

## **SPRING 2013 NEWSLETTER**

### **LOCAL GOVERNMENT CASE LAW UPDATE**

**By Stephen D. Henniger**

***University of Texas Health Science Center v. DeSoto*, 2013 Tex.App. Lexis 2950 (Tex.App-Houston [14<sup>th</sup> Dist.], March 21, 2013)**

In this medical malpractice case against the University of Texas Health Science Center at Houston (“UTHSCH”) the Fourteenth District Court of Appeals considered whether a non-negligent use of non-defective property can satisfy the governmental immunity requirements found at §101.021(2) of the Texas Tort Claims Act. The Fourteenth Court of Appeals confirmed that it is only negligent uses of property, or uses of defective property, that can form the basis of a claim against a governmental entity under §101.021(2).

Plaintiff was a patient at UTHSCH who underwent a spinal surgical procedure. To perform the procedure, it was necessary for certain organs to be retracted out of the way so that the spine could be accessed. In the course of doing this properly, there was a small nick inflicted on one of the patient’s ureters. The surgeon performing the spinal procedure elected not to contact a urologist specialist to remedy this condition, but instead had it addressed by another surgeon on hand. Following the surgery, complications arose as a result of the improper treatment of the nick on the ureter, ultimately necessitating the removal of the patient’s kidneys.

The plaintiff sued the hospital, alleging that its governmental immunity had been waived under §101.021(2) of the Texas Tort Claims Act, the section waiving immunity for claims arising from the use or misuse of tangible personal or real property. UTHSCH filed a plea to the jurisdiction, which the District Court denied, and the hospital took an interlocutory appeal of the denial of the plea.

On appeal, UTHSCH claimed that plaintiff had failed to state a claim within the Texas Tort Claims Act’s waiver of immunity as there was no allegation of a negligent use of surgical instruments, or that the surgical instruments used were defective. As such, the hospital claimed that plaintiff’s claims were actually based on alleged improper medical judgments made by the surgical team in how to treat the nick on the ureter. In response, plaintiff conceded that it was not alleging that there had been any negligent use of surgical equipment, nor that the surgical equipment was defective. Plaintiffs argued, however, that the claim still arose out of the use of the surgical instruments, in that they were directly involved in the events leading to the injury, and that the claim therefore fell within §101.021(2).

The Fourteenth Court of Appeals rejected the plaintiff’s contention and reversed the judgment of the trial court that had denied the plea to the jurisdiction. Citing prior precedent that property does not cause an injury if it does nothing more than furnish the condition that makes an injury possible, or if it serves as part of a sequence of events leading to an injury,

the Fourteenth Court of Appeals held that only *negligent* use or misuses of tangible personal property, and/or defective property can support a cause of action under §101.021(2) of the Texas Tort Claims Act. The plaintiff was not claiming any negligent use or misuse of property, nor that any property was defective, but was instead taking issue with the medical judgments made by the surgical team in deciding how to treat a condition discovered during the surgery. Immunity is not waived for such causes of action.

***University of Texas at Arlington v. Williams*, 2013 Tex.App. Lexis 3985 (Tex.App.—Ft. Worth, March 28, 2013)**

In this case, the Second Court of Appeals found that attending and exiting a sporting event is not conduct that falls within the Recreational Use Statute found in the Texas Practice & Remedies Code §75.001, *et. seq.*. The court further found that a governmental entity has sufficient notice under the Texas Tort Claims Act of a claim by a person when the claim is derivative of the claim of a spouse who has given proper notice under the Texas Tort Claims Act.

In this case, the plaintiffs attended their daughter's high school soccer game at the University of Texas at Arlington's Maverick Stadium. After the game, plaintiff Sandra Williams walked down the stadium stairs to wait for her daughter. She stopped next a gate that had a chain and padlock, and placed her hand on the gate. When she did so, the gate swung open and she fell approximately five feet onto the track below, breaking her left arm and a rib.

Sandra Williams and her husband sued the University of Texas at Arlington, alleging that the swinging gate was inadequately secured and constituted a premises defect. Sandra brought claims for her personal injuries, and Steve Williams asserted a claim for loss of consortium.

The University filed a Plea to the Jurisdiction and Motion to Dismiss, asserting that attending a sporting event is a recreational use governed by the Recreational Use Statute. As such, the University owed the plaintiffs only the duty owed to a trespasser to not injure them by gross negligence, malicious intent, or bad faith. The University contended the plaintiffs had no evidence of such conduct and therefore the case should be dismissed. The University further moved for dismissal of plaintiff Steve Williams' claims, as he had not provided the University of notice of claim under §101.101 of the Texas Tort Claims Act. The District Court denied the University's plea, and the University filed an interlocutory appeal.

On Appeal, the Second Court of Appeals affirmed the District Court. First, the Court found that a person's purpose in entering a sporting facility is not controlling in determining if a claim falls within the Recreational Use Statute. Rather, it is what the person is doing when they are injured that controls whether a claim is governed by that statute. Plaintiff Sandra Williams was not playing soccer, nor did she enter the facility to play soccer when she was injured. Rather, she had entered the stadium for the purpose of watching a soccer game, and was exiting the premises after having viewed that soccer game when she was injured. The Court found that neither spectating a sporting event, nor exiting after spectating a sporting event is like the activities listed as recreational under the Recreational Use Statute. Further,

spectating a sporting event does not fall within the Recreational Use Statute's catch-all definition of "any other activity associated with enjoying nature or the outdoors." The court found that spectating a soccer game and departure from a stadium after spectating the game are not associated with nature or the outdoors, but are associated with enjoying a sporting event. As such, the Court held that plaintiffs' claims were not governed by the Recreational Use Statute.

In regards to the notice of claim issue, the Court cited longstanding precedent holding that the notice provision of the Tort Claims Act requires the governmental unit to receive notice of the damage or injury claimed, the time and place of the incident, and a description of the incident. Further, if the governmental unit receives constructive or actual notice, rather than formal written notice, it must further receive information advising of its potential fault. Thus, Plaintiff Steve Williams would not be required to provide formal notice to the University if it had actual notice of the damage or injury claimed, the incident giving rise to the injury or damage, the time and place of the incident, as well as subjective awareness as well of its potential fault. It was undisputed that plaintiff Sandra Williams had provided the University with formal notice of her claims in full compliance with §101.101 of the Texas Tort Claims Act. The University had therefore been put on notice of all the information required by the statute, and that Sandra Williams was asserting that the University was potentially at fault for her injuries. The Court held that if the University was on notice of Sandra's injury and its potential fault for it, than it was on notice of Steve Williams' injury as well, as the loss of consortium claim is derivative of plaintiff Sandra Williams' injuries.

***Hopkins v. Strickland*, 2013 Tex. App. Lexis 2982 (Tex. App.-Houston [1<sup>st</sup> Dist.], March 21, 2013)**

In this case by a former police chief against the mayor of a municipality, the 1<sup>st</sup> District Court of Appeals considered whether allegations of slander and malicious prosecution could be subject to the immunity provided by §101.106(f) of the Texas Tort Claims Act.

Plaintiff was the former police chief of Liverpool, Texas, who retired shortly after the Defendant was elected mayor. Plaintiff then sought employment as police chief at the nearby city of Danbury. Danbury's mayor spoke to the Defendant and met with him on another occasion to discuss the Plaintiff's qualifications for employment. Plaintiff alleges that during those conversations, the Defendant defamed him by reporting that Plaintiff was dishonest, non-proficient, and not capable of doing the job of police chief.

Additionally, at around the same time, the Liverpool City Council authorized the Defendant to institute collection efforts to recover funds that had been improperly paid to a former City of Liverpool employee. The Defendant met with a representative of the Brazoria County District Attorney's office to discuss the issue, and, in the course of that conversation, allegedly discussed the possibility of pursuing criminal charges against the Plaintiff for misappropriation of city funds.

Plaintiff sued Defendant alleging causes of action for slander and malicious prosecution.

Defendant filed a plea to the jurisdiction, asserting he was entitled to the immunity provided by §101.106(f) of the Texas Tort Claims Act. That section provides that if a suit is filed against a governmental employee based on conduct within the general scope of the employee's employment, and if it could have been brought "under this chapter" against the governmental unit, then the suit is considered to be against the employee in the employee's official capacity only. Upon motion by the employee, the suit is to be dismissed unless the plaintiff amends his pleadings to assert the claim against the governmental unit employing the person within 30 days after the motion to dismiss is filed. The trial court denied the pleas to the jurisdiction, and the Defendant filed an interlocutory appeal.

The 1<sup>st</sup> District Court of Appeals noted that scope of employment is defined by the Texas Tort Claims Act as the performance for a governmental unit of the duties of an employee's office or employment, and includes being in and about the performance of a task lawfully assigned to the employee by competent authority. See Civ. Prac. Rem. Code §101.001(5). The Court also noted that even if an act is allegedly wrongly or negligently performed, it can still be within the scope of the person's duties and employment, so long as the general nature of the action was one related to the performance of the employee's job. The Defendant asserted that as mayor that he was the chief executive officer of the City and had a statutory duty to supervise subordinate municipal officers, as well as a duty to remedy any alleged negligence, carelessness, or other violations of duty by those officers. Defendant contended that in speaking to the mayor of Danbury about the Plaintiff, he was responding to routine employment verification requests and information regarding a former employee that are generally within the scope of his duties as the mayor. Further, consulting with the District Attorney's office about a possible misappropriation of city funds by a former Liverpool employees falls within the general scope of a mayor's duties to supervise subordinate officers and remedy acts of negligence, carelessness, or violations of duty. The 1st Court of Appeals held that the actions of the Defendant were thus within the general scope of his duties as mayor of the City of Liverpool.

In regards to the second inquiry under §101.106(f), whether suit could have been brought against the governmental unit under the Texas Tort Claims Act, the Court noted that this was satisfied as well. The Court recognized that the Plaintiff's causes of action for slander and malicious prosecution were intentional torts for which the City of Liverpool would be immune. However, the Court held that "all common law tort theories alleged against a governmental unit, even if not waived under the Tort Claims Act, are assumed to be 'under the Tort Claims Act', because it is the Act that delineates governmental tort liability." Accordingly, the Court held that the Plaintiff's suit against the Defendant involved actions within the general scope of the Defendant's employment, and could have been brought under the Tort Claims Act for purposes of §101.106(f). The Court therefore reversed the district court and granted the plea to the jurisdiction, dismissing the claims against Defendant.