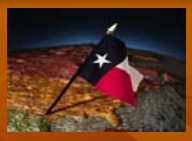


Recent State Cases of Interest

TCAA Fall Conference-Fort Worth
October 22, 2009
Clarissa M. Rodriguez
Denton, Navarro, Rocha, Bernal, P.C.

Annexation

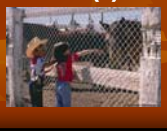
- *Five Land, Ltd. V. City of Rowlett*, 2009 WL 2462776, No. 05-08-00662-CV (Tex. App.—Dallas, August 13, 2009)
  - Five Land filed mandamus to enforce service plan over land annexed by City of Rowlett pursuant to Tex. Loc. Gov't Code S. 43.056
  - The City filed a plea to the jurisdiction claiming Five Land did not have standing to sue because they were not "residing" on the property at the time of the mandamus action. The legislature amended the statute to allow "non-resident owners" to petition for mandamus
  - The trial court held in favor of the City concluding Five Land did not have standing to bring mandamus to enforce service plan

Annexation

- *Five Land, Ltd. V. City of Rowlett*, 2009 WL 2462776, No. 05-08-00662-CV (Tex. App.—Dallas, August 13, 2009)
  - Issue was whether the legislative changes applied to Five Land
  - The Court of Appeals held Five Land did not have standing to file a mandamus action to enforce the service plan because the legislature did not intend for the changes to apply to completed annexations and they were considered "landowners" not residents at the time of the annexation

Annexation

- *City of Celina v. City of Pilot Point and Talley Ranch Management, Ltd.*, 2009 WL 2750978, No. 2-08-230-CV (Tex. App.—Fort Worth August 31, 2009)
  - Pilot Point annexed land, entered into development agreements and adopted a resolution accepting over 3000 acres of Talley Ranch property into its ETJ
  - Celina brought suit challenging the validity of the annexation and seeking a declaratory judgment because (1) the annexation extended into it's ETJ; (2) it was a prohibited "strip annexation" and (3) it annexed outside Pilot Point's ETJ



Annexation

- *City of Celina v. City of Pilot Point and Talley Ranch Management, Ltd.*, 2009 WL 2750978, No. 2-08-230-CV (Tex. App.—Fort Worth August 31, 2009)
  - Pilot Point and Talley Ranch filed summary judgment which the trial court granted their favor
    - Grounds for summary judgment were based on the following issues: the suit was filed more than two years after the annexation and this time presumed the parties have consented to the annexation and were thus barred by Tex. Loc. Gov't Code S. 43.901

Annexation

- *City of Celina v. City of Pilot Point and Talley Ranch Management, Ltd.*, 2009 WL 2750978, No. 2-08-230-CV (Tex. App.—Fort Worth August 31, 2009)
  - Celina argued that Tex. Loc. Gov't Code S. 43.901 does not cure any other defect aside from the lack of consent; however the Court of Appeals reasoned this was not the case because the legislature intended a broad application and "at a certain point in time, defects in annexation must yield to the interests of stability."
  - Celina also argued the court erred in denying to dismiss Talley Ranch's intervention. The Court of Appeals held Talley Ranch had a justicable interest to intervene.

Employment-Civil Service

- *City of Pasadena v. Smith*, 2009 WL 2667599, No. 06-0948 (Tex. August 28, 2009)
  - City suspended Officer Smith indefinitely; he appealed to independent examiner
  - The chief of police did not appear at the hearing and the hearing examiner dismissed the case without hearing any evidence
  - The Appellate Court held the hearing examiner exceeded his jurisdiction under Tex. Loc. Gov't Code S. 143.057 for failure to hear evidence before making a determination on an officer's discipline

Employment-Civil Service

- *City of Pasadena v. Smith*, 2009 WL 2667599, No. 06-0948 (Tex. August 28, 2009)
  - The Court of Appeals also set out a three part test to determine whether a hearing examiner exceeds his jurisdiction under the Civil Service Act:
    - His acts are not authorized by the Act
    - His acts are contrary to the Act
    - The acts invade the policy setting realm protected by the non-delegation doctrine

Employment- Civil Service

- *City of Houston v. Tones*, 2009 WL 3210944, No. 14-08-00209-CV (Tex. App.– Houston [14th Dist.] Oct. 8, 2009)
  - HPD Officer Tones filed a notice of appeal to commission based on her temporary suspension for failure to respond to bullet complaints
  - The City argued the hearing officer misapplied the applicable provision to Tones' appeal, Loc. Gov't. Code S. 143.1016(j)
  - The Court of Appeals held the district court did not have jurisdiction to hear the City's appeal that the hearing examiner abused his authority by wrongly applying Loc. Gov't. Code S. 143.1016(j), which is different than the test in the *City of Pasadena* case
  - The Appeals Court also held unfounded misapplication of the law does not amount to exceeding jurisdiction under the new *City of Pasadena* test.

Immunity: Monetary Damages

- *Town of Double Oak v. McDaniel*, 2009 WL 2579613, No. 2-09-046-CV (Tex. App.—Fort Worth August 20, 2009) (mem. op.)
  - McDaniel sued the Town for overcharges on sewer connection fees
  - Double Oak filed a plea to the jurisdiction, which trial court denied
  - Court of Appeals held McDaniel could not sue for retrospective monetary damages as they are barred by immunity
  - Court of Appeals also held McDaniel did not allege legislative permission to sue for these damages because overpayment of fees to complete his project did not rise to the level of duress

Immunity: Monetary Damages

- *Linbeck Construction Corp. v. City of Grand Prairie*, 2009 WL 2437097, No. 05-08-00650-CV (Tex. App.—Dallas August 11, 2009)
  - Linbeck sued the City for judicial foreclosure on a mechanic's lien on a facility owned by the City
  - City filed a plea to the jurisdiction challenging the lien issues, declaratory judgment and attorney's fees
  - The issue in this case is whether governmental immunity protects the government from lawsuits that foreclose on city owned property
  - The Court of Appeals held Linbeck's injury was in the past and his only remedy was for monetary damages which is barred by the City's immunity from suit

Immunity: Tort

- *City of San Antonio v. Riley*, 2009 WL 2045231, No. 04-09-00162-CV (Tex. App.—San Antonio, July 15, 2009) (mem. op.)
  - Plaintiff sued the City for damages when an EMS officer responded to an emergency and cut across several lanes on IH-35
  - Trial Court granted summary judgment in favor of the City
  - Plaintiff presented affidavit of witness who testified to the reckless behavior of the EMS driver
  - Court of Appeals held the affidavit was sufficient to raise a fact issue as to whether the driver was "negligent" and not "reckless" under Texas Tort Claims Act

Immunity: Tort

- *City of San Antonio v. Riley*, 2009 WL 2045231, No. 04-09-00162-CV (Tex. App.—San Antonio, July 15, 2009) (mem. op.)
  - The Court of Appeals also held the City maintained its immunity under the emergency exception of the Texas Tort Claims Act S. 101.055

Immunity: Tort

- *City of Laredo v. Reyes*, 2009 WL 2882935, No. 04-09-00132-CV (Tex. App.—San Antonio, September 9, 2009) (mem. op.)
  - Plaintiff sued the City individually and as the representative of her sister's estate for the wrongful drowning death of her sister
  - Deceased was traveling down Century Blvd. in Laredo and attempted to cross flood waters along the street

Immunity: Tort

- *City of Laredo v. Reyes*, 2009 WL 2882935, No. 04-09-00132-CV (Tex. App.—San Antonio, September 9, 2009) (mem. op.)
  - Plaintiff argued the City waived its immunity because the flooded street was a premises or special defect; City filed plea to the jurisdiction
  - Reyes presented direct evidence from a neighbor who testified in an affidavit that he began calling 911 several times throughout the evening to warn the police of the rising water because of his prior knowledge of the problem. Although the neighbor did not actually see the rising water, the Court of Appeals held this reasonable inference was sufficient to establish circumstantial evidence as to whether the City had actual knowledge

Immunity: Tort

- *City of Laredo v. Reyes*, 2009 WL 2882935, No. 04-09-00132-CV (Tex. App.—San Antonio, September 9, 2009) (mem. op.)
  - Court of Appeals held the water on the road was not a special defect as it did not present an "unexpected and unusual" danger to ordinary users
  - Installation of safety features are discretionary in nature
  - Court of Appeals reversed and remanded denial of plea to the jurisdiction

Immunity: Tort

- *City of Plano v. Homoky*, 2009 WL 2596194, No. 05-08-01461 (Tex. App.—Dallas August 25, 2009)
  - Operation of golf course is governmental function
  - Operation of golf clubhouse is interrelated to the operation of the golf course and a governmental function
  - No waiver of immunity under recreational use statute even though Plaintiff was walking to her car and not engaging in "recreation." Recreation includes journeying to and from the recreational area- here to the golf clubhouse

Immunity: Tort

- *Hunnicutt v. Dallas/Fort Worth Int'l Airport Bd.*, 2009 WL 2356858, No. 2-08-297-CV (Tex. App.—Fort Worth July 30, 2009) (mem. op.)
  - Hunnicutt sued DFW for premises liability when she sustained injuries for riding an escalator; DFW was granted summary judgment
  - Court of Appeals upheld summary judgment in favor of DFW as Plaintiff did not provide sufficient evidence DFW had constructive knowledge of the defective escalator

Governmental Immunity

- *Smith v. City of Blanco*, 2009 WL3230836, No. 03-08-00784-CV (Tex. App.—Austin Oct. 8, 2009)
  - Smith sued Blanco for declaratory judgment for a breach of contract to maintain a crossing over the river adjudicated in 1976, breach of contract and nuisance for failure to maintain the crossing
  - The City filed three pleas to the jurisdiction based on immunity and after Smith filed amended petitions; district court granted the plea and Smith appealed

Governmental Immunity

- *Smith v. City of Blanco*, 2009 WL3230836, No. 03-08-00784-CV (Tex. App.—Austin Oct. 8, 2009)
  - The Court of Appeals held:
    - Smith couched his breach of contract claim in a declaratory judgment action and he cannot change his cause of action from contract to a declaratory action to sidestep governmental immunity
    - The City did not waive its immunity for breach of contract by its conduct; possible to waive immunity absent legislative action by contracting with a private party, but that conduct must be extremely egregious to rise to the level of waiver of immunity
    - Smith failed to plead any basis to establish a waiver of governmental immunity and failed to plea any facts to establish jurisdiction regarding his nuisance claim.
  - No waiver of immunity on any of Smith's claims; upheld trial court's decision to grant the plea to the jurisdiction for the City

Land Use

- *Rhino Real Estate Investments, Inc., et. al. v. City of Runaway Bay*, 2009 WL 2196131, No. 2-08-340-CV (Tex. App.—Fort Worth, July 23, 2009) (mem. op.)
  - Rhino Group owned 12 lots in Runaway Bay's ETJ; the City filed suit against Rhino to enforce subdivision regulations for building permits and inspections on the developments within the ETJ
  - The City passed an ordinance extending the subdivision regulations to the ETJ pursuant to Tex. Loc. Gov't Code S.212.003; the issue was whether the extension of the ordinance applied to the ETJ of Runaway Bay

Land Use

- *Rhino Real Estate Investments, Inc., et. al. v. City of Runaway Bay*, 2009 WL 2196131, No. 2-08-340-CV (Tex. App.—Fort Worth, July 23, 2009) (mem. op.)
  - The Court of Appeals held the subdivision ordinance requirements did not apply to the ETJ of Runaway Bay because the plain meaning of the ordinance did not apply to subdivisons created after final approval of the ordinance; Rhino's plats were approved prior to the passage of the ordinance
  - The Court of Appeals reversed the trial court's declaratory judgment in favor of the City

Libel & Defamation: City Official

- *Brock v. Tandy,* 2009 WL 1905130, No. 2-08-400-CV (Tex. App.—Fort Worth July 2, 2009) (mem. op.)
  - Brock ran an ad in the Keller newspaper 8 days before the mayoral election blaming the Mayor, Tandy, and corrupt city hall for ruining his property and accused the mayor of falsifying legal documents
  - Mayor lost election and filed this defamation and libel per se claim against Brock; Brock filed summary judgment and trial court denied

Libel & Defamation: City Official

- *Brock v. Tandy,* 2009 WL 1905130, No. 2-08-400-CV (Tex. App.—Fort Worth July 2, 2009) (mem. op.)
  - Tandy argued the language was so hurtful and had defamatory meaning such that a reasonable person would view that as a public official, Tandy would be subject to removal from office, criminal charges or imputation of dishonesty
  - Tandy also submitted Brock's own deposition testimony as evidence that he acted with actual malice because he did not act with care as to the truth or falsity of his statements
  - Court of Appeals upheld denial of Brock's summary judgment

Takings

- *City of Carrollton v. McPhee*, 2009 WL 2596145, No. 05-08-01018-CV (Tex. App.—Dallas August 25, 2009) (mem. op.)
  - McPhee filed an inverse condemnation claim against the City for issuing a stop work order on his remodeling project; the City filed a plea to the jurisdiction and the trial court denied
  - Trial court held City did not have immunity from suit because McPhee alleged sufficient facts for a valid inverse condemnation claim; the City argued he did not have a public use for the property, but the trial court held a public use is not necessary to allege a regulatory taking

Takings

- *City of Carrollton v. McPhee*, 2009 WL 2596145, No. 05-08-01018-CV (Tex. App.—Dallas August 25, 2009) (mem. op.)
  - Trial Court further held a fact issue was created as to whether McPhee exhausted his administrative remedies under the ordinance
  - Court of Appeals upheld trial court's finding City was not immune from suit

Taxes

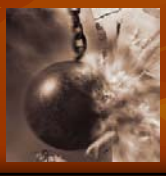
- *Goffney v. Houston Independent School District, City of Houston, et. al.*, 2009 WL 2343250, No. 01-08-00063-CV (Tex. App.—Houston [1st Dist.] July 30, 2009) (mem. op.)
  - The City and other taxing entities filed suit against the Goffneys to recover special assessments for demolition and delinquent ad valorem taxes
  - The trial court found for the taxing entities and the Goffneys appealed

Taxes

- *Goffney v. Houston Independent School District, City of Houston, et. al.*, 2009 WL 2343250, No. 01-08-00063-CV (Tex. App.—Houston [1st Dist.] July 30, 2009) (mem. op.)
  - The Goffneys owned several apartments in Houston, which were subject to a dangerous building hearing where an order was issued to comply with the City's minimum building requirements, or CURB ordinance
    - No compliance; buildings demolished and emergency hearing called one week after demolition

Taxes

- *Goffney v. Houston Independent School District, City of Houston, et. al.*, 2009 WL 2343250, No. 01-08-00063-CV (Tex. App.—Houston [1st Dist.] July 30, 2009) (mem. op.)
  - City argued the Goffneys did not have standing to sue because they did not own the property at the time of the hearing or demolition; regardless of legal title, the Court of Appeals held the Goffneys were personally aggrieved and had standing to sue



Taxes

- *Goffney v. Houston Independent School District, City of Houston, et. al.*, 2009 WL 2343250, No. 01-08-00063-CV (Tex. App.—Houston [1st Dist.] July 30, 2009) (mem. op.)
  - Goffneys also argued the City deprived them of due process based on the lack of notice for the CURB hearing and mechanism for imposing costs for the demolition
  - Court of Appeals held the issues raised on appeal for these due process allegations were different than those raised at trial court level and they did not properly preserve their error under TRAP 33