Cause No. 03-10-00677-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT
AUSTIN, TEXAS

TJFA, L.P.,
Appellant,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY and BFI WASTE SYSTEMS OF NORTH AMERICA, INC.,
Appellees.

On Appeal from the 53rd District Court of Travis County, Texas
Hon. John K. Dietz, Judge Presiding
Trial Court No. D-1-GN-09-004062

REPLY BRIEF OF APPELLANT TJFA, L.P.

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SUMMARY OF ARGUMENT IN REPLY

Extensive authority holds that post-filing requirements in suits against governmental agencies are not "statutory prerequisites" and therefore are not jurisdictional. Appellees, the TCEQ and BFI, fail to cite a single case to the contrary and simply ignore the authority cited in Appellant TJFA's initial briefing. There is no basis, either in statutory or case law, for finding the post-filing 30-day service-of-process timeline in Section 361.321 of the Health & Safety Code to be a "statutory prerequisite to a suit" or to be relevant to jurisdiction for any other reason.

The District Court only heard and ruled on the TCEQ's plea to the jurisdiction. Because the trial court neither heard nor ruled upon TCEQ's motion to dismiss, the proper procedure is for this Court to reverse on the jurisdictional issue and remand to the District Court for a hearing on the merits.

If this Court wishes to exercise its discretion to address the issue, it should hold that Section 361.321's 30-day service-of-process timeline is "directory" rather than "mandatory," and that service after 30 days does not automatically justify dismissal. The Legislature uses specific language mandating dismissal when it intends that to be the consequence of non-compliance with a post-filing timetable, and has used no such specific language here. While non-compliance with the 30-day timetable should be a factor in determining whether service of process was timely, the absence of language mandating dismissal indicates the Legislature intended timeliness of service to be evaluated using long-established principles of due diligence and lack of prejudice. There is a significant difference in how filing deadlines (such as statutes of limitations) and

post-filing requirements (such as service of process timetables) are interpreted and applied.

The parties agree that if the dismissal based on the plea to the jurisdiction is reversed, so must be the award of transcription fees; and if the dismissal is upheld, so should the transcription fee award.

ARGUMENT AND AUTHORITIES IN REPLY

I. The Post-Filing 30-Day Service-of-Process Timeline Is Not a "Statutory Prerequisite to a Suit" and Therefore Is Not Jurisdictional.

A. The TCEQ ignores unanimous authority that is contrary to its position on jurisdiction.

In its opening brief, TJFA cited and discussed six cases squarely holding that post-filing requirements are not "statutory prerequisites to suit" under Section 311.034 of the Government Code.[1] In response, the TCEQ[2] cites not a *single case* to the contrary. There *are* no contrary cases. Not only does the TCEQ fail to cite authority supporting its position; it also (with one exception) *ignores* the extensive authority cited by TJFA.[3] The unanimous holdings of several Courts of Appeals amply support TJFA's argument that the 30-day service of process timeline from Section 361.321(c) of the Health & Safety Code is not a statutory prerequisite to suit under Section 311.034 of the Government Code, and that service on the TCEQ by TJFA 41 days after filing did not deprive the trial

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[1] TJFA Brief at 10-12.

[2] Appellee BFI does not offer any substantive argument on the service timeline issue, instead simply referring to the TCEQ's argument. BFI Brief at 5-6. As discussed below, the only issue on appeal for which BFI has party standing is that related to the District Court's order that TJFA pay BFI one-half of the transcription fees from the administrative hearing.

[3] The TCEQ does attempt to address this Court's decision in *Scott v. Presidio I.S.D.*, 266 S.W.3d 531 (Tex. App. – Austin 2008), *rev'd on other grounds*, 309 S.W.3d 927 (Tex. 2010), as discussed below. The other cases cited in TJFA's opening brief are neither discussed nor cited by the TCEQ.

court of subject-matter jurisdiction. The TCEQ's silence speaks volumes, and the unanimous authority contrary to its position is alone enough to reverse the trial court's grant of the TCEQ's plea to the jurisdiction.

B. The TCEQ's new argument based on *Sierra Club* does not support its position.

In the trial court, the TCEQ argued that the Texas Supreme Court's opinion in *Texas Natural Resource Conservation Commission v. Sierra Club*, 70 S.W.3d 809 (Tex. 2002), is "exactly on point" to this case and holds that strict compliance with service-of-process timelines is not only required, but is a "jurisdictional requirement in all suits against a governmental entity."[4] Appellant TJFA, in its opening brief in this Court, demonstrated that those representations were inarguably inaccurate.[5]

In its response in this Court, the TCEQ neither restates nor defends its trial court *Sierra Club* argument. Thus, even the TCEQ tacitly acknowledges that the trial court's ruling cannot be defended on the primary ground argued in that court by the TCEQ, and in fact that its trial court argument was in error.

In this Court the TCEQ makes a different argument: not that the *Sierra Club* opinion is "exactly on point," but rather merely that it "undermines TJFA's argument that the service-within-30-days requirement is non-jurisdictional"[6] because the opinion

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[4] RR at 6, 10.

[5] TJFA Brief at 14-19.

[6] TCEQ Brief at 3.

allegedly "characterized" the 30-day service timeframe in Section 362.321 as a "judicial review prerequisite[]."[7] The TCEQ's new argument is both inaccurate and misplaced.

The issue addressed by the Supreme Court in *Sierra Club* was whether the plaintiff was required to effect service of process on all entities that had been parties to the administrative proceeding, pursuant to Section 2001.176 of the Administrative Procedure Act, even though those entities were not parties to the district court appeal. The Supreme Court held that such service under the APA was not required.[8] The opinion did not address whether the 30-day Health & Safety Code service timeline was a "statutory prerequisite to a suit" under Section 311.034 of the Government Code, and indeed could not have addressed it – the language of Section 311.034 at issue here was added in 2005, *three years after* the Supreme Court's *Sierra Club* decision.

The Supreme Court in *Sierra Club* considered no jurisdictional issue at all, unlike this Court's earlier opinion in that case. This Court in *Sierra Club* outlined the standards for determining when a service-of-process requirement is jurisdictional, holding that it is *not* jurisdictional if it does "not define, enlarge, or restrict the class of causes the court may decide or the relief that may be awarded."[9] Under that standard, the 30-day service timeline in the Health & Safety Code is not jurisdictional, particularly under the facts of this case, where the TCEQ undisputedly received a copy of the District Court petition the day it was filed, the delay in formal service was due to a good-faith misunderstanding by

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[7] *Id.* at 6, citing *Texas Natural Resource Conservation Commission v. Sierra Club*, 70 S.W.3d 809, 812 (Tex. 2002).

[8] *Sierra Club*, 70 S.W.3d at 813.

[9] *Sierra Club v. Texas Natural Resource Conservation Commission*, 26 S.W.3d 684, 688 (Tex. App. – Austin 2000), *aff'd on other grounds*, 70 S.W.3d 809 (Tex. 2002).

counsel coupled with an error by the clerk's office, formal service was accomplished 41 days after filing, and the TCEQ undisputedly suffered no prejudice due to the brief delay in service.

C. This Court's precedent supports TJFA's jurisdictional argument.

In its opening brief, TJFA demonstrated that this Court has held that a "statute requiring notice *after* suit is filed is not a 'statutory prerequisite' to suit." *Scott v. Presidio ISD*, 266 S.W.3d 531, 535 (Tex. App. – Austin 2008), *rev'd on other grounds*, 309 S.W.3d 927 (Tex. 2010). The TCEQ is unable to substantively respond to this Court's clear language, so it characterizes this on-point language from this Court as "mere background, boilerplate language."[10] Of course, it is neither; this Court's observation in *Scott v. Presidio ISD* is directly relevant and controlling – and it agrees with at least five other cases cited in TJFA's opening brief, none of which are discussed or even cited by the TCEQ.

Instead, the TCEQ argues that the substance of *Scott v. Presidio ISD* favors its position. The TCEQ is wrong; the particular facts of the case are neither relevant nor helpful to the TCEQ. The substantive issue in *Scott* was whether the Commissioner of Education was required to give *pre-filing* consent to the filing of a district court appeal of an agency ruling in Travis County, rather than the county in which the school district's administrative offices were located. This Court held that the Commissioner's agreement was necessary for the Travis County District Court to have jurisdiction. The Supreme Court disagreed, holding that if the school district and the employee agreed, the Travis

[10] TCEQ Brief at 7.

County courts had jurisdiction, regardless of the position of the Commissioner. 309 S.W.3d at 932.

The TCEQ maintains that this Court's finding that the pre-suit consent requirement was jurisdictional is somehow relevant to the instant dispute.[11] It is not; the Supreme Court reversed this Court's holding, and in any event the case turned on a *pre-filing* requirement, in contrast to the *post-filing* service requirement here at issue. This Court correctly noted that a "prerequisite to a suit" was something required *before* suit was filed. *Scott v. Presidio ISD* favors TJFA, not the TCEQ.

The TCEQ's final attempt to argue that the 30-day service timeline is jurisdictional relies on an unremarkable, unpublished opinion from this Court regarding whether service of process 13 months after the filing of a lawsuit "related back" to the date of filing for statute of limitations purposes. TCEQ Brief at 8-9, citing and discussing *Pacific Employers Ins. Co. v. Twelve Oaks Medical Center*, 2010 WL 1511753 (Tex. App. – Austin 2010, no pet.). Unsurprisingly, this Court held that the plaintiff failed to exercise diligence in obtaining service, and therefore its judicial review suit could not be considered to have been timely filed (even though the filing initially was accomplished within the required 30 days after the administrative ruling became final). The Court's holding was *not* based on any notion that service after a statutorily prescribed post-filing timetable deprived the district court of jurisdiction. Rather, the Court analyzed the case much like any other case in which a petition was filed within limitations, but served outside limitations: "whether [the plaintiff] exercised diligence in serving" the defendant.

[11] TCEQ Brief at 7.

Pacific Employers at *1. This is the same inquiry that TJFA, in its initial brief, suggested was the appropriate question in the instant case. TJFA Brief at 23-24.

The TCEQ's argument apparently is that any service accomplished more than 30 days after filing constitutes lack of diligence *per se*. That interpretation simply cannot be drawn from *Pacific Employers*, since the 30-day service timetable was not at issue there. Further, the TCEQ's argument completely avoids the key reason that the service requirement is not jurisdictional: as observed by at least six courts, a *prerequisite to suit* is a condition that must be fulfilled *before* suit is filed; a *post-filing* service requirement is not such a prerequisite.

II. If the Court Chooses to Reach the Issue, It Should Hold that the 30-Day Service-of-Process Timetable is Directory, not Mandatory.

A. BFI has no party standing on the issues related to dismissal, but is correct in arguing that jurisdiction is the only issue properly before this Court.

Appellee BFI Waste Systems of North America, Inc. ("BFI") did not file a plea to the jurisdiction or motion to dismiss, and thus does not have standing in this Court to argue either issue as a party. BFI's brief does not address the jurisdictional argument on its merits; rather, it simply "incorporate[s]" the TCEQ's arguments.[12] However, BFI *does* argue – at length – that the District Court's dismissal can be upheld on the alternative, non-jurisdictional ground that the 30-day service timeline is "mandatory" rather than "directory."[13] BFI simply has no standing as a party regarding this argument, due to its failure to move for dismissal. If the Court wishes to consider BFI's arguments

[12] BFI Brief at 5-6.

[13] BFI Brief at 6-17.

at all, at most they should be viewed as those of an interested *amicus curiae*. (BFI has party standing only as to the issue regarding transcription fees, discussed below.)

BFI, however, is correct in pointing out that the portion of the District Court's order finding the 30-day service timetable to be mandatory was neither necessary nor relevant to the granting of the TCEQ's plea to the jurisdiction.[14] BFI correctly argues that although the TCEQ filed a motion to dismiss along with its plea to the jurisdiction, the TCEQ did not press the motion to dismiss at the hearing, and the District Court ruled only on the jurisdiction plea; therefore, the only issue properly before this Court is the jurisdictional ruling. For this reason, the proper disposition of the case is a reversal and a remand for the District Court to consider the merits, including the TCEQ's motion to dismiss.

BFI is also correct in arguing that this Court has the discretion to address the "mandatory v. directory" issue, under the same rationale as employed by the Supreme Court in *In re United Services Automobile Ass'n*, 307 S.W.3d 299, 314 (Tex. 2010) (in which the Supreme Court disagreed with the lower court's decision that it lacked jurisdiction, but went on to address the merits of whether a requirement was a prerequisite to *maintaining* suit in a court that had jurisdiction – an issue the lower courts had not reached). BFI Brief at 7-8.

If the Court chooses to address this issue, it should hold that the 30-day service timeline is directory, not mandatory, for the reasons stated in TJFA's initial brief, as well as those set forth immediately below.

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[14] BFI Brief at 7.

B. The lack of a noncompliance penalty for service after 30 days is an important – but not sole – factor in why the timetable is directory, not mandatory.

Appellees cite not a single case holding that dismissal is the proper remedy when service of process occurred outside a statutory timetable – let alone any case finding dismissal proper when the defendant received a copy of the lawsuit (albeit not through formal service of process) on the very day it was filed, as is the case here.

BFI characterizes TJFA's argument as "simply" that the service timeline is directory rather than mandatory because it does not include a non-compliance penalty.[15] This characterization is incorrect. While the lack of a penalty for noncompliance with the 30-day service timetable certainly is a *factor* in determining whether the timetable is mandatory or directory – indeed, a very important factor – it is not the single "simple" reason. TJFA, in its initial brief, listed *five* factors that all point to a conclusion that the timetable is directory, not mandatory, with the lack of a noncompliance penalty being only one of those five factors. TJFA Brief at 22-23. For example, TJFA showed that the service timetable does not bear on the "essence" of a judicial review appeal, but rather relates "merely to the proper, orderly and prompt conduct" of the court's business, TJFA Brief at 22 (citing authority); neither the TCEQ nor BFI dispute this. Nor do they dispute that the service of process in this case did not prejudice any interested party; indeed, they do not challenge the District Court's finding of no prejudice.

The absence of a noncompliance penalty, though not the only relevant factor, certainly is an important consideration in determining that the 30-day service timetable is

[15] BFI Brief at 11.

directory. Indeed, the Supreme Court has made it clear that this is the *first* consideration in determining whether an apparent command is mandatory or directory, and that the absence of such a penalty means the statute is *usually* directory. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001).

BFI cites *County of Bexar v. Bruton*, 256 S.W.3d 345, 349 (Tex. App. – San Antonio 2008, no pet.), for the proposition that some post-filing deadlines are mandatory, but that case cuts in favor of TJFA's position, not that of Appellees. The post-filing notice requirement at issue in *Bruton* had a *specific noncompliance penalty*, in stark contrast to the 30-day service timetable here at issue. The statute in *Bruton* "was clearly intended by the Legislature to be a requirement to maintaining the lawsuit" because the statute provided that if the prescribed notice was not given, "the court in which the suit is pending shall dismiss the suit on a motion …." *Bruton*, 256 S.W.3d at 349. The absence of such a penalty in the Health & Safety Code provision here at issue supports a finding that it is directory, not mandatory. Had the Legislature intended the consequence for service after 30 days to be dismissal, it would have included that consequence in the statute. *Bruton* stands for the proposition that the Legislature, when it intends for dismissal to be the consequence for failure to strictly comply with a post-filing timetable, will make that consequence clear in the statute itself.

BFI implies that the Texas Supreme Court has backtracked on the analysis of mandatory v. directory it set forth in the 2001 *Helena Chemical* case. BFI Brief at 11, citing *Edwards Aquifer Authority v. Chemical Lime, Ltd.*, 291 S.W.3d 392, 404 (Tex. 2009), and *Star Houston, Inc. v. Bray*, 317 S.W.3d 742, 748 n.5 (Tex. App. – Austin

2010, pet. denied). There has been no backtracking. *Edwards Aquifer* dealt with *filing* deadlines, which are significantly different than service timetables (as discussed at more length below). Even more fundamentally, the Supreme Court in *Edwards Aquifer* merely restated what the Court had recognized in *Helena Chemical*: that the absence of a noncompliance penalty does not *automatically* make a deadline directory rather than mandatory. As TJFA has always recognized, other factors – such as the timeline's "purpose," *Edwards Aquifer* at 404 – must be considered as well. In *Edwards Aquifer*, the question was whether a *filing* deadline was mandatory. In light of long-standing authority that filing deadlines such as statutes of limitations are strictly enforced, along with the particular deadline's purpose of ensuring all claims were made timely, a finding that the filing deadline was mandatory was unsurprising and correct. The same is true for this Court's decision in *Star Houston*, which simply held that the 30-day *filing* requirement for judicial review appeals of Department of Transportation rulings should run from the date of the agency order and be strictly enforced.

The arguments of Appellees simplistically boil down to a single assertion: that the Legislature's use of the word "must" in the 30-day service timeline renders that timeline mandatory, and makes dismissal the consequence for service after 30 days. As shown in TJFA's opening brief at pages 20-23, the use of "must" is *not* dispositive when considering whether a timetable is mandatory or directory, and many statutes that appear to command a particular action "shall" or "must" be done in a specific timeframe have been held to be directory, rather than mandatory. Neither the TCEQ nor BFI actually address the case law cited by TJFA explaining the applicable standards, and of course

never cite a case holding a post-filing timetable to be mandatory in the absence of express language making dismissal the consequence of non-compliance.

BFI argues that the consequence of accepting TJFA's argument would be to recognize that service is *never* required under Section 361.321. BFI Brief at 12-13. This is incorrect. TJFA does *not* argue that the requirement of service of process is directory. Service of process is required. Rather, the 30-day timetable is directory, and service will be considered proper, even after 30 days, if (1) service is accomplished with due diligence, and (2) service after 30 days does not prejudice the agency. These standards are consistent with extensive case law, cited in TJFA's opening brief at 23-24, regarding how a court determines whether service of process should be considered timely even when it was accomplished after the expiration of the applicable statute of limitations.

Appellees make no convincing argument that there will be *any* adverse consequences if the 30-day service timetable is considered directory, and timeliness of service is evaluated much like it is in all other cases (with, of course, consideration of the 30-day timetable as a factor in considering whether service was made with due diligence). Clearly the Legislature is presumed to have been familiar with the extensive case law on timeliness of service, and as shown above would have made dismissal the explicit consequence for failure to serve within 30 days had it desired. TJFA's suggested framework for analyzing service under Section 361.321 gives effect to all the statute's provisions, promotes the orderly conduct of the court's business, and is consistent with precedent regarding both service of process and statutory interpretation.

C. Appellees' arguments fail to appreciate the significant and long-recognized difference between filing deadlines and service timetables.

The TCEQ makes a brief argument on the "mandatory v. directory" issue, asserting without elaboration that post-filing service timetables should be enforced just like filing deadlines. In support, the TCEQ offers a quotation from the Supreme Court's opinion in *Edwards Aquifer Authority v. Chemical Lime, Ltd.*, 291 S.W.3d 392, 403 (Tex. 2009), that deals with an untimely *filing* and says nothing about post-filing *service* timing.[16] *Edwards Aquifer* is entirely irrelevant. It is long-established law that statutes of limitations and filing deadlines are – practically by necessity – construed strictly, even though this strict construction sometimes leads to harsh results. TJFA does not quarrel with this proposition. The rationale set forth in the *Edwards Aquifer* excerpt quoted in the TCEQ's brief is compelling for filing deadlines, but neither that case nor *any* case cited by the TCEQ explains why the same rationale does, or even should, apply to service timelines.

BFI argues that *Edwards Aquifer*'s holding regarding filing deadlines is somehow relevant to this case.[17] Although BFI acknowledges there is a difference between filing and service deadlines, it offers no support for its argument that *Edwards Aquifer* is "instructive" in this case. The same is true with regard to BFI's citation to, and reliance upon, another filing-deadline case, *Little v. Texas Bd. of Law Examiners*, 2011 WL 1035729 (Tex. App. – Austin, March 9, 2011, no pet. h.) (BFI Brief at 16).

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[16] TCEQ Brief at 11.

[17] BFI Brief at 13-14.

Texas law has long recognized that filing deadlines by necessity must be strictly enforced, to provide a clear, bright-line standard to determine if a case was timely brought. Just as clearly, though, Texas law has recognized that the governing standards for judging service of process timeliness are due diligence and lack of prejudice. Certainly the Legislature *could* have made dismissal the consequence for service after the 30-day timetable of Section 361.321, by explicitly stating this in the statute – as the Legislature did, for instance, with the 30-day post-filing notice requirement in Section 89.0041 of the Local Government Code, which provides in relevant part (emphases added):

> (a) A person filing suit against a county or against a county official in the official's capacity as a county official shall deliver written notice to:
>
> (1) the county judge; and
>
> (2) the county or district attorney having jurisdiction to defend the county in a civil suit.
>
> (b) The written notice must be delivered by certified or registered mail by the *30th business day after suit is filed* ....
>
> (c) *If a person does not give notice as required by this section, the court in which the suit is pending shall dismiss the suit* on a motion for dismissal made by the county or the county official.

Thus, while dismissal is widely recognized as the appropriate remedy for non-compliance with filing deadlines such as statutes of limitation, the Legislature recognizes that dismissal is an extraordinary and atypical remedy for non-compliance with *post-filing* timetables, and is explicit when it wishes to invoke that atypical remedy. It has not done so with Section 361.321, which is consistent with recognizing that the service-of-process timeline is directory, not mandatory.

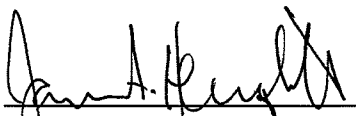
III. The Parties Agree on the Transcription Fees Issue.

Because this Court should reverse the District Court's grant of the plea to the jurisdiction and remand for a hearing on the merits, this Court also should reverse the aspect of the District Court's order that awarded transcription fees to BFI. Although BFI does not agree that the dismissal for want of jurisdiction should be reversed, it does not argue that the transcription fee award could survive reversal of the dismissal. Likewise, TJFA does not agree with Appellees' position that the grant of the plea to the jurisidction should be upheld, but if it is, TJFA agrees that the transcription fee award must stand.

CONCLUSION AND PRAYER

For the reasons set forth herein and in TJFA's initial brief, this Court should reverse the District Court's grant of the plea to the jurisdiction, and remand this case to the District Court for consideration on the merits, and should further grant TJFA all other relief to which it may show itself justly entitled.

Respectfully submitted,



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I certify that a true and correct copy of the foregoing document has been served on the following as indicated below, on this the 21st day of April, 2011.

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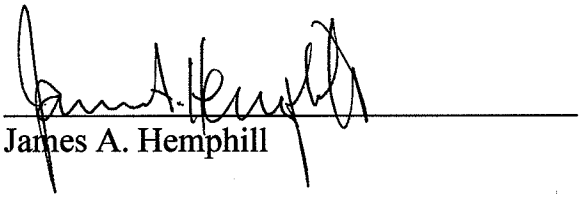

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