Case Summaries
June 10, 2022

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OPINIONS

ADMINISTRATIVE LAW
Texas Water Code

Dyer v. Tex. Comm'n on Env't Quality, — S.W.3d —, (Tex. June 10, 2022) [19-1104]

The main issues in this case concern the Texas Commission on Environmental Quality's authority to grant an injection-well permit after a final order from the Railroad Commission rescinding the statutorily required no-harm letter, and the extent of TCEQ's authority to alter and add findings of fact following a contested case hearing.

TexCom Gulf Disposal, LLC, sought to develop a commercial waste disposal facility in Montgomery County. TexCom applied to the TCEQ for permits to operate one existing Class I injection well and three others it planned to construct. The Injection Well Act (IWA) requires the application be accompanied by a letter from the Railroad Commission (RRC) verifying that the well would not harm any known oil or gas reservoirs. RRC issued this no-harm letter and TCEQ preliminarily approved the application. Montgomery County, the City of Conroe, affected individuals, and other parties challenged this approval, arguing the wells would harm their sole source of underground drinking water.

The State Office of Administrative Hearings (SOAH) held a contested case hearing on the matter. SOAH submitted a proposal for decision (PFD) to TCEQ recommending it conditionally grant TexCom's permits, but TCEQ remanded, instructing SOAH to consider new evidence.

Around this time, Denbury Onshore acquired a mineral interest underneath the proposed site and intervened in the process in opposition to the permits. SOAH conducted another hearing, with Denbury as a party, and issued an amended proposal for decition. It now recommended denying TexCom's applications, reasoning that Denbury's future operations would pump disposed waste back to the surface. Two months later, at Denbury's request, RRC issued a final order rescinding its previous no-harm letter. But that rescission would not become effective for 90 days. Before those 90 days passed, TCEQ issued a revised final order granting TexCom's application. TCEQ changed some of SOAH's findings of fact.

The County, City, individuals, and Denbury sought judicial review of TCEQ's order, arguing primarily that the recission of the no-harm letter voided the proceedings and that TCEQ did not have the authority to change the findings of fact that it did. The

trial court affirmed TCEQ's order. The parties appealed, but before a decision was made Denbury filed a motion to dismiss its appeal, which was granted. A divided court of appeals affirmed the trial court. The remaining parties filed a petition for review with the Supreme Court.

The Court first examined two issues arising out of RRC's recission of the no-harm letter: (1) whether RRC's rescission of its no-harm letter voided TCEQ's final order for lack of jurisdiction, and (2) whether TCEQ acted arbitrarily, capriciously, or abused its discretion by deciding not to reopen the record after that rescission. The Court held that RRC's rescission of its no-harm letter did not void TCEQ's final order. The rescission was not yet effective when TCEQ issued its final order, meaning that TCEQ made its decision with an active no-harm letter before it. Since TCEQ followed the statutory requirements, the not-yet-effective recission could not void the order. The Court next held that TCEQ did not act arbitrarily, capriciously, or abuse its discretion by deciding not to reopen the record and undergo more proceedings after RRC's rescission. TCEQ had all of the relevant evidence before it, including RRC's final order and the evidence that made RRC change its mind.

The Court then held that TCEQ had the authority to make its changes to SOAH's findings of fact. The Legislature specifically granted TCEQ broad authority to amend the PFD, including any finding of fact. This specific grant governed over the general grant provided to other agencies. TCEQ accordingly did not overstep its statutory authority by adding to and changing SOAH's findings, so long as the changes were supported by substantial evidence. The Court held that in this case, they were. TCEQ also adequately explained its changes by providing the basis for its decision and allowing the petitioners to prepare their appeal.

The Court also addressed various other arguments raised by the petitioners. The Court held that certain changes made in a revised final order were clerical in nature, made to conform the memorialized order to the decision reached by TCEQ. It also agreed with the court of appeals that the respondents' failure to give a mineral-interest-owner the statutorily required notice did not provide a basis for reversal of TCEQ's order in this case.

In sum, the Court held that TCEQ acted within its statutory authority, adequately explained its decision, and did so based on substantial evidence. RRC's rescission had not yet become effective, so the existing no-harm letter satisfied the IWA's requirement, and TCEQ made its decision with all of the relevant evidence before it. Accordingly, the Court affirmed the judgment of the court of appeals.

PROCEDURE—APPELLATE

Permissive Interlocutory Appeals

Industrial Specialists v. Blanchard Refining Co., — S.W.3d —, (Tex. June 10, 2022) [20-0174]

The issue presented in this case is whether a court of appeals abused its discretion either by denying a petition for permissive interlocutory appeal or by failing to more thoroughly explain its reasons for so doing.

Blanchard Refining Company hired Industrial Specialists to provide turnaround services at Blanchard's refinery in Texas City. A workplace fire injured several employees, who sued Blanchard. After the parties settled the employees' claims, Blanchard filed suit to enforce an indemnity provision in its contract with Industrial

Specialists. The trial court denied the parties' competing summary-judgment motions but granted Industrial Specialists' unopposed motion to pursue a permissive interlocutory appeal under section 51.014(d) of the Texas Civil Practice and Remedies Code. The court of appeals denied Industrial Specialists' petition for permissive appeal. In a one-page memorandum opinion, the court concluded that "the petition fail[ed] to establish each requirement" for a permissive appeal. 634 S.W.3d 760, 760 (Tex. App.—Houston [1st Dist.] 2019) (citing TEX. R. APP. P. 28.3(e)(4)). On appeal to the Supreme Court, both parties argued that the court of appeals abused its discretion by refusing to accept the appeal and by failing to adequately explain its reasons for that decision.

The Court disagreed with the parties and affirmed the court of appeals. Section 51.014(f) of the Texas Civil Practice and Remedies Code says that a court of appeals "may" accept a permissive appeal if the appealing party timely files a petition "explaining why an appeal is warranted under Subsection (d)." TEX. CIV. PRAC. & REM. CODE § 51.014(f). Section 51.014(d) says trial courts "may" permit an interlocutory appeal if (1) the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion," and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* § 51.014(d). Based on this clear statutory language, a majority of the Court held that section 51.014(f) permits courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met. A plurality of the Court agreed that the court of appeals' opinion satisfied Texas Rule of Appellate Procedure 47.4, which requires that memorandum opinions give the court's "basic reasons" for its decision.

Justice Blacklock filed a concurring opinion, in which Justice Bland joined, concluding that the Court's precedent in *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, which held that section 51.014(f) grants "absolute" discretion to courts of appeals to deny permissive appeals, ought to have disposed of this case. 567 S.W.3d 725, 732 (Tex. 2019). The concurrence thus joined the Court's holding that the court of appeals did not abuse its discretion by denying the appeal and would have further held that neither section 51.014(f) nor rule 47.4 required it to explain its reasons for doing so.

Justice Busby filed a dissenting opinion, in which Chief Justice Hecht and Justice Young joined, arguing that the court of appeals abused its discretion. First, it acted arbitrarily and unreasonably by failing to adhere to guiding principles in its decision, as evidenced by its denial of the permissive appeal when the two requirements of section 51.014(d) were objectively met. Further, it failed to adequately explain the reasons for its decision as required by both section 51.014 and rule 47.4.

MUNICIPAL LAW

Drainage Fees

Perez v. Turner, — S.W.3d —, — WL — (Tex. June 10, 2022) [20-0382]

This suit challenged a City of Houston drainage fee ordinance. In 2010, voters approved Proposition I, which amended the City Charter to create a drainage and street fund to receive revenue from various sources including fees imposed on real property owners. Elizabeth Perez (a municipal voter and taxpayer) and others filed an election contest. This case reached the Supreme Court, which held that the proposition language

misleadingly failed to mention drainage charges that would be imposed on property owners. *Dacus v. Parker*, 466 S.W.3d 820, 822 (Tex. 2015). On remand, the trial court held that Proposition I's amendment to the City Charter was void; that ruling was upheld on appeal. Meanwhile, in 2011, the city council passed its own ordinance known as the Drainage Fee Ordinance (DFO), creating a utility that was allowed to collect and spend drainage fees. In 2015, following the Supreme Court's *Dacus* decision, Perez filed the pending suit against the City, its mayor, and its director of public works (collectively the City). Perez claimed she had paid fees under the DFO. She alleged that the DFO was void and that the fees had been assessed and collected under the void DFO and 2010 charter amendment. The suit sought class certification, and as relief sought reimbursement of drainage fees and prospective injunctive relief against such fees.

The City filed a plea to the jurisdiction/motion for summary judgment. The trial court dismissed the suit, concluding that (1) Perez's constitutional claims relating to the 2010 charter amendment at issue in *Dacus* were not ripe for adjudication at the time the pending suit was filed; (2) Perez lacked standing to challenge the collection of drainage fees under the charter amendment or the DFO; and (3) governmental immunity barred her ultra vires claims. In 2018, while the case was on appeal, the City passed a new charter amendment curing the principal defects in the DFO that Perez had alleged. The court of appeals affirmed the dismissal of Perez's claims based on its analysis of ripeness and standing.

Perez filed a petition for review. The Supreme Court affirmed the court of appeals' dismissal of the claims but remanded the case to the district court to allow Perez the opportunity to replead her claims.

The Court reasoned that much of the case Perez originally pleaded had been overtaken by events, and construed Perez's briefing in the Supreme Court as limited to (1) a claim for reimbursement of the allegedly illegal drainage fees paid between 2011 and 2018, and (2) an ultra vires claim for prospective injunctive relief prohibiting City officials from spending any drainage fees collected between 2011 and 2018 that may remain in the City's accounts.

The Court disagreed with the court of appeals that claims regarding the alleged invalidity of the 2010 charter amendment were not ripe at the time Perez filed suit. Perez had asserted a present injury sufficient to make her claims ripe. The Court then addressed standing. The Court held that Perez had standing to pursue the two remaining claims. Perez had taxpayer standing to seek an injunction against the expenditure of illegally collected funds. She also had standing to bring her remaining reimbursement claim.

Hence, the Court did not affirm the dismissal of the two remaining claims on jurisdictional ripeness and standing grounds. However, the Court ultimately held that these claims were properly dismissed on grounds of governmental immunity. To defeat a plea to the jurisdiction based on governmental immunity, a plaintiff must plead facts that, if true, establish a viable claim that is not barred by immunity. Under this requirement, the claims were properly dismissed. Perez's reimbursement claim and her claim for injunctive relief were premised on the City's lack of authority to assess the drainage fees in the absence of a valid charter amendment. The Court, however, agreed with the City that even in the absence of the 2010 charter amendment, the City had authority under its general authority as a home-rule municipality to enact the DFO. Perez argued that the DFO conflicted with a state statute—the Municipal Drainage Utility Systems Act (MDUSA)—but the Court held that the MDUSA itself states that it does not alter a home-rule municipality's general powers. TEX. LOC. GOV'T CODE §

552.054. The Court noted that Perez might have a valid claim that the DFO violated the City Charter's revenue or spending caps, but she did not argue this theory of drainage fee invalidity to the Court.

Finally, the Court held that while Perez's claims were properly dismissed, she should be given the opportunity to replead in light of intervening events. The Court therefore remanded the case to the district court.

PROCEDURE – TRIAL AND POST-TRIAL

Error Preservation

In the Matter of the Marriage of Anthony Lynn Williams and Theresa Gayle Williams, —S.W.3d— (Tex. June 10, 2022) [21-0584]

At issue in this case was whether a defendant challenging the sufficiency of the evidence to support a default judgment must, to preserve error, also file a motion for new trial under *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939).

Anthony Williams filed for divorce from his wife, Theresa. Theresa failed to answer, and the trial court rendered a default judgment granting the divorce and dividing the marital estate. Theresa motioned for a new trial but raised neither the sufficiency of the evidence supporting the divorce decree nor *Craddock* in the trial court. The trial court denied Theresa's new trial motion and she appealed, arguing that the trial court abused its discretion in the property division because there was no evidence as to separate property and no evidence that the division was just and right. She did not assign as error the denial of her motion for a new trial.

The court of appeals affirmed, holding that Theresa's failure to challenge the denial of the new trial motion under *Craddock* resulted in a failure to preserve error of her other claims raised on appeal, including whether the trial court erred in its property division. Theresa appealed to the Supreme Court, contending that *Craddock* governs equitable challenges to default judgments, while evidentiary sufficiency is a legal challenge that can be raised for the first time on appeal.

The Supreme Court agreed with Theresa and reversed the court of appeals' decision in a per curiam opinion. The Court reasoned that a motion for a new trial under *Craddock* and an evidentiary sufficiency motion are distinct. The Court held that a failure to file a motion for new trial under *Craddock* in the trial court does not foreclose a party's ability to raise on appeal an evidentiary challenge to a default property division.

ELECTIONS

Voting by Mail

Paxton v. Longoria, — S.W.3d —, 2022 WL — (Tex. June 10, 2022) [22-0224]

This case involves three certified questions relating to a pre-enforcement challenge to two recently enacted provisions of the Texas Election Code: section 276.016(a)(1) and section 31.129. Section 276.016(a)(1), enacted as part of the Election Integrity Protection Act of 2021, makes it an offense for a "public official or election official" to "knowingly . . . solicit[] the submission of an application to vote by mail from a person who did not request an application." Section 31.129 states that an election official who is employed by or is an officer of the state or a political subdivision of the state and violates a provision of the Election Code may be liable to the state for a civil

penalty, which may include termination and loss of employment benefits.

Isabel Longoria, the Harris County Elections Administrator, and Cathy Morgan, a volunteer deputy registrar serving in Travis and Williamson Counties, sued in federal court to enjoin enforcement of the anti-solicitation provision and the civil-liability provision (as applied to violations of the anti-solicitation provision). Longoria and Morgan sued Texas Attorney General Warren K. Paxton and the district attorneys of Harris, Travis, and Williamson Counties, all in their official capacities. The district court granted a preliminary injunction, and Paxton and Williamson County District Attorney Shawn Dick appealed. The United States Court of Appeals for the Fifth Circuit certified three questions to the Court: (1) whether volunteer deputy registrars are "public officials" under the Election Code, (2) whether certain types of speech constitute solicitation under section 276.016(a)(1), and (3) whether the Attorney General is a proper official to enforce section 31.129.

The parties agreed on the answers to the first and third certified questions, so the Court answered, based solely on those agreements, that (1) Morgan, a volunteer deputy registrar, was not a public official subject to section 276.016(a)(1); and (2) Attorney General Paxton lacks authority to enforce section 31.129. Because there was no adversity between the parties on those questions, the Court disclaimed any effect of its answers beyond this case.

With respect to the second certified question, the Court concluded that solicitation under section 276.016(a)(1) was not limited to seeking applications of mail-in ballots from persons who were ineligible to vote by mail. The plain text of section 276.016(a)(1) prohibits officials from soliciting the submission of a vote-by-mail application from "a person who did not request an application." The Court also concluded that the definition of "solicits" under section 276.016(a)(1) is not limited to demanding submission of an application for mail-in ballots. Finally, the Court concluded that telling voters they have the opportunity to apply for mail-in ballots is not solicitation under section 276.016(a)(1), but instead qualifies as providing "general information about voting by mail, the vote by mail process, or the timelines associated with voting," which is expressly excluded from section 276.016(a)(1) under section 276.016(e)(1).