SUPREME COURT OF TEXAS UPDATE

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SUPREME COURT OF TEXAS UPDATE

J. Brett Busby
Justice
Supreme Court of Texas

I. SCOPE OF THIS ARTICLE

This article surveys cases that were decided by the Supreme Court of Texas from April 1, 2018 through March 31, 2019. Petitions granted but not yet decided are also included.

II. ADMINISTRATIVE LAW

A. Disciplinary Action

1. Aleman v. Tex. Med. Bd., 2017 WL 875315 (Tex. App.—Austin 2017), *pet. granted*, 61 Tex. Sup. Ct. J. 1827 (Aug. 31, 2018) [17-0385].

At issue in this case is whether the Texas Medical Board properly sanctioned Ruben Aleman, M.D. under the Texas Occupations Code for his failure to electronically sign a death certificate. Under the Health and Safety Code, a person who completes the medical certification on a death certificate must submit the information and attest to its validity electronically using the Texas Electronic Death Registration system. Aleman signed a paper death certificate but did not submit the information electronically. The Board filed a complaint at the State Office of Administrative Hearings (SOAH) seeking disciplinary action against Aleman for his failure to submit the information electronically. The administrative law judge concluded the violation constituted "unprofessional or dishonorable conduct that is likely to deceive or defraud the public" prohibited by Texas Occupations Code section 164.052(a)(5), which is defined under section 164.053(a)(1) as including "an act that violates any state or federal law if the act is connected with the physician's practice of medicine." The Board sanctioned Aleman based on the administrative law judge's recommendations.

Aleman filed suit in the trial court seeking judicial review of the Board's sanctioning order. The trial court affirmed the Board's sanction except for a due-process waiver in the order. Aleman appealed, and the court of appeals affirmed the trial court's judgment. Specifically, the court of appeals held substantial evidence supported that Aleman engaged in conduct prohibited by section 164.053 of the Health and Safety Code, his conduct violated state law section 193.005, and was in connection with the "practice of medicine." The court of appeals also held Aleman was not entitled to an impossibility defense for being unable to electronically submit the death certificate because the impossibility was a product of his own actions—his failure to register with the electronic death registration system.

Aleman appealed to the Supreme Court, arguing Occupations Code section 164.053(a)(1) does not contemplate electronic-submission violations. Alternatively, he asserts that no evidence supports the Board's finding of "unprofessional or dishonorable conduct that is likely to deceive or defraud the public," and signing a death certificate was not a "practice of medicine." Aleman also argues he should not be sanctioned when compliance was impossible. The Court granted Aleman's petition for review and heard oral argument on December 6, 2018.

B. Exhaustion of Administrative Remedies

1. Garcia v. City of Willis, 523 S.W.3d 729 (Tex. App.—Beaumont 2017), *pet. granted*, 61 Tex. Sup. Ct. J. 1828 (Aug. 31, 2018) [17-0713].

At issue in this case is whether the City of Willis is immune from suit in this challenge to the City's red-light-camera ordinance based on the plaintiff's failure to exhaust administrative remedies and failure to assert a valid ultra vires claim.

The City adopted an ordinance implementing a red-light-camera system, pursuant to Chapter 707 of the Transportation Code. Luis Garcia represents a putative class of residents who have paid a civil penalty for traffic violations under the red-light-camera ordinance. Garcia challenged the

constitutionality of the City's ordinance and Chapter 707. Alternatively, Garcia alleged that the City failed to meet the Transportation Code's requirement to conduct a traffic engineering study before installing the cameras and thus acted ultra vires in collecting civil penalties using the system. The City of Willis filed a plea to the jurisdiction on the grounds of governmental immunity and failure to exhaust administrative remedies. The trial court denied the plea, but the court of appeals reversed. It held that Chapter 707 of the Transportation Code directs cities to establish an "exclusive" administrative regime, which must be exhausted before filing suit in district court. It also held that the ultra vires exception does not apply because the requirement to conduct a traffic engineering study was merely a "regulatory requirement" insufficient to support an ultra vires claim. The Supreme Court granted Garcia's petition for review and heard oral argument on November 1, 2018.

2. Mosley v. Tex. Health & Human Servs. Comm'n, 517 S.W.3d 346 (Tex. App.—Austin 2017), *pet. granted*, 61 Tex. Sup. Ct. J. 1826, (Aug. 31, 2018) [17-0345].

At issue in this case is whether petitioner was required to satisfy the Administrative Procedure Act's motion-for-rehearing requirement before seeking judicial review when the Human Resources Code did not expressly require a motion for rehearing and the administrative law judge's order stated that the petitioners' "only recourse" was to file suit for judicial review within 30 days.

Patricia Mosley was placed on a Texas Department of Family and Protective Services Registry for a report of "abuse, neglect, or exploitation of an elderly person or person with a disability" after a group-home resident whom she was supervising swallowed batteries. Mosley requested an administrative appeal hearing. The administrative law judge sustained the determination and sent Mosley a letter stating that the order would become final unless she petitioned for judicial review. Believing that a motion for rehearing was not required, Mosley sued for judicial review. The agency filed a plea to the jurisdiction, arguing that under the Administrative Procedure Act, failure to file a motion for rehearing deprived the trial court of jurisdiction. The trial court denied the plea, but the court of appeals reversed and rendered judgment dismissing Mosley's claims. Mosley petitioned the Supreme Court for review arguing that a rehearing is not required under the Administrative Procedure Act but that if it is, such a requirement violates her rights to due process and due course.

The Court granted Mosley's petition for review and heard oral argument on January 9, 2019.

C. Public Information Act

1. Tex. Dep't of Criminal Justice v. Levin, 520 S.W.3d 225 (Tex. App.—Austin 2017), *pet. granted*, 62 Tex. Sup. Ct. J. 69 (Oct. 19, 2018) [17-0552].

At issue in this case is whether the Texas Department of Criminal Justice (TDCJ) proved the right to withhold from disclosure under the Texas Public Information Act (TPIA) the identity of a supplier of the lethal-injection drugs because disclosure "would create a substantial threat of physical harm." Maurie Levin, Naomi Terr, and Hilary Sheard (collectively, Levin) represent capital defendants. Against the backdrop of the controversy regarding "botched" executions by lethal injection in other states, Levin made written requests of TDCJ under the TPIA for the agency's execution protocol—the drugs used in lethal injections, any results of testing on those drugs, and the source of the drugs. TDCJ eventually produced all of the information requested except the specific source of the drugs. TDCJ then requested a ruling from the Office of the Attorney General (OAG) that it could lawfully withhold the specific identity of the pharmacy, relying on the common law protection against disclosure if the release of the information would create a "substantial threat of physical harm." The OAG agreed with TDCJ and Levin sought judicial review. The trial court granted Levin's motion for summary judgment and denied TDCJ's. The court of appeals affirmed, finding that TDCJ's summary judgment evidence presented mere isolated threats that, without more, did not support anything but speculation that disclosure of the pharmacy or pharmacist's identity would necessarily give rise to a substantial—more likely than not—threat of physical harm.

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