Texas Supreme Court orders and opinions 3.30.12

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TEXAS SUPREME COURT ADVISORY

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ORDERS AND OPINIONS ISSUED MARCH 30, 2012
… Six petitions granted [issues]

Rules changes approved this week listed below [go to]

MARCH 30 ORDERS (in HTML)
Decisions in cases from March 22 through Wednesday (PDF)

OPINIONS

09-0387
Carol Severance v. Jerry Patterson, et al.
certified questions from the U.S. Court of Appeals, Fifth Circuit
For appellant: J. David Breemer, Sacramento, Calif.
For appellees: Daniel L. Geyser, Austin
Chief Justice Jefferson did not participate
ON REHEARING: CERTIFIED QUESTIONS ANSWERED, opinion by Justice Wainwright:

In this case arising from Hurricane Rita's beach destruction in Galveston, and consequent change in public access on Galveston Island's West Beach under the Texas Open Beaches Act, the circuit asks: (1) whether Texas recognizes a "rolling" public beachfront-access easement; if so, (2) whether the rolling easement derives from common law or the Open Beaches Act; and (3) whether the landowner would be entitled to compensation for loss of property use apart from the state's offer to remove houses on the easement.

The Supreme Courts HOLDS, as it did originally, that public easements do not "roll" onto previously unencumbered private beachfront property when avulsive events cause dramatic changes in the coastline. When promulgated in 1959, the Open Beaches Act did not purport to create new substantive rights for public easements along Texas's ocean beaches and recognized that mere pronouncements of encumbrances on private property rights are improper. Because no right of public use in historic grants to private owners on West Beach exists, the state must comply with principles of law to encumber privately owned realty along the West Beach of Galveston Island. Land patents from the Republic of Texas in 1840, affirmed by legislation in the new state, conveyed the state's title in West Galveston Island to private parties and reserved no ownership interests or rights to public use in Galveston's West Beach. No inherent limitations on title or continuous rights in the public since time immemorial serve as a basis for engrafting public easements for use of private West Beach property. Although existing public easements in Galveston's West Beach are dynamic, as natural forces cause the vegetation and the mean high tide lines to move gradually and imperceptibly, these easements do not migrate or roll landward to encumber other parts of the parcel or new parcels as a result of avulsive events. New public easements on the adjoining private properties may be established if proven pursuant to the Open Beaches Act or the common law.
Opinion
… note among others changes new paragraph on page 4 summarizing response to rehearing arguments, three new paragraphs beginning new introduction section on page 4, new paragraph at the end of page 27 answering rehearing arguments on material legal difference between avulsion and erosion and changes under new subsection C (Custom in Texas) at pages 37-44.

Original opinion
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Justice Willett CONCURRING:

The absence of a common-law theory of an easement that leaps onto private land upon which the public has never set foot in no way forecloses the state from proving an easement the old-fashioned way, using traditional means.
Willett concurrence

Justice Medina DISSENTING, joined by Justice Lehrmann and in part by Justice Guzman:

The law of easements, Texas law and public policy support the enforcement of rolling easements. Such easements follow the movement of the dry beach in order to maintain their purpose and are defined by such purpose rather than geographic location. That beachfront easements are dynamic but do not roll defies not only existing law but logic as well. The Court illogically distinguishes between shoreline movements by accretion and avulsion. Under the Court's analysis, the property line may be dynamic but beachfront easements must always remain temporary. The public's right to the beach can never be established and will never be secure,
Medina dissent

Justice Guzman DISSENTING:

Texas common law has long envisioned a proper balancing between public and private use of the dry beach and the law of easements does not

allow an easement holder to unreasonably burden the servient estate. Thus, answering the third certified question about compensation, the public's reasonable use of a rolling easement over a private beach does not generally entitle a property owner to compensation, yet such an easement would unreasonably burden the servient estate if the property owner was unable to use and maintain her home. In those circumstances, the property owner would be entitled to compensation for a taking.
Guzman dissent

Justice Lehrmann DISSENTING, joined by Justice Medina:

The Court's holding on rolling easements undermines the public interest in beach access, the ability of state and local governments to protect coastal resources, and the private property interests of Galveston homeowners who do not have beachfront property. And the Court does so in deciding a certified question that will not be determinative of the parties' legal rights and should not have been accepted.
Lehrmann dissent

10-0321
Texas Department of Public Safety v. Stephen Joseph Caruana
from Hays County and the Third District Court of Appeals, Austin
For petitioner: Kevin M. Givens, Austin
For respondent: Brian L. Baker, San Marcos

The issue in this license-revocation appeal is whether an alcohol-breath test officer's notarized statement about breath test's result was admissible in the revocation hearing even though the analyst did not swear to it. Caruana challenged an administrative-law judge's finding that the department proved his intoxication while driving by admission of the breath-test analyst's unsworn statement. Under the relevant Texas Transportation Code provision (section 524.011(b)(4)(D)) a sworn report relevant to a drunk-driving arrest shall be sent to the department within five business days. The pertinent administrative regulation allows a sworn report to be admissible as a public record. The trial court reversed the administrative-law judge and the appeals court affirmed.

The Supreme Court HOLDS an officer's failure to swear to a report does not deprive it of the assurance of veracity or render it inadmissible. Statutory requirements for a sworn report in cases involving an alcohol test that was failed differ from an unsworn report permitted when an alcohol test has been refused. Though why the requirement should have been included for failure cases when it had been abandoned for refusal cases, the purpose of the requirement — an assurance of truthfulness — is as fully served in test-failure cases by the criminal penalty for making a false statement in a governmental record as it is in refusal-to-be-tested cases. The verity of a declaration is assured by criminal penalties for perjury, not a raised arm.
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Chief Justice Jefferson DISSENTING, joined by Justice Lehrmann:

The Texas Legislature has written a statute, and the State Office of Administration Hearings a rule, that carefully negotiate the roles of the two adversaries before the Court. Because the driver had an opportunity to confront his accuser, who took an oath before testifying at the hearing, the Court's judgment is correct. But the Court goes too far because the holding would excuse not only the officer's failure to swear to the truth of the report, but would permit suspension of a driver's license even if the officer never formally swears to the facts the report depicts.
Jefferson dissent

10-0953
Ford Motor Co. v. Richard H. Garcia
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg
For petitioner: Michael Eady, Austin
For respondent: Isaac Tawil, McAllen
REVERSED AND REMANDED, opinion by Justice Johnson:

The principal issues are whether the trial court abused its discretion by awarding fees to a guardian ad litem for work allegedly outside the scope of his appointment or relied on insufficient evidence in its award. Ford appealed Garcia's $28,200 award for his appointment as a guardian ad litem. The trial court appointed him to protect the interests of a man in a settlement by Ford with the man, who suffered traumatic brain injury, and his wife. Ford argues the guardian ad litem billed for review of litigation documents and other work that exceeded his need to assure the injured man's interests in a proposed settlement. Ford also argued the guardian's invoice did not specify how much time was spent on his review or how much was spent by his staff. The court of appeals affirmed the trial court's award of Garcia's fee.

The Supreme Court HOLDS that Garcia's appointment was as guardian ad litem, not as attorney ad litem as he argued, whose fees were subject to procedural rule 173 requirements that were not shown. Among non-compensable tasks demonstrated by this record were reviewing motions to transfer venue, responses to those, orders setting hearings on the motions and correspondence relating to the motions and responses; superseded petitions; discovery requests and responses; a motion relating to admission of an attorney to practice *pro hac vice*; correspondence about postponed hearings; pleadings relating to already-settled claims; notices of settlement of minor plaintiffs' claims; and copies of citations issued for defendants. Garcia testified, in part, that the activities he performed were for the purpose of becoming familiar with the lawsuit, representing Gonzalez's interests and advising the court. But tasks such as those were not necessary to fulfilling the limited role for which he was appointed.
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11-0023
Juana Lorena Arvizu, et al. v. Estate of George Puckett
from Montgomery County and the Ninth District Court of Appeals, Beaumont
REVERSED, TRIAL COURT JUDGMENT REINSTATED, per curiam opinion:

The issue is whether the appeals court erred by holding jury findings in this personal-injury case fatally conflicted. The question was who was vicariously liable for a pickup-truck driver's negligence – an auto-auction business that employed the driver, the company that owned the pickup or both. The jury found (1) that Cantu, the driver, was auction company's employee, not Puckett's, (2) that Cantu was transporting the pickup for Puckett's benefit and was subject to Puckett's control as to the details of the mission, and (3) that the auction company was transporting the vehicle for Puckett's benefit and was subject to Puckett's control as to the details of the mission. Based on these findings, the trial court, over Puckett's objection, rendered judgment on the verdict against Cantu, MCAA, and Puckett, jointly and severally. The Supreme Court HOLDS that one of the purportedly conflicting findings does not necessarily require judgment different from what the trial court rendered. To satisfy the *Little Rock Furniture Mfg. Co. v. Dunn* test (222 S.W.2d at 991), the party claiming conflict must show that one of the conflicting findings "necessarily requires the entry of a judgment different from that which the court has entered."
Opinion
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ON REHEARING, THE COURT WITHDRAWS ITS JUNE 24, 2011, OPINION IN THE FOLLOWING CAUSE AND DISMISSES IT AS IMPROVIDENTLY GRANTED

10-0592
John Ganim v. J. Farouk (Frank) Alattar
from Fort Bend County and the 14th District Court of Appeals, Houston
Original opinion in PDF
Briefs

ISSUES SUMMARIES FOR CASES GRANTED
ORAL ARGUMENT IN TODAY'S ORDERS

10-0582
University of Texas Southwestern Medical Center v. Larry M. Gentilello, M.D.
from Dallas County and the Fifth District Court of Appeals, Dallas
Oral argument date pending
The principal issues are whether (1) a medical-school department chair, by alleging Medicare- and Medicaid-rules violations to his supervisor, reported law violations to an "appropriate law-enforcement authority" under the state Whistleblower Act or (2) had a good-faith belief that his supervisor was such an appropriate law-enforcement authority.
Briefs
Court of appeals opinion

11-0312
State of Texas and Texas Department of Transportation v. NICO-WF1, L.L.C.
from Cameron County and the 13th District Court of Appeals, Corpus Christi/Edinburg
Oral argument date pending
The principal issue is whether dedication of 100-foot-wide street for public use conditioned on provision for 15-foot curb lines on each side limited the public right-of-way easement to 70 feet.
Briefs
Court of appeals opinion

11-0517
Certified EMS Inc. v. Cherie Potts
from Harris County and the First District Court of Appeals, Houston
Oral argument date pending
The issue is whether in a health-care liability case the required preliminary expert assessment must address all liability theories.
Briefs
Court of appeals opinion

11-0554
City of Lorena v. BMTP Holdings, L.P.
from McLennan County and the 10th District Court of Appeals, Waco
Oral argument date pending
The issue is whether a city's moratorium on sewer connections should apply to unsold lots in a platted development approved by the city before the moratorium.
Briefs
Court of appeals opinion

11-0630
TTHR Limited Partnership v. Claudia Moreno
from Denton County and the Second District Court of Appeals, Fort Worth
Oral argument date pending
A principal issue in this health care-liability case is whether the appeals court erred by remanding for a second extension to cure a deficiencies the court of appeals found in an expert report.
Briefs
Court of appeals opinion

11-0713
In the Interest of E.N.C., et al.
from Lamar County and the Sixth District Court of Appeals, Texarkana
Oral argument date pending
The principal issues are (1) whether legally sufficient evidence supported the "best interest" standard for terminating deported Mexican citizen's parental rights who continued support for his children and visited them with help from relatives and (2) whether legally sufficient evidence supported the endangerment standard when that evidence was based in part on the father's conviction for criminal activity with a minor a decade earlier.
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RULES CHANGES APPROVED BY COURT THIS WEEK

Procedural rules for retirement, removal of judges
… New rule 7 changes voting requirement to reflect larger Judicial Conduct Commission, rule 9(b) sets 15-day deadline for charging document, non-substantive wording changes throughout

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