



## Case Summaries October 21, 2022

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### OPINIONS

#### CONSTITUTIONAL LAW

##### Takings

*City of Robinson v. Leuschner*, 636 S.W.3d 48 (Tex. App.—Waco 2021), *pet. granted* (Oct. 21, 2022) [21-1006]

The plaintiffs in this case are homeowners who claim that municipal sewer facilities near their home caused the release of noxious odors. This appeal concerns whether the homeowners raised sufficient evidence of a constitutional taking to defeat a plea to the jurisdiction filed by the municipality.

Alton and Nina Leuschner own a home in Robinson, Texas. The City constructed a sewer lift station and related sewage line near their home. The Leuschners noticed severe, foul odors after the lift station was brought into service. They sued the City claiming a constitutional taking. The City filed a plea to the jurisdiction, attaching affidavits and other evidence in support of the plea. The Leuschners filed affidavits and other evidence in opposition to the plea. The district court denied the plea, and the City filed an interlocutory appeal. The court of appeals reversed and dismissed the suit. The court of appeals reasoned that liability for a constitutional taking requires proof that the government acted intentionally, and the evidence here did not show that the City—in planning or constructing the lift station—knew that the station would cause identifiable harm by the production of offensive odors or that specific property damage was substantially certain to result from its actions. Chief Justice Gray dissented, arguing that liability for a taking could extend to intentional conduct in the daily operation of the sewer system.

The Leuschners filed a petition for review. They argue that the court of appeals erred in misplacing the burden of proof on them when it reviewed the City's plea to the jurisdiction. They also argue that takings liability can extend to recurring conduct by the government that damages property. Finally, they contend that the intent inquiry should include consideration of evidence that the City learned, after initial construction, about the nuisance the City had created by continued operation of the facility.

The Court granted the petition for review. Oral argument is set for January 12.

## **JURISDICTION**

### **Subject Matter Jurisdiction**

*Perez v. Ditech Servicing, LLC*, 2021 WL 5365103 (Tex. App.—Corpus Christi—Edinburg 2021), *pet. granted* (Oct. 21, 2022) [21-1109]

At issue in this case is whether a statutory county court exercising jurisdiction pursuant to an independent, county-specific statute is subject to the same jurisdictional limitations as if the court were exercising its concurrent constitutional county court jurisdiction.

Perez purchased a house subject to a deed of trust held by Bank of America, Ditech’s predecessor in interest. After Bank of America initiated foreclosure proceedings, Perez filed suit in a statutory county court. Perez asserted that the bank waived its right to foreclose on the property, and the bank counterclaimed for judicial foreclosure. During the pendency of the case, Bank of America assigned its rights under the deed of trust to Ditech.

The county court rendered judgment in favor of Perez. Ditech appealed, and the court of appeals reversed and remanded. On remand, Ditech moved for summary judgment on its judicial foreclosure counterclaim, and Perez argued that statutory county courts lack subject-matter jurisdiction over actions requiring the resolution of issues of title to real property. The statutory county court rejected Perez’s challenge to its jurisdiction and granted Ditech’s motion for summary judgment. Perez appealed, challenging only the statutory county court’s subject-matter jurisdiction.

The court of appeals vacated and dismissed, holding that the statutory county court lacked subject-matter jurisdiction to order a foreclosure because the jurisdictional limitations on constitutional county courts in Texas Government Code Section 26.043, including the provision depriving such courts of jurisdiction in “a suit for the recovery of land,” also apply to statutory county courts.

Ditech filed a petition for review, asserting that the statutory county court was not acting pursuant to a grant of concurrent jurisdiction with constitutional county courts, but pursuant to an independent, county-specific grant of jurisdiction. Ditech contends that a statutory county court exercising such jurisdiction is not subject to the same jurisdictional limitations as if the court were exercising its concurrent constitutional county court jurisdiction.

The Supreme Court granted Ditech’s petition for review. The oral argument date has not yet been set.