

No. 08-0265

IN THE SUPREME COURT OF TEXAS

CITY OF DALLAS,

Petitioner,

v.

VSC LLC,

Respondent.

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas
No. 05-05-01227

RESPONSE TO PETITION FOR REVIEW

James C. Mosser
Texas Bar No. 00789784
MOSSERHILLPLLC
17110 Dallas Parkway, Suite 290
Dallas, Texas 75248
Telephone 972-733-3223
Facsimile 972-267-5072
LAWYER FOR RESPONDENTS

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2. VSC has a valid lawful possessory lien on the towed and stored vehicles. The City may not dispose of the vehicles without notice to VSC after it seized the property. There is no proof any of the vehicles were stolen, and the City does not claim VSC obtained the vehicles unlawfully. The Court determined that VSC lawfully possessed the vehicles and that state law provided for a possessory lien held by VSC vi

3. The question that the City ignores and that the trial court and the court of appeals recognized is what are the rights of a storage company that is lawfully storing vehicles when the City seizes them; consent or non consent? vi

4. The City did not raise this issue of un-joined parties in the trial court, and jurisdiction in this interlocutory appeal is limited to review of the trial court's order, the court must confine its review to the claims addressed in the plea to the jurisdiction. There is nothing for the court to review. vi

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STATEMENT OF THE CASE

The opinion of the court of appeals correctly states the facts. Respondents agree with Petitioner's statement of the case except as set forth below.

Trial Court Disposition:	The trial court denied City's plea to the jurisdiction.
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Disposition by Court of Appeals:	The court of appeals' opinion speaks for itself. The court of appeals held that the City failed to raise its Issue Fourt in the Trial Court. The court of appeals also held that the City failed to produce any evidence that the subject vehicles were actually stolen.
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RESPONSE TO PETITIONER'S STATEMENT OF JURISDICTION

The Supreme Court does not have jurisdiction over this appeal because the court of appeals did not commit an error of substantive law, or if it did, the error was not of such importance to the jurisprudence of the state that it requires correction. Tex. Gov't Code §22.001 (a)(6). The court of appeals decided the case using the guiding principals of this court and the United States Supreme Court. There is no immunity for a taking, even if the taking is an exercise of police power.

The Supreme Court does not have jurisdiction over this appeal because it is not a case in which the justices of the court of appeals disagree on a question of law material to the decision. Tex. Gov't Code §22.001 (a)(1).

The Supreme Court does not have jurisdiction over this appeal because the decision of the court of appeals does not conflict with this Court's decision in *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984); *City of Houston v. Williams*, 216 S.W.3d 827,829 (Tex. 2007), *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001), *Thomas v. Long*, 207 S.W.3d 334, 339 (Tex. 2006), and *Waco Independent School District v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000). {cite case}. Tex. Gov't Code §22.001 (a)(2).

The Supreme Court does not have jurisdiction over this appeal because the decision of the court of appeals does not conflict with the following decisions, *Tri State Chemicals Inc. v. WesternOrganics, Inc.*, 83 S.W.3d 189, 195 (Tex. App.-Amarillo 2002, pet. denied) and *Nacol v. Metallic Development Corp.*, 614 S.W.2d 172, 174-175 (Tex. Civ. App.-Fort Worth 1980, writ dismiss'd), *Tex. AlcoholicBeverage Commission v. Sanchez*, 96 S.W.3d 483, 488-489 (Tex. App.-Austin2002, no pet.), *Brooks v. Northglen Association*, 141 S.W.3d 158,163-164 (Tex. 2004) and *Sw. Bell Tel., L.P. v. Ballenger Constr.Co.*, 230 S.W.3d 489,491-492 (Tex. App.-Corpus Christi 2007, no pet.), and or *City of Houston v. Northwood Municipal Utility District No.1*, 73S.W.3d 304,313 (Tex. App.-Houston [1st Dist.] 2001, pet. denied). Tex. Gov't Code §22.001 (a)(2).

RESPONSE TO PETITIONER'S ISSUES

1. The takings jurisprudence is clear that a physical taking is a taking, either pursuant to the Texas or the United States Constitution. The court of appeals followed the law of this court and the United States Supreme Court. The City ignores the current jurisprudence and the fact that the City failed to obey State law. There is no conflict with this court's jurisprudence.
2. VSC has a valid lawful possessory lien on the towed and stored vehicles. The City may not dispose of the vehicles without notice to VSC after it seized the property. There is no proof any of the vehicles were stolen, and the City does not claim VSC obtained the vehicles unlawfully. The Court determined that VSC lawfully possessed the vehicles and that state law provided for a possessory lien held by VSC.
3. The question that the City ignores and that the trial court and the court of appeals recognized is what are the rights of a storage company that is lawfully storing vehicles when the City seizes them; consent or non consent?
4. The City did not raise this issue of un-joined parties in the trial court, and jurisdiction in this interlocutory appeal is limited to review of the trial court's order, the court must confine its review to the claims addressed in the plea to the jurisdiction. There is nothing for the court to review.

STATEMENT OF FACTS

The court of appeals correctly recited the facts in its original opinion and Petitioner does not argue otherwise. Respondents agree with Petitioner's statement of facts except as set forth below.

There was no finding or claim by City of a violation of a penal statute.

VSC was in lawful possession of the subject vehicles and City does not claim otherwise.

The City did not provide evidence that the vehicles were actually stolen.

There was no criminal action relating to allegedly stolen property pending and City does not claim otherwise.

The City disposed of the vehicles after seizure without notice to VSC.

The VSC storage license "is not active" not as the City states revoked or lost. CR 18-121.

ARGUMENT

Response to Petitioner's Issue One

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, ..." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l*

Planning Agency, 535 U.S. 302, 322 (U.S. 2002)(emphasis supplied).

There is no question that VSC possessed an interest permitted by state

law in the subject vehicles which were taken by City. "As to towing and

storage charges, a driver in Texas impliedly agrees to allow his vehicle to

be towed and stored when authorized by law. See *Bray v. Curtis*, 544

S.W.2d 816,818-19 (Tex. Civ. App.--Corpus Christi 1976, writ refiled n.r.e.).

PROPERTY CODE section 70.003(c) authorizes a lien where the garageman

came into possession of the vehicle lawfully. See *id.*; see also *Elite*

Towing Co. v. LSI Fin. Group, 985 S.W.2d 635, 640 (Tex. App.-Austin

1999, no pet.). The City does not assert that VSC came into possession of

the vehicles unlawfully." *City of Dallas v. VSC, LLC*, 242 S.W.3d 584, 593

(Tex. App. Dallas 2008).

"... or if the regulation results in a "physical invasion" of private property,

then it may be considered a per se taking." *Sheffield Dev. v. City of*

Glenn Heights, 140 S.W.3d 660, 670, 47 Tex. Sup. Ct. J. 327 (Tex. 2004), see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). *Cummins v. Travis County Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 54 (Tex. App. Austin 2005). The City simply chooses to ignore the rights of a possessory lien holder, took the property and then disposed of it. The City could have easily followed state law and submitted the property to a Chapter 47 hearing. The City never claims that there was a pending criminal proceeding or trial related to any of the subject vehicles. Consequently, the City had a legal duty to follow state law related to the challenge by VSC, to the right of possession of the vehicles. See TEX. CODE CRIM. PROC. art. 47.01a.

Restoration When No Trial Is Pending

(a) If a criminal action relating to allegedly stolen property is not pending, a district judge, county court judge, statutory county court judge, or justice of the peace having jurisdiction as a magistrate in the county in which the property is held or a municipal judge having jurisdiction as a magistrate in the municipality in which the property is being held may hold a hearing to determine the right to possession of the property, upon the petition of an interested person, a county, a city, or the state. Jurisdiction under this section is based solely on jurisdiction as a criminal magistrate under this code and not jurisdiction as a civil court. The court shall:

(1) order the property delivered to whoever has the superior right to possession, without conditions; or

(2) on the filing of a written motion before trial by an attorney representing the state, order the property delivered to whoever has the superior right to possession, subject to the condition that the property be made available to the prosecuting authority should it be needed in future prosecutions; or

(3) order the property awarded to the custody of the peace officer, pending resolution of criminal investigations regarding the property.

(b) If it is shown in a hearing that probable cause exists to believe that the property was acquired by theft or by another manner that makes its acquisition an offense and that the identity of the actual owner of the property cannot be determined, the court shall order the peace officer to:

(1) deliver the property to a government agency for official purposes;

(2) deliver the property to a person authorized by Article 18.17 of this code to receive and dispose of the property; or

(3) destroy the property.

(c) At a hearing under Subsection (a) of this article, any interested person may present evidence showing that the property was not acquired by theft or another offense or that the person is entitled to possess the property. At the hearing, hearsay evidence is admissible.

(d) Venue for a hearing under this article is in any justice, county, statutory county, or district court in the county in which the property is seized or in any municipal court in any municipality in which the property is seized, except that the court may transfer venue to a court in another county on the motion of any interested party.

TEX. CODE CRIM. PROC. art. 47.01 a.

There is no public interest interfered with or even implicated, there was no crime solving by the City and there were no criminal proceedings pending.

The City simply seized the vehicles after VSC legally came into possession and City disposed of the vehicles without notice to VSC destroying VSC's

possessory lien. *Bray v. Curtis*, 544 S.W.2d 816,818-19 (Tex. Civ. App.--Corpus Christi 1976, writ refd n.r.e.). PROPERTY CODE section 70.003(c)(authorizes a lien where the garageman came into possession of the vehicle lawfully). See *id.*; see also *Elite Towing Co. v. LSI Fin. Group*, 985 S.W.2d 635,640 (Tex. App.--Austin 1999, no pet.).

This Court should deny the City's Petition for Review.

Response to Petitioner's Issue Two

The City did not carry its burden at trial and not in the Court of Appeals. The City ignored the legislative mandate of the Tex. Code Crim. Proc. art. 47.01a., and Texas Property Code section 70.003. The actual evidence was that VSC had a claim of a possessory lien lawfully obtained. And the only had "reported stolen" vehicles. The City disposed of the vehicles disregarding the lawful claim of interest by VSC. "These statutes show the legislature did not have to provide again for a lien under the Vehicle Storage Facility Act because a garageman's lien already exists under section 70.003(c) of the property code. See Vehicle Storage Facility Act §683.032(c) ("This subchapter does not impair any lien that a garagekeeper has on a vehicle" except for termination or limitation of the claim for failure to report the vehicle); 43 TEX. ADMIN. CODE § 18.1 ("Other laws which may affect the operations

of a vehicle storage facility are ... TEXAS PROPERTY CODE, [§] 70.003")."
City of Dallas v. VSC, LLC, 242 S.W.3d 584,594 (Tex. App. Dallas 2008).
There is no proof any of the vehicles were stolen, and the City does not claim
VSC obtained the vehicles unlawfully. The Court determined that VSC lawfully
possessed the vehicles and that state law provided for a possessory lien held
by VSC. *Id.*

The Court of Appeals correctly analyzed the law and the facts presented
in the trial court. This Court should deny the City's Petition for Review.

Response to Petitioner's Issue Three

The VSC storage license "is not active" not as the City states revoked
or lost. CR 18-121. This only prohibits VSC from providing "non consent" tows
pursuant to State Law. TEX. Gee. CODE § 2308.205 (2007). But See 49 USC
14501 (prohibiting regulation of Price, Route or Service of a Towing Company,
except for the regulation of price related to non consent towing). VSC
continued with authority to store vehicles with consent of the vehicle owner.
The State cannot regulate this activity. *Id.* 'The requested declarations could
apply equally to vehicles towed and stored with the consent of the vehicles'
operators that are subsequently reported stolen. Despite the loss of its license
to operate a facility for storing vehicles from non-consensual tows, VSC's

allegations demonstrate the "ripening seeds of a controversy" and the existence of a justiciable issue, and the requested relief is not too speculative, hypothetical, or contingent to constitute a justiciable issue. *City of Dallas v. VSC, LLC*, 242 S.W.3d 584, 597 (Tex. App. Dallas 2008). The question that the City ignores and that the trial court and the court of appeals recognized is what are the rights of a storage company that is lawfully storing vehicles when the City seizes them; consent or non consent? The requested declaratory relief was not limited to licensed vehicle storage facilities or to the storage of vehicles towed without consent. The requested declarations could apply equally to vehicles towed and stored with the consent of the vehicles' operators that are subsequently reported stolen." *City of Dallas v. VSC, LLC*, 242 S.W.3d 584, 597 (Tex. App. Dallas 2008).

The court of appeals properly determined that the trial court has jurisdiction to determine the rights of a business facing the "ripening seeds of a controversy." This Court should deny the City's Petition for Review.

Response to Petitioner's Issue Four

The City's plea to the jurisdiction concerning failure to join necessary parties did not address this aspect of VSC's first requested declaration. Accordingly, whether the trial court lacks jurisdiction over this claim due to the

failure to join necessary parties is not before us." *City of Dallas v. VSC, LLC*, 242 S.W.3d 584, 598 (Tex. App. Dallas 2008). The City did not raise this issue in the trial court plea to the jurisdiction, the City cannot obtain interlocutory review of the matter. "However, Section 51.014(a)(8) gives us jurisdiction over this interlocutory appeal for the limited purpose of reviewing the trial court's interlocutory order on a plea to the jurisdiction. Because our jurisdiction in this interlocutory appeal is limited to review of the trial court's order, we must confine our review to the claims addressed in the plea to the jurisdiction. *City of Dallas v. First Trade Union Sav. Bank*, 133 S.W.3d 680, 686-87 (Tex. App.-Dallas 2003, pet. filed). *Brenham Hous. Auth. v. Davies*, 158 S.W.3d 53, 61 (Tex. App. Houston 14th Dist. 2005). There is nothing for the court to review.

CONCLUSION AND PRAYER

The court of appeals correctly concluded that the City of Dallas' Plea to the Jurisdiction should be denied.

The takings jurisprudence is clear that a physical taking is a taking, either pursuant to the Texas or the United States Constitution. The court of

appeals followed the law of this court and the United States Supreme Court. There is no conflict with this court's jurisprudence.

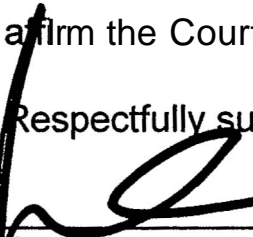
VSC has a valid lawful possessory lien on the towed and stored vehicles. The City may not dispose of the vehicles without notice to VSC after it seized the property. There is no proof any of the vehicles were stolen, and the City does not claim VSC obtained the vehicles unlawfully. The Court determined that VSC lawfully possessed the vehicles and that state law provided for a possessory lien held by VSC.

VSC has property rights when it is lawfully storing vehicles when the City seizes them; consent or non consent.

The City did not raise this issue of un-joined parties in the trial court, and jurisdiction in this interlocutory appeal is limited to review of the trial court's order, the court must confine its review to the claims addressed in the plea to the jurisdiction. There is nothing for the court to review.

For these reasons, this Court should deny the petition for review and affirm the Court of Appeals.

Respectfully submitted, *MOSSER HILL PLLC*



James C. Mosser
Texas Bar No. 00789784
MOSSER HILL PLLC

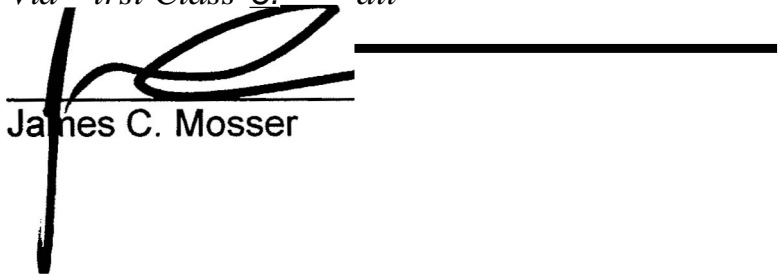
17110 Dallas Parkway, Suite 290
Dallas, Texas 75248
Telephone 972-733-3223
Facsimile 972-267-5072
LAWYERS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document has been delivered pursuant to TEX. R. ApP. P. 9.5 to counsel as indicated below on August 14, 2008.

Charles Estee
Assistant City Attorney
City of Dallas
Dallas City Hall 7CN
1500 Marilla Street
Dallas, Texas 75201

Via First Class U.S. Mail



James C. Mosser