Case Summaries
June 3, 2022

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OPINIONS

GOVERNMENTAL IMMUNITY
Ultra Vires Claims

Van Boven v. Freshour, — S.W.3d —, — 2022 WL — (Tex. June 3, 2022) [20-0117]

The issue in this case is whether members of the Texas Medical Board acted *ultra vires* by refusing to void a temporary sanction reported against a physician to the National Practitioner Data Bank even though the Board ultimately determined that the allegations underlying the temporary sanction were not proved.

After two patients filed complaints against Dr. Van Boven, the Board temporarily restricted his license to practice medicine and reported the suspension to the federal Data Bank. The U.S. Department of Health and Human Services issues a *Guidebook* categorizing the types of reports to be made, which include an Initial Report, a Void Report, and a Revision-to-Action Report. In accordance with the *Guidebook*'s instructions, the Board submitted to the Data Bank an Initial Report with notice of Van Boven's temporary suspension.

Later, an administrative law judge concluded the Board did not prove the allegations against Van Boven. Although the Board could have sought judicial review of the judge's findings, the Board adopted them. The Board issued a final order dismissing the disciplinary proceeding against Van Boven and reinstating his medical license.

Van Boven then urged the Board to submit to the Data Bank a Void Report, which the *Guidebook* says is appropriate when the action giving rise to the Initial Report is overturned on appeal. The submission of a Void Report removes the Initial Report from the physician's record. The Board instead submitted a Revision-to-Action report, which the *Guidebook* describes as "a report of an action that modifies an adverse action previously reported." When a Revision-to-Action Report is filed, the Initial Report remains part of the physician's record.

Van Boven sought a writ of mandamus directing the Board members to submit a Void Report to the Data Bank. Van Boven argued that the Board's immunity from suit was waived because the Board acted *ultra vires* by submitting a Revision-to-Action Report. The trial court denied the defendants' plea to the jurisdiction, but the court of appeals reversed and rendered judgment dismissing Van Boven's suit.

The Supreme Court reversed and remanded the case to the trial court for further proceedings. The Court reasoned that the Board's final order overturned the temporary suspension and that, therefore, the *Guidebook* required a Void Report to be filed.

Justice Boyd filed a dissent explaining his view that the Board's decision to file a Revision-to-Action Report rather than a Void Report did not violate any state or federal law and therefore was not an *ultra vires* act.

GOVERNMENTAL IMMUNITY

Ultra Vires Claims

Schroeder v. Escalera Ranch Owners' Ass'n, Inc., — S.W.3d —, (Tex. June 3, 2022) [20-0855]

At issue in this case was whether governmental immunity protected a zoning commission's determination that a proposed subdivision conformed with applicable law.

Escalera Ranch is a subdivision within the City of Georgetown's extraterritorial jurisdiction, accessible via Escalera Parkway. A developer applied to the city's Planning and Zoning Commission for approval of a preliminary plat for a new subdivision, Patience Ranch, neighboring Escalera Ranch. As planned, Escalera Parkway would provide the only access to homes in Patience Ranch. Several Escalera Ranch residents expressed concerns about adding more traffic to Escalera Parkway and asserted that the plan did not conform to the City's Unified Development Code (UDC). The Planning and Zoning Commission concluded the plat did conform to UDC requirements, and that it had a duty under state law to approve the conforming plat.

The Escalera Ranch Owners' Association sued the Commission members in their official capacities for mandamus relief, asserting that the plat was nonconforming. In a plea to the jurisdiction, the Commissioners argued that the Association lacked standing to sue, and that they had a ministerial duty to approve a plat they had determined to be conforming. The trial court granted the Commissioners' plea. The court of appeals reversed, reasoning that the increased traffic along with the accompanying safety risks amounted to a particularized injury and that the determination of whether the plat was conforming was a matter of discretion, judicially reviewable for a clear abuse.

The Supreme Court reversed the court of appeals, concluding that governmental immunity protected the Commissioners' determination of conformity. The Court explained that governmental immunity for the Commissioners had not been waived by statute, and the Association's claim did not fall within the *ultra vires* exception to governmental immunity. First, there was no ministerial duty under state law to deny a nonconforming plat. Next, there was no clear abuse of discretion by the Commissioners. The UDC required a determination of conformity by the Commissioners, and listed items for the Commissioners to consider in making their determination. The Court concluded that, so long as the Commissioners fully consider the proper materials, the duty to interpret the UDC had been committed to the Commissioners' discretion. Since the record showed that the Commissioners considered the proper items, the Association's challenge to a discretionary decision made within the Commissioners' authority was barred by governmental immunity and must be dismissed. Since the Court resolved the case on governmental immunity grounds, it did not reach whether the Association had standing to challenge the plat's approval.

PROCEDURE—PRETRIAL

Standing

Jones v. Turner, —S.W.3d—, 2022 WL (Tex. June 17, 2022) [21-0358]

This case concerns whether taxpayers have standing to challenge alleged misallocation of tax revenue by city officials and whether the taxpayers in this case sufficiently pleaded *ultra vires* acts by alleging the city officials had no discretion in so misallocating the funds.

Two Houston Taxpayers, Jones and Watson, sued Houston Mayor Sylvester Turner and other City Officials for allegedly underfunding the Dedicated Drainage and Street Renewal Fund established under the City Charter, which mandated that a certain amount of funds be spent "exclusively" on drainage and street maintenance. Specifically, Taxpayers alleged that in Fiscal Year 2020 the ad valorem tax revenue allocation to the Fund had a shortfall of about $50 million. Taxpayers' pleadings indicated that they calculated that amount by multiplying Fiscal Year 2020's total assessed taxable property value by the Charter's allocation of an "amount equivalent to proceeds from $0.118 of the City's ad valorem tax levy," minus debt service, to the Fund.

The City Officials filed a plea to the jurisdiction asserting governmental immunity. The City Officials argued the pleadings did not show that they acted outside their authority. They also contested Taxpayers' calculations. The trial court denied the plea to the jurisdiction.

On appeal, the City Officials maintained their entitlement to immunity and argued for the first time that Taxpayers lacked standing to bring suit. The court of appeals held that Taxpayers did not have standing. The appeals court concluded that Taxpayers failed to show that their suit sought to enjoin an illegal expenditure of funds (or any expenditure of funds)—a necessary component of taxpayer standing. Having determined that Taxpayers had not established taxpayer standing and had not otherwise shown a particularized injury, the appeals court dismissed the case for want of jurisdiction without reaching the immunity issue.

The Supreme Court reversed. It was undisputed the Taxpayers were "taxpayers" for purposes of standing, so the question was whether they pleaded sufficient facts showing that public funds were expended on allegedly illegal activity. The Court held they did. Taxpayers' calculations showed a measurable and not *de minimus* misallocation and alleged that the City was in fact spending the money on other services that would not have received those funds if City Officials had allocated them properly.

The Supreme Court also reached the immunity issue the court of appeals did not address. The Court held that the Charter gave the City Officials no discretion but to allocate the funds as mandated. Finally, the Court held that the trial court did not err in declining to dismiss Taxpayers' claims for mandamus and declaratory relief at the plea to the jurisdiction stage.

CONSTITUTIONAL LAW

Retroactivity

Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc., — S.W.3d —, 2022 WL — (Tex. June 3, 2022) [21-1088]

At issue in this case is whether a statute that requires good cause for the termination of certain agreements between equipment suppliers and dealers is unconstitutionally retroactive when applied to an at-will agreement entered into before the statute took effect.

Fire Protection Service (FPS) orally agreed to be an authorized dealer of life rafts manufactured by Survitec Survival Products. FPS and Survitec agreed that either of them could terminate their agreement at any time for any reason or for no reason. Several years later, the Legislature enacted the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act. Among other things, the Act prohibits an equipment supplier from terminating a dealer agreement without good cause. The Act states that it applies to an agreement existing before the Act takes effect if the agreement has no expiration date and is a continuing contract.

Nearly six years after the Act took effect, Survitec terminated the agreement without providing a reason. FPS sued, alleging Survitec violated the Act, and the case was removed to federal court. The district court entered judgment for Survitec as a matter of law, concluding that application of the Act to the parties' preexisting at-will agreement violated the prohibition on retroactive laws in Article I, Section 16 of the Texas Constitution. FPS appealed, and the Fifth Circuit certified to the Texas Supreme Court the question of whether the Act's application violated the Constitution's retroactivity clause.

The Court held that application of the Act to the parties' agreement did not violate the constitutional prohibition against retroactive laws. The retroactivity clause protects only settled expectations. Because FPS and Survitec's agreement was open-ended and at-will, Survitec had no reasonable settled expectation that it could continue to operate under the terms of that agreement in perpetuity. And Survitec had sufficient time between the Act's enactment and effective date to take whatever actions it thought necessary to avoid or defer the Act's application to its contractual relationship with FPS but instead chose to continue operating under the agreement.

GRANTS

CLASS ACTIONS

Class Certification

Mosaic Baybrook One, L.P. v. Simien, 2020 WL 5637499 (Tex. App.—Houston [1st Dist.] Sept. 22, 2020), pet. granted, — Tex. Sup. Ct. J. — (June 3, 2022) [19-0612 & 21-0159]; consolidated with *Mosaic Baybrook One, L.P. v. Cessor,* 2020 WL 5637212 (Tex. App.—Houston [1st Dist.] Sept. 22, 2020), pet. granted, — Tex. Sup. Ct. J. — (June 3, 2022) [21-0161]

The issues in these cases surround class certification: whether the trial courts performed the required "rigorous analysis" to determine whether the certification prerequisites were met and whether the certification orders listed all the elements of

the defenses, as the Rules of Civil Procedure require. In addition, one petition asks whether a court of appeals' opinion declining an application for a permissive interlocutory appeal must state a basic analysis for doing so and whether the requirements for certifying an interlocutory appeal were met.

Both lawsuits stem from tenant complaints. Tenants of properties that Mosaic owns and manages pursued class actions, claiming that Mosaic improperly billed them in violation of certain statutes. In *Simien*, class representative Simien sued Mosaic under a provision of the Water Code that was amended after Simien initiated the lawsuit. Mosaic specially excepted to Simien's petition, contending that the amendment applied retroactively. It also asked the trial court to strike Simien's request for certain penalties and attorney's fees and to dismiss the claim for lack of jurisdiction. The trial court overruled the special exceptions, denied the motion to dismiss, and granted Simien's motion for partial summary judgment. It certified Mosaic's request for a permissive interlocutory appeal of the summary-judgment ruling, which the court of appeals denied. The trial court later found that the class-certification prerequisites were satisfied and certified the requested classes. In *Cessor*, the trial court likewise granted the class representative's motion for certification.

Mosaic perfected interlocutory appeals in both cases, and the court of appeals affirmed the certification orders. Mosaic argued that the trial courts abused their discretion by certifying the classes without conducting a rigorous analysis to determine that the certification prerequisites were satisfied. The court of appeals disagreed. In *Simien*, it wrote that Mosaic's arguments on the merits neither pointed to "any theory unmoored from the pleadings" nor undermined the trial court's finding that the certification requirements were met. When Mosaic contended that the trial plan should have expressly addressed the elements of its defenses, the court of appeals held that the trial court did not abuse its discretion because the record showed that it had considered the defenses in deciding whether to certify the class. In *Cessor*, Mosaic complained that the trial court did not conduct the requisite rigorous analysis, but the court of appeals explained that deciding the merits of a suit to determine "its maintainability as a class action is not appropriate." It also reasoned that the statute's plain language made elaborate analysis unnecessary, and the trial court's certification order parsed the statutory language to identify the issues of law and fact common to the class.

Mosaic petitioned the Supreme Court for review in both cases. The Court granted the petitions, consolidating them for argument. Oral argument has not yet been set.

REAL PROPERTY

Future Interests

Jordan v. Parker, 632 S.W.3d 108 (Tex. App.—El Paso 2021), pet. granted, — Tex. Sup. Ct. J. — (June 3, 2022) [21-0205]

This case presents a dispute over the current ownership of an undivided one-eighth interest in the mineral rights to a family ranch, which turns on the scope of a 1998 deed purporting to convey all the grantor's right, title, and interest in the ranch. At the time, the grantor owned an undivided one-eighth interest in fee simple and had a vested remainder interest in another undivided one-eighth interest ("the Disputed Interest"), which remained subject to his then-living mother's life estate in the ranch.

In 2016, the beneficiary of the now-deceased grantor's will, Ola Kathleen Parker ("Parker"), filed suit against the grantees of the 1998 deed, alleging she was the rightful owner of the Disputed Interest under various theories, including a claim for trespass to try title and an alternative claim for reformation of the 1998 deed. After the parties filed competing motions for summary judgment, the trial court issued a final judgment ordering that Parker take nothing on her claims. The court of appeals reversed the trial court's judgment, holding (1) that the discovery rule deferred accrual of Parker's claims until 2016, and (2) that the 1998 deed conveyed only the grantor's fee simple interest in the mineral estate and not the Disputed Interest.

Defendant Michelle Elise Parker Jordan petitioned the Supreme Court for review, arguing that (1) the court of appeals erroneously required special language to convey a vested remainder interest; (2) that Parker's reformation claim was based on a plain omission for which the discovery rule is inapplicable; and (3) that the trial court correctly rejected Parker's estoppel-based claims. The Court granted the petition for review. Oral argument has not yet been set.

OIL AND GAS

Leases

Apache Corporation v. Apollo Exploration, LLC, 631 S.W.3d 502 (Tex. App.—Eastland 2021), pet. granted, ___ Tex. Sup. Ct. J. ___ (June 3, 2022) [21-0587]

This oil and gas lease dispute involves what respondents Apollo Exploration, Cogent Exploration, and Sellmoco's (collectively Sellers) rights are under purchase and sale agreements (PSAs) entered into with petitioner Apache Corporation (Apache).

Sellers and Gunn Oil Company (Gunn Oil) came to own over 109 leases in the Bivens Ranch area, totaling 120,000 acres with the biggest lease being 100,000 acres. This lease is divided into three equal blocks: North Block, South Block, and East Block. Sellers and Gunn Oil eventually sold 75% of their interests in these leases to Apache, each executing a separate PSA with Apache. These PSAs cover the distinct fractional interests Sellers and Gunn Oil have in the same 109 leases.

In time, Sellers sued Apache and requested a declaration of their rights under the PSAs. Gunn Oil, who sold its remaining lease interest to Apache soon after the lawsuit was first initiated, did not join. Sellers sought to determine how to calculate the formula that—given a certain output—provides Sellers the right to repurchase some of Apache's leases; Apache's duties with regards to maintaining its leases; and Apache's duty to offer to sell a failing lease interest under one PSA to all Sellers. The petition also alleges Apache breached the PSAs and committed various related torts. Apache filed motions for summary judgment challenging Sellers' various tort claims and requesting the trial court construe the PSAs and the lease in the North Block interest (North Block Lease) in a certain way. Specifically, Apache argued the PSAs allowed Sellers to repurchase leases once lease revenues doubled expenses, that Apache was not required to offer Sellers a failing lease interest under the Gunn Oil PSA, and that the North Block Lease termination date was January 1, 2016.

The trial court granted Apache's motion as to some of Sellers' tort claims but not all. The TC granted Apache's motions on how to calculate the lease repurchase formula and on how to account for the working interest originally owned by Gunn Oil. It also granted Apache's motion on the North Block Lease, holding the lease expired on

January 1, 2016. Having narrowed the scope of relevant evidence, Apache filed motions seeking to exclude the testimony of three expert witnesses Sellers had designated to testify on damages on relevancy and reliability grounds. One of those experts, Peter Huddleston, testified that the North Block Lease expired on December 31, 2015 and on how to calculate the working interest in the Gunn Oil lease. The TC granted these motions. With these rulings secured, Apache then filed a no-evidence motion for summary judgment arguing Sellers could produce no evidence of damages for their remaining breach-of-contract and tort claims. The court granted the motion and, after Sellers nonsuited their remaining claims, rendered a final judgment that Sellers take nothing on their claims and that Apache recover attorneys' fees.

The court of appeals affirmed in part, reversed in part, and remanded the case back to the trial court for further proceedings. The court of appeals affirmed the trial court that Sellers take nothing on some of their tort claims and on the exclusion of two of the damages experts. The CA reversed on (1) the expiration date of the North Block Lease, (2) the determination that Apache did not have to offer Sellers its failing lease interests under the Gunn Oil PSA, and (3) the lease repurchase formula. The court of appeals reasoned the lease expiration date was ambiguous, that the PSA required Apache to offer all Sellers a failing least interest, and that Apache had not conclusively established its meaning of the repurchase provision was correct. Because of the reversals on the first two issues, the court of appeals also reversed the trial court's order excluding expert Huddleston's damages testimony as to those issues. Consequently, the appeals court also reversed the no-evidence summary judgment order on damages and its award of attorneys' fees to Apache. In light of these rulings, the appeals court reversed the final judgment and remanded for further proceedings.

Apache petitioned the Supreme Court requesting a reversal of the court of appeals' judgment that (1) there were fact issues regarding the North Block Lease expiration date; (2) Apache's obligation to offer Sellers its failing lease interests under the Gunn Oil PSA; and that (3) Apache had not conclusively established the meaning of the lease repurchase provision. Lastly, Apache requests the Court reinstate the trial court's order granting Apache's no-evidence summary judgment order.

The Supreme Court granted the petition on June 3, 2022. A date for oral argument has not yet been set.

TEXAS CITIZENS PARTICIPATION ACT

Applicability to Claims

Comcast Corp. v. Houston Baseball Partners LLC, 627 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2021), pet. granted, __ Tex. Sup. Ct. J. __ (June 3, 2022) [21-0641]

This case addresses whether the Texas Citizens Participation Act (TCPA) applies to claims for fraud, civil conspiracy, and breach-of-contract stemming from the sale of a major sports network.

In 2003, the Houston Astros and Houston Rockets formed the Houston Regional Sports Network ("Network") to broadcast games to viewers in Houston and the surrounding area. In 2010, Comcast purchased an equity interest in the Network and signed an affiliate agreement in which it agreed to distribute Network programming to all Comcast subscribers in exchange for an "affiliate fee." The premise behind the

parties' business plan was the Network would sign similar agreements with other distributors for the same rates. In November 2011, Jim Crane and his affiliate, Houston Baseball Partners (HBP), purchased the Astros and their interest in the Network. The Network ultimately became insolvent. In September 2013, Comcast filed an involuntary bankruptcy petition against the Network. HBP subsequently sued McLane (the Astros' former owner), Comcast, and their affiliates for fraud, negligent misrepresentation, and civil conspiracy. It also sued McLane's affiliate, Champions, for breach-of-contract and sought a declaratory judgment regarding Champions' indemnification obligations. HBP claimed that Comcast and McLane made two sets of material misrepresentations when HBP was conducting due diligence prior to purchasing the Network: (1) that Comcast believed the affiliate rates were "reasonable" and "achievable," and (2) Comcast, rather than the Astros, proposed the affiliate rates.

Comcast removed the case to federal court where the bankruptcy action was pending. After abating the action for five years, the bankruptcy court remanded the case. On remand, McLane filed a TCPA motion to dismiss, which Comcast joined. The trial court denied McLane and Comcast's TCPA motion, and they filed an interlocutory appeal. The court of appeals affirmed. First, it held that even though HBP had assigned "all of [its] rights under the [Purchase Sales Agreement]" to its affiliate prior to the sale, it still had standing to sue. Next, it held that the trial court did not err in denying Comcast and McLane's motion to dismiss. It assumed without deciding that the TCPA applied to HBP's claims. However, it held HBP met its burden to establish the prima facie elements for all its claims.

Comcast and McLane petitioned the Supreme Court for review. First, they argue that HBP lacks standing to sue because it assigned all its claims to Holdings. Second, they argue that the court of appeals erred in holding that HBP established its prima facie case for its tort and breach-of-contract claims. Among other things, they argue that (1) the alleged misrepresentation that Comcast proposed the affiliate rates is not material, (2) the alleged misrepresentation that the affiliate rates were "reasonable" and "achievable" is a non-actionable opinion or prediction, and (3) regardless, HBP did not establish its justifiable reliance on the alleged misrepresentations. Finally, they argue that the TCPA applies to HBP's claims because they implicate Comcast's and McLane's exercises of the rights of free speech and association. The Supreme Court granted the petition for review. Oral argument has not yet been set.

CONSTITUTIONAL LAW

Standing

American Campus Communities, Inc., et al. v. Berry, 2021 WL 4034077 (Tex. App.—Austin 2021), pet. granted, — Tex. Sup. Ct. J. — (June 3, 2022) [21-0874]

The issues presented in this case are (1) whether absent class members lack standing to seek civil penalties for alleged violations of the Texas Property Code and (2) whether the court of appeals was required to determine and evaluate the specific elements for the causes of action raised by the class.

American Campus Communities and over thirty of its subsidiaries (collectively, ACC) are landlords at various residential properties throughout Texas. Former tenants of ACC properties filed a class action alleging that ACC violated section 92.056(g) of the Texas Property Code, which requires that leases contain bold or underlined language

informing tenants of the remedies available when a landlord fails to repair or remedy conditions that materially affect the tenant's physical health or safety. The tenants further alleged that by omitting the required language, ACC knowingly attempted to waive its landlord duties in violation of a statutory anti-waiver prohibition, entitling the tenants to further civil penalties.

The trial court denied ACC's summary-judgment motion and issued an order granting class certification. ACC filed an interlocutory appeal of the class-certification order. The court of appeals modified the order to remove references to the tenants' claim for declaratory and injunctive relief, but it otherwise affirmed the class certification.

ACC petitioned the Supreme Court for review arguing that (1) the absent class members lack standing because they suffered no concrete injury-in-fact, and (2) the court of appeals erred by failing to examine the substantive elements of the underlying claims in its predominance analysis.

The Court granted the petition for review. A date for oral argument has not yet been set.