Cause No. 03-11-00277-CV

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

NORTHEAST NEIGHBORS COALITION
and TJFA, L.P.,
Appellants,

v.

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

On Appeal from the 126th District Court of Travis County, Texas
Hon. John K. Dietz, Judge Presiding
Trial Court No. D-1-GN-09-004113

REPLY BRIEF OF APPELLANT TJFA, L.P.

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ORAL ARGUMENT CONDITIONALLY REQUESTED

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I. TCEQ and BFI Misstate Both TJFA's Position and the Law Regarding the Applicable Standard of Review.

TCEQ and BFI claim that the applicable standard of review for the denial of a plea in intervention is invariably abuse of discretion, and that TJFA errs in allegedly arguing that the standard is always *de novo*. Both of these claims are wrong.

While denials of intervention are *generally* a matter of the trial court's discretion, some issues involving intervention are *legal* issues subject to *de novo* review. Here, TJFA raises two such issues: (1) whether TJFA alleged a justiciable interest, and (2) whether TJFA met the three-part test of *Guaranty Federal Savings Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652 (Tex. 1990), and thus had a non-discretionary right to intervene. *See, e.g.*, *Zeifman v. Michels*, 229 S.W.3d 460, 464 (Tex. App. – Austin 2007, no pet.). TJFA clearly made this distinction in its opening brief, notwithstanding Appellees' mischaracterizations. TJFA Br. at 6-7. TJFA has never disputed that the appropriate standard of review is abuse of discretion *if* TJFA had a justiciable interest but did not meet the other two parts of the *Guaranty Federal* test (a circumstance that TJFA does not concede exists here). *Id.* at 7.

II. TJFA Had, and Has, a Justiciable Interest.

A. TCEQ and BFI argue for a rule that would preclude *all* interventions for parties challenging agency actions.

TJFA demonstrated in its opening brief that it possessed at the time of its intervention (and continues to possess) a justiciable interest for purposes of intervention, because it participated as a party in the underlying administrative contested case and

preserved its right to file a District Court appeal by moving for rehearing. TJFA Br. at 12-14.

The sole response of both TCEQ and BFI is a claim that the dismissal of TJFA's separately filed lawsuit retroactively extinguished TJFA's justiciable interest. BFI Br. at 6-11; TCEQ Br. at 8-14. But the upshot of Appellees' argument is that intervention is *never* proper by a party challenging an administrative agency decision – a result unsupported by case law and unjustified by policy.

Appellees argue that to have a justiciable interest, a party must file its own suit and serve the agency with process; only then can it intervene in a suit filed by another party challenging the agency decision. This is absurd on its face and makes intervention useless, as TJFA pointed out in its opening brief. TJFA Br. at 18. BFI has no substantive response to this point.

TCEQ's response, in contrast, frankly argues for an asymmetrical double standard: the agency suggests that the only way for multiple protestants to challenge an agency decision is for each of them to file their own suit and have process served, and then move for consolidation (a nonsensical, cumbersome process of the type that intervention is designed to avoid), while *supporters* of agency decisions could intervene freely. TCEQ Br. at 10. While this rule certainly would be advantageous to TCEQ and its companion agencies, it is supported by neither logic nor law.

TJFA also demonstrated that a party continues to possess a justiciable interest even when there is some procedural obstacle to maintaining an independent lawsuit in its own name. TJFA Br. at 13-14. In response, both TCEQ and BFI argue that the cases

cited by TJFA are not factually identical to this case. BFI Br. at 9-11; TCEQ Br. at 11-14. While true, this fact is unremarkable. The cases establish a *general principle* that a party will not be precluded from asserting a justiciable interest due solely to a procedural prohibition on the party bringing a separate action itself. Neither Appellee is able to cite a single case holding that a party with an otherwise-justiciable interest was held to have retroactively lost that interest due to an action such as late service of process.

B. Appellees' heavy reliance on *Galveston Bay* is misplaced.

TCEQ and BFI rely heavily on *Galveston Bay Conservation & Preservation Ass'n v. Texas Air Control Board*, 586 S.W.2d 634 (Tex. Civ. App. – Austin 1979, writ ref'd n.r.e.). That case does not support Appellees' arguments and does not support a conclusion that TJFA lacks a justiciable interest.

TJFA explained in its opening brief that there were two different types of would-be intervenors in *Galveston Bay*: (1) those that had not been parties to the administrative proceeding; and (2) one entity, the Shoreacres Environmental Committee (SEC), that had participated in the administrative proceeding. TJFA further plainly stated that this Court was "clearly correct" in holding that the trial court did not abuse its discretion by striking the intervention of the first category of would-be plaintiffs. TJFA Br. at 16-17.[1] Unfortunately, BFI misleadingly characterizes TJFA's argument in a completely separate case in an attempt to portray TJFA as somehow inconsistent. BFI Br. at 8-9. TJFA did indeed argue in that other case that intervention is improper when the intervenor did not

[1] Thus, TCEQ plainly misstates TJFA's argument as allowing intervention even when a party does not participate in the administrative proceedings. TCEQ Br. at 9. That has never been TJFA's position and would not be the result of accepting TJFA's argument.

participate in the administrative proceedings as a party. TJFA does *not* argue otherwise here, as is abundantly clear from the unambiguous words of its opening brief. That other case simply did not involve the second type of intervenor at issue in *Galveston Bay* (*i.e.*, SEC). BFI knows this. BFI's characterization is wrong, is an unfortunate attempt to prejudice the Court against TJFA, and is wholly irrelevant to this case.

TCEQ and BFI argue that this Court's upholding of the striking of SEC's intervention in *Galveston Bay* stands for the proposition that a party has no justiciable interest unless it files its own administrative appeal in the District Court. It does not. As TJFA pointed out in its opening brief, the word "justiciable" does not even appear in the *Galveston Bay* opinion. TJFA Br. at 17. Further, if SEC lacked a justiciable interest, the trial court *had no discretion* – it could not allow SEC to intervene. *See, e.g.*, *In re Union Carbide Corp.*, 273 S.W.3d 152, 154-55 (Tex. 2008) (party must have a justiciable interest to intervene "without consultation with or permission from the original parties or the court"). However, that was not the basis of this Court's holding; rather, the district court was upheld because in striking the intervention, it *did not abuse its discretion* – discretion that it would not have had if SEC had no justiciable interest. Neither TCEQ nor BFI address these points.

Thus, *Galveston Bay* does not stand for the proposition argued by Appellees. As TJFA pointed out, the decision pre-dates important subsequent developments in the law of intervention, including *Guaranty Federal* and *Zeifman v. Michels*. TJFA Br. at 17. If *Galveston Bay* were to be read as Appellees suggest – which it should not be – then it would lead to the same absurd result as Appellees advocate: essentially no intervention

for protestants in administrative appeals. Properly read and limited to its facts with respect to SEC's intervention, *Galveston Bay* is not relevant here.

III. TJFA Meets the Three-Part *Guaranty Federal* Test for Mandatory Intervention.

TCEQ and BFI ultimately both acknowledge that striking an intervention is an abuse of discretion if the intervenor meets the three-part *Guaranty Federal* test. BFI Br. at 12; TCEQ Br. at 11. TJFA established that it meets all parts; Appellees' arguments to the contrary are meritless.

The first element is the existence of a justiciable interest. As shown by TJFA in its initial brief and above, it had and has such an interest. As to the second and third elements, Appellees' arguments are cursory, conclusory, and non-substantive.

The second element is whether intervention would unduly complicate the case "by an excessive multiplication of the issues." *Guaranty Federal*, 793 S.W.2d at 657. TCEQ and BFI simplistically argue that because TJFA preserved for appeal more issues than the Northeast Neighbors, allowing intervention would *per se* excessively multiply the issues. BFI Br. at 13; TCEQ Br. at 15. Appellees offer no support for their *ipse dixit* assertions, and cite no cases for the proposition that addition of issues equates to "excessive multiplication." Plainly, it does not. And, as TJFA pointed out, this is an *appeal* (even in district court) from a set record, with a finite number of arguments that were preserved, and with strict page limits for briefing. All these factors preclude any finding that TJFA's intervention would result in "excessive multiplication of the issues."

The third element of the *Guaranty Federal* test is whether intervention "is almost essential to effectively protect the intervenor's interest." *Guaranty Federal*, 793 S.W.2d at 657. TCEQ and BFI essentially *admit* that TJFA meets this prong of the test, but argue that intervention should not be allowed because TJFA's need to intervene was allegedly caused by its own actions in not serving the TCEQ with formal process within 30 days of filing its separate suit. BFI Br. at 13; TCEQ Br. at 15.[2] This, of course, is nothing but a restatement of the fatally flawed argument that TJFA lacks a justiciable interest. Further, Appellees seek to engraft an additional requirement not present in the Supreme Court's *Guaranty Federal* decision or in any subsequent case interpreting or applying the three-part test. Simple application of the Supreme Court's mandatory *Guaranty Federal* test mandates that TJFA had the right to intervene and that the district court had no discretion to rule otherwise.

IV. TJFA Can Raise All Issues It Preserved that Challenge the Same TCEQ Order Challenged by the Northeast Neighbors.

Relying on cases between 74 and 91 years old, BFI argues that because "the intervenor takes the case as he finds it and is bound by the issues pleaded," TJFA cannot "inject new issues" if it is allowed to intervene. BFI Br. at 14-15. BFI misapprehends the principle articulated in these ancient cases. They stand for the proposition that an intervenor cannot raise unrelated, independent causes of action into a case; intervenors are restricted to the subject matter of the pending case. *See, e.g.*, *Buzzini Drilling Co. v.*

[2] The Court correctly held that service within 30 days was not a jurisdictional prerequisite to suit as the district court held. *TJFA, L.P. v. Texas Comm'n on Envt'l Quality*, 368 S.W.3d 727 (Tex. App. – Austin 2012, pet. filed). TJFA respectfully disagrees with the conclusion of the majority in that case that service within 30 days is mandatory to maintenance of suit and has petitioned the Supreme Court for review. TJFA acknowledges that the majority opinion governs the instant case for present purposes.

Fuselier, 562 S.W.2d 878, 879 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ). For example, BFI cites *Lynn County School Board v. Garlynn Common County Line School Dist.*, 118 S.W.2d 1070, 1071 (Tex. Civ. App. – Amarillo 1938, writ ref'd). In that case, the original parties disagreed about a proposed consolidation of two school districts. The intervenor attempted to use the lawsuit to adjudicate whether an entirely different school district should be consolidated with one of the original two districts; the Court of Appeals held this was improper. In the present case, both NNC and TJFA seek review of the *very same* TCEQ order. TJFA does not seek to introduce independent issues unrelated to the original lawsuit, and the law does not preclude TJFA as an intervenor from challenging the TCEQ order on the grounds preserved by TJFA.

CONCLUSION AND PRAYER

TJFA had a justiciable interest in the NNC judicial review lawsuit and complied with all administrative remedies and the statute of limitations in filing its own suit. Further, TJFA meets the three-part test for mandatory intervention. TJFA prays that this Court reverse the striking of TJFA's intervention and remand this case for hearing on the merits, and that this Court further grant TJFA all other relief to which it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following as indicated below, on this the 10th day of September, 2011. Electronic service is also being made on those participating counsel.

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