Government Law Section
of the State Bar of Texas



September 9, 2020

Government Law Section Newsletter - September 2020

Dear Government Law Section members:

This month's article is from Andrew Devine of Parkland Health and Hospital System, and it concerns practical tips for addressing Public Information Act requests as they affect "temporary custodians" of information. Click here (section member login required) to read the full article.

Sincerely,

Kuruvilla Oommen, Chair
Government Law Section
State Bar of Texas

Recent Case Updates

Austin Court of Appeals holds no vested rights for zoning changes related to square foot of use ratio

River City Partners, Ltd. V City of Austin, 03-19-00253-CV (Tex. App. — Austin, June 4, 2020).

River City's predecessor in title to a property in 1986 received conditional approval from the City to rezone its property with Community Commercial classification. In 2003, the owner filed a plat application to create a commercial subdivision. The City passed a new zoning ordinance while the application was pending, then approved the plat. After recognizing that its plans exceeded use size limits in relation to the building, River City in 2017 sought an exemption (claiming vested rights under the 1986 covenants), which was denied. When River City sued, the trial court granted the City's plea to the jurisdiction, and plaintiff appealed.

As defined by Chapter 245 of the Texas Local Government Code, a vested right attaches to a project, not a permit holder. It "does not apply to" municipal zoning regulations unless they affect specific categories, such as building size. Here, central question was whether the City's restriction qualified as a zoning regulation on building size. Because

Austin's LDC does not prohibit multiple uses within the same building, the court found the plaintiff failed to establish that the LDC affected "building size," impacting only "use size." As such, River City failed to establish a possible vested right, the City retained immunity, and the trial court lacked jurisdiction. The plea was properly granted.

For more on this case, click here.

Paying for train ticket is not the same as paying for use of train station under TTCA premise defect claim, says 5th COA

City of Dallas v. Kennedy, No. 05-19-01299-CV (Tex. App.—Dallas June 13, 2020) (mem. op.)

Plaintiff Kennedy was purchased a train ticket in Longview and used it to travel from Kilgore to Dallas. At a city-owned train station in Dallas, she tripped on a broken area of tile, and later sued the City under the Texas Tort Claims Act (TTCA) for failing to repair the floor or warn of a dangerous condition. The City claimed immunity, arguing that the plaintiff was a licensee rather than an invitee, because she had not paid to use the train station. The trial court denied the City's plea to the jurisdiction.

The Fifth Court of Appeals disagreed with the plaintiff's argument that, because she had paid to ride a train to the station, she was an "invitee." Because she had not paid to use the rain station itself, the appeals court found that she was a licensee — and the City owed her only a duty to warn of dangers of which it had actual knowledge. There were no reports on file at the City that broken tile posed a danger. The trial court's ruling was reversed.

For more on this case, click here.

Austin Court of Appeals holds junior college could not withhold school transcripts of two employees under Texas Public Information Act

Del Mar College District v Ken Paxton, 03-19-00094-CV (Tex. App. – Austin, July 1, 2020)

The Del Mar College District sued the Attorney General's office after being ordered to release the college transcripts of two professors, in conjunction with a Texas Public Information Act request. Although the AG had found the District was entitled to withhold some information requested in the original PIA, it determined that other information (including the transcripts) should be disclosed. The trial court heard summary judgment motions from both the plaintiff (a junior college district), and the defendant, and granted the AG's motion.

On appeal, the central question was whether the junior college is a "public school." For purposes of the PIA, §552.102(b) would make the transcripts exempt. The court found that while junior colleges are an integral part of the state's education system, they are part of the "higher education system" (governed by Tex. Educ. Code § 130.084(b)) because students pay tuition. Thus, the transcripts must be released. The trial court's ruling was affirmed.

For more on this case, click here.

Failure to use an x-ray machine in the right area to locate a missing sponge constitutes misuse of tangible personal property under TTCA

Univ. of Tex. Sw. Med. Ctr. V. Rhoades, No. 05-19-00445-CV (Tex. App.—Dallas June 30, 2020).

This is a medical negligence case brought under the Texas Tort Claims Act (TTCA) filed after a sponge was left inside Plaintiff Rhoades during surgery. The Dallas Court of Appeals held the plea to the jurisdiction was properly denied because Rhoades had made a proper allegation of misuse of tangible personal property.

The plaintiff in this case underwent surgery, during which tissue was removed from her abdomen and placed in her chest. While the surgery was still under way, medical staff realized a surgical sponge was missing and X-rayed the patient, but they failed to locate the item. During her post-op recovery, the sponge was found in her pelvic region and was removed. Plaintiff Rhoades experienced complications from the second procedure, prompting multiple additional surgeries. She sued the Medical Center for negligence, arguing that immunity was waived under the TTCA through misuse of tangible personal property (i.e., the sponge and the X-ray machine). The trial court denied the Medical Center's plea to the jurisdiction, and the ruling was appealed.

Under the TTCA and existing case law, governmental immunity is not waived for incorrect medical judgment or by non-use of medical equipment. Here, the plaintiff argued that medical staff misused the X-ray machine by failing to scan the correct abdominal region — thus causing additional surgery and further medical complications. The Appeals Court upheld the lower court's denial of the plea to the jurisdiction. A dissenting opinion was also filed.

For more on this case, click here.

14th Court of Appeals holds police sergeant who picked up husband's police "take-home" vehicle was acting within course and scope of employment

City of Houston v. Isabel Mejia, 14-19-00559-CV (Tex. App. – Houston [14th Dist.], July 21, 2020)

This is a Texas Tort Claims Act ("TTCA") case involving a motor vehicle accident in which the 14th Court of Appeals affirmed an order denying the City's jurisdictional challenge on interlocutory appeal.

This TTCA case involves a Houston police officer who was involved in a motor vehicle accident with a civilian. Police Sergeant Michelle Gallagher had responded to a request from her husband, a lieutenant in the Houston Police Department, to pick up his "take-home" police vehicle from a mechanic's garage and drive it to their residence. While doing so, Gallagher collided in an intersection with a vehicle driven by Isabel Mejia, who sued Gallagher and the Department for personal injuries.

The City first admitted Gallagher was acting "in the course and scope of her employment" at the time of the accident, but later amended its responses to the plaintiff. It then filed a motion for summary judgment, claiming that she had not been within the course and scope — with Gallagher testifying that she was not on duty, responding to a call for service or emergency and was not being paid at the time the accident occurred. The trial court denied the City's motion.

The Appeals Court held that the "scope of employment," under the TTCA, includes "being in or about the performance of a task lawfully assigned to an employee by competent authority." Gallagher's affidavit established that her husband (a superior officer) asked her to pick up his City-issued vehicle so that it would be available at the beginning of his shift (a benefit to their mutual employer). In short, Gallagher was not commuting to or from work but running an errand for the City. The lower court's denial of the City's jurisdictional challenge was affirmed.

For more on this case, click here.

Under the Texas Tort Claims Act, injury to self by suicide is foreseeable injury under motor-vehicle waiver of immunity when officer did not properly fasten seat belt of detainee

City of Austin v. Sayeed Anam, et al., 03-19-00294-CV (Tex. App.—Austin, July 30, 2020) (mem. op.).

In this Texas Tort Claims Act, the Court of Appeals upheld the trial court's denial of the City's plea to the jurisdiction for the death of an arrestee by suicide due to use of a motor vehicle because it was foreseeable that not properly fastening a seatbelt would allow an arrestee to commit suicide.

This TTCA case involves a person who was arrested for shoplifting, searched and then placed in a patrol car, where the arresting officer fastened his seatbelt — but a handgun in the detainee's waistband went undetected. While en route for booking, the detainee managed to unfasten his seatbelt, told the officer he was suicidal and had a loaded gun, and then fatally shot himself. The decedent's family sued the City, arguing that the use of a motor vehicle (not properly fastening a seatbelt) was a "foreseeable" cause of his death. The City filed a plea to the jurisdiction, which was denied.

To waive government immunity through the TTCA, a plaintiff must show that the cause of injury or death was the operation or use of the motor vehicle. The appeals court did not review the issue of whether tangible personal property caused the injury, but it held that the improper fastening of a seatbelt was a foreseeable cause of self-injury by an arrestee. The trial court's ruling was affirmed, with a dissent also on file.

For more on this case, click here.

Fourth Court of Appeals holds no jurisdiction exists for ex-council member to sue after office was declared forfeit for charter violations

City of Leon Valley v Martinez, 04-19-00879-CV (Tex. App. — San Antonio, August 19, 2020)

This is a suit by an ousted city council member to recover his position. The San Antonio Court of Appeals held the exclusive remedy in this situation was a *quo warranto* lawsuit brought by the State.

Complaints about a City Council member's conduct prompted an investigation about violations of the city charter. After several hearings and testimony from a number of witnesses, the Council voted to remove CM Martinez for charter violations. A replacement was appointed, sworn in and began to function before Martinez sued, asserting his due process rights had been denied and he should be reinstated to the Council. The trial court denied the City's plea to the jurisdiction, and the ruling was appealed.

A *quo warranto* action is designed to determine questions about the proper person entitled to hold a public office, and exercise its functions, when such disputes arise. The *quo warranto* statute contains plain and unambiguous language that only the State — not a private litigant — has standing to lodge such a challenge. Moreover, a *quo warranto* proceeding is the sole remedy to test the right of an officer to hold public office. Thus, only the State has standing to challenge the proceedings or votes under which Martinez was removed. The City's plea should have been granted.

For more on this case, click here.

Upcoming CLE: September 2020 - October 2020

(All courses are webcast only)

September

- **Sept. 2-4:** Advanced Criminal Law Course 2020
- **Sept. 2-4:** Advanced Personal Injury Law Course 2020
- **Sept. 3-4:** Advanced Texas Administrative Law Seminar
- **Sept. 9:** Civil Appellate Practice 101, 2020
- **Sept. 10-11:** Advanced Civil Appellate Practice Course 2020
- **Sept. 9-11:** Advanced Criminal Law Course 2020
- **Sept. 16-18:** Annual Criminal & Civil Law Conference 2020
- **Sept. 21-30:** IMLA Annual Conference
- **Sept. 24-25:** Firearms 2020 - What Every Texas Lawyer Needs to Know

October

- **Oct. 2:** Jury Trials from the Millennial Perspective
- **Oct. 5-9:** IMLA - Institute for Local Government Lawyers
- **Oct. 12-16:** IMLA - Code Enforcement Programs
- **Oct. 14-16:** Advanced Personal Injury Law Course 2020
- **Oct. 15:** Texas City Attorney Association (TCAA) Fall Conference
- **Oct. 22-23:** Advanced Civil Appellate Practice Course 2020
- **Oct. 28-30:** Advanced Civil Trial Course 2020

TDCAA Online Training

- Annual Criminal & Civil Law Conference 2020 **($250)**

- Mandatory Brady Training (2018) - **Includes 1 hour MCLE ethics credit (FREE)**
- Mental Health Training: The Sequential Intercept Model **($25)**
- Multiple Presenter Training: Caseload Management **($25)**
- Multiple Presenter Training: General Advocacy **($25)**
- Multiple Presenter Training: Issues in Domestic Violence **($25)**