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Legal Opinion

September 10, 2015

Re: Whether Victoria County, the Victoria County Commissioners' Court, the Victoria County Juvenile Board, and/or individuals employed by or involved in leadership at these entities (or the Victoria Regional Juvenile Justice Center) would have moral, civil, and/or criminal liability stemming from operating the juvenile detention center with the present smoke and heating venting or smoke control systems in the event of fire or smoke-related injuries or death of children held at the Victoria County Juvenile Detention Center.

The Honorable Kevin M. Janak
Commissioner, Precinct 2
115 N. Bridge, Room 127
Victoria, Texas 77901

Dear Commissioner Janak,

You asked whether continued operation of the juvenile detention center in the current configuration exposes county entities and individuals serving within those county entities to moral, civil and/or criminal liability. The simple answer is: YES. The summary at the end of this opinion provides a brief explanation. The basis for this opinion follows.

I. Authority

A. Criminal District Attorney

"A district or county attorney, on request, shall give to a county or precinct official of his district or county a written opinion or written advice relating to the official duties of that official." TEX. GOV'T CODE ANN. § 41.007 (West 2015).

"Neither the opinion of the Attorney General nor the advice of the County Attorney has the force of law." *Travis Cnty. v. Matthews*, 235 S.W.2d 691, 696 (Tex. Civ. App. - Austin 1950, writ refused N.R.E.). Despite lacking the authority of either statute or case law, the opinion of a Criminal District Attorney has utility; "It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon a written interpretation of the law contained in an opinion by a public official charged by law with responsibility for interpreting the law in question." TEX. PENAL CODE ANN. § 8.03(b)(2) (West 2015).

B. District Judge

"A [district] court may not substitute its judgment and discretion for the judgment and discretion of the governing body upon whom the law vests the primary power and duty to act." *Ector Cnty. v. Stringer*, 843 S.W.2d at 479 (Tex. 1992) (citing *Lewis v. City of Fort Worth*, 126

Tex. 458, 89 S.W.2d 975, 978 (1936)). Although Article V, Section 8 of the Texas Constitution vests the district court with "appellate jurisdiction and general supervisory control over the County Commissioners' Court, with such exceptions and under such regulations as may be prescribed by law," Texas case law defines the scope of the district courts' jurisdiction as limited:

> It is equally well settled that the supervisory power of the district court over the judgments of a [C]ommissioners' [C]ourt, as authorized by article 5, section 8, of the Constitution, and article 1908 of the Revised Civil Statutes [the predecessor of the Government Code], **can only be invoked when it acts beyond its jurisdiction or clearly abuses the discretion conferred on it by law.**

Stringer, 843 S.W.2d at 479 (quoting, *Tarrant County v. Shannon*, 129 Tex. 264, 104 S.W.2d 4, 9 (Tex. 1937) (emphasis added); *accord Yoakum County v. Gaines County*, 139 Tex. 442, 163 S.W.2d 393 (Tex. 1942); *Vondy v. Commissioners' Court*, 714 S.W.2d 417, 420 (Tex.App.–San Antonio 1986, writ ref'd n.r.e.)).

II. Facts

A. Applicable Safety Codes

The National Fire Protection Association (NFPA) has promulgated NFPA 101: Life Safety Code Edition 2012 (LSC 2012). "The Life Safety Code is the most widely used source for strategies to protect people based on building construction, protection, and occupancy features that minimize the effects of fire and related hazards. Unique in the field, it is the only document that covers life safety in both new and existing structures." National Fire Protection Association (visited Aug. 27, 2015) <http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=101>.

Victoria Regional Juvenile Justice Center (VRJJC) meets the definitions of "Detention Occupancy" as well as an "Education Occupancy" under A.3.3.188.5 (Annex A, LSC 2012) and A.3.3.188.6 (Annex A, LSC 2012). There are presently over approximately 40 (capacity for 72) juveniles housed within this building.

LSC provision 2.1(3) grandfathers existing buildings by stating: "Existing buildings or installations that do not comply with the provisions of the codes or standards referenced in this chapter shall be permitted to be continued in service, provided that the lack of conformity with these documents does not present a ***serious hazard*** to the occupants as determined by the authority having jurisdiction." *Id. (emphasis added).* The LSC special provision 23.4.1.2 states:

> Any one of the following means shall be provided to evacuate smoke from the smoke compartment of fire origin:
>
> (1) Operable windows on not less than two sides of the building, spaced not more than 30 ft (9.1m) apart, that provide openings with dimensions of not less than 22 in. (560 mm) in width and 24 in. (610 mm) in height
>
> (2) Manual or automatic smoke vents
>
> (3) Engineered smoke control system
>
> (4) Mechanical exhaust system providing not less than six air changes per hour
>
> (5) Other method acceptable to the authority having jurisdiction

NFPA 101: Life Safety Code Edition 2012, Special Provision 23.4.1.2.

Although these codes are applicable, my research has not shown an absolute statutory requirement for a particular smoke and heating venting or smoke control systems in a juvenile detention center. Further, the NFPA provides only guidance for design and testing rather than a legal requirement.

B. Ownership of Facilities

The land on which the VRJJC stands was leased for construction by ReCor Inc. from the Victoria County Airport Commission. Vol. 151 pp. 407-21 Records of Victoria Cnty. Comm'rs. Ct. (June 16, 1994). The facility's lease-purchase agreement provided that ReCor Inc. would lease the finished facility to Victoria County. Vol. 151 pp. 429-40 Records of Victoria Cnty. Comm'rs. Ct. (June 16, 1994); *see also* "First Amended Lease Purchase Agreement" Victoria County. pp. 193-225 Records of Victoria Cnty. Comm'rs. Ct. (October 27, 2004); "Final Payment Record" Victoria Cnty Aduitor's Records (March 15, 2010). The "Essential Use and Source of Funds Certificate" states the following: "Specifically, the Leased Premises was selected by us to be used as a secure juvenile facility (the "Facility"); provided that it is recognized the County may, in future years, determine to use the Facility for any other legitimate public purpose of the County." Vol. 151 pg. 481 Records of Victoria Cnty. Comm'rs. Ct. (June 16, 1994). There is no statutory authority obligating the County to provide these or any facilities to the Victoria County Juvenile Board for use as a detention center. Besides the lack of statutory authority to obligate or compel Victoria County to provide a detention center by, in practice, the Victoria County Juvenile Board has abrogated much of its remaining statutory budget autonomy.

C. Operation of Facilities

The operation of the VRJJC is a joint corroboration between the Commissioners' Court and the Juvenile Board as evidenced by the continued exclusive ownership of the facility and premises by Victoria County. The past "solicited services and equipment" contract approval between the Victoria County Juvenile Board and Commissioners' Court, prior "services provided" contract approval by the court, as well as the practice of the Commissioners Court and Juvenile Board in considering non-Victoria County sourced funds in annual budgets act contrary to the statutory provision for budget autonomy. TEX. HUM. RES. CODE ANN. § 152.0012 (West 2015). Lastly, in creating Victoria County Juvenile Board the legislature statutorily excluded the provisions when stating: "Sections 152.0002, 152.0004, 152.0005, 152.0006, 152.0007, and 152.0008 do not apply to the juvenile board of Victoria County." TEX. HUM. RES. CODE ANN. § 152.2411 (West 2015).

Beyond the autonomy the legislature statutorily excluded and that which the Juvenile Board surrendered by practice the Juvenile Board agreed to traded what remained of budget autonomy upon the creation of a detention center and the VRJJC. The "Essential Use and Source of Funds Certificate" includes the following paragraph establishing the co-mingling of funds and authority:

> The Commissioners' Court of Victoria County, Texas (the "Court") has agreed that, ***subject to future appropriations by the Court***, the necessary funds will be available from Victoria County to make any and all payments under the Lease. In addition, the Court has agreed that the County shall, as appropriate in the judgment of the court from time to time, make the necessary requests for funds from the Texas Juvenile Probation Commission and the State Legislature to

> enable the Lessee to make payments under the lease and that in the event such state funds are appropriated by the Legislature for the Facility then, and in that event, the funds shall be encumbered on behalf of [the] Facility and utilized for the satisfaction of the Lease.

Vol. 151 pg. 481 Records of Victoria Cnty. Comm'rs. Ct. (June 16, 1994) (emphasis added). This agreement encumbering of any state funds to service the lease on behalf of the lessee Victoria County vitiates the statutory construct: "The [C]ommissioners' [C]ourt may not review any part of the budget derived from state funds." Tex. Hum. Res. Code Ann. § 152.0012 (West 2015). From inception, the "Essential Use and Source of Funds Certificate", a founding document for the detention center, provided for a hybrid Juvenile Board - Commissioner's Court relationship instead and in lieu of the statutorily separate and autonomous relationship created within Chapter 152, Subchapters A and D. [Subchapters B & C being non applicable under Tex. Hum. Res. Code Ann. § 152.0031 (West 2015) including Tex. Hum. Res. Code Ann. § 152.0054 "Provision of Physical Facilities" in Subchapter C].

This lack of autonomy is reflected in the legislature's establishment of the Victoria County Juvenile Board which limits the Commissioners' Court obligation to "provide the funds necessary to pay the salaries and expenses essential to the proper operation of the probation department." Tex. Hum. Res. Code Ann. § 152.2411(e) (West 2015). Not only does this Victoria specific statute not compel funding of a detention center, it also removes the obligation of paying juvenile board certified expenses when Section 152.2411(f) strips away the compulsory funding created in section 152.0004 ("The [C]ommissioners' [C]ourt shall pay the salaries of juvenile probation personnel and other expenses certified as necessary by the juvenile board chairman from the general funds of the county.") Tex. Hum. Res. Code Ann. § 152.0004 (West 2015).

The VRJJC web page further confuses the issue of autonomy, and thereby liability, by representing to the public that the VRJJC is a Victoria County department. *See* Victoria County; Juvenile Detention/Residential Center page (visited Aug. 27, 2015) <http://www.victoriacountytx.org/index.php/en/county-departments?id=346>. Pama Hencerling, serving as the CJPO, "Victoria County Chief Juvenile Probation Officer," is the chief administrator for "Juvenile Probation, Detention or Correctional Services" for the "Victoria County Juvenile Services Department [located at] 97 Foster Field Dr., Victoria, TX 77904." *Id.*

The above sections "B" and "C" affirms the Commissioners' Court authority to close, reduce or reorganize the juvenile detention center. In this regard, this opinion concurs with that of Allison, Bass & Magee, LLP provided to the Victoria County Judge in a letter dated July 20, 2015 signed by James P. Allison.

D. Existing smoke & fire systems

The building IS NOT protected throughout by an approved automatic sprinkler system. The building has never had: operable windows, a mechanical exhaust system or an engineered smoke control system each as defined in 23.4.1.2. NFPA 101: Life Safety Code, ed. 2012. An architect and HVAC engineer, who inspected the building when preparing a bid for roof repair, and HVAC and ventilation upgrades, believe the current smoke ventilation or evacuation systems to be substandard and dangerous. The engineer's report by Scott E. Stridde dated May 22, 2014 determines that VRJJC fails to provide any of the four "acceptable methods for smoke removal" listed under LSC Chapter 23.4.1.2:

> Operable windows do not exist in the building. The heat operated fire hatches in the day room (even if in operating condition) do not communicate with the cells. Therefore, there is no provision for smoke removal from the cells. The code required continuous ventilation delivered by the six wall fans serving the cells provides only 3 air changes per hour and therefore falls short of the six air changes per hour required for smoke removal. There is no effective method of smoke removal from the detention area. While there is a provision in the LSC for "Grandfathering", it is our opinion that the absence of a smoke removal system ***constitutes a life safety hazard***.

Report dated May 22, 2014 By STRIDDE, CALLINS & ASSOCIATES, INC., signed by R. David Morales, P.E. attached to a report from Rawley McCoy, A.I.A. submitted to Commissioner Janak dated August 11, 2015 (emphasis added).

E. Other Facts

The "Development Agreement" between ReCor and Victoria County dated June 16, 1994 was "for a 72 bed regional Facility of approximately 35,400 square feet and an outdoor recreation area consisting of an additional 4,400 square feet, all in conformance with current standards of the American Corrections Association, the Texas Juvenile Probation Commission, and applicable fire and safety codes." Vol. 151 pp. 422-28 Records of Victoria Cnty. Comm'rs. Ct. (June 16, 1994). By order, the Commissioners' Court assigned contracting authority for the "acquisition, purchase and construction of a secured juvenile detention facility" to the "County Judge and/or Chief Juvenile Probation Officer." Vol. 151 pp. 493-92 Records of Victoria Cnty. Comm'rs. Ct. (June 27, 1994).

A search of the American Correctional Association website for accredited facilities lists the following Texas accredited juvenile facilities: Corsicana Residential Treatment Center in Corsicana, Ron Jackson State Juvenile Correctional Facility in Brownwood, San Saba State School in San Saba, Travis County Juvenile Detention in Austin, Williamson County Academy (juvenile community residential facility) in Georgetown, Travis County - Leadership Academy (juvenile community residential facility) in Austin, Travis County Juvenile Probation Services in Austin. By contrast, the American Correctional Association website does not list the Victoria Regional Juvenile Justice Center as accredited. <http://www.aca.org/aca_prod_imis/ACA_Member/Standards_and_Accreditation/SAC_AccFacHome.aspx?WebsiteKey=139f6b09-e150-4c56-9c66-284b92f21e51&hkey=f53cf206-2285-490e-98b7-66b5ecf4927a&CCO=2#CCO>.

The facility is purported to have an automatic smoke and heat venting system. I am uncertain as to whether the Juvenile Detention Center's automatic smoke vents comply with NFPA 204 (Standard for Smoke and Heat Venting), because I have not found any equivalency evaluation or study approved by an Authority Having Jurisdiction (AHJ), the "Conceptual Design Report," the "Detailed Design Report," or the "Operations and Maintenance Manual." NFPA 2015 LSC 23.4.1.2 lists smoke evacuation means including manual or automatic smoke vents which cross references A.23.4.1.2(2) which in turn refers to NFPA 204. NFPA 204, 13.1.3 requires a Detailed Design Report, 13.1.4 requires an Operations and Maintenance Manual, 13.1.4 requires an Operations and Maintenance Manual.

If instead the Juvenile Detention Center were to have a smoke control system, I remain uncertain as to code compliance because I not found any performance-based review by a third or

any other party demonstrating compliance with NFPA 92 (Standard for Smoke Control Systems) as required by LSC 9.3.1.

Demonstrating that the requirement is not unique, the architect Rawley McCoy and engineer Scott Stridde provided me the following list of Juvenile Detention Centers that they are aware of that having proper smoke evacuation systems as we have recommended to the County and below was his response: both Juvenile detention facilities in Nueces County, Limestone County juvenile detention center, McLennan County juvenile detention center and Terrance County juvenile detention center.

The entity operating the building, Juvenile Board/Juvenile Justice Center, stated anecdotally to the Commissioners' Court that the automated mechanism for the ventilation was disabled some number of years ago, yet subsequently and repeatedly passed LSC inspections. The building operators, maintenance office, and the county fire marshal became unaware that this ventilation system existed until the recent rediscovery, following the Commissioners' Court voicing of safety concerns, after which the automated feature was returned to operation. When asked about performance of the automated ventilation system, quantitative measures were unavailable. Commissioners were told, however, that a person can feel and hear air movement.

The Victoria County Fire Marshal has repeatedly inspected this building, finding that existing fire/smoke systems were sufficient. The Victoria County Fire Marshal's present validation of those vents as simply moving air does not demonstrate code compliance as I understand the LSC and NFP sections respectively.

According to A.3.2.2 (Annex A, LSC 2012), the Authority Having Jurisdiction (AHJ) could be the County Fire Marshal, the Juvenile Director (department official), or the Commissioner's Court (property owners). Concerning code compliance and safety, there are conflicting opinions from a District Judge (Juvenile Board chairman of the board and its chief administrative officer), a County Fire Marshal (bailiff & court's officer for juvenile court), Juvenile Director, an Architect and an Engineer.

III. State Civil Liability

A. General Liability under Texas Tort Claims Act

Relative to Victoria County, the Texas Tort Claims Act (TTCA) provides a limited waiver of sovereign immunity and allows suits against governmental units only in certain narrow circumstances. *Texas Dep't Crim. Justice v. Miller,* 51 S.W.3d 583, 587 (Tex. 2001). The TTCA includes a limited waiver of the state's immunity from suits alleging personal injury so caused by a condition or use of real property if the governmental unit, were it a private person, would be liable to the claimant under Texas law. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021 (2), 101.025 (West 2015). "If a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property." TEX. CIV. PRAC. & REM. CODE ANN. § 101.022 (West 2015). Since the legislature has yet to vest Juvenile Boards with jural authority (the ability to sue and be sued), the Juvenile Board as an entity exists as a mere subdivision or department of the County and is not independently subject to suit. *McCoy–Eddington v. Brazos Cnty.*, No. H–05–0395, 2007, WL 1217989, at *2 (S.D.Tex. Apr. 24, 2007).

Section 152.0013 of the Tex. Hum. Res. Code establishes that members of a juvenile board can have civil liability. Although juvenile board *members* normally enjoy immunity,

statutory immunity is not applicable if their acts or omissions are "reckless or intentional; done willfully, wantonly, or with gross negligence; or done with conscious indifference or reckless disregard for the safety of others." Tex. Hum. Res. Code Ann. § 152.0013(b) (West 2015). Like the TTCA and section 142.0013, the Texas Civil Practice and Remedies Code (TCPRC) limits damages to $100,000 to a single person, $300,00 for a single occurrence of personal injury or death. TEX. CIV. PRAC. & REM. CODE ANN. § 104.003 (West 2015). TCPRC also indemnifies persons within the scope of their employment for all but "wilful or wrongful act or an act of gross negligence; or the damages arise out of a cause of action for deprivation of a [State or Federal Constitutional] right." TEX. CIV. PRAC. & REM. CODE ANN. § 104.002 (West 2015).

The TTCA provides that a governmental unit is liable for injury and death caused by a condition of real property "if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem.Code Ann. § 101.021(2) (West 2015). With respect to ordinary premises defects, however, the TTCA specifically limits the governmental duty owed to a claimant to "the duty that a private person owes to a licensee on private property." Tex. Civ. Prac. & Rem.Code Ann. § 101.022(a) (West 2015). Thus, a governmental unit is liable for an ordinary premises defect only if a private person would be liable to a licensee under the same circumstances.

A "premises defect" is not defined by the Act; thus, the courts look to the ordinary meaning of the words. *Cobb v. Tex. Dep't of Criminal Justice,* 965 S.W.2d 59, 62 (Tex.App.-Houston [1st Dist.] 1998, no pet.). Generally, the term may be defined as a defect or dangerous condition arising from a condition of the premises. *Univ. of Tex. Med. Branch v. Davidson,* 882 S.W.2d 83, 84 (Tex.App.-Houston [14th Dist.] 1994, no writ). Ignoring a known "premises defect" can except the county from sovereign immunity and persons from indemnity where a duty is owed. Thus, the omission to correct known defects creates an unreasonable risk for which the County and individuals assume civil liability.

The elements of a premises liability claim include (1) possessor/owner/operator had actual or constructive knowledge of some condition on the premises, (2) the condition posed an unreasonable risk of harm, (3) possessor/owner/operator did not exercise reasonable care to reduce or eliminate the unreasonable risk of harm, and (4) possessor/owner/operator's failure to use reasonable care to reduce or eliminate the unreasonable risk of harm proximately caused injuries.

"A condition presenting an unreasonable risk of harm is one in which there is such a probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen." *Seideneck v. Cal Bayreuther Associates,* 451 S.W.2d 752, 754 (Tex. 1970). A landowner or occupier has a basic duty to exercise ordinary care to maintain premises in a reasonably safe condition. *H.E. Butt Grocery Co. v. Newell*, 664 S.W.2d 116, 118 (Tex. App. 1983) *Citing, Seideneck,* 451 S.W.2d at 754. This duty includes inspection to discover any latent defects and to make safe any defects or give adequate warnings. *H.E. Butt Grocery Co. v. Newell*, 664 S.W.2d 116, 118 (Tex. App. 1983) (*citing, Adam Dante Corp. v. Sharpe,* 483 S.W.2d 452 (Tex.1972)). In the TTCA "liability of a unit of local government under this chapter is limited to money damages in a maximum amount of $100,000 for each person and $300,000 for each single occurrence for bodily injury or death." TEX. CIV. PRAC. & REM. CODE ANN. § 101.023 (West 2015).

The TCPRC does provide the affirmative defense of "Discretionary Powers." TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (West 2015). Besides the TCPRC limiting damages, this provision may allow the County to escape liability if successfully asserted in a plea to the jurisdiction or a motion for summary judgment. Such a defense would be unavailable, however, if a statutory requirement for smoke and heating venting or smoke control systems in a juvenile detention center compliant with 23.4.1.2. NFPA 101: Life Safety Code, ed. 2012 does exist. The affirmative defense of "Discretionary Powers" could also be precluded if the above cited "Development Agreement" constituted a policy negligently implemented.

B. Conclusions concerning Liability under Texas Tort Claims Act

The County and the Board have actual knowledge of a dangerous condition (as stated by the County's experts who alerted the County that it operates a detention center that "constitutes a life safety hazard" by failing to provide acceptable methods for smoke removal as listed under LSC Chapter 23.4.1.2). If there was a fire/smoke event, then the inadequacies of the facility pose an unreasonable risk of harm. Having been aware in excess of a year of these conditions without conducting any meaningful mitigation would demonstrate failure to exercise reasonable care to reduce or eliminate the unreasonable risk of harm. Likewise, the Juvenile Board's 1) knowledge of these conditions, 2) continued use of these facilities, and 3) dismissal of the concerns of both an architect and engineer, would also likely establish a conscious indifference or reckless disregard for the safety of others. Should there be a fire/smoke event that results in injuries (physical or emotional), causation would be apparent.

I conclude that there exists the potential for civil liability with some damages for Victoria County under the Texas Tort Claims Act from the continued operation of the VRJJC in a hazardous condition. Any damages, however, would be limited to a fraction of the cost of modifying the facilities. Sovereign immunity may further reduce the County's liability.

IV. Federal Civil Liability

A. General Liability Under 42 U.S.C.A. § 1983

Section 1983 of the U.S.C.A. provides a civil remedy and should be read against a background of tort liability which makes a man responsible for natural consequences of his actions. Section 1983 actions can involve two distinct legal tests: 1) a plaintiff who sues an individual for an injury allegedly caused by that individual must show that individual was acting under color of state law, but 2) a plaintiff who seeks recovery from a governmental entity for a injury allegedly caused by individual must show that governmental entity in question had an unconstitutional or illegal practice, or custom.

To state a claim under § 1983, a plaintiff must allege a violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (U.S. 1988); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005); *Billops v. Sandoval*, 401 F. Supp. 2d 766, 771 (S.D. Tex. 2005). Establishing pervasive and unreasonable risk of harm for supervisory liability under this civil rights statute requires evidence that the conduct is widespread or has been used on several different occasions and that it poses an unreasonable risk of constitutional injury.

Federal law treats a detained juvenile as an inmate. 42 U.S.C.A. § 1997(1)(B)(iv) (West 2015). Courts have held that exposing adult or juvenile inmates to hazards deprives inmates of their constitutional right against cruel and unusual punishment. For example, prison officials have a duty to take reasonable measures to protect inmates. *See*, *Farmer v. Brennan*, 511 U.S. 825 (1994); *See also*, U.S. CONST. amend. VIII; 42 U.S.C.A. § 1983 (West 2015). "Consistent with the Restatement and with *Browning*, a significant majority of courts in other states have likewise concluded that prison or jail officials owe a duty of reasonable care to protect inmates from harm when that harm is reasonably foreseeable." *Salazar v. Collins*, 255 S.W.3d 191, 200 (Tex. App.—Waco 2008, no pet.). Similarly, the Pennsylvania court stated inadequate fire safety precautions violated prisoners' Eighth Amendment rights:

> SCIP [State Correctional Institution at Pittsburgh] does not meet the Life Safety Code standards. These standards are promulgated by the National Fire Protection Agency and provide the minimum fire safety standards for any building. Joe Gavala, Fire Safety Coordinator for the Department of Corrections, testified that plans to bring SCIP up to Code standards are nonexistent.
>
> To correct the fire safety deficiencies at SCIP, Mr. Jaeger recommended: 1) an automatic smoke detector and exhaust system for both blocks; 2) either sprinkler systems in cells or a reduction in the amount of exposed combustibles in cells; 3) an increased number of exits from the blocks; 4) smoke detectors; 5) a floor slab between the second and third floors; 6) some fire separation materials between the Rotunda and cell blocks; 7) an automatic fire alarm system; and 8) an electronic cell locking system ...
>
> By pure luck, SCIP has not yet experienced a major tragedy caused by fire; we are not going to wait for one to occur before concluding that the personal safety of inmates is at risk to an unconstitutionally impermissible degree. We find that the Commonwealth has failed to provide a reasonably safe place of confinement for SCIP inmates housed in the North and South Blocks, and consequently, is violating the eighth amendment rights of those prisoners.

Tillery v. Owens, 719 F. Supp. 1256, 1279-80 (W.D. Pa. 1989), *aff'd* 907 F.2d 418 (3d Cir. 1990).

For supervisory liability to exist under Section 1983, the supervisor's conduct or inaction must have been intentional, must have been grossly negligent, or must have amounted to a reckless or callous indifference to the constitutional rights of others. *Coates* and *Flores* establish the County's assumed liability for both the County's actions and the actions of the Juvenile Board as an entity. *Coates v. Brazoria Cnty. Tex.*, 894 F. Supp. 2d 966, 968-71 (S.D. Tex. 2012); *Flores v. Cameron Cnty., Tex.*, 92 F.3d 258, 264-65 (5th Cir. 1996).

In summary, federal case law establishes that the County serves as the supervising agency and has jural authority (authority to sue or be sued) begetting liability. Certainly, the County has liability if there was a fire resulting in physical and/or emotional injuries. As publicly stated, the detention center functioned for a number of years with the chief administrator knowing the automatic ventilation system had been disabled. Further, it has functioned in excess of a year after being made aware that the ventilation system and absence of a smoke removal system constitutes a life safety hazard. This establishes a practice, or custom of conduct, that is

widespread or has been used on several different occasions that it is posing an unreasonable risk of constitutional injury. The continued operation without mitigating that hazard would amount to reckless or callous indifference if not gross negligence.

B. Individual Liability

A public official or employee is entitled to official immunity when a plaintiff seeks to hold him liable for (1) acting within the scope of his authority (2) in performing discretionary duties (3) in good faith. *See, Ballantyne,* 144 S.W.3d at 424; *Chambers,* 883 S.W.2d at 653. By contrast, a defendant is not entitled to official immunity for the failure to perform (or negligent performance) of ministerial duties. *See Harris County v. Gibbons,* 150 S.W.3d 877, 886–87 (Tex.App.-Houston [14th Dist.] 2004, no pet.); *Myers v. Doe,* 52 S.W.3d 391, 396 (Tex.App.-Fort Worth 2001, pet. denied).

Here, individual members of the County, the Victoria Regional Juvenile Justice Center, and the Juvenile Board operate a juvenile detention center under the authority of Texas law and thereby under the color of law. The unsafe conditions impinge upon the detained juveniles' constitutional rights. Just as in the previous analysis of government liability under Section 1983, the reckless operation of that facility does not demonstrate a "good faith" performance of individuals' duties.

C. Judicial & Quasi-Judicial Immunity

It is well-established that judges are absolutely immune from liability for judicial acts that are not performed in the clear absence of all jurisdiction, no matter how erroneous the act or how evil the motive. *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir.), cert. denied, 492 U.S. 921, 109 S.Ct. 3250, 106 L.Ed.2d 596 (1989); *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (1961).

> With regard to the doctrine of judicial immunity, Texas follows the same principles set out by the United States Supreme Court in *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), that absolute immunity extends to all judicial acts unless such acts fall clearly outside the judge's subject-matter jurisdiction. Immunity applies even when the judge is accused of acting corruptly or maliciously.

Garza v. Morales, 923 S.W.2d 800, 802 (Tex. App. -- Corpus Christi 1996, no writ); *See also,* TEX. CIV. PRAC. & REM. CODE ANN. § 101.053 (West 2015).

Immunity of judicial officers applies in actions for damages brought under the Civil Right Acts [42 U.S.C. 1983] when Judges act within their jurisdiction and authority. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972); *Carter v. Duggan*, 455 F.2d 1156 (5th Cir. 1972); *Collins v. Moore*, 441 F.2d 550(5th Cir. 1971); *Guedry v. Ford*, 431 F.2d 660(5th Cir. 1970); *Beard v. Stephens*, 372 F.2d 685(5th Cir. 1967); *Carmack v. Gibson*, 363 F.2d 862 (5th Cir. 1966); *Hanna v. Home Insurance Co.*, 281 F.2d 298 (5th Cir. 1960), cert. denied, 365 U.S. 838, 81 S.Ct. 751, 5 L.Ed.2d 747, rehearing denied, 366 U.S. 955, 81 S.Ct. 1905, 6 L.Ed.2d 1247.

"From the Doctrine of Judicial Immunity springs the Doctrine of Quasi-Judicial Immunity. *Alzua v. Johnson*, 231 U.S. 106, 34 S.Ct. 27, 58 L.Ed. 142 (1913); *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966) and cases cited therein at footnote 7. Quasi-judicial immunity is

more limited than the immunity afforded judges and extends only to those acts committed within the scope of the actor's jurisdiction and with the authorization of law." *Turner v. Am. Bar Ass'n*, 407 F. Supp. 451, 482 (N.D. Tex. 1975) *aff'd sub nom. Taylor v. Montgomery*, 539 F.2d 715 (7th Cir. 1976) and *aff'd sub nom. Pilla v. Am. Bar Ass'n*, 542 F.2d 56 (8th Cir. 1976).

Judges are not immune for their non-judicial activities or ministerial or administrative activities. A judicial officer is not immune from a civil action that complains of acts that are properly characterized as ministerial or administrative as opposed to judicial. The Supreme Court long ago established this ministerial distinction in the still valid and often-cited *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1879). "Functions of administrative judge and other city family court judges, whose activities concerning operation of youth study center were not judicial in that they had only general jurisdiction over detention center, were not of type for which judicial immunity was required." *Santiago v. City of Philadelphia*, 435 F. Supp. 136, 146 (E.D. Pa. 1977) *abrogated for other reasons by Chowdhury v. Reading Hosp. & Med. Ctr.*, 677 F.2d 317 (3d Cir. 1982). In a civil rights action challenging the adequacy of a juvenile detention center, the chief judge and a juvenile judge, both named defendants, did not have judicial immunity since the suit was directed solely at their administrative and ministerial duties and only requested such equitable relief as was necessary to safeguard the plaintiffs' constitutional rights. *Doe v. Lake Cnty., Indiana*, 399 F. Supp. 553, 556 (N.D. Ind. 1975).

The function of the Victoria County Juvenile Board, despite being a statutory construct comprised solely of judges, involves administrative and ministerial duties. Even should Board members establish a defense of judicial immunity from damages, the Board is certainly subject to being enjoined. Further, members of the VRJJC, specifically administrators of the detention facility, lack immunity and could incur civil liability for any child injured.

D. Conclusions concerning Liability under 42 U.S.C.A. § 1983

Victoria County, Juvenile Board members individually, and individuals of the VRJJC have actual knowledge of a dangerous condition (as stated by the county's experts who alerted the county that it operates a detention center that "constitutes a life safety hazard" by failing to provide acceptable methods for smoke removal as listed under LSC Chapter 23.4.1.2). If there was a fire/smoke event, then the inadequacies of the facility pose an unreasonable risk of harm. Having been aware in excess of a year of these conditions without conducting any meaningful mitigation demonstrates failure to exercise reasonable care to reduce or eliminate the unreasonable risk of harm. Likewise the Juvenile Board's 1) knowledge of these conditions, 2) continued use of these facilities, and 3) dismissal of the concerns of both an architect and engineer taken together would likely establish conscious indifference or reckless disregard for the safety of others. Should there be a fire/smoke event that results in injuries (physical or emotional), causation would be apparent.

I conclude that there exists civil liability for Victoria County under the 42 U.S.C.A. § 1983 from the continued operation of the VRJJC in a hazardous condition. Further, any damages would not be limited as with the Texas Tort Claims Act. At present, I conclude good fortune alone prevents liability of County, individual members of the Juvenile Board, and individuals working for and with the VRJJC.

V. **Summary**

The County, through its offices, VRJJC, and Victoria Juvenile Board, detains children when, among other causes, the child lacks "suitable supervision, ***care, or protection for him is not being provided by a parent***, guardian, custodian, or other person … [and] ***he may be dangerous to himself*** or may threaten the safety of the public if released." TEX. FAM. CODE ANN. § 54.01(e)(2) & (4) (West 2015). Similarly, a child is confined in part upon a finding that "it is in the ***child's best interests*** to be placed outside the child's home … and the child, in the child's home, cannot be provided the ***quality of care and level of support and supervision*** that the child needs to meet the conditions of probation." TEX. FAM. CODE ANN. § 54.04(i)(1)(A) & (C) (West 2015). It is at least ironic that the County, in estranging children from their homes, would inadequately protect such a child from the dangers of fire and smoke.

Understanding the vagaries trial, I use "Liability" to express the existence of **risk** not the **certainty** of any particular outcome. This analysis presumes smoke and fire with tragic results, an event that has not occurred. With that presumption, these facts and the current law, there is a graver risk of federal civil liability than state liability but that any outcomes depend entirely upon the evidence/facts developed at trial making any such predictions imperfect.

In regards to moral liability, your consciences are more than capable of fully informing you on any decision. I would only add but two thoughts: First, that it is easier to swim without a millstone *see*, Luke 17:2, Mark 9:42 and Matthew 18:6 (King James); and Second, that no man outlives or outruns their conscience.

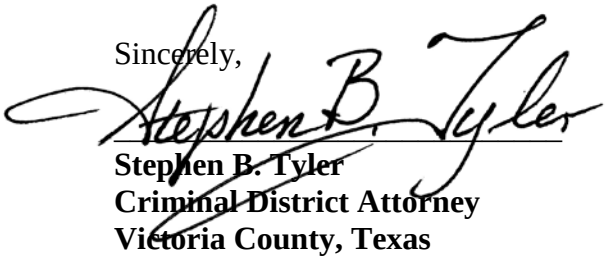
Victoria County has both federal and potentially state civil liability. The Juvenile Board, as an entity, does not have civil liability. Individuals operating/administering the facilities have federal civil liabilities. Individuals comprising the Juvenile Board likely have federal civil liability relative to damages and certainly are subject to equitable relief.

All the above parties could have criminal liability if by reckless omission a child were injured. An architect and engineer, both certified and licensed by Texas, have warned Commissioners' Court as follows:

> "[T]he absence of a mechanical smoke removal system that is capable of evacuating smoke from the cells in the time required by state agencies … The heat operated fire hatches in the day room (even if in operating condition) do not communicate with the cells. Therefore, there is no provision for smoke removal from the cells. The code required continuous ventilation delivered by the six wall fans serving the cells provides only 3 air changes per hour and therefore falls short of the six air changes per hour required for smoke removal. There is no effective method of smoke removal from the Detention area. While there is a provision in the LSC for 'Grandfathering', ***it is our opinion that the absence of a smoke removal system constitutes a life safety hazard.***"

With the above opinion this Criminal District Attorney has indicated that the County, Commissioners' Court, members of the Juvenile Board and individuals within the Victoria Regional Juvenile Justice Center have a duty of care relative to children in its custody. Having been so repeatedly warned as to the conditions and liabilities, it would indeed be a reckless omission for those entities and persons not to act to correct known premises defects and/or safeguard children in their custody.

Sincerely,



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