

FALL 2015 NEWSLETTER

LOCAL GOVERNMENT CASE LAW UPDATE

By: Stephen D. Henninger

Williams v. City of Baytown, 2015 WL2090488 (Tex. App.-Houston [1st. Dist.] May 5, 2015)

This case discusses the limited waiver of governmental immunity provided by the Texas Tort Claims Act. The lawsuit arose from an accident involving two shop lifting suspects. The suspects had driven a vehicle to an Academy store and policemen were alerted to their possible criminal activities. While the two suspects were in the store, police arrived and set up a “box-in” maneuver to block the suspects’ vehicle from exiting the parking lot. When the suspects exited the store, they encountered the box-in but were able to get through it by ramming one of the police cars and then exiting the parking lot. After exiting the parking lot they began fleeing the police, reaching speeds of up to 90 mph. Several police cars followed, although they did not engage in a high speed pursuit of the suspects’ vehicle, but instead simply kept their vehicle in site. Meanwhile, another police officer who heard about the situation on the radio went to a location ahead of the route the suspects’ vehicle was traveling and placed a spike strip along the roadway. Shortly thereafter, the suspects’ vehicle ran over the spike strip and one of its tires was punctured. The driver did not stop driving, however, but continued down the road and ended up striking a vehicle that was stopped at a stop light at approximately 70 mph. The collision killed one of the occupants and severely injured the other.

Representatives of the estate of the deceased occupant and the injured occupant filed suit against the City, alleging that its officers were negligent and that this negligence proximately caused the collision. The City filed a plea to the jurisdiction and a motion for summary judgment asserting it was entitled to governmental immunity from the Plaintiffs’ claims. The Trial Court granted the motions and dismissed the claims, and the Plaintiffs appealed.

On appeal, the First District Court of Appeals in Houston noted that the Texas Tort Claims Act waives governmental immunity for property damage, personal injury, and death proximately caused by a governmental employee’s negligent operation or use of a motor driven vehicle. The Court went on to note that a Plaintiff must show that the use or operation of a vehicle was an *actual cause* of the injury, rather than simply being something that furnished a condition that made an injury possible. The Court noted that no City vehicle was actually involved in the collision upon which the suit was based. Rather, the Plaintiffs were suggesting that the police officers’ unsuccessful use of vehicles to box-in the suspects’ vehicle at the Academy parking lot was a negligent use of vehicles. The Court of Appeals held this was insufficient to state a claim against the City, as this alleged use of the vehicles was not sufficiently tied to the subsequent accident.

Next, the Court noted that the Texas Tort Claims Act waives immunity for claims involving a misuse of tangible property. Plaintiffs alleged that they stated a claim pursuant to this section in that they claimed that the police officer negligently used the spike strip which deflated one of the suspects’ vehicle’s tires prior to the collision. Again, the Court noted that a negligent misuse of

personal property, like a negligent use or operation of a motor vehicle, must be shown to have been the actual cause of an incident, not simply part of a chain of events leading to that incident. In this case, while the Plaintiffs had presented evidence that the spike strip deflated one of the tires on the suspects' vehicle, Plaintiffs presented no evidence raising a fact issue that this caused the driver of the vehicle to lose control and be involved in the accident. Absent such evidence, the Court of Appeals held that the use of the spike strip could not be sufficiently linked to the subsequent collision to establish a waiver of immunity under the Texas Tort Claims Act.

Accordingly, the Court of Appeals held that the Plaintiffs had failed to establish their causes of action fell within the Texas Tort Claims Act's limited waiver of immunity and affirmed the dismissal of the suit.

City of Brazoria, Texas v. Ellis, 2015 WL3424732 (Tex.App.-Houston [14th Dist.] May 28, 2015)

This case discusses the impact of a police officer's official immunity to the waiver of governmental immunity under the Texas Tort Claims Act, as well as the emergency exception to the waiver of immunity provided by the Texas Tort Claims Act. The case arose from an automobile accident between a police vehicle driven by a City police officer and a vehicle driven by the Plaintiffs. The evidence demonstrated that the police officer was responding to an emergency call regarding a domestic disturbance involving weapons. As he approached an intersection, a large building to the right blocked his view of approaching traffic. The intersection was controlled by a yield sign. The officer claimed that his lights and sirens were operating, and offered conflicting testimony about whether he slowed down as he entered the intersection. Witnesses to the collision testified that they did not hear a siren as the police car approached the intersection. As the police officer entered the intersection, he collided with the vehicle driven by the Plaintiffs, which had the right-of-way. The Plaintiffs thereafter sued for personal injuries under a negligence theory, arguing that the City's immunity had been waived pursuant to the section of the Texas Tort Claims Act that waives immunity for claims arising from the negligent operation of motor driven vehicles. The City filed a plea to the jurisdiction asserting that its immunity had not been waived because: (1) the police officer driver was entitled to the defense of official immunity; and (2) the case was controlled by the emergency exception to the Texas Tort Claims Act and the Plaintiffs had failed to satisfy the requirements of that section. The trial court denied the plea to the jurisdiction and the City appealed.

The Court of Appeals noted that the limited waiver of immunity provided by the Texas Tort Claims Act requires that the governmental employee at issue be personally liable according to Texas law. Accordingly, when a City employee's conduct is protected by the defense of official immunity, then governmental immunity is not waived. Official immunity is an affirmative defense protecting governmental employees from lawsuits that arise from: (1) the performance of discretionary duties; (2) performed in good faith; and (3) within the course and scope of the employee's authority. "Good faith" is an objective standard that looks to whether a reasonably prudent officer, under the same or similar circumstances, could have believed his actions were justified. To counter evidence of good faith, a plaintiff must establish that no reasonable person in the officer's position could have thought the facts were such that they justified the officer's actions.

Establishing good faith generally requires expert testimony and, in the context of an

automobile accident, it is established by considering the need for the officer's actions versus the risks entailed by the conduct the officer engages in. The Court of Appeals noted that when an expert is performing this balancing test, the expert cannot establish good faith by assuming the truth of disputed facts, or by failing to consider other uncontroverted facts. The Court of Appeals noted that the City's experts on good faith had assumed the truth of the officer's claim that he was operating his siren at the time he entered the intersection. This was, however, a disputed fact, and the experts improperly relied upon it to establish good faith. Moreover, the City's experts had failed to mention the fact that the officer's field of vision to his right was blocked by a large building. As such, the experts did not address all of the facts confronted by the officer at the time of the event. Accordingly, the Court found that the City had failed to establish that the officer acted in good faith and was entitled to official immunity.

The Court then turned to the City's assertion that it retained its immunity due to the emergency exception in the Texas Tort Claims Act. That provision provides that when a claim arises from the actions of an employee responding to an emergency call, immunity is not waived if the officer's actions are in compliance with applicable laws and ordinances and are not taken with conscience indifference or reckless disregard for the safety of others. The Court of Appeals held there was a fact issue as to whether the officer had acted recklessly in that his testimony established he was subjectively aware that he lacked a clear view of approaching traffic to the right because of the building, but proceeded through the yield sign without stopping, anyway. Additionally, there was a fact issue about whether he had failed to use his siren as he entered the intersection. These factors would support a finding that the officer acted recklessly. There was, therefore, a fact issue and the denial of the plea to the jurisdiction by the trial court was affirmed.

Douglas v. City of Kemp, Texas, 2015 WL3561621 (Tex.App.-Dallas June 9, 2015)

This case involves a suit based on purported promises to abate taxes allegedly made by the City of Kemp. Plaintiff had built a nursing facility in Kemp, Texas, and claimed that before he began construction, the Mayor and City Manager of Kemp had agreed to an abatement of property taxes as an incentive for the construction of the facility. After the facility was built, the Plaintiff received a tax statement reflecting an assessment of taxes in full, and making no mention of the agreed upon tax abatement. Plaintiff thereafter sued the City asserting claims for negligent misrepresentation, fraudulent inducement, declaratory judgment, and breach of contract. The City filed a plea to the jurisdiction asserting that all of Plaintiff's claims were barred by immunity, which the trial court granted. The Plaintiff then appealed.

In regards to Plaintiff's negligent misrepresentation and fraudulent inducement claims, the Court found that these were first barred by Section 101.055(1) of the Texas Tort Claims Act, which provides that there is no waiver of governmental immunity for tort claims arising from the collection or assessment of taxes. The Plaintiff asserted that his claim was not based on the collection or assessment of taxes, but rather from the proprietary function of agreeing to a tax abatement which was an "entirely discretionary" decision and only "incidentally related to the City's power to collect taxes." The Court of Appeals rejected this argument, agreeing with the City that the case centered on the assessment and collection of taxes which are purely and essentially governmental functions, and noting that the Plaintiff in places characterized his claims as arising from "invalid tax assessments."

The negligent misrepresentation and fraudulent inducement claims thus fell squarely with Section 101.055(1) of the Texas Tort Claims Act and the City was immune.

The Court of Appeals then turned to Plaintiff's declaratory judgment claims. The City had argued that Plaintiff's declaratory judgment claims were barred because he had failed to exhaust his administrative remedies before filing suit, and because the declaratory judgment claims were a merely recasting of Plaintiff's breach of contract claims for which immunity had not been waived. The Court of Appeals found that the Plaintiff had failed to respond to the City's argument that he had failed to exhaust his administrative remedies. As such, the Court of Appeals affirmed the granting of the plea to the jurisdiction on that ground.

Finally, the Court of Appeals turned to the Plaintiff's breach of contract claim. The Court cited to Texas Local Government Code Sections 271.151 and 271.152, which provide that immunity is waived for breach of contract claims provided the claim relates to a properly executed written contract for the provisions of goods or services to a local governmental entity. The Court of Appeals found that Plaintiff had failed to establish that there was properly executed written contract, and further failed to show that the contract at issue, which was for alleged tax abatements, was an agreement for goods and services to the City. The City was thus immune from the breach of contract claim and the Court of Appeals affirmed the trial court's granting of the plea of the jurisdiction.

Green v. City of Houston, 2015 WL1967582 (Tex.App.-Houston [1st Dist.] April 30, 2015)

This case concerns the notice of claim required by the Texas Tort Claims Act for tort claims against a governmental entity. It involved a slip and fall accident at the George Bush Intercontinental Airport in Houston. While walking through the airport, the Plaintiff tripped and fell over an exposed metal strip, injuring her knee. The Plaintiff claimed that she spoke with a TSA agent immediately after the fall, and again a few months later. A person traveling with the Plaintiff who had witnessed the fall also wrote a letter to the TSA manager of the airport stating that the Plaintiff had tripped on a steel strip at the airport. The Plaintiff made no claim that she communicated directly with any City of Houston employee within 90 days of the incident, as is required by City of Houston regulations. Plaintiff sued the City of Houston and the trial court granted the City's plea of the jurisdiction based on Plaintiff's failure to provide the City with notice of claim. Plaintiff appealed.

On appeal, the Court of Appeals noted that the Texas Tort Claims Act provides a limited waiver of governmental immunity. The Texas Tort Claims Act further provides that a City's Charter and Ordinance Provisions requiring notice of a potential claim within a certain time period are ratified and approved. The City of Houston's required notice was within 90 days of the injury. The Court of Appeals further noted that Section 311.034 of the Texas Government Code provides that statutory prerequisites to a suit, including notice provisions, are jurisdictional requirements. The Court of Appeals recognized that in addition to formal notice of claim, a claimant may also rely on a governmental entity's actual notice of a claim. "Actual notice" requires knowledge by the governmental entity both that an injury has occurred and also of the entity's potential fault for the incident. Actual notice may be imputed to the government provided its agent or representative receives the requisite notice and had a duty to investigate and report it.

The Court of Appeals observed that the Plaintiff conceded she did not directly notify the City of Houston of her claim, but had instead notified TSA agents. The City of Houston contended that actual notice to the Federal government could not be imputed to it and that agents of the TSA are not agents of the City of Houston. The Court of Appeals agreed, noting that absent evidence of affiliation, notice to one governmental entity does not impute notice to another. Because the Plaintiff was unable to submit any evidence demonstrating that the TSA was an agent or representative of the City of Houston, she had failed to demonstrate that she had provided actual notice to the City. The dismissal of the Plaintiff's claims was affirmed.

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