

SUMMER 2014 NEWSLETTER

LOCAL GOVERNMENT CASE LAW UPDATE

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City of Watauga v. Gordon, 2014 Tex. LEXIS 456 (Supreme Court of Texas June 6, 2014)

This is a case in which the Texas Supreme Court considered whether a suit for injuries arising from a police officer's use of handcuffs stated a viable cause of action for negligence, or was prohibited by the Texas Tort Claims Act retention immunity for claims arising from intentional torts. Plaintiff had been stopped by City of Watauga police officers on suspicion of drunk driving. He refused to be submitted to a sobriety test and was arrested, without any resistance. He was handcuffed at the scene and transported to the city jail. Plaintiff claimed that he informed the arresting officers on multiple occasions that the handcuffs were too tight but his complaints were ignored.

Plaintiff subsequently sued the City for a negligent use of tangible property, *i.e.*, the handcuffs. The City filed a plea to the jurisdiction which the trial court denied, and this denial was affirmed by the Court of Appeals. The Court of Appeals reasoned that Plaintiff's pleadings were asserting a negligence claim, rather than a battery/assault claim, because the Plaintiff alleged that the arresting officers had no intent to injure him and because the Plaintiff did not resist the arrest. According to the Court of Appeals, this compliance by the Plaintiff indicated consent to the arrest, thereby negating the "offensive" nature of any contact, which is necessary to support a claim for assault or battery.

The Texas Supreme Court began by citing the well-established law that the Texas Tort Claims Act waives the governmental immunity of municipalities for claims for personal injury and death caused by a condition or use of tangible personal or real property. The Court went on to note the exception to this waiver for any claims arising from intentional torts, for which a city retains its immunity. The City asserted it was entitled to immunity from Plaintiff's claims because they arose from an alleged assault or battery committed by the police officers when they handcuffed the Plaintiff too tightly.

The Texas Supreme Court first noted that assault and battery are related, but conceptually distinct, torts. Traditionally, an assault occurred when a person was put in fear of imminent bodily contact, whereas a battery occurred when an individual actually sustained harmful or offensive contact to his or her person. Currently, the Texas Penal Code combines these common law concepts of assault and battery under the definition of assault. Specifically, the Penal Code defines assault as:

1. Intentionally, knowingly, or recklessly causing bodily injury to another person;
2. Intentionally or knowingly threatening another with imminent bodily injury; or
3. Intentionally or knowingly causing physical contact with another person when such contact is reasonably believed to be regarded as offensive or provocative.

The Texas Supreme Court rejected the Court of Appeal's conclusion that the Plaintiff had stated a viable negligence claim. First, the Court disagreed that the Plaintiff's lack of resistance

to the arrest established “consent” to the subsequent handcuffing which would defeat one of the elements of assault or battery. The Court noted that it is established that a person does not “consent” when they yield to the assertion of legal authority. Rather, such action is treated as submission by a person against their will, as a matter of law. Moreover, the Texas Supreme Court noted that even if the Plaintiff’s compliance with his arrest constituted consent to the application of reasonable force, the police officers would not be entitled to use force that exceeded the scope of that consent. Plaintiff’s pleadings in the case specifically asserted that he repeatedly protested that the handcuffs had been placed too tight and were causing him pain, clearly indicating that the officers had exceeded any alleged “consent” by Plaintiff to the arrest and handcuffing.

The Texas Supreme Court also rejected Plaintiff’s argument that he was not stating a claim for an intentional tort because he did not allege that the police officers intended to injure him. The Court noted that while a specific intent to inflict injury is undoubtedly an intentional tort, and many assaults/batteries are of this type, a specific intent to injure the other party is not an essential element of a battery or assault. Rather, all that is required is harmful or offensive contact. Thus, if a defendant intends bodily contact that is offensive to the Plaintiff, whether or not the Defendant intends to physical injure the Plaintiff, a battery/assault has occurred.

The Texas Supreme Court concluded by noting that the overall focus of the Plaintiff’s complaint was that police officers had used excessive force in the course of effecting the Plaintiff’s arrest. The Court expressly held that claims of excessive force in the context of a lawful arrest arise from the intentional tort of assault/battery, rather than negligence, whether the excessive force was intended by the officers or not. Thus, the Texas Supreme Court reversed the Court of Appeals, holding that Plaintiff’s claims arose from an intentional tort for which the City retained its immunity under Section 101.05(7) of the Texas Tort Claims Act.

Quested v. City of Houston, 2014 Tex. App. LEXIS 6379 (Tex. App.- Houston [14th Dist.] June 12, 2014)

This case concerns the standard of review for a denial of a motion for continuance to develop jurisdictional discovery in response to a plea to the jurisdiction, as well as the emergency exception to the limited waiver of immunity found in the Texas Tort Claim Act.

In this case, Erik Holland, a City of Houston Police SWAT Officer, was at home, on call for duty at about 7:00 p.m, when he received an emergency call to report to the scene of a hostage situation. Holland immediately left his home in his personal truck and proceeded to the hostage situation exceeding the speed limit while doing so. In the course of traveling, he rear-ended the Plaintiff’s vehicle that was stopped in traffic. The Plaintiff originally sued Holland individually, but subsequently added the City and dismissed any claims against Holland. The City of Houston answered and filed a plea to the jurisdiction asserting that it was entitled to immunity from Plaintiff’s claims on the basis of the emergency exception found at Section 101.055(2) of the act. That provision provides that immunity is not waived for any claim arising from the actions of an employee when responding to an emergency call or reacting to an emergency situation, if the action is in compliance with laws and ordinances applicable to emergency action or, in the absence of such laws or ordinances, if the action is not taken with conscious indifference or reckless disregard for the safety of others. After the City filed its plea to the jurisdiction, Plaintiff requested a continuance in order to conduct discovery relevant to the

jurisdictional issues. The trial court denied the motion and entered an order granting the plea to the jurisdiction and dismissing Plaintiff's claims. Plaintiff then appealed, arguing that it was error for the district court to deny her motion for continuance, and also that the granting of the plea to the jurisdiction was improper.

The Court of Appeals first addressed Plaintiff's argument that the trial court erroneously denied her motion for continuance. First, the Court noted that reviewing courts apply an abuse of discretion standard when reviewing a trial court's decision on whether to grant a continuance of the plea to the jurisdiction to allow additional discovery. The court noted that a trial court does not abuse its discretion when it reasonably could have believed that additional discovery was unnecessary and irrelevant to the jurisdictional issues in the case. Upon review, the Court of Appeals held that the trial did not abuse its discretion in denying the motion for continuance. The Court noted the only disputed issue relevant to the jurisdictional argument was whether Eric Holland was acting within the scope of his employment when the collision occurred, which is a purely legal issue. Plaintiff argued that she should have been afforded the opportunity to depose Holland, his expert, and obtain discovery of other documents to determine whether Holland was actually on the job for the City of Houston at the time the collision occurred. The Court of Appeals noted, however, that such evidence would not ultimately be relevant to the jurisdictional issue. If the discovery revealed that Holland was on the job, then the discovery would simply support the City of Houston's argument in its plea to the jurisdiction. If, on the other hand, the evidence were to demonstrate that Holland was not on the job for the City, this still would not be helpful to Plaintiff, as the Texas Tort Claims Act only waives immunity for claims based upon governmental employees acting within the scope of their employment. If Plaintiff were to obtain discovery demonstrating that Holland was not within the course and scope of his employment, Plaintiff would do nothing more than establish that the limited waiver of immunity provided by the Texas Tort Claims Act did not apply. Accordingly, since the discovery sought would ultimately be irrelevant to the jurisdictional issues, the Court of Appeals found that the trial court had not erred in denying the Plaintiff's motion for continuance.

The Court of Appeals then turned to the question of whether the plea to the jurisdiction was properly granted. First, the Court noted that, to overcome the emergency exception found in Section 101.0552 of the Texas Tort Claims Act, the Plaintiff had the burden of establishing that:

1. Holland was not responding to an emergency call or reacting to an emergency situation at the relevant time; or
2. Holland's actions were not in compliance with the laws and ordinances applicable to emergency action; or
3. Holland's actions were undertaken with conscious indifference or reckless disregard. To do this, the Court noted that Texas Supreme Court precedent required a showing that Holland knew the relevant facts but did not care what happened to motorists.

Analyzing the issue, the Court of Appeals found that the jurisdictional evidence established that at the pertinent time Holland had received an emergency call from his SWAT commander which directed him to immediately report for duty and proceed to the scene of a hostage incident. These facts, which Plaintiff did not contradict, were sufficient to establish that Holland was responding to an emergency call. The Court of Appeals went on to note that the

City presented additional evidence from Holland that, while responding to the call, he actively considered the need to reach the hostage scene quickly while also minimizing risk to other drivers and pedestrians; determined it was necessary to exceed the speed limit to arrive as soon as possible; and determined that the risk of harm from his conduct to others was minimal, and that need to reach the scene quickly outweighed any risk to the public, considering that traffic was light, weather was clear, streets were dry, and there was plenty of daylight.

In response, Plaintiff failed to present any evidence demonstrating that Holland had violated applicable rules or ordinances, and further failed to present any evidence raising a fact issue that Holland had acted with conscious indifference or reckless disregard for the safety of others. Rather, she simply offered the conclusory statement that, based upon her driving experience, she believed Holland was driving recklessly because he should have been able to stop and avoid striking her vehicle if he had been traveling the posted speed limit and maintained a safe distance from her vehicle. These self-serving, contradictory statements were insufficient to overcome the specific evidence offered by Holland as to the lack of conscious indifference or reckless disregard for the safety of the public. Thus, the Court of Appeals concluded the trial court properly granted the plea to the jurisdiction and the judgment was affirmed.

Brumfield v. Texas Department of Transportation, 2014 Tex. App. LEXIS 5763 (Tex. App.- Ft. Worth, May 29, 2014)

This case involved an analysis of the Texas Tort Claims Act's limited waiver of immunity for claims based upon premises or special defects. In the summer of 2010, the Texas Department of Transportation (TxDOT) performed a "mill and overlay" maintenance procedure to the entrance ramp of the highway. This involved milling out a section of roadway to a depth not to exceed 2 inches and subsequently applying an overlay material to fill in the milled out portion. Signage warning of uneven pavement would be placed at the site between the time that the roadway was milled out and then filled in.

On June 27, 2010, at around 4:00 o'clock a.m., after TxDOT had milled out the service road but before the overlay had occurred, the Plaintiff drove his motorcycle onto the northbound service road, drove over the uneven pavement caused by the mill out, and crashed. He later sued TxDOT for his alleged injuries, arguing that the milled out service road was a special defect or a premise defect. The District Court granted the plea to the jurisdiction and dismissed the Plaintiff's claims, and Plaintiff appealed.

The Fort Worth Court of Appeals first observed that special defects under the Texas Tort Claims Act are conditions such as "excavations or obstructions on highways roads or streets." Further, they are distinguished from ordinary premises defects in that, because of their size or some other unusual quality, they are outside the ordinary course of events and pose unexpected and unusual dangers to ordinary users of the roadway. The Court then went on to hold that a 2 inch difference in elevation on a highway is not analogous to an excavation or obstruction, nor is it outside the ordinary course of events such as it poses an unexpected and unusual danger to ordinary drivers. To the contrary, the Court held that drivers can expect to encounter minor differences in pavement elevations as they drive along highways.

Because the condition was not a special defect, but only an ordinary premises defect, TxDOT owed Plaintiff the duty owed to a licensee. That duty requires a land owner to use

ordinary care to warn a licensee of, or make reasonably safe, dangerous conditions of which the owner is actually aware and the licensee is not. When determining whether a premises owner has actual knowledge of a dangerous condition, courts generally consider whether there have been prior reports of injuries or potential dangers presented by an alleged condition. Looking at the jurisdictional evidence presented in the case, the Fort Worth Court of Appeals found that there was no evidence that TxDOT received any report about prior accidents or notice of dangers posed by the condition. Plaintiff argued that TxDOT had actual knowledge because it created the condition when it milled out the roadway. The Court of Appeals rejected this, noting that while it was undisputed that TxDOT had created the condition, there was no evidence indicating that the variation in elevation created by the mill out was unreasonably dangerous. To the contrary, as the Court had already held, ordinary drivers could expect to encounter such conditions and they are not normally considered hazardous. Thus, the fact that TxDOT created the condition did not raise any fact issue that it was aware of a danger to the public caused by the condition.

Since Plaintiff had failed to raise a fact issue about actual knowledge of a dangerous condition by TxDOT, the Court of Appeals held that the trial court had properly granted the plea to the jurisdiction and dismissed Plaintiff's claims.

Eldridge v. Brazoria County, 2014 Tex. App. LEXIS 3363 (Tex. App.- Houston [1st Dist.] March 17, 2014)

This case concerns the sufficiency of pleadings alleging a cause of action for premises or special defects under Section 101.022 of the Texas Tort Claims Act. Plaintiffs were injured when they were driving down a county road and drove off the remains of a bridge that was in the process of being replaced. Plaintiffs claimed that warning signs that had been erected had blown over in a storm, and they therefore had no notice of the dangerous condition.

Plaintiffs sued Brazoria County, claiming it was negligent because the removed bridge posed a dangerous condition and the County had failed to provide any warning of the hazard and/or had failed to replace warning signs after notice that they had been blown down.

The County filed a plea to the jurisdiction and presented evidence that the work being done on the bridge was being performed by contractors who were hired and overseen by the Texas Department of Transportation. The County argued that no County employees were involved in the project and Plaintiff had therefore failed to state a claim within the Texas Tort Claims Act waiver of immunity, because Section 101.021 requires that injuries be caused by the negligent acts of governmental employees acting within the scope of their employment. The County claimed that this language applied both to claims under Section 101.021 as well as premise liability claims under Section 101.022. The District Court agreed and dismissed Plaintiff's claims.

On appeal, the Houston Court of Appeals cited Texas Supreme Court precedent holding that liability in premise defect cases is not based on the actions of a governmental entity's employees. It is, instead, based upon the unsafe condition of the property itself and the governmental entity's knowledge of and responses to such unsafe condition. The entity's duties in that regard are specifically defined by the Texas Tort Claims Act at section 101.022. Thus, liability in premise defect cases is not derived from the acts or omissions of governmental employees, and a claimant alleging a premise defect claim is not required to plea or show the

wrongful act or omission of a governmental employee to establish a cause of action under Section 101.022. Accordingly, the Court of Appeals found that the Plaintiffs had adequately pled a cause of action within the Texas Tort Claims Act's waiver of governmental immunity for premise or special defects, reversed the District Court, and reinstated Plaintiff's lawsuit.