Court Order Allows Syrian Resettlement to Go On

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The federal government and the International Rescue Committee can continue to resettle Syrians in Texas after a federal judge in Dallas turned down a Texas request for a court order to stop it under certain conditions.

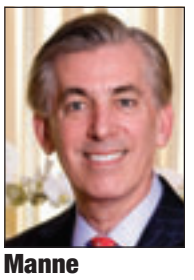
On Feb. 8, U.S. District Judge David Godbey of the Northern District of Texas denied an amended application from the Texas Health and Human Services Commission (HHSC) for a preliminary injunction to block the federal government and the International Rescue Committee from resettling Syrians in Texas without complying with duties to consult first with Texas and cooperate with the commission.

In an 11-page order, U.S. District Judge David Godbey of the Northern District of Texas found that the commission failed to establish a "substantial threat of irreparable injury." He also found that applicable statutes "do not contemplate a judicial remedy."

Godbey wrote that the case "presents a litany of political questions" and he will leave resolution of the political questions to the political process.

"Somewhat ironically, Texas, perhaps the reddest of red states, asks a federal court to stick its judicial nose into this political morass, where it does not belong absent statutory authorization," Godbey wrote.

The litigation came after Gov. Greg Abbott sent a letter to President Barack Obama on Nov. 16, 2015, informing him that Texas would not accept refugees from Syria in the wake of the "deadly terrorist attack in Paris." After the International Rescue Committee notified the HHSC that it had two Syrian family reunification cases in Dallas in early December, the commission on Dec. 2 filed *Texas Health and Human Services Commission v. USA* in U.S. District Court for the Northern District of Texas seeking a temporary restraining order to prevent the defendants from resettling refugees in Texas without providing information to the commission and working in close cooperation with it.


Manne

The state withdrew the motion for the restraining order Dec. 4, 2015, but continued to seek the temporary injunction.

The attorney general's office is evaluating its options in the wake of Godbey's order, Katherine Wise, deputy press secretary for Texas Attorney General Ken Paxton, said in a written statement.

"At a minimum, Texans deserve to know if the people moving into our communities and neighborhoods have a history of providing support to terrorists. In today's ruling, the court acknowledged the validity of our concerns, but ruled existing federal law does not grant states a sufficient voice, which would effectively leave it to Congress to make necessary changes," Wise wrote.

Neal Manne, a partner in Susman Godfrey in Houston who represents the International Rescue Committee on a pro bono basis, said his client got what it asked for with Godbey's order. However, he said a motion to dismiss the claims against the International Rescue Committee is pending before Godbey.

Stuart Robinson, a U.S. Department of Justice civil division attorney who represents the federal defendants, which include the U.S. Department of State and the U.S. Department of Health and Human Services, did not return a phone call seeking comment.

In his order, Godbey found that the commission failed to show any evidence that terrorists have actually infiltrated the refugee program or that any Texas refugees are terrorists intent on causing harm.

However, Godbey wrote that he "does not deny" the Syrian refugees pose some risk, and to deny that would be foolish.

"In our country, however, it is the federal executive that is charged with assessing and mitigating that risk, not the states and not the courts," he wrote. TNL

Fifth Court Issues Sanctions in Cow in the Road Case

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Why did the appellants in the Cow in the Road case go to Dallas' Fifth Court of Appeals and stay there? Apparently to get sanctioned for filing a frivolous appeal, according to a recent ruling in the unusual dispute.

Archer v. Tunnell is dubbed the Cow in the Road case because it involves a retired doctor who once tried to use the Texas medical malpractice tort reform laws to shield himself from a lawsuit filed by a plaintiff who was allegedly injured after hitting the defendant's loose cows. [*See "How Is Hitting a Cow in the Road Med Mal?," Texas Lawyer, Jan. 19, 2015.*]

It all started when Bobby Tunell sued Richard K. Archer Sr. for personal injury after hitting several of Archer's cows that had wandered into a roadway. Archer attempted to get the case dismissed by arguing that Tunell's accident was really a health care liability claim by virtue of the fact that Archer is a retired physician. As such, Archer argued that Tunnell had failed to comply with Chapter 74 of the Texas Civil Practice & Remedies Code, which requires plaintiffs to first file "expert reports" detailing the expected standard of care of doctors before they can sue them.

Archer asserted the Chapter 74 claim again before a trial court judge. But the trial court denied Archer's motion to dismiss the case, a decision he appealed to the Fifth Court. [*See "Dallas Judge: Doctor's Cow in the Road Is Not Med Mal," Texas Lawyer, April 20, 2015.*]

The basis of Archer's motion was *Texas West Oaks Hospital v. Williams*, a 2012 decision from the Texas Supreme Court that requires plaintiffs to file expert reports when they sue doctors—even if the plaintiff's claim has no direct relation to health care.

But on May 1, the high court arguably pulled back from that decision when it issued *Ross v. St. Luke's Episcopal Hospital*, which held that "a safety standards-based claim does not come within the [tort reform laws] provisions just because the underlying occurrence took place in a health care facility, the claim is against a health care provider, or both." [*See "Plaintiffs Bar Gives Rare Thumbs-Up for SCOTX Med-Mal Ruling," Texas Lawyer, May 4, 2015.*]

After *Ross* was decided, Tunnell's counsel sent a letter to Archer and his lawyer stating that "it is now obvious that your position lacks any good faith basis in law or fact." Tunnell's counsel stated he intended to file a motion for sanctions with the Fifth Court unless the appellants and their counsel dismissed their appeal.

The appellants later filed a status report with the court acknowledging Ross and stated they would drop the health care liability claim. However, they also stated they had another point of error involving an Employee Retirement Income Security Act issue (ERISA). Tunnell later argued that the Fifth Court also lacked jurisdiction to decide the ERISA issue and then moved for sanctions asserting that the appellants had repeatedly pursued frivolous arguments in an effort to delay trial and increase Tunnell's litigation costs.

In her Feb. 9 decision in the case, Justice Lana Myers wrote that the court was dismissing Archer's appeal and sanctioned the retired doctor and his counsel for actions that were "so egregious" that Tunnell deserved damages from the appellants for pursuing the frivolous appeal.


Myers

"After the Supreme Court's opinion in *Ross*, there were no reasonable grounds for an advocate to believe the case could be reversed. However, appellants did not dismiss this frivolous appeal. Instead, appellants' counsel filed a brief on the merits asserting ERISA preemption based on non-existent orders that this Court lacked jurisdiction to consider," Myers wrote.

"No reasonable counsel could believe the ERISA-preemption argument was a reasonable ground for reversal in this case when there was no written order on a motion asserting the argument and no statute permits an interlocutory appeal from such an order," Myers wrote. "In these circumstances, we conclude that appellants and their counsel's actions are so egregious as to warrant the award to Tunnell of just damages from appellants and their counsel for their pursuit of this frivolous appeal."

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Myers awarded $2,205 in damages against Archer and his counsel for the attorney fees Tunnell spent in defending the case on appeal.

Philip Russ, an Amarillo solo who represents Archer, did not return a call for comment. Neither did Jonathan Bearrie, an Austin attorney who filed a brief on Archer's behalf.

"Mr. Russ thought he had a valid argument favoring his position; I have no idea whether he or the court is correct," Archer wrote in an e-mailed statement.

"What is not arguable is the absurdity of Mr. Tunnel's contention that we are responsible for the injuries he sustained," wrote Archer, who alleges Tunnel's trial attorney "is engaging in the age-old legal extortion game." Leighton Durham, a partner in Dallas' Kelly, Durham & Pittard who represents Tunnell, said he regretted he was forced to file for sanctions against Archer and his lawyers.

"Twice we sent him a letter saying to please take this down. It's my job not to tell him to file frivolous appeals," Durham said. "I hate filing for sanctions. I've only done it twice. And both times they were granted because I don't do it unless I absolutely have to."

Durham will be paid $2,205 for the 6.3 hours he spent preparing the motion to dismiss at a rate of $350 an hour.

"I'm not being greedy," Durham said. "I just don't want my clients to have to pay for this mess." TNL