Government Law Section

of the State Bar of Texas



November 27, 2018

This month's article provides some helpful information on drafting regulations. The information can be applied to various forms of rules, orders, and ordinances on every level of local and state government. It is submitted by Kim Mickelson, who is a senior assistant city attorney for the City of Houston. If you are interested in reading this article, please click here.

Enid Howard, Chair
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Recent Case Updates

- **Husband's testimony greasy area had cones, but warning was inadequate was enough to create fact issue on plea to the jurisdiction says 1st Court of Appeals in Houston.**

  City of Houston v. Marion Crawford, 01-18-00179-CV (Tex. App. – Houston [1st Dist.], October 9, 2018)

  Husband was walking in front of his wife in a terminal of the Houston airport. He passed a greasy spot on the floor with warning cones around it. Wife walked near the area and fell. In denying the city's plea to the jurisdiction, the court held the cones created a fact issue as to whether the city had actual knowledge of the defect and whether the warnings provided were sufficient.

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- **Officer not on duty at time of vehicle accident, so city's dismissal should have been granted.**

  City of Fort Worth v Jeff Hart, et al. 10-17-00258-CV (Tex. App. – Waco, October 10, 2018).

  Fort Worth police officer Aldo Castaneda collided with a vehicle driven by Howard. However, since Castanada was simply driving "to" work, and not at work, evidence is insufficient to show actions were taken within the course and scope of

his employment.

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- **Supervisor at city operated summer day camp who accidentally hit minor in the eye with bat held not to be grossly negligent under recreational use statute.**

  City of Conroe v. Tiffany Thomas, et al. 09-18-00215-CV (Tex. App. – Beaumont, October 11, 2018).

  The recreational use statute recognizes that landowners who open their property to the public for recreational purposes, provide a public benefit and absolves property owners of liability so long as they do not engage in grossly negligent conduct. The Plaintiff was participating in a free summer day camp operated by the city and was accidentally struck by a bat while playing softball. Such is an accidental injury which does not qualify as "gross negligence."

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- **Board of Adjustment's plea on declaratory judgment claim granted as UDJA is a redundant remedy says Austin Court of Appeals.**

  City of Wimberley Board of Adjustment v. Creekhaven, LLC; and William D. Appleman, 03-18-00169-CV (Tex. App. – Austin, October 18, 2018)

  Neighbor filed for a setback variance, which was granted. The neighbor filed a second variance request, which was also granted after the neighbor missed a deadline under the first variance. Plaintiff Creekhaven sued asserting the BOA had to make a determination on the first variance lapsing before granting a new variance and opposed the granting of any variance. However, such is a request under the Uniform Declaratory Judgment Act for an *interpretation* of an ordinance, not an invalidation of the ordinance. As a result, the city is immune from such declaratory relief requests.

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- **5th Court of Appeals hold "City Attorney's Office" is not a jural entity which can be sued** *Thompson v Dallas City Attorney's Office*, 05-17-00847-CV (Tex. App. — Dallas, October 18, 2018)

  Thompson is a former employee of the city. She filed suit against the "Dallas City Attorney's Office" for, apparently, some form of discrimination. The court held the City Attorney's Office is not a jural entity which can be sued on its own. By the time Thompson corrected the parties, the statute of limitations had passed. The filing of suit against a non-jural entity was held not to toll the limitations.

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- **Contract for sale of waste water to golf course is a governmental function and no waiver of immunity exists for breach claim.**

  City of Merkel v Copeland, 11-16-00323-CV (Tex. App. — Eastland, October 18, 2018).

  City had an agreement to sell wastewater to a golf course with set gallons per

year. The city was forced to stop selling as the quality did not meet state requirements. The court held that while sale of waste is not a listed governmental function, it is a required sub-component of the governmental function of water and sewer services. The city must get rid of the waste somehow under TCEQ regulations, so selling it is a reasonable means of fulfilling its overall governmental function. Given the law applicable at the time of the contract, sale of wastewater was not a "service" and no waiver of immunity exists.

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- **Order for city to release documents under PIA and certify compliance was not a "temporary injunction" entitling city to interlocutory appeal says Houston's 1st District Court of Appeals.**

  City of Houston v Dolcefino Communications, et al., 01-17-00979-CV (Tex. App. – Houston [1st Dist.], October 30, 2018)

  This is a Public Information Act case. The trial court ordered the city to produce all responsive documents and provide the court a certification when completed. The appellate court held the requirement of a certification (which is not required under the PIA) was not "injunctive relief" entitling the City to an interlocutory appeal.

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- **Fort Worth Court of Appeals holds trial court lacked jurisdiction to hear civil lawsuit for wrongful arrest/malicious prosecution since plaintiff was convicted of one of three indictments.**

  Nathaniel Washington v. City of Arlington Police Department, et al. 02-17-00337-CV (Tex. App — Fort Worth, Oct. 4, 2018)

  Washington was arrested on three outstanding warrants for the offenses related to drugs. A jury convicted Washington of one of the drug offenses. He sued officers and the city over the arrest and prosecution of the other two. However, the crux of Washington's claims is that law enforcement and legal counsel worked in tandem to have Washington falsely arrested and convicted of delivery of cocaine. An inmate plaintiff's civil-rights or tort claims based on facts that, if true, would undermine the validity of his conviction are not legally cognizable unless the plaintiff can show that the conviction was reversed on direct appeal. Since Washington's conviction is final, the trial court lacks jurisdiction to hear the claims challenging the arrest.

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- **El Paso Court of Appeals holds limitations defense in Whistleblower Act case could not be raised in a plea to the jurisdiction.**

  *Sims v. City of Madisonville, 08-15-00113-CV, 2018 WL 4659572, at *1 (Tex. App. —El Paso Sept. 28, 2018, no pet. h.)*

  Prior to termination, a police officer, Sims, reported his supervisor of suspected illegal activity. The officer later utilized remote access to law enforcement computer databases to collect information. However, when the Chief discovered he had remote access which he believed was against policy, he terminated the

officer. The plaintiff filed a Whistleblower Act suit within 90 days of his SOAH hearing on his F-5 determination. The city asserted the officer's two-year wait in filing his suit made it untimely. The court recognized that under certain statutes, a limitations bar could be jurisdictional, especially if the timing were indispensable to a jurisdictional question. However, that is not the contention raised or presented to the trial court by the city. Therefore, limitations in this case is an affirmative defense only and cannot be raised on a plea to the jurisdiction.

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- **U.S. 5th Circuit holds promoter of sex convention had standing to sue after city passed ordinance banning convention.**

  Three Expo Events, LLC v City of Dallas, 17-10632 (5th Cir. October 24, 2018).

  Promoter of adult love- and sex-themed conventions was blocked from holding its second convention in Dallas by the city council. The city responded that it was not stopping the promoter (who actually filed suit) but a subsidiary. The court held the city was utilizing semantics when the undisputed promoter and proposed presenter of Exxxotica 2016, was banned due to the totality of actions by the city. The panel held the promoter established the three elements required for standing on each of its claims and should be permitted to proceed with its suit.

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- **City not liable for takings claim because of alleged failure to enforce ordinances against neighboring property owner/developer.**

  City of Mason v. William Robin Lee, et al. 04-18-00275-CV (Tex. App. – San Antonio, Nov. 7, 2018).

  Property owner asserted that when the city approved a minor plat allowing another property owner to develop his property upstream, the city was liable for flood damage caused by the runoff. The court held the crux of the plaintiff's claims is that the city failed to impose applicable regulations to the subdivision. If the government's alleged affirmative conduct is nothing beyond allowing private developers to use their property as they wish, the more appropriate remedy is a claim against the private developers rather than a novel taking claim against the government. The court dismissed the Plaintiff's taking claim against the city.

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- **City retains immunity for accident after changing traffic signal timing says Austin Court of Appeals.**

  City of Killeen v. Mary Cheney, Surviving Spouse of Decedent Eric Cheney, 03-18-00139-CV (Tex. App. – Austin, Nov. 8, 2018).

  The city's traffic lights at two connected intersections (i.e. the interchange) went from a three-phase to a four-phase timing. Approximately 15 minutes after the change, Eric Cheney drove his motorcycle through the interchange and collided with an SUV. The court held §101.060 (traffic light section) is not an independent waiver of immunity. It imposes special limitations on a waiver of immunity otherwise effected by §101.021 (premise liability). As long as the device is

properly displaying or operating, there is no “condition” over which to warn or make safe. Moreover, any possible danger created by the city’s decision to reprogram the traffic signals would be negated by motorists’ compliance with the signals. Ordinary drivers should expect to encounter traffic signals and to react accordingly, regardless of how that particular traffic signal may have operated in the past.

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CLE November- December 2018

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

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

Handling Your First (or Next) False Claims Act Case, November 30 (Austin)

Jury Selection in Impaired Driving Prosecutions, December 7 (Richmond)

Jury Selection in Impaired Driving Prosecutions, December 7 (Rockwall)

Jury Selection in Impaired Driving Prosecutions, December 7 (San Antonio)

LGBTQ Legal Issues in Changing Times: What Every Texas Practitioner Needs to Know, December 11 (Austin)

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