

Civil & Criminal Appellate Update: Notable Cases Edition

Presented by the Honorable Gina M. Benavides

Justice, 13th Court of Appeals

April 12, 2017

Introduction

This presentation will present a brief survey of cases of note issued over the last year by Texas appellate courts covering civil and criminal matters that may be of interest to you as practitioners.

Ready....set...GO!

Civil Cases

Sinatra v. Sinatra, 2016 WL 4040290 (Tex. App.—Corpus Christi 2016, pet. denied)

- The central issue in this case was whether Frank Sinatra Jr. and ex-wife Cynthia Sinatra had entered into a common law marriage following their 2001 divorce.
- The evidence in this case showed that after the 2001 divorce, Frank continued to support Cynthia and her children because “he felt it was the appropriate thing to do.”
- Cynthia claimed that after the 2001 divorce, the couple had entered into a common law marriage.
- Trial court held that the elements of common law marriage were satisfied.

Sinatra v. Sinatra, 2016 WL 4040290 (Tex. App.—Corpus Christi 2016, pet. denied)

- Three elements of a common law marriage: (1) an agreement to be married; (2) after the agreement, living together in Texas as husband and wife; and (3) representing to others in Texas that they are married.
- On appeal Frank challenged the first element.
- COA held that even if the evidence showed that Frank and Cynthia held out to others that they were married and cohabitated during that time, we find no evidence either direct or circumstantial that Frank ever intended to be married to Cynthia after the 2001 divorce or that he actually agreed to be married.

Sinatra v. Sinatra, 2016 WL 4040290 (Tex. App.—Corpus Christi 2016, pet. denied)

- An agreement to be married must be “specific and mutual”
- Cynthia testified that she believed that the couple entered a common law marriage because the couple continued their relationship and not because Frank had agreed or shown an intent to enter into a common law marriage.
- Further, Cynthia could not and did not specify when Frank agreed to be married and did not provide any evidence that Frank had an intent to be married to her after the 2001 divorce.
- When it came to legal matters such as purchasing a home and filing yearly income taxes, Frank and Cynthia bought as tenants in common and filed separate returns.

Sinatra v. Sinatra, 2016 WL 4040290 (Tex. App.—Corpus Christi 2016, pet. denied)

- COA reversed and rendered judgment in favor of Frank's estate.
- **PRACTICE TIP:** Even if you have evidence of the last two elements to establish common law marriage, without specific and mutual evidence of the first element, everything else fails.



*UDR Tex. Props., L.P. v. Petrie, --
S.W.3d--*, 2017 WL 382426 (Tex.
Jan. 27, 2017)

- Apartment complex visitor attended a party at his co-worker's apartment complex at 2 o'clock in the morning in Houston and parked his car in the visitor lot of the complex.
- While still in his vehicle and making a phone call, a vehicle pulled up and parked behind his car, blocking it, and two men exited the vehicle.
 - One pointed a shotgun at Petrie through his window and ordered him to exit the car. Petrie complied and, when requested, surrendered his wallet and keys. But when ordered to lie down, he hesitated.
 - So one of the men shot him in the knee and he fell to the ground. The shooter then placed the shotgun barrel to Petrie's head and pulled the trigger, but the weapon did not fire. Petrie quickly crawled under the vehicle next to him while the assailants fled.
 - Petrie sued Gallery, alleging it knew or should have known about the high crime rate on its premises and in the surrounding area yet failed to use ordinary care to make the complex safe.

UDR Tex. Props., L.P. v. Petrie, --
S.W.3d--, 2017 WL 382426 (Tex.
Jan. 27, 2017)

- After a two-day (!) evidentiary hearing, the trial court concluded that the apartment complex owed no duty to Petrie and signed a take-nothing judgment in the complex's favor.
- 14th COA reversed holding that there was evidence of foreseeability of an unreasonable risk of harm that a person on the premises would be the victim of violent criminal conduct, citing *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998).
- **General Rule:** Property owners have no legal duty to protect persons from third-party criminal acts.
 - **But:** A property owner who "controls the premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee.

*UDR Tex. Props., L.P. v. Petrie, --
S.W.3d--*, 2017 WL 382426 (Tex.
Jan. 27, 2017)

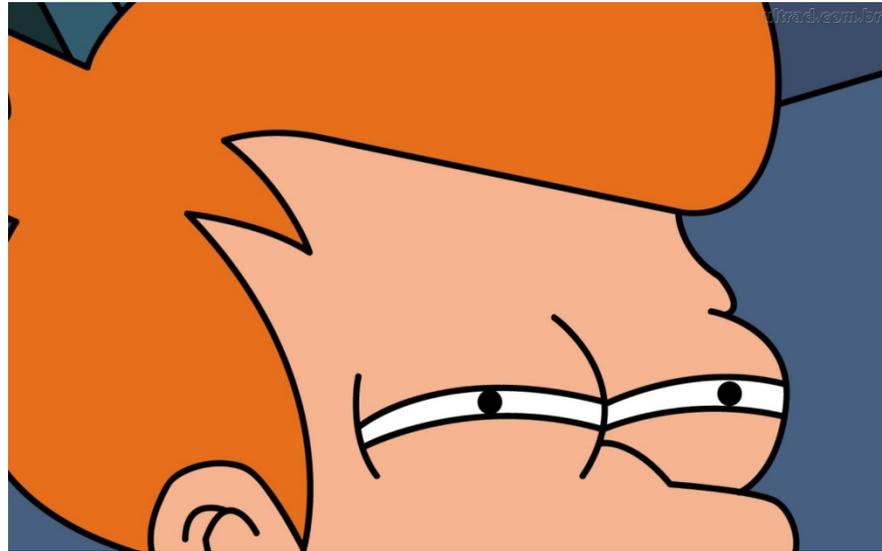
- SCOTX emphasized that in order to impose a duty on a property owner, a risk must be both foreseeable and unreasonable.
- The four Timberwalk factors (proximity, recency, frequency, similarity, and publicity) were solely a means to aid courts in determining foreseeability specifically, not whether the risk was unreasonable.
 - Foreseeability and unreasonable
- In conducting an unreasonableness inquiry, courts should explore policy implications of imposing a legal duty to protect against foreseeable criminal conduct.
 - Thus, if a premises owner could easily prevent a certain type of harm, it may be unreasonable for the premises owner not to exercise ordinary care to address the risk, but if the burden of preventing the harm is unacceptably high, the risk of the harm is not unreasonable.

UDR Tex. Props., L.P. v. Petrie, --
S.W.3d--, 2017 WL 382426 (Tex.
Jan. 27, 2017)

- SCOTX reversed and rendered in favor of the apartment complex because Petrie failed to offer evidence of the burden that would be imposed on Gallery to prevent or reduce the risk from a crime like this one.

PRACTICE TIP: Remember there are two factors to consider when seeking to impose a duty upon a property owner to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee. Present evidence as to BOTH elements in order to avoid a no-duty MSJ.

Civil Case To Watch!



Pidgeon v. Turner, 477 S.W.3d 353, 354 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (reh'g granted Jan. 20, 2017).

- Taxpayers filed suit against the City of Houston to enjoin the City from providing employee benefits to the same-sex spouses of employees legally married in another state.
- Taxpayers relied on provisions of the Texas Constitution and Family Code banning recognition of the Texas Constitution and Family Code.



Pidgeon v. Turner, 477 S.W.3d 353, 354 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (reh'g granted Jan. 20, 2017).

- Trial court signed a temporary injunction in favor of taxpayers by determining:
 - Spending funds in that manner will recognize a union between two people of the same sex as a status identical to the Texas Constitution's definition of marriage. That expenditure is thus barred by the Texas Constitution.
 - Spending funds in that manner recognizes and validates a marriage between persons of the same sex. That expenditure is thus barred by the Family Code.
 - Spending funds in that manner gives effect to a right or claim to benefits asserted as the result of a marriage between persons of the same sex. That expenditure is thus barred by the Family Code.
 - Spending funds in that manner will furnish employment benefits to persons who are not an employee's legal spouse or dependent children. That expenditure is thus barred by the City's charter.

Pidgeon v. Turner, 477 S.W.3d 353, 354 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (reh'g granted Jan. 20, 2017).

- 14th COA reversed and remanded in light of SCOTUS' *Obergefell*.
- After initially denying petition for review, SCOTX granted rehearing and heard oral arguments on the case March 1, 2017 and remains pending submission.

Criminal Cases

Shimko v. State, 2017 WL 604065, (Tex. Crim. App. 2017), 5-4 decision

- Officer waves down Shimko in parking lot; Shimko was there to pick up intoxicated friend; officers determined Shimko showed signs of intoxication and arrested him for driving while intoxicated
- Trial court determined it was a consensual encounter and officer was acting in “community caretaking” function; Court of Appeals held that officer’s words or actions did not amount to display of official authority
- CCA: consensual encounter does not implicate Fourth Amendment, citizen can terminate encounter at any time; seizure is based on “means of physical force or show of authority” and liberty of person has been restrained (such as investigative detention)

Shimko v. State, 2017 WL 604065, (Tex. Crim. App. 2017), 5-4 decision

- CCA: no evidence Shimko was not able to terminate encounter, so no Fourth Amendment violation was implicated; decision in this case was based on the facts (CCA is not trying to create bright line rule regarding police encounters); Shimko failed to prove there was a seizure
- CCA Dissent: felt a reasonable person would not feel free to leave the scene or decline officer's request to stop



Acosta v. State, 2016 WL 6946933, (Tex. Crim. App. 2017), 8-1 decision

- Acosta stopped for speeding, behavior was abnormal (nervous, fidgety, very talkative), Acosta and wife gave inconsistent answers when separated, suspected of drug trafficking (third party vehicle, only one key on key ring, carrying \$300 when unemployed, got consent to search and found herb for good luck in car, along with Santa Muerte statute); also officers noticed spare tire had oil on it and was unusually clean, tooling marks under spare tire; officer cut tire open and found close to 25 lbs. of marijuana; Acosta said would take responsibility if family was allowed to leave
- Jury convicted Acosta, COA reversed stating there was insufficient evidence to prove Acosta exercised control, management, or care over marijuana and because car was borrowed, more affirmative links to the drugs were necessary

Acosta v. State, 2016 WL 6946933, (Tex. Crim. App. 2017), 8-1 decision

- **Majority:** found there were affirmative links to support the jury's verdict and based on cumulative evidence and reasonable inferences, the evidence could support the verdict
- **Concurrence:** facts could support knowledge or be indicative of non-criminal activity also; trial testimony was full of assumptions based more on personal belief than factual information and omissions of relevant information; felt opinion needed more detail
- **Dissent:** felt affirmative links were not present; agreed that observations may have amounted to probable cause but did not affirmatively link Acosta to drugs; more investigation should have taken place to determine if he exercised care, custody, or control over contraband

Love v. State, 2016 WL 7131259 (Tex. Crim. App. 2016), 6-3 decision

- Death penalty case reversed; cell phone records were seized without a warrant supporting probable cause in violation of the Fourth Amendment (were turned over to the State via subpoena)
- **Issue:** did Love have expectation of privacy in cell phone records (specifically text messages) and would society accept that expectation as reasonable or justifiable under the circumstances?
- Case regards text messages; CCA held that text messages could not be obtained without probable cause→-based search warrant; text messages are analogous to regular mail and email communications which required search warrant; Love had reasonable expectation of privacy in contents of text messages sent

Love v. State, 2016 WL 7131259 (Tex. Crim. App. 2016), 6-3 decision

- CCA found trial court erred by failing to suppress the text messages; found harmful error for admission and weight given to text messages during the trial; reversed and remanded for a new trial
- **Dissent:** Love did not sufficiently preserve the error the CCA ruled on; none of the objections were sufficiently specific



Thank you!
Any questions?