."

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- **City found liable in $4.7 million dollar breach of an economic development agreement** *City of Lancaster v. White Rock Commercial, LLC,* 05-17-00583-CV (Tex. App. – Dallas, Aug. 20, 2018).

  Developer entered into two contracts: (i) an "Incentive Agreement" with the Lancaster EDC and (ii) a Chapter 380 Economic Agreement with the City of Landcastser. Each contract had a different method of payment. In the City's view, the 380 Agreement's purpose was to reimburse the developer for costs in excess of the $1.8 million to be paid by the EDC, but the court disagreed. The different payment methods and triggering conditions meant the contracts were not

interdependent. The court also held the 380 Agreement was not an unconstitutional debt. The evidence supports the judgment against the City.

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- **Police officer's need to reach site of 911 call justified actions of entering intersection in course and manner – immunity therefore preserved** *Jason Roche v. City of Austin*, 03-17-00727-CV (Tex. App. – Austin, Aug. 21, 2018).

  This is an emergency responder case where a police officer collided with the Plaintiff at an intersection. The court held the City established the need to reach the site as quickly as possible was manifest as an assailant was threatening customers with a knife. The officer properly articulated his thought process and actions when going through the intersection and justified the actions based on the risks perceived.

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- **City employee returning to work from lunch deemed not to be in course and scope of employment says 14th Court of Appeals** *Martin Molina v. City of Pasadena*, 14-17-00524-CV (Tex. App. – Houston [14th Dist.], Aug. 21, 2018).

  An inspector was in an automobile collision when driving a City vehicle back from his lunch break. The court went through a burden shifting analysis noting evidence that the employee was on a personal errand to eat at the time of the accident. This rebutted the presumption that he was acting in the course and scope.

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- **Texas judges successfully reverse injunction in federal court regarding system for setting bail for indigent misdemeanors** *ODonnell v. Harris County, et al.,* No. 18-20466 (5th Cir. Aug. 14, 2018).

  Citizens sought a federal injunction to prevent state court judges from setting bail under an adopted county procedure. Federal trial court issued an injunction requiring County to release, on unsecured personal bond, all misdemeanor arrestees not assessed for bail within 48 hours. Fourteen Judges filed an emergency motion with U.S. 5th Circuit, requesting a stay. U.S. 5th Circuit held the trial court's injunction violated the federal mandate rule and awarded more relief than dictated by the U.S. Constitution or the rule.

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- **City obtained mandamus to remove TRO preventing display of budget meeting which addressed fiscal impact of pending charter election** *In re Sylvester Turner, Mayor and Dave Martin, Houston City Council Member* 14-18-00649-CV (Tex. App. – Houston [14th Dist.], Aug. 23, 2018)

  After a collective bargaining unit/association successfully placed a charter amendment on the ballot for an upcoming election, the City held finance committee hearings to examine the fiscal impact. The association sued to remove the website broadcast and archive noting the Election Code prohibited spending public funds for political advertising. The court held public funds were not being used for political advertising by making the meeting video publicly available on

City's website, even though an incidental effect may touch on support or opposition for the measure.

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- **School immune from suit where student drop-off only provided location of incident – student's injuries caused by reckless driver** *Stiff v. Kaufman Indep. Sch. Dist.*, 05-17-00988-CV, 2018 WL 3725278, at *1 (Tex. App.—Dallas Aug. 6, 2018) (mem. op.).

  Student exited school bus and was crossing the road to his foster parents' home when he was hit by a pickup truck. Under the TTCA, the operation or use of a motor vehicle "does not cause the injury if it does no more than furnish the condition that makes the injury possible". The mapping of bus stops does not involve the use or operation of a motor vehicle. Neither the school bus, nor any part of the school bus, was used directly as a proximate cause of the student's death.

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- **County immune from suit brought by late Judge's widow asserting her husband was exposed to asbestos in the Jefferson County courthouse and subsequently died.** *Jefferson County, Texas v. Ellarene Farris, et al.,* 01-17-00493-CV (Tex. App. – Houston [14th Dist.], Aug. 31, 2018).

  Widow of county judge brought suit asserting Judge James Farris, was exposed to asbestos in the Jefferson County courthouse over several years, which eventually caused his death. Court held notice of claim was untimely. The wrongful-death claim only could be pursued if Judge Farris "would have been entitled to bring an action for the injury" if he had lived. Since his last exposure was in 1996, his notice would have likewise been untimely in 2005.

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- **Police report insufficient to establish actual notice of a claim under the TTCA says Eastland Court of Appeals** *Darvus Henry v. City of Midland*, 11-16-00265-CV (Tex. App. – Eastland, Aug. 31, 2018).

  Plaintiff sued the City of Midland asserting that "a manhole cover caught the underside" of his vehicle causing a single-vehicle accident. "Knowledge that a death, injury, or property damage has occurred, standing alone, is not sufficient to put a governmental unit on actual notice for TTCA purposes." Since no timely report analyzing fault was presented in the police reports used by the Plaintiff, TTCA notice of claim was deemed untimely.

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- **Ex-employee failed to file supplemental EEOC charge, so failed to exhaust administrative remedies says Eastland Court of Appeals** *Christopher Wernert v. City of Dublin*, 11-16-00104-CV (Tex. App. – Eastland, Aug. 30, 2018).

  When injured police officer could not return to work after a year, he was terminated. The fact the officer filed an EEOC charge when put on administrative leave did not carry forward to his termination for retaliation. As a result, he failed to

exhaust his administrative remedies.

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- **Historic Commission's suit moot after City acquired title to property says El Paso Court of Appeals** *City of El Paso v Grossman*, 02-17-00384-CV (Tex. App. – El Paso, Aug. 30, 2018).

  County Historical Commission sought a declaratory judgment to prevent the City from demolishing an older downtown area when the City announced the project. Texas Natural Resources Code § 191.0525(a) requires notice to a historical commission before an entity breaks ground in order for the commission to determine historical significance. After acquiring title, the City did notify the Commission. This mooted the declaratory judgment claims.

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- **Austin Court of Appeals holds vehicle barrier into parking lot was not a traffic control device; therefore, plaintiff injured by tripping on barrier must proceed under premise defect theory** *Texas Facilities Commission v. Courtland Speer*, 03-17-00244-CV (Tex. App. – Austin, Aug. 31, 2018)

  A vehicle barrier with a cable suspended between the posts was constructed across the driveway of state parking area to address pedestrian/vehicle problems at that point. Plaintiff sued after tripping on the cable. The court held the cable was not a traffic control device under TTCA §101.060. As a result, Plaintiff had to proceed under a premise defect theory of recovery.

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CLE September- October 2018

2018 Section of State and Local Government Law Fall CLE and Networking Conference, October 4-7 (San Antonio)

Advanced Personal Injury Law Course, October 10-12 (S. Padre Island) (video)

Handling Your First (or Next) Collections Case, October 16 (Austin)

Handling Your First (or Next) DWI Case, October 17 (Austin)

Advanced Civil Appellate Practice Course 2018, October 18-19 (Dallas) (video)

International Municipal Lawyers Association Annual Conference, October 17-21 (Houston)

Advanced Civil Trial Course 2018, October 24-26 (Houston)

Advanced Personal Injury Law Course 2018, October 24-26 (Fort Worth) (video)

Firearms Law 2018: What Every Texas Lawyer Needs to Know, November 1-2 (Dallas) (video)

Disaster Proof Your Practice, November 7 (Corpus Christi) (FREE COURSE)

2018 Key Personnel & Victim Assistance Coordinator Seminar, November 7-9 (Kerrville)

Civil Litigation Conference, November 8-9 (Houston)

Leasing Institute, November 9 (Houston)

Prosecuting and Defending Truck and Auto Collision Cases 2018, November 15-16 (Houston)

2018 Elected Prosecutor Conference, November 28-30 (San Marcos)

Advanced Civil Trial Course 2018, November 28-30 (Austin) (video)