

## FALL 2013 NEWS LETTER

### LOCAL GOVERNMENT CASE LAW UPDATE

By: Stephen D. Henninger

1. ***Lone Star College System v. Immigration Reform Coalition of Texas*, 2013 Tex. App. LEXIS 12922 (Tex. App. [14<sup>th</sup> Dist.] October 17, 2013).**

This is a case asserting declaratory judgment and *ultra vires* claims against the Lone Star College System and its' Chancellor Richard Carpenter. The plaintiff was a public interest group known as the Immigration Reform Coalition of Texas (IRCOT). IRCOT brought claims under the Uniform Declaratory Judgment Act against the Lone Star College System and its Chancellor Richard Carpenter, in his official capacity, seeking a declaration that the College System was improperly providing education grants to illegal aliens in the State of Texas, and that State statutes state the authorizing such grants were pre-empted by Federal law. The suit specifically sought a declaratory judgment that illegal aliens were not eligible for State student financial aid and that the provisions of Texas law authorizing such aid were pre-empted and void, and further sought an order enjoining the defendants from providing any further financial aid to such persons. The College System and Chancellor, in his official capacity, sought dismissal pursuant to a Plea to the Jurisdiction, alleging that governmental immunity deprived the court of jurisdiction of the claims against them.

First, the Houston Court of Appeals affirmed prior precedent that the Uniform Declaratory Judgment Act constitutes a waiver of governmental immunity for claims challenging the validity of ordinances or statutes. The court explained that the Declaratory Judgment Act permits statutory challenges to legislation and, because governmental entities may be bound by the resolution of those challenges, the Declaratory Judgment Act, by definition, contemplates that governmental entities may be joined in declaratory judgment lawsuits.

The court went on to hold that claims against officials in their official capacity alleging *ultra vires* acts are also not subject to pleas of governmental immunity. The court explained that *ultra vires* suits are based upon the contention that a government official acted without legal authority, or seek to compel governmental officials to comply with duties about which they have no discretion. As such, *ultra vires* claims are not subject to pleas of governmental immunity. To fall within the *ultra vires* exception, a claim must not involve a complaint about a government officer's exercise of discretion, but rather must allege, and prove, that an officer acted without legal authority or failed to perform a purely ministerial act. Further, such claims must seek only prospective declaratory or injunctive relief restraining future improper conduct, not any retroactive relief.

**2. *Franks v. Zwicke*, 2013 Tex.App. LEXIS 4780 (Tex.App. San Antonio, April 17, 2013)**

Plaintiff was arrested by several members of the Guadalupe County Sheriff's Department while attempting to break into a county facility. In the course of the arrest, he alleged he was assaulted and sustained personal injuries. Plaintiff brought suit against Guadalupe County Sheriff Arnold Zwicke and individual deputies of the Sheriff's Department. His suit did not specify whether he was suing the Sheriff and deputies in their official or individual capacities.

The Sheriff and four deputies filed a Plea to the Jurisdiction, asserting the claims against them were barred by governmental immunity. The trial court agreed, and Plaintiff appealed. The San Antonio Court of Appeals held that, under §101.106(f), when a plaintiff brings suit against a governmental employee for acts the employee's scope of employment, the suit is considered to be one against the employee in their official capacity. Thus, by operation of law, Plaintiff's suit was considered to be against the five county employees in their official capacities. Further, suits against governmental employees in their official capacity are considered to be suits against the governmental entity by which the individual is employed. Therefore, such individuals can assert the defense of governmental immunity in such lawsuits.

The court held that Plaintiff's suit was properly dismissed because the petition did not allege a clear and unambiguous waiver of governmental immunity allowing the suit to proceed. Further, the court went on to note that, even if the Plaintiff had properly invoked the limited waiver of immunity provided by the Texas Tort Claims Act, dismissal would still be warranted as Plaintiff's claims all concerned alleged intentional torts, for which the Texas Tort Claims Act does not waive governmental immunity. See Texas Tort Claims Act, §101.057(2).

**3. *City of Houston v. Cogburn*, 2013 Tex.App. LEXIS 2827 (Tex.App. Houston [1<sup>st</sup> Dist.] March 19, 2013)**

This was a suit alleging a special defect cause of action against the City of Houston. Plaintiff had parked his car at a city parking meter on a street in Houston. While returning to his car after putting money in a parking meter, Plaintiff tripped and fell over exposed tree roots, pipes, and other material caused by excavation and maintenance work that the City had performed. Plaintiff sustained a broken femur and knee injuries, and sued the City alleging that immunity had been waived under §101.022(b), in that the excavated area and exposed roots constituted a "special defect". The City filed a Plea to the Jurisdiction on the basis of governmental immunity which was denied by the trial court, and the City appealed.

First, the Houston Court of Appeals found that the Plaintiff had sufficiently pled a cause of action for special defect under §101.022(b) of the Texas Tort Claims Act. The court noted that special defects are defined as defects such as excavation or obstructions on highways, roads, or streets. While the area where the Plaintiff tripped and fell was not technically on a roadway, it nonetheless was in an area that users of the road and parallel sidewalk could be expected to use. As such, citing to previous authority holding that conditions in areas immediately abutting roadways can constitute special defects, as long as the location is one that pedestrians can be

expected to use, the Court of Appeals found that the condition at issue qualified as a special defect.

There was an additional dispute over whether the Plaintiff had properly alleged that the area in question was owned or controlled by the City of Houston. While there was conflicting evidence regarding whether the real property at issue was owned by the City or another, private-sector defendant, the Court of Appeals ultimately held that Plaintiff had adequately pled that the City exercised control over the site by placing a parking meter at the location and requiring persons who wished to use the parking space to traverse the area to pay the parking meter. The City also claimed that tree roots were a naturally occurring condition which cannot, as a matter of law, constitute a special defect. The court rejected this assertion, noting that Plaintiff was alleging the hazard was created by tree roots that had been excavated by the City, rather than being at the site in their natural state. Additionally, Plaintiff claimed that there were other non-natural materials at the site, such as pipes and other debris.

Finally, the City argued that because tree maintenance is a discretionary act, its immunity was not waived by virtue of §101.056 of the Texas Tort Claims Act, which retains governmental immunity for any claims based upon discretionary acts of governmental entities. The Court of Appeals disagreed, citing long-standing precedent that §101.022 of the Texas Tort Claims Act is an exception to the rule that a governmental entity has immunity from claims based upon discretionary acts. Even if a particular function is discretionary, if the government's exercise of that function results in a hazardous condition, then the legal obligation arises to warn of that hazard, in accordance with the provisions of §101.022. The Court of Appeals therefore affirmed the trial court's denial of the City of Houston's Plea to the Jurisdiction.