

2014 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2014:

LOCAL GOVERNMENT

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University of Texas Health Science Center at Houston v. Dickerson; 2014 Tex. App. LEXIS 1889 (Tex. App. – Houston [14th 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.

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.

Ruggeri v. Baylor College of Medicine, 2014 Tex. App. LEXIS 9728 (Tex. App.- Houston [1st Dist.], August 29, 2014)

This was a case interpreting the Texas Tort Claims Act's waiver of immunity for alleged medical negligence. Plaintiffs were the parents of a young woman who died of liver failure. Plaintiffs sued Baylor hospital for medical negligence, alleging that their daughter had a history of drug abuse and that her liver failure was caused by an overdose of medication that had been prescribed to her by physicians working at the Ben Taub Hospital. Baylor Hospital filed a plea to the jurisdiction which was granted, and the Plaintiffs appealed.

The Court began by noting that Chapter 312 of the Texas Health and Safety Code classifies Baylor Hospital as a unit of state government whose immunity is waived for alleged negligence in the provision of medical services only to the extent that immunity is waived for governmental entities under the Texas Tort Claims Act. Plaintiffs first contended that they need not satisfy the requirements of the Texas Tort Claims Act, however, because they were suing based upon acts of alleged medical negligence and discretion, rather than any "official" or "governmental" decision making. Plaintiffs pointed to previous precedent establishing that government employed physicians were not protected by official immunity from claims involving their medical discretion. The Court of Appeals rejected this argument. First, the Court stated that the Plaintiffs had not sued any individual medical professionals but had instead sued Baylor Hospital. The official immunity arguments that the Plaintiffs were making would be applicable to claims against individual persons, not to Baylor Hospital. Second, the Court noted that the case law Plaintiff's cited to regarding official immunity for government physicians had been abrogated but the legislature's amendment of §101.106 of the Texas Tort Claims Act in 2003. The amendments to the statute effectively provided that government employed personnel *did* have immunity from actions arising from their medical discretion.

The Court then turned to an analysis of Plaintiffs' claims to determine if they fell within the Texas Tort Claims Act's limited waiver of immunity. The Court noted that §101.021(2) of the Texas Tort Claims Act waives immunity for personal injury or death caused by a condition or use of tangible personal or real property. Plaintiffs asserted that they satisfied this because they were alleging that Baylor Physicians had used their daughter's medical records and prescribed certain medications that eventually caused her death, despite her documented medical history of drug abuse. Plaintiffs claimed that placing the prescriptions on tangible property (the prescription documents) and providing those documents to their daughter constituted a use and condition of tangible personal property. The Court of Appeals rejected this argument. The Court rejected this, holding that a governmental unit does not use property when it merely allows someone else to use property. In this case, it was the Plaintiff's daughter's use of the property (the prescription and the medication that was ultimately obtained with it) that caused her liver failure and death. The medical records and prescriptions created by the hospital did not cause it. The Court noted that merely furnishing a condition that makes an injury possible does not waive a governmental entity's immunity. Instead, it is the actual use of property that must cause the injury. The Court also noted three prior Court of Appeals decisions which held that writing prescriptions and administering medications are not acts that waive immunity within the Texas Tort Claims Act limited waiver of governmental immunity. Accordingly, the Court found that allegations that physicians wrote prescriptions that provided the Plaintiffs' daughter with the ability to obtain medication which was then used and caused her death, did not state the claim within the Texas Tort Claims Act of limited waiver of immunity. The granting of the plea to the jurisdiction was affirmed.

City of Corpus Christi v. Ferguson, 2014 Tex. App. LEXIS 1299 (Tex. App.- Corpus Christi 2014)

This is a case involving premises liability claims and the recreational use statute. Plaintiff had gone to Corpus Christi on December 4, 2009 where she planned to participate with her family in the Harbor Lights Festival Boat Parade scheduled for the following day at the Corpus Christi Marina. The Marina is owned and operated by the City. Plaintiff arrived on December 4, 2009, and spent the night on her family's sailboat, which was kept in a slip at the Marina. The next morning, December 5, 2009, Plaintiff went to the Marina's bathroom facilities to take a shower. When she was walking back to the sailboat along the pier, she passed thru a gate and slipped and fell on a sheet of ice, sustaining injuries.

Plaintiff then sued the City for general and gross negligence and premises liability. The City filed a plea to the jurisdiction alleging that immunity had not been waived under the Texas Tort Claims Act, as the recreational use statute applied and Plaintiff could not demonstrate gross negligence. The trial court denied the plea, and the City appealed. The Court of Appeals began by noting the Texas Tort Claims Act waives immunity in three scenarios:

1. The negligent operation or use of a motor vehicle or motor-driven equipment;

2. The negligent use of tangible personal or real property; or,
3. Premises defects.

The Court went on to note that premises liability claims were further subject to the provisions of Section 101.058 of the Texas Tort Claims Act, which modifies the waiver of immunity by imposing the limitations on liability set forth in the recreational use statute. The recreational use statute provides that when a person enters a premises owned, operated, or maintained by a governmental unit and *engages in recreation* on those premises, then the governmental unit owes only the duty of care owed to a trespasser.

In the case, the City argued that the Plaintiff was engaged in recreation at the time of the event made the basis of the suit, as she had come to the marina to engage in a boating activity.

Plaintiff asserted she was not engaged in recreation at the time of the event, but was instead walking back to her boat after taking a shower, which was matter of personal hygiene necessity and not related to recreation or leisure.

The Court of Appeals announced that when determining whether a person is engaged in recreation for purposes of the statute, a fact specific analysis is required. In doing so, the Court noted that Plaintiff's ultimate purpose in going to the Marina was to participate in a boating activity, the Harbor Lights Boat Parade. In order to do so, she had come to the Marina a day early and camped overnight on the sailboat. The evidence further established that the Marina showers were for the use of "boaters," and that Plaintiff had used the Marina showers rather than the showers on the sailboat, because the boat did not have enough hot water. Analyzing the evidence as whole, the Court of Appeals found that the Plaintiff's activity in sleeping overnight on the boat and getting ready the next morning were merely one stage of the broader boating activity for which the Plaintiff had gone to the Marina in the first place. The Court found it would be inappropriate to carve out of that boating activity the few moments Plaintiff spent in walking to and from the shower.

Thus, the Court of Appeals held that Plaintiff was engaged in "recreation" at the time of the event, and that the City owed her the same duty of care owed to a trespasser. The Court went on to find, however, that the Plaintiff had presented sufficient evidence of potential gross negligence by the City to raise an issue of fact and therefore affirmed the denial to of the plea to the jurisdiction and remanded the case for further proceedings.

Dallas Metrocare Services v. Juarez, 2013 Tex. LEXIS 950 (Tex. 2013)

In this per curiam opinion, the Texas Supreme Court considered whether the Court of Appeals had improperly refused to hear certain jurisdictional arguments that were raised for the first time on appeal and also interpreted what constitutes a "use" of property under Texas Tort Claims Act Section §101.021(2).

Defendant Dallas Metrocare Services was a public non-profit organization providing mental health services to Dallas County residences. The Plaintiff had attended a counseling session at the facility. During the session, he was seated at one end of the table in a conference room and a 4 x 8 foot white board had been propped on a table behind him. During the session, the white board fell, hitting the Plaintiff on the head. At the time this occurred, no one was writing on, moving, or otherwise using the whiteboard or the table on which it was sitting. Plaintiff filed suit against Dallas Metrocare Services. The facility filed a plea to the jurisdiction alleging that Plaintiff had failed to allege facts for which immunity had been waived under the Texas Tort Claims Act, claiming that no proper allegation of “use” under Section 101.021(2) had been made, nor had a proper premises liability claim been stated. In response, the Plaintiff amended his petition to add four additional allegations of negligent conduct, including a claim of an “unsafe condition.” After the trial court denied the plea, the facility filed an interlocutory appeal. On appeal, Dallas Metrocare Services attempted to raise jurisdictional arguments concerning the Plaintiff’s amended causes of action. The Court of Appeals, however, refused to hear such arguments, holding that it could not consider such arguments for the first time on appeal, and that it was limited to the grounds set forth in the plea to the jurisdiction at the trial court level. Dallas Metrocare Services then filed a petition for review to the Texas Supreme Court.

The Texas Supreme Court held that the trial court had improperly refused to hear the new jurisdictional arguments of Dallas Metrocare Services. The Court found that an appellate court must consider all of the Defendant’s immunity defenses presented to it, whether those defenses were first raised at the trial court, or are made for the first time on appeal.

Additionally, the Court went on to find as a matter of law that Plaintiff could not maintain a cause of action for “use” of tangible personal property under Section 101.021(2). The Court noted that 101.021(2) only waives immunity for use of tangible personal property when the governmental unit uses the property. There is no use of property where it is simply provided, furnished, or allowed access to. The undisputed evidence in the case showed that at the time of the events the whiteboard was simply sitting on the table and was not being used in any sense by a governmental employee. Therefore, Plaintiff could not assert a claim for negligent use of the whiteboard under Section 101.021(2). The Texas Supreme Court declined to consider whether Plaintiff could state a claim for a negligent “condition” of the whiteboard, nor whether a premises liability claim was properly alleged.