

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-04-00223-CV**

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**Denne A. Sweeney and Texas Division, Sons of Confederate Veterans, Inc., Appellants**

**v.**

**Wallace Jefferson, in his Administrative Capacity; Rick Perry, in his Official Capacity as Governor of the State of Texas; and Edward Johnson, in his Official Capacity as Executive Director of the Texas Building and Procurement Commission, Appellees**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT  
NO. GN001678, HONORABLE PAUL DAVIS, JUDGE PRESIDING**

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**OPINION**

This is an appeal from the district court's order of dismissal for want of jurisdiction. Appellants Denne A. Sweeney<sup>1</sup> and the Texas Division, Sons of Confederate Veterans, Inc.,<sup>2</sup> filed suit against appellees<sup>3</sup> seeking declaratory and injunctive relief regarding the removal of two plaques

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<sup>1</sup> Although appellees assert in their brief that Denne Sweeney was removed as a plaintiff in July 2002, the record indicates that Sweeney was included as a plaintiff in the fourth amended petition filed November 26, 2003, and in the notice of appeal filed April 12, 2004. Because there is no entry on the docket sheet confirming the district court's removal of Sweeney as a plaintiff in these proceedings, for purposes of this appeal, we consider Sweeney to be properly included as an appellant.

<sup>2</sup> We refer to the appellants collectively as "Confederate Veterans."

<sup>3</sup> We substitute Chief Justice Wallace Jefferson, in his administrative capacity, as successor to Thomas Phillips, Chief Justice of the Texas Supreme Court, and Edward Johnson, in his official capacity, as successor to Randall Riley, Executive Director of the Texas Building and Procurement Commission, as the proper parties on appeal. *See* Tex. R. App. P. 7.

that previously hung in the lobby of the Supreme Court Building. Agreeing with appellees' argument that it lacked subject-matter jurisdiction over the Confederate Veterans' claims, the district court granted appellees' plea to the jurisdiction and entered an order dismissing the case. Because we hold that the district court had jurisdiction to consider the Confederate Veterans' claims, we reverse the order of dismissal and remand to the district court for further proceedings.

### **FACTS AND PROCEDURAL BACKGROUND**

The Texas Supreme Court Building was completed in 1957. Shortly thereafter two plaques were installed in the building lobby to commemorate and dedicate the building to Texas veterans who served in the Confederacy. These plaques were installed pursuant to a 1953 amendment to the Texas Constitution, which created the State Building Commission and transferred excess funds from the Confederate Pension Fund to the State Building Fund. *See* Act of Apr. 30, 1953, 53d Leg., R.S., 1953 Tex. Gen. Laws 1172, 1172-73. One of these plaques contained the seal of the Confederate States of America and the phrase "Dedicated to Texans who served the Confederacy."<sup>4</sup> The other plaque contained a raised relief image of a waving confederate flag and the following quote from Confederate General Robert E. Lee: "I rely upon Texas regiments in all tight places, and I fear I have to call upon them too often. They have fought grandly, nobly."<sup>5</sup>

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<sup>4</sup> This plaque was hung on the southeast lobby wall of the Supreme Court Building.

<sup>5</sup> This plaque was hung on the northeast lobby wall of the Supreme Court Building.

In 2000, acting upon a “routine maintenance request” issued at the direction of the appellees, the Building and Procurement Commission<sup>6</sup> removed these two plaques and installed two new plaques in their place. The first of these new plaques states: “The courts of Texas are entrusted with providing equal justice under the law to persons, regardless of race, creed, or color.” The second plaque states: “Because this building was built with monies from the Confederate Pension Fund, it was, at that time, designated as a memorial to the Texans who served the Confederacy.”

It is undisputed that no one, including appellees, sought the approval of the Texas Historical Commission, or any other state agency, prior to the removal of the original plaques and the installation of the new plaques. Nor did appellees give notice or hold a public hearing before removing the original plaques and installing the new plaques.

After the new plaques were installed, the Confederate Veterans filed suit in the Travis County district court challenging both the removal of the original plaques and the installation of the new plaques. In their third amended petition, the Confederate Veterans alleged that the appellees had acted unlawfully and asserted jurisdiction under the Texas Constitution, Chapter 37 of the Texas Civil Practice and Remedies Code, Chapter 191 of the Texas Natural Resources Code, Chapters 551 and 2166 of the Texas Government Code, and Titles 1 and 13 of the Texas Administrative Code. *See* Tex. Const. art. V, § 8; Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-.009 (West 1997); Tex. Nat. Res. Code. Ann. §§ 191.002, .051, .092, .093, .097, .132(b), .173(a) (West 2001); Tex. Gov’t

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<sup>6</sup> At the time the plaques were removed, the Building and Procurement Commission was known as the General Services Commission. *See* Act of May 27, 2001, 77th Leg., R.S., ch. 1422, § 1.02, 2001 Tex. Gen. Laws 5021, 5021 (abolishing General Services Commission and transferring its functions to newly created Building and Procurement Commission). Consistent with this change, we refer to the Commission by its present name throughout the remainder of this opinion.

Code Ann. §§ 551.002, .141 (West 2004), §§ 2166.501, .5011 (West 2000 & Supp. 2005); 1 Tex. Admin. Code §§ 111.1(b)–(c), 116.3(d) (West 2004); 13 Tex. Admin. Code § 26.5(6)(B)(ix) (West 2004). The Confederate Veterans sought declaratory and injunctive relief as follows:

1. A declaration that the removal of the plaques from the Texas Supreme Court building, as set forth hereinabove, is a violation of the Texas Constitution.
2. A declaration that the plaques which replaced them do not comply with the Constitutional mandate that the Texas Supreme Court building be dedicated to the memory of Confederate Texans.
3. A declaration that the removal of the original plaques from the Texas Supreme Court building, as set forth hereinabove, is a violation of the Texas Antiquities Code, The Texas Administrative Code and the Texas Government Code, in that the removal (and replacement) was done without constitutional/statutory/lawful authority.
4. An order directing the protection, return and re-installation of the original plaques to their original site in the Texas Supreme Court building.
5. In the alternative without waiving any of the foregoing, that if this Honorable Court believes it lacks authority to remove the new replacement plaques from their location at the site of the original plaques, an order directing the protection, return and re-installation of the original plaques on the column immediately in front of the new replacement plaques so that the original plaques are facing the front or east door of the Supreme Court building.
6. In the alternative without waiving any of the foregoing, that upon the Court declaring that the removal (and replacement) of the original plaques was done without constitutional/statutory/lawful authority that the Court will direct the Plaintiff to seek the removal of the new replacement plaques and re-installation of the original plaques through the Texas Historical Commission.
7. Attorney's fees and costs, as provided by Tex. Civ. Prac. & Rem. Code Ann. § 37.009, and § 191.73 of the Texas Antiquities Code; and
8. Such other and further relief, general or special, in law or in equity, to which the Plaintiffs may show itself to be justly entitled.

The appellees answered and filed a plea to the jurisdiction on the ground that the trial court lacked authority to award the relief sought by the Confederate Veterans. Appellees' argument was two-fold: (1) the Confederate Veterans' requests for declaratory relief under the Uniform Declaratory Judgments Act do not confer jurisdiction on the district court; and (2) the district court lacked jurisdiction to award the relief sought by the Confederate Veterans—namely, removal of the new plaques and re-installation of the old plaques. The district court granted appellees' plea to the jurisdiction in part finding “the Court lacks jurisdiction over any of Plaintiff's claims requesting this Court to order state officials to remove/re-install any plaques made the subject of this suit. The Court finds that it has jurisdiction regarding the remaining claims.”

After the district court denied the Confederate Veterans' motion to reconsider this order, the Confederate Veterans amended their pleadings and filed their fourth amended petition alleging jurisdiction under the Texas Constitution, Chapters 442, 551, 2165, and 2166 of the Texas Government Code, Chapter 191 of the Texas Natural Resources Code, the Texas Civil Practices and Remedies Code, and Titles 1 and 13 of the Texas Administrative Code. *See* Tex. Const. art. V, § 8; Tex. Gov't Code Ann. §§ 442.006, .012, 551.002, .141 (West 2004), §§ 2165.255, 2166.501, .5011 (West 2000 & Supp. 2005); Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-.009; Tex. Nat. Res. Code Ann. §§ 191.002, .051, .092, .093, .097, .132(b), .173(a); 1 Tex. Admin. Code §§ 111.1(b)-(c), 116.3(d); 13 Tex. Admin. Code § 26.5(6)(B)(ix). The Confederate Veterans amended their requests for declaratory and injunctive relief as follows:

Plaintiffs ask for a Declaratory Judgment that the Defendants and their predecessors have engaged in violations of the Texas Constitution and the state statutes enumerated herein. Defendants ask for an award of their costs, including

reasonable and necessary trial and appellate attorneys' fees of not more than \$75,000.00.

Under the Court's inherent injunctive powers granted by the Texas Constitution to restore in all cases the *status quo ante* to any violation of the Constitution or state law, Plaintiffs ask the Court to issue a mandatory injunction compelling the Defendants to remove the second New Plaque and to re-install the Original Plaques to the general location in the building lobby where they originally stood. Plaintiffs also assert that the Court holds this injunctive power under Section 442.012 of the Texas Government Code and Section 191.173 of the Texas Natural Resources Code.

Alternatively, this Court clearly has the power to enforce compliance with Section 2166.5011 of the Texas Government Code. Under that law, the Court should order the Defendants to relocate the Original Markers, removed under a 'maintenance work order' of the [General Services Commission] to a 'prominent position' in the building under subsection (c) of the statute.

Plaintiffs ask for such other relief to which they may be entitled under the facts hereinabove alleged.

In addition to their fourth amended petition, the Confederate Veterans filed a second motion to reconsider and a motion for summary judgment. In response, appellees filed a second plea to the jurisdiction repeating their argument that the trial court lacked subject-matter jurisdiction over the Confederate Veterans' claims. Without specifying the grounds, the district court granted appellees' second plea to the jurisdiction; denied the Confederate Veterans' pending motions as moot; and dismissed this cause for lack of subject-matter jurisdiction. This appeal followed.

## DISCUSSION

In three issues, the Confederate Veterans argue: (1) the trial court erred in dismissing this cause for want of jurisdiction; (2) the trial court erred in denying the Confederate Veterans' motion to reconsider; and (3) the trial court erred in denying the Confederate Veterans' motion for

summary judgment. Appellees respond that the trial court correctly granted appellees' plea to the jurisdiction because the UDJA fails to confer jurisdiction over the Confederate Veterans' claims and the district court lacked jurisdiction and authority to grant the relief sought by the Confederate Veterans. Appellees further maintain that this Court cannot consider the Confederate Veterans' second and third issues because this Court lacks jurisdiction to consider appeals from interlocutory orders of the trial court.

### ***Standard of Review***

This case comes to us upon the trial court's dismissal for lack of subject-matter jurisdiction. Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993); *Rylander v. Caldwell*, 23 S.W.3d 132, 135 (Tex. App.—Austin 2000, no pet.). A plea to the jurisdiction challenges the trial court's authority to hear and decide a specific cause of action. *Lukes v. Employees Ret. Sys.*, 59 S.W.3d 838, 841 (Tex. App.—Austin 2001, no pet.). To prevail on a plea to the jurisdiction, the party challenging jurisdiction must show that even if all of the allegations in the plaintiff's petition are taken as true, there is an incurable jurisdictional defect on the face of the pleadings that deprives the trial court of jurisdiction to hear the case. *Rylander*, 23 S.W.3d at 135.

The existence of subject-matter jurisdiction is a question of law. *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). Therefore, we review *de novo* the trial court's ruling on a plea to the jurisdiction. *Id.* When reviewing the trial court's order of dismissal for lack of subject-matter jurisdiction, we do not consider the merits of the case, but

only the facts alleged in the pleadings and any evidence relevant to the jurisdictional inquiry.<sup>7</sup> *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). The plaintiff must allege facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Richardson v. First Nat'l Life Ins. Co.*, 419 S.W.2d 836, 839 (Tex. 1967). Unless the petition affirmatively demonstrates a lack of jurisdiction, the trial court must construe the petition liberally in favor of jurisdiction. *Peek v. Equipment Serv. Co.*, 779 S.W.2d 802, 804 (Tex. 1989); *Texas Ass'n of Bus.*, 852 S.W.2d at 446. The court must accept the plaintiff's good faith jurisdictional allegations as true unless the defendant pleads and proves that the allegations were fraudulently made to confer jurisdiction. *City of Austin v. Ender*, 30 S.W.3d 590, 593 (Tex. App.—Austin 2000, no pet.). Appellees do not challenge the truth of the Confederate Veterans' jurisdictional allegations.

### ***Jurisdictional Allegations***

In their fourth amended petition, the Confederate Veterans bring eight separate causes of action challenging the routine maintenance request removing the original plaques and installing the new plaques. The Confederate Veterans assert violations of the Texas Antiquities Code,<sup>8</sup> Chapters 442, 551, 2165, and 2166 of the Texas Government Code, and the Texas Constitution. *See*

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<sup>7</sup> To the extent that appellees contend we must presume that there is evidence in the record to support the trial court's order in light of the Confederate Veterans' failure to bring forward a reporter's record, or statement of facts, we note that the Confederate Veterans' need only present a sufficient record to show reversible error. *See Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex. 1990). A reporter's record may not be necessary for review of pure questions of law. *See Segrest v. Segrest*, 649 S.W.2d 610, 611 (Tex. 1983).

<sup>8</sup> The Antiquities Code is codified in chapter 191 of the Texas Natural Resources Code. *See* Tex. Nat. Res. Code Ann. § 191.001 (West 2001). We refer to the natural resources code unless otherwise noted.



Tex. Nat. Res. Code. Ann. §§ 191.002, .051, .092, .093, .097, .132(b), .173(a); Tex. Gov't Code Ann. §§ 442.006, .012, 551.002, .141, 2165.255, 2166.501, .5011; Tex. Const. art. V, § 8. The Confederate Veterans also seek a declaratory judgment under Chapter 37 of the Texas Civil Practices and Remedies Code and mandatory injunctive relief to restore the *status quo ante*.<sup>9</sup> See Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-.009.

A common theme underlying all of the Confederate Veterans' claims is that appellees acted without lawful authority in removing the original plaques and installing the new plaques. Although appellees concede that they violated section 2166.501 of the government code by removing the original plaques and installing the new plaques without obtaining approval of the Texas Historical Commission, they argue that the trial court lacked jurisdiction to remedy this violation of law. We disagree.

It is well established that Texas district courts are courts of general jurisdiction. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000). Article V, Section 8 of the Texas Constitution provides that a district court's jurisdiction "consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." Tex. Const. art. V, § 8. The government code also provides that district courts "may hear and determine any cause that is cognizable by courts of law or equity and may grant

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<sup>9</sup> As alleged by the Confederate Veterans, the *status quo ante* is the situation that existed prior to the appellees' execution of the routine maintenance request—namely, the return of the original plaques to the lobby of the Supreme Court Building. See Black's Law Dictionary 1420 (7th ed. 1999).

any relief that could be granted by other courts of law or equity.” Tex. Gov’t Code Ann. § 24.008 (West 2004). As courts of general jurisdiction, Texas district courts enjoy a presumption of subject-matter jurisdiction unless a contrary showing is made. *Dubai*, 12 S.W.3d at 75 (quoting 13 Wright et al., Federal Practice & Procedure § 3522, at 60 (1984)); *see also Dean v. State ex rel. Bailey*, 30 S.W. 1047, 1048 (Tex. 1895) (“No other court having jurisdiction over the cause, the district court has the power to determine the rights of the case and to apply the remedy.”).

1. *Texas Natural Resources Code, Chapter 191 and Texas Government Code, Chapters 442, 551, and 2165*

On appeal, appellees do not dispute the Confederate Veterans’ allegations of jurisdiction under chapter 191 of the Texas Natural Resources Code or chapters 442, 551, and 2165 of the Texas Government Code. *See* Tex. Nat. Res. Code. Ann. §§ 191.002, .051, .092, .093, .097, .132(b), .173(a); Tex. Gov’t Code Ann. §§ 442.006, .012, 551.002, .141, 2165.255. Nor do appellees plead or attempt to prove that these particular jurisdictional allegations were fraudulently made in order to confer jurisdiction upon the district court. *See City of Austin*, 30 S.W.3d at 593. Absent a contrary showing, we thus presume that the district court has jurisdiction over Confederate Veterans’ claims under chapter 191 of the natural resources code and chapters 442, 551 and 2165 of the government code. *See Dubai*, 12 S.W.3d at 75; *Peek*, 779 S.W.2d at 804.

2. *Texas Government Code, Chapter 2166*

The Confederate Veterans also assert jurisdiction under chapter 2166 of the government code. *See* Tex. Gov’t Code Ann. §§ 2166.501, .5011. Specifically, the Confederate Veterans allege that appellees’ removal of the original plaques and installation of the new plaques

violated section 2166.501(d) because appellees failed to get approval from the Texas Historical Commission as required in the statute. *See* Tex. Gov't Code Ann. § 2166.501(d) (West 2000). Although appellees concede that “[t]he new plaques were installed without the approval of the Texas Historical Commission, in violation of Sec. 2166.501,” appellees contend that the district court was without jurisdiction to remedy this alleged violation of law because sections 2166.501 and 2166.5011 of the Texas Government Code oust the district court of jurisdiction to award the relief sought by the Confederate Veterans—namely, removal of one of the new plaques and re-installation of the two original plaques.

Appellees’ argument required the district court to consider the effects, if any, of sections 2166.501 and 2166.5011 on its own jurisdiction. This question is a matter of statutory construction, which we review *de novo*. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000). In construing these two statutes, our primary goal is to determine and give effect to the legislature’s intent. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). We begin with the plain language of the statute at issue and apply its common meaning. *Id.* To determine legislative intent, we look to the statute as a whole, as opposed to isolated provisions. *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002).

Enacted in 1995,<sup>10</sup> section 2166.501 states:

- (a) A monument or memorial for Texas heroes of the Confederate States of America or the Texas War for Independence or to commemorate another event or person of historical significance to Texans and this state may be erected on land owned or acquired by the state or, if a suitable contract can be made for

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<sup>10</sup> Act of Apr. 21, 1995, 74th Leg., R.S., ch. 41, § 1, 1995 Tex. Gen. Laws 324, 395.

permanent preservation of the monument or memorial, on private property or land owned by the federal government or other states.

- (b) The graves of Texans described by Subsection (a) may be located and marked.
- (c) The commission shall maintain a monument or memorial erected by this state to commemorate the centenary of Texas' independence.
- (d) Before the erection of a new monument or memorial, the commission must obtain the approval of the Texas Historical Commission regarding the form, dimensions, and substance of, and inscriptions or illustrations on, the monument or memorial.

Tex. Gov't Code Ann. § 2166.501. Four years later, the legislature enacted section 2166.5011.<sup>11</sup>

This provision states:

- (a) In this section, "monument or memorial" means a permanent monument, memorial, or other designation, including a statue, portrait, plaque, seal, symbol, building name, or street name, that:
  - (1) is located on state property; and
  - (2) honors a citizen of this state for military or war-related service.
- (b) Notwithstanding any other provision of this code, a monument or memorial may be removed, relocated, or altered only:
  - (1) by the legislature;
  - (2) by the Texas Historical Commission;
  - (3) by the State Preservation Board; or
  - (4) as provided by Subsection (c).

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<sup>11</sup> Act of May 15, 2001, 77th Leg., R.S., ch. 377, § 7, 2001 Tex. Gen. Laws 700, 703.

- (c) A monument or memorial may be removed, relocated, or altered in a manner otherwise provided by this code as necessary to accommodate construction, repair, or improvements to the monument or memorial or to the surrounding state property on which the monument or memorial is located. Any monument or memorial that is permanently removed under this subsection must be relocated to a prominent location.

Tex. Gov't Code Ann. § 2166.5011.

Neither section 2166.501 nor section 2166.5011 addresses the district court's jurisdiction to decide the controversy at hand—*i.e.*, whether appellees acted without authority or violated existing law by removing the original plaques and installing the new plaques or whether an appropriate remedy is available for these allegations. The plain language of these statutes does not reference the terms “court” or “jurisdiction” and does not speak to the district court's inherent jurisdiction. *See id.* §§ 2166.501, .5011. Moreover, the supreme court has recognized that:

a court, once having obtained jurisdiction of a cause of action as incidental to its general jurisdiction, may exercise any power, or grant any writ, including the writ of injunction, necessary to administer justice between the parties to preserve the subject matter of the litigation, and make its judgment effective.

*City of Dallas v. Wright*, 36 S.W.2d 973, 975 (Tex. 1931). Accordingly, we conclude that neither section 2166.501 nor section 2166.5011 divests the district court of jurisdiction to consider the Confederate Veterans' claims or to determine what remedy, if any, may be appropriate under existing law. *See id.*; *see also Dubai*, 12 S.W.3d at 75; Tex. Const. art. V, § 8.

3. *Texas Civil Practices & Remedies Code, Chapter 37 (UDJA)*

The Confederate Veterans also assert jurisdiction and seek declaratory relief under the UDJA. *See Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-.009.* Appellees respond that the

UDJA is a remedial statute that does not confer jurisdiction on the district court absent an underlying cause of action.

The Supreme Court has recognized that private parties may invoke the UDJA to seek declaratory relief against state officials who allegedly act without legal or statutory authority. *See Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002); *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994). In their fourth amended petition, the Confederate Veterans allege that the appellees acted without the approval of the Texas Historical Commission or any other state agency before removing the original plaques from the lobby of the Supreme Court Building and that this action was taken without legal authority in violation of section 191.132 of the natural resources code and section 2166.501 of the government code.<sup>12</sup> *See* Tex. Nat. Res. Code Ann. § 191.132; Tex Gov't Code Ann. § 2166.501. Because we are bound to accept these jurisdictional allegations as true in the absence of a showing to the contrary, we conclude that the district court had jurisdiction to entertain the Confederate Veterans' claims for declaratory relief.

#### 4. *Texas Constitution*

Having concluded that the district court had jurisdiction to consider the Confederate Veterans' claims under Chapter 191 of the natural resources code, and chapters 442, 551, 2165, and 2166 of the government code, as well as the Confederate Veterans' claims for declaratory relief under the UDJA, we find it unnecessary to reach the question of the district court's jurisdiction under

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<sup>12</sup> Although we do not address the merits of the Confederate Veterans' claims in this appeal, we note that appellees concede the new plaques were installed without obtaining approval from the Texas Historical Commission.

the Texas Constitution. *See Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852, 857 (Tex. App.—Austin 2004, no pet.) (recognizing the general practice that courts should avoid deciding any constitutional question unless necessary for its decision).

***Motion to Reconsider and Summary Judgment***

In their second and third issues, the Confederate Veterans claim that the district court erred in denying their motion to reconsider and their second motion for summary judgment. In light of our disposition of the Confederate Veterans' first issue and the meager record, we do not reach the Confederate Veterans' other issues. *See* Tex. R. App. P. 47.1 (opinion to be as brief as practicable to decide issues necessary to final disposition).

**CONCLUSION**

Having determined that the district court had subject-matter jurisdiction to consider the Confederate Veterans' claims, we reverse the order of dismissal for want of subject-matter jurisdiction and remand this case to the district court for further proceedings.

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Jan P. Patterson, Justice

Before Justices B. A. Smith, Patterson and Puryear

Reversed and Remanded

Filed: July 28, 2006





**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-07-00073-CV**

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**Ron Strybos and Texas Division, Sons of Confederate Veterans, Inc., Appellants**

**v.**

**Rick Perry, in his Official Capacity as Governor of the State of Texas;  
Wallace Jefferson, in his Administrative Capacity; and Edward Johnson,  
in his Official Capacity as Executive Director of the Texas Facilities Commission, Appellees**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT  
NO. D-1-GN-00-001678, HONORABLE SCOTT H. JENKINS, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Ron Strybos and Texas Division, Sons of Confederate Veterans, Inc. appeal the summary judgment granted against them on their claims that two plaques were wrongfully removed from the Texas Supreme Court Building. They sued three State of Texas officials in their administrative or official capacities—the governor, the chief justice of the supreme court, and the executive director of the agency “in charge and control” of state buildings. Appellants contend that the removal of the plaques, and the installation of new plaques, was in violation of the state constitution and statutes pertaining specifically to the Supreme Court Building, and generally in violation of the manner in which the State is required to handle historical markers. We affirm the judgment in part, reverse and render judgment in part, and reverse and remand in part.

The parties agree regarding much of the history underlying this dispute, but disagree regarding what law applies and how the applicable law affects the facts presented. In 1954, voters amended the Texas Constitution to permit funds in a pension benefitting Confederate veterans and their widows to be transferred to the State Building Fund. The amendment provided that the first major structure built “shall be known and designated as a memorial to the Texans who served in the Armed Forces of the Confederate States of America, and shall be devoted to the use and occupancy of the Supreme Court and such other courts and State agencies as may be provided by law.” *See* Tex. Const. art. III, § 51-b(c) (repealed 1978).<sup>1</sup> The enabling legislation passed in 1957 provided that the building

shall be known and properly designated by the State Building Commission as a memorial to the Texans who served in the Armed Services of the Confederate States of America, and a suitable cornerstone or plaque, or other proper means of designation, shall be integrated into the construction of the building to effectuate this memorial purpose.

*See* former Tex. Civ. Stat. Ann. art. 678m, § 11.<sup>2</sup> The Supreme Court Building was constructed with a cornerstone, laid in 1957, that contains copies of the constitutional amendment and statutes designating the building as a memorial to Texas Confederate veterans, a roster of the officers of the United Daughters of the Confederacy, a Confederate flag, and Confederate currency. The

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<sup>1</sup> *See* Act of April 30, 1953, 53d Leg., R.S., S.J.R. 10, 1953 Tex. Gen. Laws 1172.

<sup>2</sup> *See* Act of June 24, 1955, 54th Leg., R.S., ch. 514, § 11, 1955 Tex. Gen. Laws 1298, 1300, *repealed by* Act of May 26, 1979, 66th Leg., R.S., ch. 773, § 99.05, 1979 Tex. Gen. Laws 1908, 1960.

supreme court moved into the building in 1959. In the mid-1960s, two plaques, the cost of which was included in the original contract price for the building, were installed in the foyer of the Supreme Court Building. One plaque stated, “Dedicated to Texans who served the Confederacy.” The other contained the following quote from General Robert. E. Lee: “I rely on Texas regiments in all tight places, and I fear I have to call on them too often. They have fought grandly, nobly.”

In 1978, voters amended the constitution to repeal provisions concerning the State Building Commission, including article III, section 51-b, the provision for the Supreme Court Building. In 1979, the legislature repealed the enabling statute concerning the Supreme Court Building. *See* Act of May 26, 1979, 66th Leg., R.S., ch. 773, § 99.05, 1979 Tex. Gen. Laws 1908, 1960.

In June 2000, the original plaques were removed and replacements installed in what was described in an interagency e-mail as “‘routine maintenance’ order.” One of the new plaques states, “The courts of Texas are entrusted with providing equal justice under the law to all persons regardless of race, creed, or color.” The other states, “Because this building was built with monies from the Confederate Pension Fund, it was, at that time, designated as a memorial to the Texans who served the Confederacy.”

Appellants filed suit, alleging that the removal of the original plaques and installation of the new ones violated Texas Constitution article III, section 51-b; the antiquities code (chapter 191 of the natural resources code); open meetings provisions; and the government code.<sup>3</sup> Appellants

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<sup>3</sup> The suit was initially filed against Jim Muse, in his official capacity as Executive Director of the Texas General Services Commission. Eventually, the governor and the chief justice of the supreme court were added as defendants.

requested a declaratory judgment that the violations occurred as well as a mandatory injunction ordering removal of the new dedication plaque and the reinstallation of the original plaques, or the installation of the original plaques at a prominent position in the building.

Both sides filed motions for summary judgment. Appellants contend that the undisputed facts show that none of the appellees or their employees were legally authorized to remove the original plaques and install new ones without a public hearing. The appellees sought summary judgment alleging, in part, that the law on which appellants base their claims does not apply to the removal of the original plaques or the installation of the new plaques. The trial court granted the appellees' motion for summary judgment and denied appellants' motion.

We review summary judgments de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A traditional motion for summary judgment should be granted only when the movant establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. See Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). When both parties move for summary judgment and the trial court grants one party's motion and denies the other party's, as occurred in this case, the reviewing court should review both sides' summary judgment evidence and determine all questions presented. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). If the district court erred, we will reverse and render the judgment the court should have rendered. *Id.*

Appellants contend that the appellees' actions violated the constitutional provision authorizing construction of the Supreme Court Building and the enabling legislation that

accompanied it. *See* former Tex. Const. art. III, § 51-b; former Tex. Civ. Stat. Ann. art. 678m. The amendment authorized transfer of funds from the Confederate Pension Fund to the State Building Fund, required that the first building constructed with those funds be “known and designated as a memorial to the Texans who served in the Armed Forces of the Confederate States of America,” and that the building be used by the supreme court. Former Tex. Const. art. III, § 51-b. The statute additionally specified that “a suitable cornerstone or plaque, or other proper means of designation, shall be integrated into the construction of the building to effectuate this memorial purpose.” Former Tex. Civ. Stat. Ann. art. 678m. These former constitutional and statutory provisions were undisputedly repealed more than two decades before the original plaques were removed and the new ones installed, however. The repeal of a statute does not affect any right acquired or accrued under it. Tex. Gov’t Code Ann. § 311.031 (West 2005). When a cause of action is based on a statute, however, the repeal of that statute without a savings clause for pending suits immediately abrogates the right of action unless the rights have become vested. *See Smallwood v. United States*, 68 F.2d 244, 246 (5th Cir. 1933); *Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex. 1998). Neither amendment contained a savings clause preserving rights or directives of the repealed provisions. Tex. S.J. Res. 48, § 1, 65th Leg., R.S., 1977 Tex. Gen. Laws, 3367, 3367 (proposal); 1979 Tex. Gen. Laws 3266 (vote); Act of May 26, 1979, 66th Leg., R.S., ch. 773, § 99.05, 1979 Tex. Gen. Laws 1908, 1960. Thus, if the provisions have no remaining effect, they were not violated.

We need not decide if the former provisions have any remaining force because, even if their repeal was a mere housekeeping maneuver, the undisputed evidence shows that the appellees’ actions did not violate the former provisions. The constitution and the statute required that the

Supreme Court Building be dedicated to Confederate veterans. It was and still is. The language of the dedication has changed and the plaque memorializing the dedication has changed. The new dedication plaque states that the building “was, at that time, designated as a memorial to the Texans who served the Confederacy.” While one might infer from that phrasing that the building is no longer so dedicated, the plain meaning of the words is that, in 1957, the building was dedicated as a memorial to the Texans who served the Confederacy. That is consistent with the former constitutional and statutory mandates and is consistent with the facts in the record. The plaque does not state that the building has been undedicated or rededicated. The news release issued by the General Services Commission on June 12, 2000, expressly states, “The building is still dedicated to Texas Civil War veterans.”<sup>4</sup> The constitutional mandate that the building be known and designated as a memorial to Texans who served in the Armed Forces of the Confederate States of America remains fulfilled. Even if rights under the prior constitutional and statutory scheme are at issue here, that scheme required a dedication of the building to Texas Civil War veterans. It did not require that the dedication be immutable over time. The appellees did not violate former constitution article III, section 51-b.

The former statute additionally required that a suitable cornerstone or plaque, or other proper means of designation be integrated into the construction. The statute did not specify that any particular wording be included on the commemorative feature, that any commemorative feature installed could not be replaced, or that any particular administrative procedure must be followed

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<sup>4</sup> We note that the news release was issued three days after this suit was filed.

to remove or replace the commemorative feature. The original cornerstone remains undisturbed, integrated into the building. The new plaque noting the building's designation as a Confederate memorial is attached to the building where the original plaque noted the dedication. The original plaque containing the Lee quote, while complementing the original dedication plaque, did not itself speak to the dedication. Its removal, therefore, did not infringe on the constitutional and statutory mandates regarding dedication and commemoration of the dedication. Although the new plaque regarding the court system did not address the dedication requirement, neither the constitutional nor statutory provision prohibited the installation of plaques unrelated to the dedication of the building. The appellees' removal of the original plaques and installation of new ones did not violate former article 678m.

Appellants contend that the appellees' removal of the original plaques violated the antiquities code's prohibition of damage or destruction of specified types of property. *See* Tex. Nat. Res. Code Ann. § 191.132(b) (West 2001). The antiquities code is intended to protect and preserve sites, buildings, and locations of historical, archeological, educational, or scientific interest. *Id.* § 191.002 (West 2001). Appellants contend that the appellees violated the following provision: "A person who is not the owner shall not wilfully injure, disfigure, remove, or destroy a historical structure, monument, marker, medallion, or artifact without lawful authority." *Id.* § 191.132(b).

Assuming—without deciding—that the plaques are historical markers under the statute, we conclude as a matter of law that section 191.132(b) did not prohibit their removal by the appellees. It is undisputed that the State owns the Supreme Court Building. Appellants contend that the State or the people of the State collectively own the building, not any

individual—particularly not the appellees. The people of the State, however, choose representatives to conduct their collective business. The legislature passes laws, and the executive branch implements and enforces the policies and mandates embodied therein. The supreme court and its justices, the governor, and the executive director of the general services commission are, when acting in their official or administrative capacities, the State. *See Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)) (“A suit against a state official in his official capacity ‘is not a suit against the official personally, for the real party in interest is the entity.’”). Such a suit actually seeks to impose liability against the governmental unit rather than on the individual specifically named and “is, in all respects other than name, . . . a suit against the entity.” *Id.*; *see also Texas Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 855-56 (Tex. 2002).<sup>5</sup> The legislature has decided that, as custodian of state property, the Facilities Commission has “charge and control of all public buildings, grounds, and property.” *See* Tex. Gov’t Code Ann. § 2165.001 (West 2008). Accordingly, the removal of the plaques at the behest of any of the appellees acting in their official, administrative, or representative capacities did not violate section 191.132 because their official status rendered them effectively acting for the State, the State is undisputedly the owner of the building, and the statute placed no restriction on the right of an owner to remove a historical marker from the owner’s property.<sup>6</sup> This is true even when the State is the owner.

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<sup>5</sup> Consistent with this, appellants’ suit is against the current officials, not the officials who made the decisions in 2000.

<sup>6</sup> This case is not controlled by Texas Government Code section 2166.5011. That section defines monument or memorial to include plaques located on state property and honoring a citizen of this state for military or war-related service. *See* Tex. Gov’t Code Ann. § 2166.5011 (West 2008).



Appellants contend that the installation of the new dedication plaque<sup>7</sup> without approval from the Texas Historical Commission violated the statute concerning construction on state land of monuments or memorials for “Texas heroes of the Confederate States of America,” among other events and persons of historical significance. *See* Tex. Gov’t Code Ann. § 2166.501(a) (West 2008). “Before the erection of a new monument or memorial, the [Texas Facilities Commission] must obtain the approval of the Texas Historical Commission regarding the form, dimensions, and substance of, and inscriptions or illustrations on, the monument or memorial.” *Id.* § 2166.501(d). The State argues that this statute does not apply to the new dedication plaque because it is not itself a new monument or memorial.

Upon its construction, the Supreme Court Building was expressly designated as a memorial to the Texans who served in the Armed Forces of the Confederate States of America. *See* Tex. Const. art. III, § 51-b. Although neither the old nor the new dedication plaques comprise the entire memorial, the new dedication plaque is new, it is an inscription, it is affixed to and on the memorial, and it is related to the memorial purpose.<sup>8</sup> The record indicates that, after

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The statute permits removal, relocation, or alteration only by the legislature, the Texas Historical Commission, or the State Preservation Board unless the removal, relocation, or alteration is made only to accommodate construction, repair, or improvements. *Id.* Section 2166.5011 does not apply to the actions in this case, however, because it was not enacted or effective until several months after the plaques were changed. *See* Act of May 15, 2001, 77th Leg., R.S., ch. 377, § 7, 2001 Tex. Gen. Laws 700, 703-04 (eff. Sept. 1, 2001).

<sup>7</sup> Because appellants expressly “have no dispute with, nor request removal of, the first of the two New Plaques regarding equal access to Texas courts,” we will constrain our review to the installation of the new dedication plaque.

<sup>8</sup> We note that the Supreme Court Building presents an atypical situation because of its dual-use nature. A classic monument or memorial is constructed with that single purpose, and inscriptions will tend to focus on that purpose. Here, the building is both a memorial and a

the removal of the original plaques, the new dedication plaque is the only plainly visible acknowledgment of the memorial nature of the building. We conclude, as a matter of law, that the new dedication plaque falls within the terms of government code section 2166.501 regulating the inscription of new memorials. Texas Historical Commission approval of the new dedication inscription was required. Appellees concede that they did not obtain that approval.<sup>9</sup>

We conclude that neither the Texas Constitution nor any cited statute prohibited appellees from removing the original plaques. We conclude, however, that the government code required that the appellees have the approval of the Texas Historical Commission before installing the new dedication plaque describing the memorial purpose of the Supreme Court Building. We affirm the trial court's grant of summary judgment to the appellees concerning the removal of the plaques. We reverse the trial court's grant of summary judgment to the appellees concerning the installation of the new dedication plaque. We also reverse the trial court's denial of appellants' request for attorneys' fees.<sup>10</sup> We render judgment declaring that the appellees' installation of the

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working court office and courtrooms. We constrain our holding to the inscriptions relating to the memorial purpose.

This opinion is limited to inscriptions related to the memorial purpose in dual-purpose structures. We offer no opinion on non-memorial inscriptions on dual-purpose structures.

<sup>9</sup> We need not consider whether appellees' installation of the new plaque without approval of the Texas Historical Commission also violated government code sections 442.006 and 2165.255 because, even if a violation were shown, the relief granted appellants would be no greater. *See* Tex. R. App. P. 47.1 (opinions should be as brief as practicable while addressing all issues raised and necessary to the final disposition of the appeal).

<sup>10</sup> Because the trial court denied appellants' request for attorneys' fees in the context of a denial of all of appellants' requested relief, we also reverse the denial of an award of attorneys' fees to appellants. We remand for the trial court to determine what award of attorneys' fees, if any, is equitable and just in light of our holdings and the further proceedings on the merits. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West 2008).

new dedication plaque without Texas Historical Commission approval violated Texas Government Code section 2166.501. We remand to the trial court for further proceedings consistent with this opinion and judgment.

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G. Alan Waldrop, Justice

Before Chief Justice Law, Justices Waldrop and Henson;  
Chief Justice Law not participating

Affirmed in part; Reversed and Rendered in part; Reversed and Remanded in part

Filed: March 26, 2010

