

## **2013 YEAR IN REVIEW**

### **SIGNIFICANT DECISIONS IN 2013:** **LOCAL GOVERNMENT CASE LAW UPDATE**

**By Stephen D. Henninger**

***University of Texas M.D. Anderson Cancer Center v. Vicki M. King*, 2013 Tex. App. Lexis 7861 (Tex. App. – Houston [14<sup>th</sup> Dist.] June 27, 2013)**

In this negligence case against the University of Texas M.D. Anderson Cancer Center (“MDA”), the Fourteenth District Court of Appeals in Houston considered whether a hospital’s decision to raise some, but not all, guardrails on a hospital bed could support a claim for liability against MDA under the Texas Tort Claims Act. Finding that such claims attempted to impose liability on MDA for the exercise of medical judgment for which it is immune, the Fourteenth Court of Appeals held that the District Court had erred in denying MDA’s Plea to the Jurisdiction.

Plaintiff was a patient at MDA who sustained a broken arm and torn rotator cuff when she fell out of her hospital bed while undergoing chemotherapy. The hospital bed was equipped with four sets of side rails. The two upper rails, which were to the sides of the Plaintiff’s head and upper torso, were raised, while the two lower rails, near the Plaintiff’s legs, were not raised. Plaintiff claimed that MDA’s immunity had been waived under the Texas Tort Claims Act as her suit stated a claim for personal injuries “caused by a condition or use of tangible personal or real property”, under §101.021(2) of the Texas Tort Claims Act. In support of her argument, Plaintiff cited to three cases, on almost identical facts, which had equated a hospital’s failure to raise all guardrails on a hospital bed with claims in which governmental units had provided personal property lacking an integral safety component. Such claims have historically been held to fall within the Texas Tort Claim Act’s limited waiver of immunity.

The Fourteenth Court of Appeals, however, distinguished the instant case from those prior cases. What was critical in this case, unlike the other cases, was that the jurisdictional evidence presented by MDA established that the decision to raise some of the guardrails on the bed, rather than all of them, had been made by the nurses after assessing various risks and medical factors when Plaintiff was placed in the bed. Thus, the Fourteenth Court of Appeals held that Plaintiff’s complaint was really taking issue with MDA’s nurses’ exercise of medical judgment in determining how Plaintiff should be placed in the bed and what level of protection should be provided. Citing prior Supreme Court precedent, the Fourteenth Court of Appeals held that governmental immunity is not waived for such causes of action. The court stated “a complaint that the state actor should have chosen a more effective treatment or protection – that ‘more should have been done’ – is not a complaint about the use of property”. The Fourteenth Court of Appeals therefore reversed the district court’s denial of MDA’s Plea to the Jurisdiction and entered judgment dismissing Plaintiff’s claims.

***Redburn v. Charmelle Garrett, et al*, 2013 Tex. App. Lexis 6005 (Tex. App. – Edinburg, May 16, 2013)**

In this case, the court considered the applicability of Texas Tort Claims Act §101.106(f) to claims of trespass against two City of Victoria employees. The Plaintiff in the case was the purchaser of real property on which a City-owned culvert was located. Without the City's consent, Plaintiff plugged the culvert with concrete. Thereafter Plaintiff filed suit against City officials Charmelle Garrett and Lynn Short to enjoin them from entering his property to repair the culvert, on the basis that the repairs would result in the City trespassing on the Plaintiff's property.

The City of Victoria filed an Answer on behalf of Garrett and Short, as well as a Plea to the Jurisdiction, asking the court to dismiss the claims against them on the basis of §101.106(f) of the Texas Tort Claims Act. That section provides that if a suit is filed against an employee of a governmental unit based on conduct within the scope of the employee's duties, and the suit could have been brought against the government, then the suit is to be considered against the employee only in their official capacity, and should be dismissed upon motion of the government, unless the plaintiff files an amended pleading dismissing the employee and naming the governmental unit as a defendant.

The Victoria Court of Appeals noted that the Texas Supreme Court in *Frenka v. Valascos*, 332 S.W.3d 367 (Tex. 2011) had established two conditions for the §101.106(f) bar to apply. First, the actions giving rise to the suit against the employee must have been within the employee's general scope of employment. Second, the suit against the employee must be one that could have been brought under the Texas Tort Claims Act. In regards to the first element, the Plaintiff claimed it was not met because he was bringing a claim of trespass, an intentional tort, and intentional torts are not within an employee's scope of employment. The Court of Appeals rejected this argument noting that an employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve the purpose of the employer. In this case, although the Plaintiff did allege trespass, he did not allege any independent course of conduct by the city employee that was not intended to serve any purpose of the city. To the contrary, Plaintiff's pleadings established that Garrett and Short were attempting to enter Plaintiff's property on the business of the city and with the city's consent and sanction. As such, while plaintiff wished to characterize the actions as a "trespass", they were not being undertaken without the authorization of the City. As such, they were within the employee's scopes of employment.

In regards to the second element, it was also met. Citing again to *Frenka*, the Victoria Court of Appeals held that, for purposes of §101.106(f), a suit "could have been brought under the Tort Claims Act" anytime it sounds in tort and not under another statute that independently waives immunity. Trespass is a tort claim, and all tort claims arise under the Texas Tort Claims Act. Further, it does not matter if the Act does not waive immunity for the particular tort claim being alleged. The only question is whether it is a tort claim that would have to be brought under the Tort Claims Act. Plaintiff's trespass claim was such a cause of action. Therefore, the second element was met, and §101.106(f) barred the suit against the individual employees.

***City of Texas City v. Suarez*, 2013 Tex. App. Lexis 2272 (Tex. App. Houston [1<sup>st</sup> Dist.] March 7, 2013)**

In this negligence case the First District Court of Appeals considered an attempted premises/special defect claim asserted against the City of Texas City. The case involved a drowning that had occurred at the Texas City Dike, a five mile long manmade structure surrounded on three sides by Galveston Bay. The Dike had been deeded to the City of Texas City in 1931 for public purposes. In 1963, the Legislature allowed the dike to be used for recreational purposes, and visitors began engaging in activities such as boating, fishing, picnicking, and swimming. There is an asphalt road running the length of the Dike and it also contains boat ramps, parking areas, and picnic shelters. It is owned, maintained, and operated by Texas City.

The Dike was heavily damaged during Hurricane Ike, including the loss of several warning signs regarding water hazards such as undertows, rip currents, wakes, and sinkholes. When the dike was re-opened following repairs, approximately two years after the hurricane, some, but not all, of the warning signs had been replaced. There were signs, however, at two of the boat ramps warning in Spanish that there should be no swimming, and warning in English of undertow and wakes from passing ships.

On Sunday, October 3, 2010, the Suarez family visited the Dike. Two of the children went swimming and shortly after entering the water were pulled away by strong currents and drowned, as was the father who attempted to rescue them. The surviving wife and mother filed a wrongful death and survival action against the City, alleging negligence claims based on special defect and premises defect, as well as claims of gross negligence and attractive nuisance. The City filed a Plea to the Jurisdiction alleging that it was entitled to immunity. The trial court denied the plea and the City filed an Interlocutory Appeal to the First District Court of Appeals.

The case decided several issues regarding governmental immunity and premises/special defect liability under the Texas Tort Claims Act. First, the Plaintiff claimed that the Texas Wrongful Death Statute waived the City's governmental immunity, as it expressly applied to "persons", which are defined to include municipal corporations. The First Court of Appeals rejected this contention, noting that the Wrongful Death Statute expressly states that it applies only if the deceased individual would have been entitled to bring an action for the injury if the individual had lived. An person is only entitled to bring an action against a municipal corporation if that individual can satisfy the requirements of the Texas Tort Claims Act. Thus, the Wrongful Death Statute does not itself waive immunity, and a claimant must still satisfy the requirements of the Texas Tort Claims Act.

In response to the Plaintiff's argument that the operation and the maintenance of the Dike was a proprietary, rather than governmental function, the court noted that the Texas Tort Claims Act specifically identifies "recreational facilities, including but not limited to swimming pools, beaches, and marinas" as governmental functions. The court found that the Dike at issue in this case clearly fit within the definition of a recreational facility.

The court then went on to note that premises and special defect claims under the Tort Claims Act are modified in claims to which the Recreational Use Statute, applies. The Recreational Use Statute, Texas Civil Practice and Remedies Code §75.001, *et. seq.* is a provision limiting a governmental unit's liability as a premises owner when a plaintiff engages in recreation on the premises at issue. The statute specifically provides that it controls over Chapter 101 of the Texas Tort Claims Act. The statute states that a governmental unit's liability to a claimant when an injury or death occurs on government-owned, recreational land is that owed to a trespasser. This requires a plaintiff to show gross negligence, malicious intent, or bad faith.

The Plaintiff did not allege malicious intent or bad faith, therefore the issue of whether sufficient jurisdictional facts had been alleged depended on whether Plaintiff had stated a claim for gross negligence. The Plaintiff's petition alleged that the City was grossly negligent based upon its actual knowledge of dangerous currents and an unstable bottom around the beach area, knowledge further demonstrated by other drownings and swimming incidents, and the City's previous installation of warning signs. The First Court of Appeals noted that Plaintiff's petition did not contain allegations that the City had knowledge of unique dangers from a combination of natural conditions and manmade conditions. This was significant. Prior Supreme Court precedent has established that landowners under the Recreational Use Statute have no duty to protect or warn against the dangers of natural conditions on the land. This is distinguished from dangerous conditions created by manmade conditions, or a combination of natural conditions and manmade conditions, which the owner of recreational land does have a duty to warn of. The Plaintiff in this case was unable to come forward with any evidence demonstrating the City had actual knowledge of unique dangers posed by manmade conditions, or a combination of manmade and natural occurring conditions. At best, Plaintiff put forward evidence implying some notice of dangers from natural conditions, of which, as a matter of law, the City was under no obligation to warn. Accordingly, Plaintiff had failed to allege sufficient jurisdictional facts, and Texas City was entitled to governmental immunity from Plaintiff's claims.

***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 on 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.