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RD-914

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Opinion Committee

FILE # ML-39031-96
I.D. # 39031

The Attorney General
State of Texas
Supreme Court Building
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for attorney general's opinion pursuant to V.T.C.A, Government Code, Section 402.043

Dear Sir:

I am requesting an attorney general's opinion pursuant to referenced statute.

I will first discuss the background, the issue presented, the law as I perceive it and then my conclusion.

BACKGROUND:

Frio County Sheriff Carl H. Burris had several opponents in the March, 1996, Democratic Primary Election and was forced into a Run-Off Election in April, 1996, wherein he prevailed over his opponent by 168 votes.

His opponent filed an election contest (see enclosed copy of Contestant's Original Petition) which Sheriff Burris answered (see enclosed copy of Contestee's Answer to Contestant's Amended Petition) and which I answered on behalf of the County Clerk (see enclosed copy). It is important to note that Frio county was not made a party to this lawsuit.

Several hearings were held before a visiting District Judge, the Hon. Ron Carr (see enclosed copy of court's docket sheet), and the lawsuit was resolved in favor of the incumbent Sheriff, Carl H. Burris, but the Judge explicitly refused to award attorney's fees to the prevailing party, the Sheriff.

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The attorneys for Sheriff Burris have now presented a claim to Frio County Commissioners Court seeking reimbursement for attorney's fees (see copy of FAXed letter to me, dated July 25, 1996, and my letter to the Frio County Judge and addressees requesting an agenda item for the Special Called Meeting of the Frio County Commissioners Court on July 29, 1996. At the Court's meeting on that date, the item was "tabled" pending research into the matter.

Additionally, prior to April 14, 1996, Frio County was participant in Texas Association of Counties County Government Risk Management Pool and the claims manager was Professional Claims Mangers, Inc., Dallas, Texas.

Professional Claims Managers, Inc., by letter dated April 29, 1996, (see enclosed copy), rejected Frio County's claim for two reasons: a) the claim was made outside of the coverage period; b) the insurance coverage did not apply

"to defense of, or attorney's fees for the non monetary **CLAIMS**, demand or actions seeking professional remedies, relief or redress inform other than money **DAMAGES**."

The County's present liability insurer, Frio County Insurance Agency, by and through its insurance agent verbally told me that his underwriter, Titan Indemnity and Insurance Company, San Antonio, Texas, would not reimburse the County for payment of the attorneys fees to the Sheriff's to attorneys in this lawsuit since this lawsuit did not pertain to any alleged wrongful acts during the course of and scope of the Sheriff's performance of his official duties.

In the attorney's aforementioned letter to me, he maintained that since the contestant in the lawsuit "attacked not only Carl Burris (Sheriff) but the County Clerk ***, the election supervisor *** and numerous other officials in his bid to over turn the election," (parenthetical insertion, mine), that he and co-counsel may recover in **quantum meruit** if "non payment for services rendered would result in an unjust enrichment to the party benefited by the work'." (citations omitted).

QUESTION:

Is the Frio County Commissioners Court on behalf of Frio County, Texas, authorized to pay attorney's fees for an elected county official who is a party to an election contest since attorney's fees were not awarded at the conclusion of the election contest hearing for the prevailing party?

THE LAW:

V.T.C.A., Civil Practices and Remedies Code, Section 102.002 permits but doesn't require a County or any other political subdivision to pay actual damages awarded against an employee in his personal or individual capacity as a result of acts occurring in the course and scope of his employment for which he was found liable as a result of negligence. However, I would argue this statute does not apply to this situation since it speaks only to employees, not elected officials, and it pertains to a finding of negligence and the award of actual damages which didn't occur as a result of the lawsuit.

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Nor does V.T.C.A., Local Government Code, Section 157.903 apply in this situation since no loss of money or damages to property occurring in the course of the official duties of the elected official was alleged.

Referring to David Brooks' two-volume treatise, County and Special District Law, Texas Practice, Section 2.28, "Legal Representation and Fees," Mr. Brooks cites numerous case authorities in which counties as well as its officials and employees were made party defendants of lawsuits. However, as stated before, Frio County itself was not made a party defendant in the election contest.

Broadly speaking, Chapter 38 of V.T.C.A., Civil Practices and Remedies Code would not be applicable to the facts of this situation as being applicable to the County since the County, as stated previously, was not a party-defendant in this lawsuit.

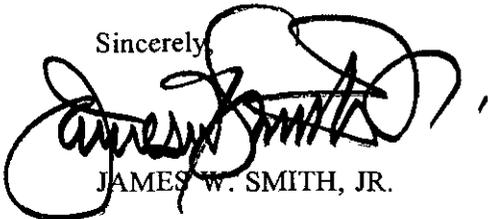
As to counsel's "quantum meruit" argument for reimbursement of attorney's fees from the County, there was never a prior contract either express or implied between counsel and the County for their employment to defend the Sheriff or anyone else in this lawsuit. Although it could be maintained that the County "benefited" by having the incumbent Sheriff prevail in the lawsuit and thus remain in office (there is no opponent for the General Election in November, 1996, for the office of Sheriff), the same could be said for the Sheriff's opponent in the Democratic Party Primary and Run-Off Elections, Mr. Villarreal, for the County would also have "benefited," by having him to be the Democratic Party's nomination for Sheriff in November, assuming if he prevailed and there was no opponent in that Election.

MY CONCLUSION:

Chp. 38, V.T.C.A., Civil Practices and Remedies Code, does not apply in this situation as to the County since the County was not made a party-defendant.

The "quantum meruit" argument fails, in my opinion, since there was no contract of employment with the County for counsel's legal services in defending the Sheriff in this lawsuit unless a theory of unjust enrichment on behalf of the County for preservation of the integrity of the Democratic Party Primary and Run-Off Elections can be found since it is conceivable if Contestant Villarreal had prevailed the Court could conceivably ordered a new election for not only the Office of Sheriff but for all offices listed on the ballot. This latter argument (ordering new elections) was made by one of the counsel's associates (although not himself an attorney of record in the election contest) at the Court's Special Called Meeting on July 29th, last.

Sincerely,



JAMES W. SMITH, JR.

JWSJr/ymm

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