

## **SPRING 2014 NEWS LETTER**

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

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*Perry v. Brazoria County*, 2014 Tex. App. LEXIS 3363 (Tex. App. – Houston [1<sup>st</sup> District] March 27, 2014)

This is a case involving premises and special defect causes of action against Brazoria County. Plaintiffs had been driving on a road and were attempting to cross an area where there had been a bridge. However, the bridge was being replaced and had been removed. Just prior to the incident there had been severe storms that had blown away all warning signs that had been placed in the area. The Plaintiffs drove off the missing bridge and sustained injuries.

Plaintiffs subsequently brought suit against the County, alleging claims under Section 101.021(2) of the Texas Tort Claims Act (which deals with claims arising from conditions or uses of tangible, personal or real property) and also asserting claims for premises and special defects.

Brazoria County filed a plea to the jurisdiction claiming that its immunity had not been waived for Plaintiff's claims. Specifically, Brazoria County pointed to an advance funding agreement between the County and the Texas Department of Transportation. ("TxDOT") which provided that TxDOT would be in charge of the reconstruction process for the bridge, and that it would contract much of the work out to third parties. Brazoria County pointed to this evidence as proof that no Brazoria employees or agents were involved in the construction project. As a result, the County contended that Plaintiff's pleadings did not allege, and the Plaintiffs could not prove, that their injuries were caused by any wrongful act or omission of a County employee. The County argued that such involvement by a County employee is required under Section 101.021(2), just as it is for claims involving the use or operation of motor vehicles under Section 101.021(1). The District Court granted the plea to the jurisdiction and Plaintiffs appealed.

The Houston Court of Appeals reversed the District Court and remanded the case for further proceedings, finding that the plea to the jurisdiction was improperly granted. The Court found that Section 101.021(1) expressly requires involvement of a governmental employee for immunity to be waived. Section 101.021(2), however, is silent on that issue. Prior Texas Supreme Court precedent, however, establishes that claims based upon conditions of tangible real property, as opposed to personal property, do not depend upon *respondeat superior* principles that require County employee involvement. Rather, claims involving conditions of real property are premises/special defect claims that controlled by Section 101.022, and do not necessarily require any direct County employee involvement. Consequently, claimants alleging premises defect or special defect claims are not required to plead that a wrongful act or omission of a governmental employee to properly plead a cause of action under the Tort Claims Act. The Court of Appeals reversed the granting of the plea to the jurisdiction and remanded the case back to the District Court.

***Rolling Plains Management Corporation of Baylor v. Hobbs***, 2014 Tex. App. LEXIS 3090  
(Tex. App. – Ft. Worth, March 20, 2014)

This is a case involving the sufficiency of actual notice of a potential claim under Section 101.101(c) of the Texas Tort Claims Act. Defendant Rolling Claims Management Corporation is a rural public transportation provider that qualifies as a governmental entity. Plaintiff was a passenger on a minibus operated by the Defendant that rear-ended another vehicle. As a result of the collision, the Plaintiff was thrown from her seat onto the floor of the bus. It was undisputed that the driver of the bus saw the Plaintiff thrown from her seat, and even described it in an accident report as her “flying to the front” of the bus following impact. Further, the driver admitted she asked another Rolling Plains employee who had arrived on the scene to call 911 for an ambulance, and that she did so to verify that the Plaintiff had not been injured. An ambulance arrived at the scene and transported the Plaintiff to the hospital. Representatives of Defendant called the hospital and learned that the Plaintiff would be discharged later in the day. Defendant claimed that the hospital did not mention that Plaintiff had sustained any specific injuries. Additionally, another driver of Defendant took the Plaintiff home from the hospital and that driver did not mention to supervisory staff of Defendant that the Plaintiff had sustained any injuries. The accident file maintained by Defendant contained a Texas Peace Officers Crash Report that placed fault of the accident on Defendant, and also indicated that the Plaintiff was taken by ambulance to the hospital.

The Plaintiff did not file a formal notice of claim within six months of the incident with Defendant. After the lawsuit was filed, Defendant filed a plea to the jurisdiction, asserting that the claim should be dismissed because it did not have sufficient actual notice of the claim under 101.101(c) of the Texas Tort Claims Act. The District Court denied the plea, and Defendant appealed.

On Appeal, the Second Court of Appeals from Fort Worth affirmed the decision of the District Court denying the plea to the jurisdiction. First, the Court noted that the notice requirements of the Texas Tort Claims are jurisdictional. It was undisputed that formal notice had not been provided, therefore, the sole issue on appeal was whether Defendant had received sufficient actual notice to satisfy Section 101.101(c). Defendant did not dispute that it was aware of the accident and the parties involved, and did not dispute that it had notice of its potential fault for the accident. It contended, however, that it did not have sufficient actual notice of the injuries to Plaintiff to satisfy the Tort Claims Act. The Defendant argued that it was required to have knowledge of a specific injury resulting from the accident in order to have actual notice under 101.101(c). The Fort Worth Court of Appeals disagreed, finding that the Texas Tort Claims Act does not require actual knowledge of a specific type of injury suffered by a claimant. Rather, the Court held that simply that notice of some type of injury or potential injury was sufficient. The Court specifically found that it was undisputed that Defendant had actual knowledge of the following:

1. An accident occurred;
2. Defendant had caused the accident and was potentially at fault;
3. Plaintiff was thrown to the front of the bus as a result of the impact of the vehicles;
4. Plaintiff was lying on the floor and did not respond when asked if she was ok;
5. Defendant called 911 for an ambulance;

5. An ambulance transported Plaintiff to the emergency room following the accident.

The Second Court of Appeals held that these undisputed facts established that Defendant had sufficient actual knowledge of some injury to the Plaintiff to satisfy the Texas Tort Claims Act's requirements for actual notice. It therefore affirmed the District Court's denial of the plea to the jurisdiction.

***University of Texas Health Science Center at Houston v. Dickerson***; 2014 Tex. App. LEXIS 1889 (Tex. App. – Houston [14<sup>th</sup> Dist.] February 20, 2014)

This was a wrongful death and survivor suit brought by the mother of a child who passed away following treatment at the University of Texas Health Science Center at Houston ("Hospital"). Plaintiff had taken her daughter to the hospital in February, 2010, for treatment in the emergency room. The physician ordered a blood culture and then discharged Plaintiff and her child. The blood culture tested positive for Group B Streptococcus, however, Plaintiff alleges that the test result was never communicated to her. Several weeks later, Plaintiff brought her child back to the hospital suffering from complications from the untreated Streptococcus infection. The child was treated for the infection but the treatment was unsuccessful and the child passed away several weeks later.

Plaintiff brought suit against the hospital alleging that it negligently failed to communicate to her the results of the diagnostic medical tests showing the Streptococcus infection. Specifically, Plaintiff alleged that the death of her daughter was caused by the Hospital's negligent operation, use, misuse, or non-use of motor driven equipment in the following manners:

1. By negligently operating and using and/or misusing the telephone to inform Plaintiff of the test results;
2. By negligently operating, using, misusing, or failing to use the hospital's computer, typewriter, or dictation system to prepare a letter or other communication advising Plaintiff of the test results;
3. By negligently failing to use one of the hospital patrol vehicles to physically go to Plaintiff's residence and notify her of the infection; and,
4. By the negligent use and/or misuse of the blood culture test by failing to notify the Plaintiff of its findings.

The hospital filed a plea to the jurisdiction which was denied and the hospital appealed.

On appeal, the Houston Court of Appeals held that the plea to the jurisdiction should have been granted. The Court first noted that the Texas Tort Claims Act provides a *limited* waiver of governmental immunity. Generally, immunity is waived for claims arising from the negligent operation or use of a motor driven vehicle or motor driven equipment, or from conditions or uses of tangible personal or real property. The Court found that the Plaintiff had failed to plea the cause of action within the Tort Claims Act's waiver of immunity, relying on substantial precedent (starting with the Texas Supreme Court case *University of Texas Medical Branch at Galveston v. York*, 871 S.W.2d 175 (Tex. 1994), holding that information, whether or not it is recorded in a tangible form, is not itself tangible personal property that can be "used or misused" to establish a waiver of immunity under the Texas Tort Claims Act. The Court held

that the results of the blood culture test that the hospital performed were intangible information that is not tangible personal property, as a matter of law. The Court noted that in determining a waiver of immunity, it is to look at the real substance of a plaintiff's complaints, not the Plaintiff's characterization of them. Taking this approach, the Court held that the substance of Plaintiff's allegations was that the hospital had failed to convey information to her.

Additionally, the Court conducted a causation analysis, noting that the Texas Tort Claim Act requires that the use or condition of tangible property must be the *proximate cause* of an injury. Looking at Plaintiff's allegations, the Court held that the Plaintiff was not claiming that the alleged information she was given was the instrumentality of harm that caused her daughter's death. Rather, the cause of death was the delayed treatment of the Streptococcus infection. The Court also noted established precedent that claims based upon an alleged *non*-use of property are insufficient to state a claim within the Texas Tort Claims Act's limited waiver of immunity.

Plaintiff's final argument was that the hospital had breached an assumed duty to contact any patients with positive test results. Plaintiff pointed to discharge instructions provided by the Hospital stating that it would contact any patient if there was a positive blood culture test. The Houston Court of Appeals acknowledged that the Texas Supreme Court has recognized there is a common law duty to use reasonable care when a person undertakes and provides services to another. However, such a common law duty does not act as a waiver of immunity. Whether or not such a duty exists, a claim against a governmental unit such as the Hospital is limited to those causes of action for which immunity has been expressly waived under the Texas Tort Claims Act. As the Court had already determined that Plaintiff's claims failed to state a viable cause of action under the Texas Tort Claims Act, Plaintiff could not proceed under an assumed duty theory.