RECENT STATE CASES OF INTEREST TO CITIES

Ronald D. Stutes
Tyler, Texas
POTTER MINTON
A Professional Corporation

TEXAS CITY ATTORNEYS ASSOCIATION
FALL 2012

City of Austin v. Whittington
2012 WL 3800183, No. 10-0316 (Tex. 2012)

- City of Austin condemned city block owned by Whittington
- Parking garage on ½ of block leased to city
- Public purpose:
  - Cooling plant
  - Parking garage

City of Austin v. Whittington *(cont'd)*
2012 WL 3800183, No. 10-0316 (Tex. 2012)

- Good Faith of public necessity determination is fact issue for jury
  - In this case, no fact issue
  - Only question was whether undisputed facts showed bad faith – question of law
- Council determination not outweighed by one email from one staff member
- Economic Development prohibition not applicable to public facility
- Subsequent amendment of taking to include alley was permissible

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A Professional Corporation

City of Haltom City v. Aurell
No. 2012 WL 3600007, 02-11-00197-CV
(Tex. App.—Fort Worth Aug. 23, 2012)

- Trailer park subject to flooding
- Catastrophic flood event led to fatalities and immense property damage
- City had put up warning signs

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City of Haltom City v. Aurell *(cont'd)*
No. 2012 WL 3600007, 02-11-00197-CV
(Tex. App.—Fort Worth Aug. 23, 2012)

- Two theories
  - Premises defect – but plaintiff has to show the city knew of specific danger (the flood), not the possibility of the dangerous condition occurring (propensity to flood), before duty to warn arises
  - Negligent undertaking – liability for negligently undertaking steps to help must be based on either:
    - steps made the situation worse, or
    - plaintiff reasonably relied on steps

Mission Consol. Independent School Dist. v. Garcia
372 S.W.3d 629, No. 10-0802 (Tex. 2012)

- Plaintiff discharged, replaced with same gender, same ethnicity, older
- Suit filed claiming sex, racial, and age discrimination

Mission Consol. Independent School Dist. v. Garcia *(cont'd)*
372 S.W.3d 629, No. 10-0802 (Tex. 2012)

- Under McDonnell Douglas, prima facie case includes showing that employee was replaced by someone younger or that was otherwise terminated because of age
  - Majority – plaintiff is required at plea to the jurisdiction stage to come forward with some evidence that age was a motivating factor
  - Dissent – McDonnell Douglas analysis is inappropriate here, because that's just one way to prove discrimination
  - Key question may be whether plaintiff has had a chance to develop any evidence – in this case, the case had been remanded from the first appeal for 9 months before the plea to the jurisdiction was filed, and over 90 days elapsed between the filing of the plea and the hearing on that plea.

Rusk State Hosp. v. Black
2012 WL 3800218, No. 10-0548, (Tex. Aug. 31, 2012)

- Plaintiffs family filed suit against hospital under Tort Claims Act
- Their son had committed suicide by placing a plastic bag over his head
- On appeal, state raised immunity/jurisdiction for the first time
  - Appeals court did not consider because not raised in trial court

Rusk State Hosp. v. Black *(cont'd)*
2012 WL 3800218, No. 10-0548, (Tex. Aug. 31, 2012)

- Supreme Court says jurisdictional matters can be raised at any time so permissible to raise for first time on appeal
- Must be remanded, however, unless defendant can show:
  - pleadings negate jurisdiction
  - plaintiffs have had full opportunity to develop record and amend pleadings but have not done so, or
  - plaintiffs cannot show jurisdiction even with opportunity to amend and develop record

Rusk State Hosp. v. Black *(cont'd)*
2012 WL 3800218, No. 10-0548, (Tex. Aug. 31, 2012)

- Dissent says it is time to separate immunity from jurisdiction
  - Defendant can waive immunity, but not jurisdiction
  - Majority does not really reject this analysis, but says that this change in law was not fully briefed by the parties so should not be made by the court.

OTHER CASES

Other Cases

- *City of Beaumont v. Como* – Heather Stewart decision on rehearing really means what it says
- *City of Caldwell v. Lilly* – Allegation that city violated a statute does not automatically mean immunity is waived
- *City of Denton v. Paper* – 3" depression in street is not a special defect, and a repair that doesn't work is not notice
- *City of El Paso v. Arditti* – Separation of Powers doctrine does not apply to municipalities
- *City of Fort Worth v. Jacobs* – No immunity for suit seeking reinstatement for unconstitutional termination

Other Cases

- *City of Houston v. Hatton* – Decision to speed, use lights and sirens, and go a particular route are all exercises of discretion
- *City of North Richland Hills v. Friend* – Failure to use AED is not within Tort Claims Act waiver
- *City of San Antonio v. Casey and City of San Antonio v. Wheelabrator* – A claim for quantum meruit is not within the waiver of immunity for breach of contract suits.
- *Goss v. City of Houston* – EEOC and TWC deadlines are jurisdictional and can be raised at any time
- *Steele v. City of Southlake* – When city has policy of termination for untruthfulness, and there's no evidence that policy has not been followed, summary judgment can be granted

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PREVIEW OF COMING ATTRACTIONS

City of Houston v. Atkins, et al.

- At least seven cases are pending before the Supreme Court of Texas on the resolution of how Civil Practices and Remedies Code Section 101.106 should be interpreted
- City of Houston says that when a plaintiff sues both an employee and the city:
  - subsection (e) says the city can get the employee dismissed; and
  - subsection (b) says that suing the employee "immediately and forever" barred the suit against the city, unless city consents.
  - So, city argues, entire case should be dismissed

City of Houston v. Atkins, et al. *(cont'd)*

- First Court of Appeals, rejected
- Fourteenth limited to non-Tort Claims Act claims, as Tort Claims Act constitutes consent.
- Neither finally adopts city's position.

City of Houston v. Trail Enterprises, Inc.

- This is Trail's third suit for inverse condemnation
  - 1995 suit; held by court of appeals was barred by statute of limitations
  - 1999 suit; summary judgment for city affirmed in part, reversed in part, subsequently voluntarily dismissed.
  - 2003 suit
    - trial court held plaintiffs had not exhausted administrative remedies
    - affirmed by court of appeals, reversed and remanded by Supreme Court of Texas
    - On remand, trial court finally granted plaintiffs relief, awarding $17 million to plaintiffs and awarding remaining minerals to City

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City of Houston v. Trail Enterprises, Inc. *(cont'd)*

- Good inverse condemnation analysis by 14th Court of Appeals
  - Use *Penn Central* analysis unless
    - actual physical invasion (none here); or
    - denies all economically beneficial use of land
      - not the case here because some old wells still are producing
  - So use the 3 *Penn Central* factors
    - character of governmental action (protection of drinking water is important)
    - economic impact of regulation (loss of chance to drill gas wells means this factor favors plaintiffs)

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City of Houston v. Trail Enterprises, Inc. (cont'd)

- investment-backed expectations
  - many plaintiffs inherited properties, so no investment
  - others purchased properties after regulations in place, so no expectations
  - only one plaintiff purchased when not regulated, and no evidence that plaintiff purchased as an investment
- Four previous appellate opinions, one to supreme court, makes it appear likely there will be further opinions on this case