12/20/2019 1:48 PM
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Envelope No. 39433299
By: Tammy Tolman
Filed: 12/20/2019 1:48 PM

No. 2019-52676

HARRIS COUNTY, TEXAS	§	**IN THE DISTRICT COURT OF**
	§	
AND	§	
	§	
THE STATE OF TEXAS, acting on behalf of the Texas Commission on Environmental Quality, a Necessary and Indispensable Party,	§	**HARRIS COUNTY, TEXAS**
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
EXXONMOBIL CHEMICAL COMPANY	§	
	§	
Defendant.	§	**190th JUDICIAL DISTRICT**

PLAINTIFF HARRIS COUNTY'S RESPONSE TO THE STATE OF TEXAS' PLEA TO THE JURISDICTION

I. Summary of Response.

The State's plea is based on language not found in the relevant statute. Because the State's argument is not supported by the plain language of the statute, and because Harris County has complied with the statute as written, the State's plea should be denied.

II. Background.

Chapter 7 of the Water Code grants general authority to local governments to bring environmental enforcement actions for violations or threatened violations of certain chapters and provisions of state law "or a rule adopted or an order or a permit issued under those chapters or provisions." Tex. Water Code Ann. § 7.351(a). With

regard to alleged violations of Chapter 26 of the Water Code or Chapter 382 of the Health and Safety Code, Chapter 7 conditions a local government's authority to enforce those chapters on the adoption of a resolution by the local government's governing body authorizing the exercise of the enforcement power. *Id.* § 7.352.

On April 30, 2019, the Harris County Commissioners Court adopted, by unanimous vote, a resolution authorizing Harris County (acting through the Harris County Attorney's Office) to exercise the enforcement powers granted by Chapter 7. *See* State's Plea, Attachment B. The Commissioners Court determined that it was in the public's best interest to authorize the County Attorney's Office to institute environmental suits when it deemed necessary. *See* State's Plea, Attachment B. Harris County is home to a large number of oil and gas and chemical facilities. *See* State's Plea, Attachment B. Fires, explosions, spills, and other accidents can result in the discharge of numerous dangerous pollutants into the air and water in Harris County. Earlier this year, there were a number of such incidents. *See* State's Plea, Attachment B. Recognizing the need for prompt action, the Commissioners Court utilized the power granted in Sections 7.351 and 7.352 and adopted a resolution authorizing the County to bring an action under Chapter 7 of the Water Code. *See* State's Plea, Attachment B.

Pursuant to the authority granted by the April 30 resolution, the Harris County Attorney's Office filed this suit against ExxonMobil for alleged violations of Chapter 382 of the Health and Safety Code and violations of ExxonMobil's permit that occurred when a fire broke out at ExxonMobil's facility in Baytown. The State

has filed a plea to the jurisdiction arguing that the April 30 Resolution was ineffective to authorize the filing of this suit because it was adopted before the alleged violations occurred. According to the State, Chapter 7 should be read to require the Commissioners Court to adopt separate resolutions authorizing enforcement actions on a case-by-case basis, after each violation occurs. In fact, as explained below, the statute contains no such requirement.

III. Argument.

The State contends that Harris County lacks standing because the Commissioners Court did not adopt a resolution that conforms with Section 7.352 of the Water Code.[1] However, the State's argument impermissibly adds language to the statute and must therefore be rejected.

A. Standard of review.

In its plea to the jurisdiction, the State contends that, because Harris County lacks standing, this Court lacks subject matter jurisdiction. The court's review of a plea to the jurisdiction generally mirrors the summary judgment standard.

[1] The State's challenge is limited to the language of Chapter 7 of the Water Code, in particular sections 7.351 and 7.352. The State does not challenge the April 30 Resolution on any other grounds, such as, for example, that the Commissioners Court lacked power to adopt such a resolution, generally, or that the Commissioners Court abused its discretion in doing so. *See Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 80 (Tex. 1997) ("A party can invoke the district court's constitutional supervisory control over a Commissioners Court judgment only when the Commissioners Court acts beyond its jurisdiction or clearly abuses the discretion conferred upon the Commissioners Court by law."). Furthermore, the State has not sued to invalidate the April 30 order. As the Attorney General has determined, "[A] district court's 'general supervisory control' over a commissioners court exists only when the district court's jurisdiction is properly invoked by the filing of a lawsuit." Op. Tex. Att'y Gen. No. JM-708 (1987). Thus, the only issue is whether the Commissioners Court complied with Water Code Section 7.352.

Chambers-Liberty Ctys. Navigation Dist. v. State, 575 S.W.3d 339, 345 (Tex. 2019). "If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004). On appeal, the trial court's ruling on a plea to the jurisdiction is reviewed de novo. *Klumb*, 458 S.W.3d at 8.

The State's argument is based on statutory construction. Issues of statutory construction are also reviewed de novo. *Chambers-Liberty Ctys. Navigation Dist.*, 575 S.W.3d at 345. As the Supreme Court has repeatedly confirmed, the plain language of the statute is the primary inquiry for statutory construction questions.

> In interpreting statutes, we must look to the plain language, construing the text in light of the statute as a whole. A statute's plain language is the most reliable guide to the Legislature's intent. The statutory terms bear their common, ordinary meaning, unless the text provides a different meaning or the common meaning leads to an absurd result. This Court may not impose its own judicial meaning on a statute by adding words not contained in the statute's language. If the statute's plain language is unambiguous, we interpret its plain meaning, presuming that the Legislature intended for each of the statute's words to have a purpose and that the Legislature purposefully omitted words it did not include. The statutory words must be determined considering the context in which they are used, not in isolation.

Silguero v. CSL Plasma, Inc., 579 S.W.3d 53, 59 (Tex. 2019) (citations omitted).

B. Harris County has standing because the Commissioners Court adopted a resolution pursuant to Section 7.352.

The legislature unequivocally conferred standing on Harris County and other local governments to safeguard the public welfare by bringing lawsuits for violations of environmental and pollution control laws. Section 7.351 of the Texas Water Code provides, in pertinent part:

> [I]f it appears that a violation or threat of violation of Chapter 16, 26, or 28 of this code, Chapter 361, 371, 372, or 382, Health and Safety Code, a provision of Chapter 401, Health and Safety Code, under the commission's jurisdiction, or Chapter 1903, Occupations Code, or a rule adopted or an order or a permit issued under those chapters or provisions has occurred or is occurring in the jurisdiction of a local government, the local government … may institute a civil suit under Subchapter D in the same manner as the commission in a district court by its own attorney for the injunctive relief or civil penalty, or both, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.

Tex. Water Code Ann. § 7.351(a). However, for certain suits, the legislature imposed a condition.

> In the case of a violation of Chapter 26 of this code or Chapter 382, Health and Safety Code, a local government may not exercise the enforcement power authorized by this subchapter unless its governing body adopts a resolution authorizing the exercise of the power.

Id. § 7.352.

Applying the plain language of this statute, the "elements" of Section 7.352 are:

1) a violation of Chapter 26 of the Water Code or Chapter 382 of the Health and Safety Code; and

2) an adoption of a resolution by a local government's governing body authorizing the exercise of the power to bring suit granted by Water Code Chapter 7, Subchapter H.

Here, Harris County alleged and the State agrees that a violation of Chapter 382 occurred. The State filed suit in Travis County for such violations, Cause No. D-1-GN-19-004495, *State of Texas v. Exxon Mobil Corporation*, in the 419th District Court of Travis County, alleging, "This matter involves an ethylene manufacturing plant owned and operated by ExxonMobil in the Baytown, Texas area that caught fire and emitted multiple air contaminants without TCEQ authorization." (Courtesy Copy attached as **Exhibit 1**.) Thus, the first "element" is established.

The undisputed evidence establishes that the Commissioners Court passed a resolution in April of 2019 authorizing the County attorney to file suit under the authority granted in Water Code Chapter 7, Subchapter H. *See* State's Plea, Attachment B. Thus, the second "element" is established.

Application of the plain language of the statute to the undisputed facts therefore establishes, as a matter of law, that Harris County has standing under Chapter 7 of the Water Code.

C. The State's argument requires adding language to the statute.

The State's plea is based on adding language to Section 7.352 that the legislature did not include. A court may not judicially amend a statute to add language that the legislature declined to make part of the statute. *See, e.g.*, *In re Geomet Recycling LLC*, 578 S.W.3d 82, 87 (Tex. 2019) ("It is not our place to 'judicially amend the statute to add an exception not implicitly contained in the language of the statute.' *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996

S.W.2d 864, 867 (Tex. 1999). And '[w]e have no right to engraft upon the statute any conditions or provisions not placed there by the legislature.'"). A court must "presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

Here, the relevant statue provides:

> In the case of a violation of Chapter 26 of this code or Chapter 382, Health and Safety Code, a local government may not exercise the enforcement power authorized by this subchapter unless its governing body adopts a resolution authorizing the exercise of the power.

Id. § 7.352. Despite the complete absence of any such language, the State contends that this statue has "conditions or provisions not placed there by the legislature." Specifically, the State contends that Section 7.352 contains a requirement that the resolution authorizing a local government to file suit concerning an environmental violation must occur **after** the violation occurs. In other words, the State contends that this Court should amend the Statute to add the language emphasized in the following:

> In the case of a violation **<u>or a threat of violation</u>** of Chapter 26 of this code or Chapter 382, Health and Safety Code, a local government may not exercise the enforcement power authorized by this subchapter unless its governing body adopts a resolution authorizing the exercise of the power **<u>after the violation or threat of violation that is the subject matter of the suit occurs</u>**.

See State's Plea at 6. However, the legislature did not include any such requirement. Courts must presume that the legislature carefully chose its words and purposefully omitted words it did not include. *See Silguero*, 579 S.W.3d at 59;

TGS–NOPEC Geophysical Co., 340 S.W.3d at 439. Therefore, the State's argument must be rejected.

D. The State's statutory construction arguments do not support the State's attempt to add language to the statute.

The State contends that reading Section 7.351(a) and 7.352 together creates an implied condition that must be read into the statute despite the legislature's decision not to add it to the express language. Based on this reading, the State further argues that allowing a resolution to authorize local government to file a lawsuit before a specific violation occurs renders section 7.352 "meaningless." *See* State's Plea at 7–9.

The statute as written is not meaningless. For example, if the facts of the current case had occurred except that the Commissioners Court had not adopted the April 30 Resolution, Section 7.352 would deprive Harris County of standing. Because Section 7.352 would still apply and bar certain suits, it is not "meaningless" as the State contends. Thus, rendering the legislature's language meaningless is not a consideration in this case.

The State also asserts that the prior versions of the statute support its addition of requirements to Section 7.352. *See* State's Plea at 7–8. Harris County disagrees that any of the prior versions of the statute contain the language the State wishes to add. However, assuming, for the sake of argument, that the prior versions of the statute did, in fact, impose a specific timing requirement (i.e., a resolution adopted before the lawsuit but after a violation had occurred), the relevant inquiry is still the plain language of the statute as enacted. *Dealers Elec.*

Supply Co. v. Scroggins Const. Co., Inc., 292 S.W.3d 650, 658 (Tex. 2009) ("[C]ourts may not look back to the former text of a statute that has been nonsubstantively re-codified if the current text is direct and unambiguous."). Generally, the legislature's choice to change the statutory language indicates the legislature's desire to change the meaning of the statue. *See, e.g.*, *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 835 (Tex. 2009) ("The material change in the statutory language indicates a legislative intent to create a different standard. *Indep. Life Ins. Co. of Am. v. Work*, 124 Tex. 281, 77 S.W.2d 1036, 1039 (1934) ('The rule is elementary that we must give some effect to changes in the words of legislative acts, and must also construe their words, so as to accomplish the legislative intent.')").

E. Conclusion.

Before filing this suit, the Commissioners Court adopted a resolution authorizing Harris County to exercise the power to file suit. That is all that Section 7.352 requires. The State's interpretation of the statute, at its heart, relies upon language that the legislature has not adopted. Therefore, the State's plea should be denied.

Prayer

Plaintiff Harris County respectfully requests that this Court deny the State's plea to the jurisdiction so that the suit on the merits of the purported environmental violations may proceed in a timely manner to protect the people of Harris County.

Respectfully submitted,

HARRIS COUNTY ATTORNEY
VINCE RYAN

/s/ Rock W. A. Owens
Rock W. A. Owens
Special Assistant County Attorney
Environmental Affairs
1019 Congress, 15th Floor
Houston, Texas 77002
Phone: 713-274-5121
Fax: 713-437-4211
Email: rock.owens@cao.hctx.net

ATTORNEYS FOR PLAINTIFF
HARRIS COUNTY, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, a true and correct copy of the foregoing document was sent by via electronic service to the following parties:

Yasmin Atasi
Winstead PC
600 Travis Street, Suite 5200
Houston, Texas 77002
yatasi@winstead.com

Albert R. Axe
Lisa Dyar
Winstead PC
401 Congress Avenue, Suite 2100
Austin, Texas
aaxe@winstead.com
ldyar@winstead.com

Counsel for Defendant, Exxonmobil Chemical Company

Katie B. Hobson
Assistant Attorney General
Katie.hobson@oag.texas.gov

Phillip Ledbetter
Assistant Attorney General
Phillip.ledbetter@oag.texas.gov

Jake Brown
Assistant Attorney General
Jake.Brown@oag.texas.gov

Office of the Attorney General of Texas Environmental Protection Division
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Phone: (512)463-2012
Fax: (512)320-0911

/s/ Rock W. A. Owens
Rock W. A. Owens