

## **FALL 2016 NEWSLETTER**

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

**By: Stephen D. Henninger**

*City of Dallas v. Sanchez*, 2016 WL 3568055 (Tex. 2016)

This is a case interpreting the limited waiver of immunity provided by the Texas Tort Claims Act. Plaintiffs were the Estate of Matthew Sanchez, who died from a drug overdose following a 911 call to the City of Dallas. Ten minutes prior to the call on behalf of Matthew Sanchez, another caller from the same apartment complex had called 911 also to report a drug overdose. When the call for Sanchez was placed, the 911 dispatcher informed the caller that emergency responders were already en route, disconnected the call, and did not reestablish it. When emergency responders arrived at the apartment complex to assist the subject of the first 911 call, they mistakenly concluded that the two 911 calls were redundant and that a single individual was the subject of both calls. Consequently, after treating the subject of the first call, the responders left the scene and never went to Sanchez's apartment to provide aid. Approximately 6 hours later, he died of a drug overdose.

Sanchez's estate sued the City of Dallas for negligence alleging that: (1) the City's 911 dispatcher misused the phone system by hanging up before the responders arrived to provide assistance, or that the 911 system malfunctioned and the call was disconnected prematurely; (2) that the 911 dispatcher failed to follow proper procedure and violated various laws by disconnecting the call and failing to reestablish it; and (3) that if the emergency responders had located Sanchez before leaving the premises they most likely could have saved his life.

The City filed a motion to dismiss under Rule 91a, arguing that the Plaintiff's allegations failed to state a cause of action within the limited waiver of immunity provided by the Texas Tort Claims Act. The trial court granted the City's motion to dismiss as to all claims except Plaintiff's claim that the 911 phone system had failed or malfunctioned when it hung up on the second call prematurely and did not reestablish the connection. On interlocutory appeal, the Court of Appeals affirmed the trial court holding that the Plaintiffs had sufficiently alleged a cause of action based upon a supposed defect in the phone system that proximately caused Sanchez' death. The City filed a petition for review of the Court of Appeals decision to the Texas Supreme Court, which granted the petition.

In reviewing the Plaintiff's pleadings, the Supreme Court noted that for immunity to be waived under Section 101.021(2) of the Texas Tort Claims Act, personal injury or death must be proximately caused by a condition or use of tangible, personal or real property. Citing previous precedent, this Court noted that proximate cause requires both cause and fact and foreseeability, and that when a condition or use of property merely furnishes a circumstance that makes an injury possible, the condition or use is not a proximate cause. Rather, to be a proximate cause, the condition or use of the property must have actually caused the injury, and any use of property that simply hinders or delays treatment does not actually cause injury and is not a proximate cause of an injury.

Applying these principles to the case, the court noted that the alleged telephone system malfunction was not a proximate cause of Sanchez's death. Between the alleged malfunction of the system and Sanchez' passing, emergency medical personnel responded and erroneously concluded that separate 911 calls were redundant and left the apartment complex without checking the specific apartment number listed on the second 911 call. Moreover, the court noted that approximately 6 hours past between the alleged phone malfunction and Sanchez's death, which further attenuated the causal connection. Accordingly, the Supreme Court concluded that the malfunction of the phone system was merely one of a series of events or factors that contributed to Sanchez not receiving timely medical assistance. The true cause of Sanchez's death was his drug overdose, the passage of time, and the misinterpretation of information. This is not a cause of action that falls under the Texas Tort Claims Act's waiver of immunity. The Texas Supreme Court therefore reversed the Court of Appeals and entered judgment dismissing the case.

*University of Texas M.D. Anderson Cancer Center v. Karen Jones*, 485 S.W.3d, 145 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2016)

In this case the Plaintiff, a long-time smoker, sued University of Texas M.D. Anderson Cancer Center (UTMDA) after she participated in a smoking study and was prescribed medication. The Plaintiff contended that as a result of the medication, she became depressed and unsuccessfully attempted suicide. As a result of this suicide attempt, she suffered permanent nerve and renal damage.

Plaintiff sued UTMDA alleging that it negligently screened her for the study, negligently admitted her into the study, and then negligently prescribed her medication when it knew or should have known that she should not be given the drug due to her history of depression. UTMDA filed a plea to the jurisdiction which the trial court denied, and the hospital filed an interlocutory appeal.

UTMDA argued that the Plaintiff's cause of action did not fall within the Texas Tort Claims Act because the true nature of the Plaintiff's claims was that UTMDA personnel exercised negligent medical judgment and misused information when they screened her and admitted her to the study. UTMDA argued this was the true nature of Plaintiff's claims, not that they negligently prescribed and dispensed medication to the Plaintiff. The Court of Appeals agreed that allegations involving misuse of information, negligent medical judgment, or negligent training, without more, do not state a cause of action within the Texas Tort Claims Act's limited waiver of immunity. The Court of Appeals disagreed, however, that the Plaintiff's complaints were nothing more than allegations of improper screening and negligent medical judgment. While such claims were within the Plaintiff's pleadings, she had also included a claim that UTMDA had negligently prescribed and dispensed medication to her that was the proximate cause of her injuries. The Court of Appeals held that the dispensing of drugs by a hospital is a use of tangible personal property, and this is true whether or not the hospital actually administers the drugs to the patient, or the patient administers the drugs to herself.

The court next turned to the issue of whether the use of the medication was adequately shown to be a proximate cause of the Plaintiff's alleged injury. UTMDA argued that the Plaintiff had not demonstrated that the administration of the drugs was the proximate cause of the injury, and cited to cases where no waiver of immunity had been found because the prescribing of drugs had merely been part of a chain of events leading to an injury. The Court

of Appeals recognized those cases, but distinguished this case from them. Unlike other cases where the prescription or use of drugs may have been part of a chain of events in which someone was injured, but the true source of the injury was some other event, in this case the Plaintiff had alleged and presented expert evidence that the use of the drug that UTMDA had prescribed and instructed Plaintiff to take was the *direct* cause of her subsequent depressive symptoms and suicide attempt. Accordingly, the court held that Plaintiff had demonstrated that the use of the drugs was the proximate cause of her injury, not simply part of a chain of events leading to it. Accordingly, the plea to the jurisdiction was properly denied and the Court of Appeals affirmed the judgment of the trial court.

***Austin Independent School District v. Salinas***, 2016 WL 1566707 (Tex. App. – Austin 2016)

This case involved the waiver of immunity provided by the Texas Tort Claims Act for lawsuits against school districts. Plaintiff was a minor child with disabilities who sustained injuries after he opened the back exit door of a moving school bus and jumped out. He sued the Austin Independent School District alleging that his injuries were caused by the negligence of the bus driver in failing to keep a proper lookout for his safety, failing to drive attentively, failing to timely apply the brakes, failing to drive at a safe speed, failing to use the rear-view mirror, failing to respond to the door buzzer which went off when the back door was opened, and also alleged negligence *per se* based on violations of various provisions of the Texas Transportation Code. The school district filed a plea to the jurisdiction alleging that Plaintiff's claims did not fall within the Texas Tort Claims Act limited waiver of immunity, which the district court denied. The school district then filed an interlocutory appeal.

On appeal, the Court of Appeals noted that the Texas Tort Claims Act only waives immunity for claims against school districts when injuries are caused by the negligent use or operation of a motor-driven vehicle. The Court of Appeals noted that this requires that the use or operation of the motor-driven vehicle be the proximate cause of the alleged injury, and that the use or operation of a motor-driven vehicle is not a proximate cause when it does nothing more than furnish a condition that makes an injury possible. The Court of Appeals further cited to establish precedent holding that when injuries arise from the acts or omissions of a school district employee involving the supervision or control of children, then immunity is not waived, even if that lack of supervision or control takes place on or near a school bus.

Applying these principles to the Plaintiff's allegations, the Court of Appeals found that Plaintiff's case was one alleging negligent supervision of children by the bus driver, not any negligent use or operation of the bus. The court noted that while Plaintiff made reference to alleged negligent use/operation of certain parts of the bus (*e.g.*, the mirrors, or not applying the brakes), the true gravamen of the complaint was that the bus driver had failed to adequately supervise and control the Plaintiff to prevent him from jumping out of the back door. The court further found that the alleged negligent uses or operation of the bus was not the proximate cause of the injuries, but was, at best simply something that furnished a condition that made the injury possible. The cause of the Plaintiff's injuries, from the Plaintiff's own pleadings, was the Plaintiff's affirmative action in opening the back door of the bus and jumping out of it. The court further found that allegations of violations of the Texas Transportation Code were of no consequence. The Transportation Code does not, itself, waive governmental immunity. Further, the Court of Appeals had already found that the Plaintiff's claims were for negligent supervision or control of the student, and therefore there was no waiver of immunity. The Court of Appeals therefore reversed the District Court and entered judgment dismissing Plaintiff's claims.