Opinion Summaries
April 1, 2022

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OPINIONS

GOVERNMENTAL IMMUNITY

Chapter 2400

Von Dohlen v. City of San Antonio, — S.W.3d. — (Tex. Apr. 1, 2022) [20-0725]

The issue in this case is whether individuals suing the City of San Antonio for excluding Chick-fil-A from the San Antonio airport on account of Chick-fil-A's contributions to various religious organizations pleaded sufficient facts to invoke a statutory waiver of governmental immunity.

At a March 2019 meeting, two members of the San Antonio City Council expressed concerns about Chick-fil-A's inclusion in a proposed concession agreement for the San Antonio airport, citing Chick-fil-A's history of "funding anti-LGBTQ organizations." The City Council ultimately voted in favor of amending the concession agreement to replace Chick-fil-A with another vendor. After the vote, the Texas Legislature passed Senate Bill 1978, which created Chapter 2400 of the Government Code. The statute prohibits a governmental entity from taking any adverse action against a person based wholly or partly on the person's contributions to religious organizations.

Following Chapter 2400's effective date, five citizens residing in counties near the airport sued the City in state district court. The citizens alleged that the City's continued exclusion of Chick-fil-A based on its donations to religious organizations violated Chapter 2400. The citizens requested declaratory and injunctive relief, plus costs and attorney's fees. The City sought dismissal based on governmental immunity and lack of standing. After a hearing, the trial court denied the City's jurisdictional challenges, and the City appealed.

The court of appeals reversed and rendered judgment dismissing the case for lack of jurisdiction. The court of appeals reasoned that, although the citizens purported to be seeking only prospective relief, the only plausible remedy for their claims was invalidation of the previously enacted concession agreement. Thus, the

court of appeals concluded that the citizens' claims were barred by governmental immunity. The court of appeals did not address standing.

The Supreme Court reversed the court of appeals' judgment dismissing the case for lack of jurisdiction and remanded the case to the trial court. The Court held that the citizens failed to allege sufficient facts to invoke a waiver of immunity because their petition did not point to any specific action taken by the City on or after Chapter 2400's effective date that could constitute an "adverse action" under Section 2400.002. The Court rejected the citizens' argument that their mere allegation that the City is taking actions to implement the agreement approved by the City Council is sufficient to invoke a waiver of immunity because the citizens did not describe any of the actions related to the agreement's implementation. But the Court further held that because the citizens' petition did not affirmatively negate the existence of jurisdiction, they should be given the opportunity to replead. The Court concluded that standing should be determined based on the parties' live pleading, so it would be premature to weigh in on the City's standing arguments before the citizens repleaded.

Justice Blacklock concurred in the judgment, joined by Justice Devine. The concurrence would have held that the citizens' petition sufficiently invoked a waiver of immunity because it credibly alleged that the exclusionary, discriminatory effects of the City Council's vote would continue to be felt after Chapter 2400's effective date. The concurrence reasoned that, based on the record, the City was not entitled to a presumption that it would comply with Chapter 2400 after its effective date.

GRANTS

OIL & GAS
Royalty Payments

Devon Energy Prod. Co. v. Sheppard, 2020 WL 6164467 (Tex. App.—Corpus Christi–Edinburg 2020), *pet. granted*, ___ Tex. Sup. Ct. J. ___ (April 1, 2022) [20-0904]

At issue in this case is whether the parties' lease required Devon Energy to add postproduction costs incurred by third-party purchasers to the gross proceeds from sale before calculating Sheppard's royalty.

Sheppard sued Devon Energy for allegedly reducing royalty payments by failing to add postproduction costs. Devon Energy asserted it did not incur the costs at issue; they were instead incurred by downstream purchasers, and Devon Energy was not required to add post-sale costs to the royalty base. The parties stipulated to twenty-three issues, each addressing particular amounts that Devon Energy allegedly failed to add to the royalty base in violation of the lease. The trial court granted summary judgment for Sheppard on all twenty-three issues.

The court of appeals affirmed in part and reversed in part. The court noted that the royalty provision was "highly unique": the provision stated that certain sums "shall be added" to the royalty base so that Sheppard's royalty is not charged "directly or indirectly" with postproduction costs. The court held that, per those terms, the

plain language of the lease required Devon Energy to add expenses incurred by third-party purchasers to the royalty base. Applying the lease as so construed, the court of appeals held that some but not all of the amounts at issue in the stipulated issues should have been added to the royalty base. Accordingly, the court of appeals affirmed summary judgment as to those amounts that should have been added and reversed summary judgment as to those that should not have been added.

Devon Energy petitioned for review. Devon Energy asserts that because the royalty is based on gross proceeds from sale, post-sale costs necessarily must not be included in the royalty base. Devon Energy argues that the court of appeals therefore erred, contending that the court construed the lease's terms in isolation and without regard for precedent construing gross-proceeds leases. Sheppard argues that the plain language of the lease controls over background principles and that Devon's argument renders portions of the lease surplusage.

The Supreme Court granted Devon Energy's petition for review on April 1, 2022. Oral argument has not yet been scheduled.

MEDICAL LIABILITY
Expert Reports

Collin Creek Assisted Living Center, Inc. v. Faber, 629 S.W.3d 630 (Tex. App.—Dallas 2021) (en banc), *pet. granted*, 65 Tex. Sup. Ct. J. — (Apr. 1, 2022) [21-0470]

The issue in this case is whether claims against an assisted living facility arising out of a resident's fall on the facility's sidewalk, pleaded as premises liability claims, are health care liability claims (HCLCs) under the Texas Medical Liability Act (TMLA) and therefore require an expert report.

Collin Creek operates a licensed assisted living facility. Carmelina Smith was a resident. Smith's daughter, Christine Faber, came to pick Smith up for an appointment. With Smith seated backwards in a rolling walker, a Collin Creek employee wheeled Smith's walker down a parking lot sidewalk to Faber's car. A wheel of the walker became caught in the sidewalk. The walker tipped over, and Smith suffered injuries. She died about a week later.

Faber sued Collin Creek, asserting negligence, negligent hiring, premises liability, and bystander claims. Collin Creek moved to dismiss the case for failure to timely serve an expert report under the TMLA, arguing that Faber's claims were HCLCs. Faber amended her petition to remove any claims of active negligence by Collin Creek, leaving only allegations based on the condition of the sidewalk. The trial court granted Collin Creek's motion to dismiss. The court of appeals panel affirmed. On en banc reconsideration the court of appeals reversed, holding that Faber's live petition did not assert an HCLC and did not require an expert report.

Collin Creek filed a petition for review. Collin Creek argues that Faber's amended pleading does not change the nature of Faber's claims. If the underlying facts could support an HCLC, then the requirements of the TMLA apply regardless

of what theory the plaintiff pleads. Here, the underlying facts include the employee's provision of health care to Smith, which could support an HCLC and require an expert report. Therefore, the trial court's dismissal was proper.

The Supreme Court granted Collin Creek's petition for review. Oral argument has not yet been set.

GOVERNMENTAL IMMUNITY
Texas Tort Claims Act

Texas Dep't of Transp. v. Christ et al., No. 13-20-00339-CV, 2021 WL 2149632 (Tex. App.—Corpus Christi–Edinburg May 27, 2021, *pet. granted*, __ Tex. Sup. Ct. J. ___ (April 1, 2022)[21-0728]

The issue in this case is whether modifying an engineering plan without an engineer's statutorily required seal is a discretionary act for which the Texas Department of Transportation retains immunity under the Texas Tort Claims Act.

One night, Daniel Christ went out for a ride on his motorcycle with his wife, Nicole Salinas, as a passenger. They exited an interstate onto an intersecting road headed west. Meanwhile, a sedan turned onto the same road headed east but entered the westbound lane. They collided. The crash led to severe injuries. Christ and Salinas sued the driver of the sedan. Eventually, they also added TxDot and a contractor.

TxDot and a contractor were working on the interstate and the intersection road. The interstate and road were not shut down. Instead, TxDot wanted to shift lanes so traffic could continue. This requires lane shifts with which many drivers are familiar. Despite this familiarity, each lane shift requires safety devices to guide drivers. Therefore, TxDot has an engineer devise a traffic control plan. Because an engineer prepares the traffic control plan, he must sign and seal it with his engineering seal. Here the sealed traffic control plan called for a concrete barrier between the opposite direction lanes. But the contractor decided there was not enough room for the concrete barrier. Instead, the contractor substituted a safety device called strips and buttons. The strips and buttons, TxDot claims, were substituted with an engineer's oral approval.

This case turns on whether that substitution was permissible. Typically, decisions about a traffic control plan are up to TxDot discretion. *State v. San Miguel*, 2 S.W.3d 249, 251 (Tex. 1999). That discretion places TxDot into the protection of the Texas Tort Claims Act's discretionary function immunity. *See* Tex. Gov't Code § 101.056. Christ and Salinas argued that because the original engineering plan was designed and sealed by a TxDot engineer, any modification must have been approved by some TxDot engineer in writing and with their seal. *See* Tex. Occ. Code §§ 1001.401, .407. Christ and Salinas argue that engineering regulations about public works and engineering seals create a requirement of law that are not subject to TxDot's discretion. Without that discretion, TxDot could fall back into the Tort Claims Act's waiver of immunity. Or, in the alternative, the strips and dots are inherently a defect.

TxDot argues that this traffic device claim is still discretionary and that small alterations to traffic control plans in the field do not need an updated engineering plan. And the strips and buttons are not a defect of any kind. Accordingly, TxDot asserted its claim to immunity in a plea to the jurisdiction. The trial court denied the plea, so TxDot took an interlocutory appeal on the immunity question. The Court of Appeals credited TxDot's arguments and reversed. Christ and Salinas moved for rehearing, which the court of Appeals also denied.

Christ and Salinas petitioned to the Texas Supreme Court. The Texas Supreme Court granted review on April 1, 2022. Oral argument has not been scheduled.