

WINTER 2015 NEWSLETTER

LOCAL GOVERNMENT CASE LAW UPDATE

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Tex. Dept. of Aging and Disability Services, et al. v. Cannon, 2015 Tex. LEXIS 2 (Tex. 2015)

In this case, the Texas Supreme Court considered whether a plaintiff is prohibited from amending a petition to assert additional claims after a governmental defendant has filed a motion to dismiss pursuant to Section 101.106 (e) of the Texas Tort Claims Act. That section of the Texas Tort Claims Act provides that “if a suit is filed under this chapter against both a governmental unit and any of its employees, the employee shall immediately be dismissed on the filing of a motion by the governmental unit.”

In this case, the mother of the resident of a State-supported living center who had died after being restrained by center personnel brought State-law tort claims against the center and several of its employees. The school filed a motion to dismiss the claims against the employees pursuant to Texas Tort Claims Act Section 101.106(e). While that motion was pending, the Plaintiff amended her petition to add claims against the individual Defendants under 42 U.S.C. § 1983, alleging violations of the decedent’s federal constitutional rights. After filing the amended petition, the Plaintiff agreed to dismiss all common law tort claims against the individual Defendants and the trial court did so. When ruling on the 101.106(e) motion to dismiss, the trial court denied the motion and did not dismiss the employees from the case. The school appealed to the Court of Appeals. On appeal, the school argued that because subsection (e) provides that governmental employees are to be dismissed “immediately” upon the filing of the motion to dismiss, the employees had been effectively dismissed from the case at the moment the motion was filed, and the subsequent amended petition filed by the plaintiff against them should not be considered. The appellate court disagreed, finding that employees remain parties in the suit until a trial court actually signs an order dismissing them. Therefore the filing of the amended petition and the trial court’s consideration of it, which occurred before any order of dismissal was entered, was proper. The school then sought review from the Texas Supreme Court.

The Texas Supreme Court affirmed the judgment of the Court of Appeals. First, the Texas Supreme Court noted that 101.106(e) requires dismissal of claims filed “under this chapter” against the government and its employees. The Texas Tort Claims Act is the only avenue for a claimant to pursue common-law tort claims against the government. Therefore, any tort claims asserted by a claimant against the government, even if immunity has not been waived for those claims, are considered to have been brought “under this chapter”. However, the Court went on to note that any claims that are asserted against the government pursuant to *other* statutory waivers of immunity would not be considered to have been brought under the Texas Tort Claims Act. 42 U.S.C. §1983 represents such an independent statutory waiver of immunity. Claims asserted under 42 U.S.C. §1983 are not brought under the Texas Tort Claims Act, and any such claims would not be subject to dismissal pursuant to Section 101.106(e).

The center once again argued that because 101.106(e) states that employees will be “immediately” dismissed upon the filing of a motion by the governmental unit, an individual

employee's entitlement to dismissal attaches at the moment the motion to dismiss is filed, and any subsequent amendments to a plaintiff's petition cannot defeat this "perfected" right to dismissal. The Texas Supreme Court rejected this argument, finding that the word "immediately" indicates only that the dismissal is mandatory, not discretionary. Dismissal is not actually effectuated under Texas procedural rules until an order is entered, and that order should not be entered until the court has found that a claimant has brought suit under the Texas Tort Claims Act and that the individual defendants are employees of the governmental unit.

As such, the Texas Supreme Court held that a plaintiff is not foreclosed from amending a petition to assert claims that are not brought under the Texas Tort Claims Act when a governmental unit files a motion to dismiss under Section 101.106(e), and the subsequent amended petition should be considered by the court when entering its rulings on the pending motion to dismiss.

Tinnard v. Dallas County Hospital District, et al., 2015 Tex. App.- LEXIS 627 (Tex. App – Dallas, 2015)

This case involved a negligence claim filed by the Plaintiff against the Dallas County Hospital District and University of Texas Southwestern Medical Center for negligence. The Plaintiff had treated at Parkland Hospital for several months in 2011 for arthritis. Towards the end of his treatment, he was informed that the decision at the hospital to cease antibiotic treatment for MRSA had been a mistake by some of the medical staff. Plaintiff thereafter sued the hospital and hospital system under the Texas Tort Claims Act and also under the Declaratory Judgment Act. The suit under the Tort Claims Act sought monetary damages for personal injuries, while the declaratory judgment cause of action sought a declaration concerning whether the alleged misuse of a medical license constitutes tangible personal property under the Texas Tort Claims Act.

After suing the Defendants, the Plaintiff provided a purported expert report from a doctor, which was in reality nothing more than progress notes prepared the doctor during the treatment of the Plaintiff, and that had been prepared prior to the lawsuit being filed. Thereafter, the hospital Defendants filed Motions to Dismiss pursuant to §74.351 of the Texas Medical Liability Act, based upon the failure of the Plaintiff to provide the expert report provided by the Act. The trial court granted the motions and dismissed Plaintiff's claims and Plaintiff appealed.

On appeal, the Plaintiff contended that the Court had improperly ruled on the motions to dismiss filed under the Texas Medical Liability Act that because he had filed claims under the Texas Tort Claims Act that must be determined prior to any other action by the Court, and also contending that he had not filed a healthcare liability claim but had filed a declaratory judgment action. In affirming the dismissal of the case by the trial court, the Court of Appeals first held that there was no authority for the proposition that the trial court was required to address issues under the Texas Tort Claims Act and potential waivers of governmental immunity prior to addressing the asserted defenses under the Texas Medical Liability Act. The Court of Appeals stated that the Defendants were entitled to present their defenses in whatever order they wanted to, and the court could consider them in whatever order it wanted to.

The Court further rejected Plaintiff's contention that he was not bringing a healthcare liability claim. First, the Court noted that in determining whether a cause of action is a healthcare liability claim that is subject to the Texas Medical Liability Act, the court looks at three elements:

1. Whether the defendant is a healthcare provider or physician;
2. Whether the claimant's cause of action is for treatment, lack of treatment, or other departure from accepted standards of medical care; and,
3. Whether the defendant's alleged departure from accepted standards of care approximately caused the claimant's injury or death.

The Court also noted that whether a claim was a healthcare liability claim is determined by considering the underlying nature of the cause of action. Artful pleadings cannot change the nature of a claim, and a request for declaratory relief also does not alter the underlying nature of a lawsuit.

Turning to an analysis of the suit, the Court first noted that it was beyond dispute that Parkland Hospital and UT Southwestern were healthcare providers and that Plaintiff was a healthcare claimant, as he was seeking monetary damages from the Defendants. The Court went on to examine the nature of the cause of action and found that Plaintiff's petition identified the cause of his injury as an error in medical judgment and decision making. The Court then found that the issue of whether there was an error of medical judgment and decision making, and the further issue of whether that error was the cause of the Plaintiff's alleged injuries are subjects that require expert testimony to establish. Thus, Plaintiff's claims were "healthcare liability claims" and the fact the Plaintiff had also filed a claim for declaratory relief and brought suit under the Texas Tort Claims Act did not change the nature of the cause of action. As a result, Plaintiff was required to file an expert report that complied with the Texas Medical Liability Act. He failed to do so, and the case was therefore properly dismissed.

City of Diboll, Texas v. Lawson, 2014 Tex. App.- LEXIS 12914 (Tex. App – Tyler, 2014)

This case involved analysis of the Texas Tort Claims Act's waiver of immunity for premises defects and the recreational use statute. Plaintiff in the case had gone to a park operated by the City of Diboll to watch her granddaughter's softball game. At the end of the game, while walking back to her vehicle, the Plaintiff tripped on a four inch hollow pipe protruding upward from the center of a walkway on park grounds and sustained serious injuries. Ordinarily, the pipe acted as a receptacle for a pole, however, the pole was not in the pipe on the day in question.

Plaintiff sued the City, asserting a premises defect claim. The City filed a plea to the jurisdiction and motion for summary judgment alleging that Plaintiff's claims were governed by the recreational use statute, which required her to show that the City acted with gross negligence. The trial court denied the plea and summary judgment, and the City appealed.

The Court of Appeals noted that the Texas Tort Claims Act waives immunity for premises defect claims, citing to §101.021(2) and §101.022. The Court also noted the further limitation on liability for premises defect claims provided by §101.058 of the Texas Tort Claims

Act which provides that a governmental unit's liability for premises defects under the Act is further limited by the recreational use statute, to the extent it would apply.

The recreational use statute, found at Chapter 75 of Texas Civil Practice & Remedies Code, provides that if a person enters upon premises owned by a governmental unit and engages in recreation, then the governmental unit only owes the duty of care that is owed to a trespasser. That duty of care requires the premises owner not to injure a person through gross negligence, defined as an "act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others."

Plaintiff argued that she was not engaged in recreation at the time of the events as she had been spectating a sporting event and was returning to her vehicle at the time of the accident. The Tyler Court of Appeals first noted that there was a split of authority among the circuits as to whether spectating at a sport event constitutes recreation. Some courts of appeal hold that it does constitute recreation, and other courts of appeal hold that it does not. The Tyler Court of Appeals held that it believed that spectating a sporting event does constitute recreation under the Statute. In doing so, the Court noted that the recreational use statute identifies picnicking and hiking as recreation. The Tyler Court of Appeals felt that if walking and picnicking in or on a public park constitutes recreation, then spectating a sporting event likewise would do so. The Court of Appeals then went on to note that there was also a split of authority among courts in Texas as to whether traveling from an event after its conclusion constitutes recreation. The Tyler Court of Appeals noted that the recreational use of defines premises as not on the land itself, but also roads and private ways attached to the land. Accordingly, the Tyler Court of Appeals found that an injury occurring on premises while walking to or from an activity is considered a part of the recreational event and qualifies as recreation.

The Tyler Court of Appeals then held that the Plaintiff was engaged in recreation when she was injured on the premises while returning to her vehicle after watching a softball game. The Court then examined the Plaintiff's pleadings and found that she had plead a cause of action based upon the duty owed to a licensee, not a trespasser. Further, in its brief on appeal, the Plaintiff had conceded that she was not alleging or attempting to prove that the City had acted with gross negligence. Accordingly, the Tyler Court of Appeals found that Plaintiff had failed to state a claim, reversed the trial court, and granted the plea to the jurisdiction dismissing all claims.

NOTE, on January 15, 2015, the Plaintiff filed a petition for review with the Texas Supreme Court. This may present an opportunity for the Texas Supreme Court to address the split of authority on recreational use discussed in this opinion and resolve it.