

FALL 2012 NEWSLETTER

Local Government Case Law Update

by Laura O'Leary

SUPREME COURT OF TEXAS

1. *Texas Dep't of Transp. v. Perches*, 56 Tex. Sup. Ct. J. 109, 2012 Tex. LEXIS 973 (Tex. Nov. 16, 2012).

Although an off-road condition can constitute a special defect for which the state's sovereign immunity is waived by the Texas Tort Claims Act (TTCA), conditions may be considered special defects only when they pose a threat to the ordinary users of a particular roadway. Guardrails placed in accordance with the roadway design plan do not pose such a threat and therefore cannot constitute a special defect under the TTCA.

Perches died after his car crashed through a permanently installed guardrail and fell twenty feet onto another roadway. His estate sued TxDOT and others, claiming negligent maintenance and implementation of the roadway and traffic control devices. TxDOT asserted immunity under the TTCA, but the district court and the appeals court held that Perches had asserted sufficient facts to establish a waiver of immunity with respect to Perches' claim that the guardrail was a special defect.

The Court exercised jurisdiction over TxDOT's interlocutory appeal in order to address a conflict among the courts of appeal as to whether a guardrail may constitute a special defect giving rise to governmental liability under the TTCA. The Court noted that the Act does not define "special defect" but likens it to conditions such as excavations or obstructions on a roadway. *Id.* at *6. An obstruction would impede or hinder travel on a roadway. The Court held that because a properly placed guardrail does not impede travel or otherwise block the road for an ordinary user in the normal course of travel, it does not constitute a special defect under the TTCA. Perches had therefore failed to plead sufficient facts demonstrating a waiver of immunity, and the Court dismissed Perches' TTCA claims against TxDOT.

2. *Rusk State Hosp. v. Black*, 55 Tex. Sup. Ct. J. 1320, 2012 Tex. LEXIS 731 (Tex. Aug. 31, 2012).

A governmental entity may raise an immunity argument for the first time in the court of appeals, however, such a case will be remanded to the trial court unless the governmental entity can conclusively show either: 1) the plaintiff's pleadings or the record conclusively negate jurisdiction; 2) the plaintiff had a full and fair opportunity in the trial court to develop the record and amend his pleadings to show jurisdiction yet failed to do so; or 3) the plaintiff could not show jurisdiction even if the case were remanded to the trial court and the plaintiff was given the opportunity to develop the record and amend his pleadings.

This case arose in the context of a wrongful death suit against a state hospital. Plaintiffs sued claiming that the hospital had created an inherently dangerous condition of tangible personal property when it permitted a psychiatric patient access to a plastic bag which the patient used to commit suicide. On appeal, the hospital argued that no waiver of its immunity had occurred and requested dismissal for lack of subject matter jurisdiction.

The Court found that the hospital had not shown conclusively that the plaintiffs had received a full and fair opportunity in the trial court to develop the record as to jurisdiction and amend their pleadings or that plaintiffs would be unable to show jurisdiction. Accordingly, the Court remanded the case for development of the record concerning jurisdiction.

TEXAS COURTS OF APPEALS

- 1. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Baker*, No. 14-11-01037-cv, 2012 Tex. App. LEXIS 10007 (Tex. App.—Houston [14th Dist.] Dec. 4, 2012, no pet. h.).**

The Court remanded a case for further development of the question of jurisdiction when the governmental entity appealed the trial court's denial of its plea to the jurisdiction and raised the issue of governmental immunity for the first time on appeal.

Baker, an employee of the hospital, claimed that a machine on which he worked lacked integral safety components to protect against lead dust exposure and that both he and his children were injured by lead dust which clung to his clothing after his use of this machine. The hospital filed a plea to the jurisdiction which the trial court denied. On appeal, the hospital argued that there had been no waiver of immunity and therefore the Court lacked jurisdiction.

Following the Texas Supreme Court's recent holding in *Rusk State Hosp. v. Black*, the court permitted the defendant to raise the issue of immunity on appeal and remanded the case for further development of the question of subject matter jurisdiction.

- 2. *Gibson v. Garland Indep. Sch. Dist.*, 378 S.W.3d 613 (Tex. App.—Dallas Aug. 27, 2012, no pet.).**

There was no waiver of immunity when a student was injured while participating in a mandatory emergency exit drill on a stopped school bus because this didn't constitute "use" of a motor vehicle within TTCA.

A student was injured when he jumped from the rear exit of a parked school bus during a mandatory emergency exit drill. He brought suit claiming that his injury arose from the operation or use of a motor-driven vehicle and that governmental immunity was waived under §101.021 and §101.051 of the TTCA.

The Court rejected the student's claim explaining that because the bus was turned off and was not moving during the emergency exit drill, the injury did not arise from the operation or use of a motor-driven vehicle; the bus was merely the setting for the injury. The Court stated that "when the injuries arise from an employee's acts or omissions involving only supervision or control of children, immunity has not been waived even if the acts took place on or near the bus." *Id.* at 618 (citing *Breckenridge Indep. Sch. Dist. v. Valdez*, 211 S.W.3d 402, 408 (Tex. App.—Eastland 2011, no pet.)).

Justice Murphy filed a dissent in which she argued that the student had pleaded a waiver of immunity as to use of the school bus pursuant to the Court's prior reasoning and holding in *Dallas Area Rapid Transit v. Willis*, 163 S.W.3d 814, 817 (Tex. App.—Dallas 2005, pet. denied), in which the Court found a waiver of immunity when a passenger was injured when exiting a city bus that had been stopped too far from the curb.