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11TH ANNUAL ADVANCED TEXAS ADMINISTRATIVE LAW SEMINAR

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I. INTRODUCTION

This case law update includes many of the administrative law cases decided in Texas between November 2015 and mid - July 2016. This is not an exhaustive review of all administrative law cases, nor do these synopses exhaustively cover all issues raised by these cases. We have attempted to choose cases representative of issues raised in Texas courts and to highlight the most salient points of each. Our views are not to be taken as the views of Texas Tech University School of Law and should not be interpreted as predictive of the result of future cases.

II. AGENCY AUTHORITY

Machete's Chop Shop, Inc. v. Tex. Film Comm'n, No. 03-14-00098-CV, ___S.W.3d___, 2016 WL 368534, 2016 Tex. App. LEXIS 953 (Tex. App.—Austin Jan. 29, 2016, no pet.). ¶

Machete's Chop Shop, Inc. (Machete) brought suit against a number of parties, including: the Texas Film Commission (the Commission); the Director of the Commission, Heather Page; the Music, Film, Television, and Multimedia Office (the Office); the Office of the Governor; and the Governor of Texas, Greg Abbott (collectively, the State Defendants), after the Commission denied Machete's grant application from the Moving Image Industry Incentive Program (the Program). Machete sought declaratory relief, alleging the Commission mishandled its grant application from the Program and also sought a declaration from the court that a statute and two administrative rules that governed the program were unconstitutionally vague or, alternatively, that the rules did not apply to Machete. The trial court granted the State Defendants' plea to the jurisdiction and dismissed the lawsuit. Machete then appealed, and the Austin Court of Appeals affirmed the trial court's judgment.

The Office delegated administration of the Program to the Commission, which

then developed administrative rules to govern the procedure for submitting grant applications and the awarding of such grants. The administrative rules are codified in the Texas Government Code section 485.002 and title 13 of the Texas Administrative Code sections 121.1–.14, 121.4(b), which permit the Commission to deny a grant application if it finds the content of a film is inappropriate or depicts Texas or Texans in a negative light. According to these administrative rules, such content has the effect of revoking the eligibility of the applicant for grant funds, even after a project's completion.

In this case, Machete submitted a grant application in 2009, seeking funds in connection with its feature film *Machete*. The Commission initially approved the application for acceptance into the incentive program after reviewing the film's initial content but notified Machete that approval would not necessarily guarantee incentive funds. Following the film's release in 2010, the Commission notified Machete that based on a final review of the film's content, Machete no longer qualified for the Program grant pursuant to the relevant administrative rules and statutes.

As a result, Machete brought suit against the State Defendants, asserting that Page and Governor Abbott acted beyond the scope of their authority, or *ultra vires*, in denying the application and further argued that the applicable administrative rules and statutes were impermissibly vague in violation of the Fourteenth Amendment of the United States Constitution and the Due Course of Law provisions of the Texas Constitution. In bringing this lawsuit, Machete maintained that Texas Government Code section 2001.038 provided the trial court with appropriate subject-matter jurisdiction because the statute allows a party to challenge the applicability or validity of an agency rule through a declaratory action.

However, the appellate court ultimately found that section 2001.038 requires a justiciable controversy to establish subject-matter jurisdiction, and the justiciable controversy Machete pleaded

centered on its claim that the Commission's denial of the Program grant was unauthorized. Most importantly, the court held that sovereign immunity barred these claims, therefore Machete's § 2001.038 declaratory action was moot. Thus, the appellate court affirmed the trial court's decision granting the State Defendants' plea to the jurisdiction and dismissed Machete's lawsuit for lack of subject-matter jurisdiction.

McMillen v. Tex. Health & Human Servs. Comm'n., No. 15-0147, ___S.W.3d___, 2016 WL 766799, 2016 Tex. LEXIS 178 (Tex. Feb. 26, 2016). Ω

Karen Nelson, a Deputy Inspector General for the Health and Human Services Commission's Office of the Inspector General (OIG), instructed the Deputy Counsel for the Commission, Michael McMillen, to research the Commission's practice of obtaining payments from certain recipients of Medicaid benefits. Through a memorandum, McMillian stated that the Commission did not have a legal basis for obtaining these payments. McMillen then gave the memorandum to Nelson, the OIG Internal Affairs Division, and the Commission's Executive Commissioner.

The Commission soon after terminated McMillen; McMillen, in turn, sued the Commission and its Executive Commissioner under the Whistleblower Act. Tex. Gov't Code § 554.0035 (West 1995). The Whistleblower Act shields "a public employee who in good faith reports a violation of law be employing the governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code § 554.002(a).

The Texas Supreme Court faced the question of whether McMillen, in good faith, reported this alleged legal violation to the appropriate law enforcement authority when he reported this violation to the Executive Commissioner of the OIG. The OIG's powers include investigating fraud and abuse regarding health and human services issues, and investigating fraud by providers and recipients. *Id.* at § 531.102(a) (West 2015); *Id.*

at § 531.102(f)(2). The Act distinguished the powers of the OIG from the powers of the department chair of the University of Texas Southwestern Medical Center when it noted that the OIG has outward-looking enforcement authority into matters of fraud and abuse. *Univ. of Tex. Southwestern Med. Ctr. v. Gentilello*, 398 S.W. 3d 380, 385 (Tex. 2013). Ultimately, the Supreme Court held that McMillen reported the alleged legal violation to an appropriate law enforcement authority and reversed the court of appeals' judgment and remanded back to the court of appeals.

III. AGENCY INTERPRETATION OF STATUTES AND RULES

Brown v. Hegar, No. 03-14-00492-CV, 2015 WL 7952259, 2015 Tex. App. LEXIS 12254 (Tex. App.—Austin Dec. 3, 2015, no pet.). Γ

This case concerns the sale of an airplane to Mr. W. Robert Brown from CMB wherein neither Brown nor CMB paid any taxes to the state regarding the sale. Brown argued that the district court erred in granting the motion for summary judgment filed by the Comptroller of Public Accounts of the State of Texas (Comptroller) and the airplane qualified as an occasional sale. Therefore, according to Brown the sale was exempt from taxation and a four-year statute of limitations barred the taxes called for by the Comptroller's tax assessment. An administrative law judge decided that Brown did not show that the sale qualified for the occasional sale exemption and that he should have filed a use-tax report. After each party filed motions for summary judgment, the district court granted the Comptroller's motion, which alleged that the sale of the airplane did not qualify as an occasional sale, and held that the statute of limitations was not applicable due to Brown's failure to file a tax report. Brown appealed the district court's judgment.

Section 111.2104 of the Texas Tax Code includes a provision allowing for a four-year statute of limitations on assessing taxes, which Brown contended had run when

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