

Supreme Court of Texas
Constitutional (Federal and State) Law Topics

Greer v. Abraham

No. 14-0669

Case summary written by Katherine Mendiola, Articles Editor.

JUSTICE DEVINE delivered the opinion of the Court.

Plaintiff, a school district trustee, sued an internet blogger regarding its statements published about the Trustee's activity at a rally held by an opponent of his colleague. The article mentioned the Trustee by his name but did not reference his official position. The trial court granted the Defendant's motion to dismiss on the basis that the Trustee had not brought forth a prima facie case for defamation, as required under the Texas Citizens Participation Act (TCPA). The trial court determined that the Trustee did not prove actual-malice, a requirement for defamation suits involving public officials. On appeal, the court determined that actual-malice was not a required element because the article did not identify the Trustee in his official capacity, but rather as an individual. Additionally, the connection between the statement and the Trustee's official capacity could not be implied because the connection was too attenuated.

The issue before the Court was whether the Trustee needed to prove actual-malice as part of the prima facie case for defamation.

The Court, relying on Supreme Court precedent, reversed and remanded. The Court relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and held that actual-malice is a required element for the public official. If the alleged defamation implicates the public official's position and is circulated in his community in which his name is automatically associated with his official position, then the requirement for actual-malice must apply, even if the article is circulated outside the official's community. Due to the highly visible nature of the Trustee's office, coupled with the fact that he was the longest serving member on the school board, this warranted the *New York Times* requirement for a showing of actual malice.

Wheelabrator Air Pollution Control, Inc., v. City of San Antonio

No. 15-0029

Case Summary written by Eric Matthews, Articles Editor.

JUSTICE GREEN delivered the opinion of the Court.

CPS Energy is a municipally-owned utility company in San Antonio, Texas. CPS contracted to pay Wheelabrator Air Pollution Control over \$40 million to construct a coal-fired power station. Although Wheelabrator undisputedly completed the project, CPS withheld ten percent of the contract price due to a dispute with Casey Industrial—the company that designed the station. Wheelabrator sued for breach of contract and, alternatively, quantum meruit, and requested reasonable attorney’s fees, costs, and interest. CPS filed a plea to the jurisdiction, asserting that governmental immunity barred the claims because they fell outside the waiver of immunity under the Texas Local Government Code.

The trial court denied the plea and the Fourth Court of Appeals reversed. On remand, CPS amended its plea to the jurisdiction asserting immunity from all claims outside the scope of section 271.152 of the Local Government Code and filed a motion to consolidate the claims with those filed by Casey. In its amended plea, CPS sought dismissal of the claims for attorney’s fees as not allowed under the prior version of the immunity statute. Wheelabrator argued that CPS was not entitled to governmental immunity from claims arising out of the performance of a proprietary function. The trial court granted CPS’s plea and dismissed the claims for attorney’s fees with prejudice. The court of appeals affirmed, and Wheelabrator brought an interlocutory appeal to the Supreme Court of Texas.

The Court reiterated its rule that a city does not have immunity when performing a proprietary function and that the operation and maintenance of a public utility constitutes such a function. Because CPS is owned by the city of San Antonio and the contract’s purpose was to further provide utilities, CPS was not protected by governmental immunity. Further, the claims for attorney’s fees arose directly from the breach of contract claim, so they similarly did not implicate immunity.

BCCA Appeal Group, Inc. v. Houston

No. 13-0768

Case Summary written by Laura Parton, Articles Editor.

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE JOHNSON, JUSTICE WILLET, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE DEVINE, and JUSTICE BROWN joined, and in which JUSTICE BOYD joined as to Parts III (B) and IV, and filed an opinion dissenting in part.

The Texas Legislature enacted the Texas Clean Air Act in 1967 (the Act). The act gives regulatory authority and great discretion to the Texas Commission on Environmental Quality (TCEQ). In 2007, the home-rule city of Houston enacted an “ordinance to establish its own air-quality regulatory-compliance program and adopted a fee schedule to fund the program.” Under the ordinance, it is unlawful for any facility to operate if it did not register with the city, which includes facilities that are not subject to TCEQ regulation. Additionally, the ordinance incorporates several TCEQ rules “as they currently are and as they may be changed from time to time.” While the instant suit was pending, Houston amended the ordinance to include that violations of the TCEQ rules included in the ordinance shall be prosecuted in municipal court.

The operators of several refineries and chemical manufacturing plants within the City, BCCA Appeal Group (BCCA), sought a declaratory judgment that the ordinance is invalid and unenforceable, and an injunction against the ordinance's enforcement. The trial court granted BCCA's motion for summary judgment, and the court of appeals reversed. BCCA appealed, “assert[ing] the same arguments as it did at the trial court.” The Court reversed the lower court's judgment on the preemption grounds and affirmed the judgment that the nondelegation doctrine was not violated.

BCCA maintains that the ordinance's enforcement mechanism and registration requirement are preempted by the Act. Houston is a home-rule city. Such cities look to the Legislature only for limitations, not grants of authority. A home-rule city's ordinance is preempted by state statute to the extent they are inconsistent. The ordinance will not be preempted if there is “any other reasonable construction leaving both

in effect.” This inquiry looks to whether limiting the home-rule cities power was the Legislature’s intent with “unmistakable clarity.”

In reviewing the statute, TCEQ has wide authority in determining if a violation has occurred and if that violation requires an administrative penalty. Such penalties are “full and complete satisfaction for the violation for which the penalty is assessed and precludes any other civil or criminal penalty for the same violation.” The ordinance allows for criminal prosecution of any violation of its incorporated TCEQ rules, separate from any notification, involvement, or deference to the TCEQ. This undermines TCEQ’s discretion and authority granted under the Act. Therefore, the enforcement mechanisms of the ordinances are preempted and unenforceable.

As for the registration requirement, the court of appeals relied on *Unger v. State*, which it erroneously claimed was a “writ refused” case from the Supreme Court of Texas. *Unger* upheld an ordinance that allowed a city to issue drilling permits, a duty shared by the Texas Railroad Commission. *Unger*, however, was reviewed by the Texas Court of Criminal Appeals and does not carry the precedential value the court of appeals contended. Under the ordinance, a facility that complied with the Act and all TCEQ rules would still be “unlawful” if not registered with the city. The ordinance makes unlawful what is authorized by state law and is thus preempted and invalid.

BCCA finally contended that the ordinance was invalid because it violated the nondelegation doctrine of the Texas Constitution by incorporating TCEQ rules in their future form. The nondelegation doctrine of the Texas Constitution reads in relevant part: “no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others.” BCCA claimed that the ordinance’s provision that adopts the future version of TCEQ rules “[was] a [] violation because it impermissibly delegates the city council’s core lawmaking power.” Incorporation of such agency rules is permitted if the city may delegate to that agency. In analyzing analogous cases, the Court concluded that the home-rule city was not limited by any statutory or constitutional provision, and consequently it is not a violation of the nondelegation doctrine to incorporate the TCEQ rules in both their current and future forms.

JUSTICE BOYD, dissenting in part.

Justice Boyd dissents because of what he describes as a “subtly but substantively significant” disagreement. “[A] general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. In other words, both will be enforced if that be possible under any reasonable construction.” This means that only the part of the ordinance that is inconsistent is preempted. Accordingly, the enforcement provision of the ordinance can be read in part to be statutorily consistent, and only the part that cannot be read to be consistent is invalid.

Under the Texas Water Code, if within forty-five days the TCEQ notified the peace officer that “administrative or civil penalties would not be adequate or appropriate,” or if the TCEQ does not provide any notice, then the city may prosecute the violation criminally. Since the ordinance does not mandate prosecution, it may be construed as allowing a prosecutor to wait the forty-five days for notice of the appropriateness of criminal prosecution or lack thereof.

There is a construction of the ordinance, then, that is not inconsistent with the statute. This is further emphasized by the lack of provision in the ordinance that states that “criminal prosecution is the ‘only’ remedy for a violation.” Justice Boyd contends that the ordinance is not preempted to the extent that it allows the city to prosecute in this consistent manner, and the Court may “limit[] the effect of the ordinance to legally permissible applications, even if other applications would be inconsistent with state law and therefore invalid.” Therefore, Justice Boyd would hold the enforcement provision enforceable as limited to its permissible construction.

Garofolo v. Ocwen Loan Servicing, L.L.C.

No. 15-0437

Case Summary written by Katherine Mendiola, Articles Editor.

JUSTICE BROWN delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE DEVINE joined.

A homeowner sued its lender for failure to deliver notice of release of lien after the homeowner timely paid off the home-equity loan. Although the lender recorded the release of lien, the lender failed to submit notice to the homeowner, as required by the terms of the loan.

The homeowner notified the loan servicer, however, the servicer again failed to provide the release of lien. The homeowner sued the lender in federal court for violations of the Texas Constitution and breach of contract. The district court granted the lender's motion to dismiss for failure to state a claim. The Fifth circuit certified two questions for review to the Supreme Court of Texas.

Is there a constitutional right to forfeiture? Secondly, is forfeiture available for this specific breach of contract action?

The majority determined there was no constitutional right to forfeiture because the terms and conditions of the home-equity loan would equate to substantive constitutional rights. The Court determined that compliance with constitutional requirements is measured at the origination of the loan, not performance after the loan. The constitutional right granted under the applicable constitutional provision is freedom from a forced sale. Because this is not a case where the lender attempted to foreclose on a homestead after the homeowner entered delinquent status, there was no constitutional violation. The court determined that forfeiture is available when a lender fails to correct its failure to comply with the specific corrective measure and if none of the corrective measures applied, forfeiture does not apply. Applying that rationale to the instant case, forfeiture was not applicable for a lender's failure to deliver a release of lien. The lender can only correct the delinquency by delivering the release of lien.

JUSTICE BOYD filed a dissenting opinion, in which JUSTICE JOHNSON joined.

Justice Boyd dissented based on the majority's conclusion that forfeiture was not applicable. Justice Boyd opined that the catchall provision was sufficient to correct the deficiency and forfeiture should therefore be applied to the instant case. The catchall provision would correct the lender's underlying deficiency. The agreement expressly requires forfeiture and the duty of the Court is to enforce the parties' agreement.

Wood v. HSBA Bank USA, N.A.

No. 14-0714

Case Summary written by Laura Parton, Articles Editor.

JUSTICE LEHRMANN delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE GUZMAN, JUSTICE BOYD, JUSTICE DEVINE, and JUSTICE BROWN joined.

Eight years after Alice and Daniel Wood acquired a home-equity loan securing their homestead, they notified the note holder, HSBC Bank, along with Ocwen Loan Servicing, the loan servicer (together, the Lenders), that the loan did not comply with article XVI, Section 50 of the Texas Constitution. One aspect of the loan that was constitutionally noncompliant was the closing fee, which exceeded the permissible three percent of the loan amount. The bank made no attempt to cure the defects after receiving notice. Later, the Woods brought a quiet title claim and sought “a declaratory judgement that the lien securing the home-equity loan is void, that all principal and interest paid must be forfeited, and that the Woods have no further obligation to pay.”

The trial court granted the Lender’s motion for summary judgment, specifically on the grounds that the lien is not void, but voidable and thus barred by the four-year statute of limitations. The court of appeals affirmed and the Court granted Wood’s petition for review.

In reversing the court of appeals in part and remanding, the Court emphasized that effect should be given to the plain language of Section 50. Section 50 allows the homestead to be secured by a loan only if it complies with “very specific and extensive limitations on those encumbrances.” The constitution provides that notice shall be given to the lender, who then has sixty days to cure the defect, specific methods for which are provided. A “constitutionally noncompliant home-equity loan is not valid before the defect is cured.”

When an instrument is void, the statute of limitations will not apply, and a claim for quiet title may be brought at any time. In the instant case, the Lenders chose not to cure the defects in the home-equity loan after being given notice that the loan was constitutionally noncompliant. Thus, the lien was void and not barred by the statute of limitations. The Court reversed on this issue and remanded for determinations on issues on the merits not before the Court.

Affirming the court of appeals in part, the Court construed the declaratory judgment cause of action, the claim that the Woods are owed the forfeiture of interest and principle, in light of its opinion in

Garofolo v. Ocwen Loan Servicing—released the same day. In *Garofolo*, the Court held that:

[S]ection 50(a) does not create substantive rights beyond a defense to foreclosure of a home-equity lien securing a constitutionally noncompliant loan, observing that the terms and conditions in section 50(a)(6) “are not constitutional rights and obligations unto themselves.” We also clarify that “the forfeiture remedy [is not] a constitutional remedy unto itself. Rather, . . . borrowers may access the forfeiture remedy through a breach-of-contract action based on the inclusion of those terms in their loan documents, as the Constitution requires to make the home-equity lien foreclosure-eligible.

Because the Woods’ claims are for quiet title and a declaratory judgment, and not for a breach-of-contract or fraud, they are foreclosed by *Garofolo* .

CHIEF JUSTICE HECHT filed a dissenting opinion, in which JUSTICE GREEN and JUSTICE WILLETT joined.

The dissent argues that the Woods could have known, on the day they closed on their loan, that the loan did not comply with Section 50. The U.S. Court of Appeals for the Fifth Circuit and every appellate court in Texas that has addressed this issue has held that the statute of limitations applies to such claims of noncompliance. A loan under Section 50 is invalid, not for the life of the loan, but only after a failure to cure the defect. Before the failure to cure, a loan is not void, but voidable and thus subject to the four-year statute of limitations.

McIntyre v. El Paso Independent Sch. Dist.

No. 08-11-00329-CV

Case Summary written by Jordan Fowler, Staff Member.

JUSTICE DEVINE delivered the opinion of the court.

The school district’s attendance officer filed criminal charges against the McIntyre parents and their minor children for contributing to truancy and failure to attend school. The McIntyres sued the school

district and the attendance officer for violating their federal and state constitutional rights to due process, equal protection, free exercise of religion, and right to privacy. The school district challenged the trial court's jurisdiction and moved to dismiss the case. The trial court denied the motion, and the school district filed an interlocutory appeal. The appellate court concluded that the attendance officer had qualified immunity, and the McIntyres should have exhausted their administrative remedies before seeking judicial relief. The appellate court dismissed the McIntyres' claims and they petitioned the Supreme Court of Texas for review.

ISSUE: Was the appellate court correct in dismissing the McIntyres' claims based on the officer's qualified immunity and a failure to exhaust administrative remedies?

The Court began its analysis by stating that this case is an example of when an appellate court's judgment on an interlocutory appeal is not final because there is uncertainty in the law that must be clarified. The Court analyzed the Texas Education Code and determined that it needed to clarify the authority of the Commissioner of Education. The Court explained that the Commissioner is authorized to resolve all disputes that arise when a party is aggrieved by the school laws of the state or an employment contract between the school district and an employee. The Court noted that the Legislature intended the authority of the Commissioner to be limited, and when a cause of action falls under that express authority, then all administrative remedies must be exhausted prior to a party seeking judicial relief.

The Court reversed the lower court's decision to dismiss the McIntyre's claims for failure to exhaust administrative remedies and affirmed its decision to dismiss their claims against the attendance officer based on qualified immunity. The court reasoned that the plaintiffs were not required to exhaust administrative remedies because their claims were based on the district's violation of the United States and Texas Constitutions—not on a violation of school laws.

The Court clarified that the Legislature only requires exhaustion if the party is upset by the school laws or alleges that the school district violated them. Further, the McIntyres' claims against the attendance officer were barred because the Fifth Circuit has repeatedly held that there is not a constitutional interest or due process right to avoid a criminal prosecution that is not supported by probable cause.

Justice Brown said that the dissent believes that the majority construed the exhaustion statute too narrowly. He criticized the dissent's approach because it would allow mandatory exhaustion for parties like the McIntryes that are upset with a school district's actions rather than its laws.

JUSTICE GREEN delivered a dissenting opinion.

Justice Green disagreed with the majority's interpretation of the Texas Education Code. He felt that the majority allowed the McIntyre family to bypass the mandatory exhaustion of administrative remedies by masking their claims in constitutional issues. He said that in order for the Court to find the McIntyres' rights to homeschool were violated they would have to find that their rights under the Education Code, not the Constitution, were violated. Justice Green said he does not feel that the majority construed the statute too narrowly—rather, they eliminated an important piece of it altogether. He said that the majority interpreted that statute to say that the McIntyre family did not have to exhaust administrative remedies because they were not challenging the constitutionality of the school district's laws. Justice Brown pointed out that the Commissioner does not have authority to decide whether school district laws are unconstitutional, so the majority incorrectly interpreted the statute and left §7.057(a) meaningless.

Tex. v. One (1) Lincoln Navigator, VIN #5LMFU27RX4LJ28242
No. 14-0692

Case Summary written by Ryley T Bennett, Staff Member.

JUSTICE BROWN delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE BOYD joined, and in which CHIEF JUSTICE HECHT, JUSTICE JOHNSON, and JUSTICE LEHRMANN joined in all but part IV.

Police officers arrested Miguel Herrera, and seized his Lincoln Navigator. While conducting an inventory search of the vehicle, drugs were found. The State then filed a notice of seizure and intended forfeiture under Chapter 59 of the Code of Criminal Procedure. The State claims that the Navigator is considered “contraband” under the

statue. Herrera argued that the stop, which led to the arrest, was unlawful, and as such, any evidence obtained should therefore be excluded in the civil-forfeiture proceeding.

The trial court agreed with Herrera, finding the vehicle search to be illegal, and “denying the seizure.” The court of appeals affirmed the decision of the trial court, holding that (1) article 59.03(b)—“[s]eizure of property subject to forfeiture may be made without warrant if . . . seizure was incident to a lawful arrest, lawful search, or lawful search incident to arrest”—precludes the state from initiating a civil-forfeiture proceeding based on an illegal search. The court of appeals also held (2) the stop leading up to the arrest was unlawful because the officers did not have reasonable suspicion; and (3) Herrera was entitled to relief because, after exclusion of the evidence found in the vehicle, the state was left with no evidence that the Navigator was contraband.

ISSUE: The issue before the court was whether an illegal seizure requires exclusion in a Chapter 59 civil-forfeiture proceeding.

The Court first established that the forfeiture proceedings are distinctly civil in nature. Although this case is a civil-forfeiture case, the court analyzed the Fourth Amendment exclusionary rule and its applicability in such context. The Court noted that it has not previously determined whether the exclusionary rule applies to civil-forfeiture proceedings. It criticized the lower appellate court decision in prematurely assuming that the officers’ illegal conduct equated to inadmissibility without first asking whether exclusion was the proper remedy. In Texas, an expanded version of the Fourth Amendment common-law rule has been codified to ensure that, “[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted into evidence against the accused on the trial of any criminal case.” The Court discussed how the exclusionary rule is a judge-made deterrent. Across the board, the exclusionary rule is only applied where the deterrence benefits outweigh substantial social costs. The Court noted that the effect of the exclusionary rule impedes upon the truth-finding functions of the judge and jury. In recognition of the substantial costs the exclusionary rule imposes, the Supreme Court has repeatedly declined to extend the rule to any other proceeding other than criminal trials. The Court in this case held that the exclusionary rule is confined to

criminal cases where it has an actual deterrent value, which does not include Chapter 59 proceedings because the “suppression of illegally seized evidence under Chapter 59 fails to yield appreciable deterrence.”

Since Chapter 59 does not import an exclusionary rule itself, the next issue the Court addressed was whether the “may be made” language within article 59.03(b), limits officer conduct in seizing property to be forfeited. The Court stated that the court of appeals read article 59.03(b) too broadly because 59.03(b) is concerned only with the seizure of property that is subject to forfeiture. The Court agreed with Herrera, in part, in that the state is not empowered by Chapter 59 to unlawfully seize such property that is subject to forfeiture. Additionally, while there appears to be a limitation on officer conduct in seizure of property that is subject to forfeiture, Chapter 59 does not provide a remedy. Even if property is unlawfully seized, Chapter 59 does not mention exclusion or suppression of property subject to forfeiture. In its place, the state must prove by a preponderance of the evidence that the property seized is contraband, and is therefore subject to forfeiture. In conclusion, the Court held that Chapter 59 does not address exclusion of illegally obtained evidence, and it does not require the state to prove lawful seizure as a prerequisite to commencing a forfeiture proceeding. Rather, the only burden on the state is proving by a preponderance of the evidence that the property seized is subject to forfeiture.

In addressing Justice Devine’s concurrence, the Court stated that the issue that Justice Devine wishes to address is not necessary to the resolution of the present case. The Court noted, that they desire to avoid a criminal-law question that is beyond the Court’s jurisdiction, as only civil law matters are to be decided by the Court.

In conclusion, the Court reversed and remanded to the court of appeals and held that neither the Fourth Amendment or Chapter 59 provided an exclusion within a Chapter 59 civil–forfeiture proceeding. Further, the state is not required to show lawful seizure of property as a prerequisite to a Chapter 59 proceeding.

JUSTICE DEVINE, joined by CHIEF JUSTICE HECHT, JUSTICE JOHNSON, and JUSTICE LEHRMANN, delivered a concurring opinion.

Justice Devine agreed that the court of appeals should be reversed, but did not reach the same issue as to whether illegally

obtained evidence should be excluded in a civil-forfeiture proceeding. Rather, Justice Devine stated that the officers had a reasonable suspicion to stop Herrera and search the driver's area of the vehicle. Unlike the Court's evaluation, Justice Devine addressed Chapter 59 of the Texas Code of Criminal Procedure and concluded that the search of Herrera's vehicle was lawful. With such conclusion, Justice Devine states that determination of whether the illegally seized evidence is subject to forfeiture was unnecessary. Although arriving at the same conclusion as the Court, Justice Devine focused on the reasonable suspicion inquiry of the search and seizure.

JUSTICE WILLETT delivered a concurring opinion.

Justice Willett joined that Court's opinion because of its comparative jurisdictional and practical advantages. Justice Willett stated that the jurisdictional advantage of the Court's approach is its avoidance of crossing into the constitutional divide separating the Court's jurisdiction from the Court of Criminal Appeals' jurisdiction, agreeing with the substantively distinct roles between the two courts. Justice Willett further agreed with the Court's practical advantages: omitting the reasonableness inquiry allows the Court to streamline the civil-forfeiture proceeding, and the Court resolves the issue of the exclusionary rule's application in civil-forfeiture proceedings. Justice Willett added that, until the Texas Legislature first initiates to modernize the current judicial system, and second, addresses imbalances inherent in the civil-forfeiture regime, the Court must take existing law as it.

Harris Cnty. Flood Dist. V. Kerr

No. 13-0303

Case Summary written by Shelby Broaddus, Staff Member.

JUSTICE WILLETT delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE BROWN joined.

About 400 homeowners located in the upper White Oak Bayou watershed of Harris County suffered flood damage after Tropical Storm Francis in 1998, Tropical Storm Allison in 2001, and another storm in 2002. Following these storms, the homeowners sued Harris County and

the Harris County Flood Control District asserting a takings cause of action.

The White Oak Bayou has experienced a long history of flooding. In an Interim Report prepared in 1976, it was noted that the area experienced damaging flooding for the past several years. It was further noted that the flooding was primarily caused by “inadequate channel capacities of the streams,” and that continuing urbanization was exacerbating the problem. Because the Report predicted that flood damage would increase substantially in the future, flood control measures were proposed and were to be funded by the federal government. The County agreed to sponsor the project, however, federal funding was slow to materialize.

The County later approved new residential developments to be constructed in the upper White Oak Bayou area. In 1984, the District hired engineers who also developed a flood control plan for the area called the Pate Plan. That same year, the County approved the Pate Plan and the District was to implement the plan through funding raised through local taxes and impact fees. The Pate Plan was never fully implemented, and six years later a new plan entitled the Klotz Plan, suggested flood prevention measures which differed from the Pate Plan.

The Homeowners claimed that the combination of the County’s failure to implement the Pate Plan and the approval of “unmitigated” upstream development were to blame for the flooding of their homes, and these actions amounted to a constitutional taking of their property. In response, the County filed a plea to the jurisdiction and a motion for summary judgment to the homeowners takings claim. The trial court denied the motion, and the decision was affirmed by the court of appeals.

ISSUE: Whether governmental entities that have approved private developments without fully implementing previously approved flood plans are liable to homeowners who have suffered flood damage based on a governmental takings theory.

The majority concluded that the homeowners failed to demonstrate a genuine issue of material fact to each of the takings elements. The Court first held that the county lacked the intent to cause any flooding. The Court found that the county desired to prevent the flooding and undertook many efforts to accomplish the goal of flood

prevention. Thus, the homeowners failed to prove the intent requirement of a takings claim.

The Court also found that the homeowners failed to meet the affirmative conduct and specificity elements of a takings claim. The Court found that the law does not recognize liability for inaction, and the county's failure to fully implement the Pate Plan did not represent affirmative conduct. Further, the Court found that the homeowners failed to demonstrate the specificity requirement. It was not enough that the county knew that someday its performance would result in damage to an unspecified parcel of land; the government must know that specific property damage is certain.

The Court further held that the homeowners failed to demonstrate that the government burdened their property through regulation, which deprived them of the land's economic value or use and enjoyment. The Court found that the regulation was not to the Homeowner's property, but to other private property. Further, this scenario demonstrated insufficient regulation rather than excessive governmental regulation. The homeowners failed to meet the public-use element since the government merely approved of private development on other properties and there were no designs for use of the homeowner's particular properties for flood control measures.

The Court concluded that there was no taking on the part of the government. The Court stated that if they were to find a taking, their holding would unjustifiably extend takings liability. The Court reversed the judgment of the court of appeals, and rendered judgment dismissing the case. The Court held that the pleas to the jurisdiction should have been granted.

JUSTICE LEHRMANN delivered a concurring opinion.

Justice Lehrmann agreed with the Court's opinion in full, however, wrote separately to call attention to the Court's point that "if a taking for public use is compensable, then surely a taking for private use would also be compensable." Justice Lehrmann emphasized that a taking for private use is compensable in order to prevent potentially governmental action. She emphasized that any suggestion that a private-use taking might bar a property owner's right to recover is misplaced.

JUSTICE DEVINE delivered a dissenting opinion, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, and JUSTICE BOYD joined.

The dissent held that the homeowners raised a fact issue to each element of the takings claim because there was evidence that the government entities knew unmitigated development would lead to flooding, approved the development without appropriately mitigating it, and this action thereby caused the flooding.

In regards to the intent element, the dissent held that a fact issue existed because there is evidence that the governmental entities abandoned 100-year flood plans and instead implemented 10-year flood plans. The dissent argued there was also evidence that the governmental entities deviated from their earlier policy requirements of on-site detention ponds. The dissent stated that this evidence taken together raised a fact issue as to the entities' intent to take homeowners property to facilitate new development without appropriate mitigation. Further, the dissent stated the reoccurring nature of the floods could be taken as evidence as to the government's intent.

The dissent also opined that the homeowners raised a fact issue as to causation. The dissent highlighted expert testimony which concluded that 'but for' the county approving the unmitigated development and not fully implementing the Pate plan, the homeowners would not have incurred damage during the floods. The government pointed to analytical gaps in the expert's testimony thus, raising a fact issue in regards to causation.

The dissent also stated that a fact issue existed for the public use element. The dissent stated that some evidence exists as to whether the governmental entities were acting for a public use by approving the new drainage plans. In conclusion, the dissent held that the plea to jurisdiction should have been denied.

Pidgeon v. Turner

No. 15-0688-CV

Case Summary written by Jordan Fowler, Staff Member.

JUSTICE DEVINE, dissenting.

Houston taxpayers sued the city and its mayor to enjoin the enforcement of an amendment to the tax charter that permitted same-sex spouses to receive equal benefits of opposite-sex spouses. This suit

was originally filed when Texas still outlawed same-sex marriage. The city countered with a plea to the jurisdiction, but the trial court denied it. The city appealed and, while the case was on appeal, the Supreme Court of the United States decided *Obergefell v. Hodges*, the landmark case that legalized same-sex marriage under the Equal Protection clause of the Fourteenth Amendment. Based on *Obergefell*, the court of appeals reversed the trial court's injunction, and the taxpayers petitioned for review. The majority of the Court denied review.

ISSUE: Does the U.S. Supreme Court's holding in *Obergefell* mandate the Texas Supreme Court to require cities to provide equal benefits to same-sex spouses of city employees as it provides to opposite-sex spouses?

Justice Devine would have granted review. He reasoned that the allocation of marital benefits is entirely distinguishable from the Supreme Court's holding in *Obergefell*. Devine said that the court of appeals mistakenly applied strict scrutiny to the issue of marital benefit when the Supreme Court only established the fundamental right to marry. He feels that because of the biological differences between males and females, the city may have legitimate and important governmental interests in allocating more benefits to opposite-sex spouses. Justice Devine reiterated that the governmental interest in encouraging procreation justifies the city in a higher allocation of benefits to opposite-sex spouses, because they are the only married couples that can independently procreate. Devine recognized that some opposite-sex couples will never procreate, but applying the proper standard of rational basis, or even intermediate scrutiny, allows the old charter to live on. Although the majority in *Obergefell* assumed that cities would allocate benefits equally, Devine said that the general assumption about the state law did not constitute a legal holding or admonish the firmly established standards of judicial review.

In re State of Texas

No. 05-0139

Case Summary written by Jennifer Wallace, Staff Member.

JUSTICE BROWN, joined by JUSTICE DEVINE, filed a concurring opinion.

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the United States Supreme Court held that all state bans of same-sex marriage are unconstitutional under the Fourteenth Amendment. Following the *Obergefell* decision, on February 19, 2015, a lawyer for a same-sex couple, Sarah Goodfriend and Suzanna Bryant, filed a lawsuit challenging the constitutionality of Texas law which outlawed same-sex marriages and defined marriage as only between a man and a woman. The trial court granted a temporary restraining order (TRO), without notifying the attorney general as required by law in cases of a constitutional attack, which allowed the same-sex couple to obtain a marriage license from the Travis County Clerk. The plaintiff's lawyer also obtained a waiver of the mandatory 72-hour waiting period between the issuance of a marriage license and the performance of a marriage ceremony. Following the marriage ceremony of the same-sex couple, their lawyer nonsuited the lawsuit to prevent intervention by the attorney general or appellate review. The next day, the attorney general filed a petition for writ of mandamus to challenge the validity of the trial court's order despite the nonsuit.

Issue(s): Did the trial court properly grant the TRO, and is the attorney general's petition for writ of mandamus moot following the United States Supreme Court ruling in *Obergefell*?

On April 15, 2016, the Texas Supreme Court dismissed the mandamus petition as moot in light of the United States Supreme Court decision in *Obergefell v. Hodges*. Justice Brown concurred in the Court's dismissal, but argued that the trial court did not follow proper Texas Civil Procedure when it granted the TRO. He noted that a TRO is meant to preserve the status quo, which in this case was that the Texas Family Code and Texas common law limited marriage to between one man and one woman. Justice Brown pointed out that no upper state courts in Texas had altered this status quo, so the trial court erred by granting the TRO absent such precedential authority. According to Justice Brown, the trial court abused its discretion by declaring Texas marriage law unconstitutional and by authorizing a same-sex union. Also, he concluded that the attorney for the same-sex couple intentionally and illegitimately manipulated the legal process to achieve his desired ends with the help of the trial court.

JUSTICE WILLETT, joined by JUSTICE DEVINE, filed a concurring opinion.

Justice Willett concurred in the Court's dismissal, but argued the trial court failed to follow the proper legal procedures. Under § 402.010 of the Government Code, Texas courts must notify the attorney general when the constitutionality of state law is challenged. Section 402.010 also provides that to grant the attorney general sufficient time to respond and defend Texas law against constitutional attack, a Texas court cannot declare a law unconstitutional within forty-five days after such statutorily-required notice. Justice Willett acknowledged that the trial court failed to meet this legal requirement and did not notify the attorney general of such constitutional attack and ruled immediately rather than waiting the required forty-five days. Justice Willett argued that the attorney general should have been allowed the opportunity to defend Texas marriage law, and the trial court improperly handled the constitutionality issue.