

## **FALL 2011 NEWSLETTER**

### **Local Government Case Law Update**

**by Laura O’Leary**

#### **Supreme Court of Texas**

***1. City of Dallas v. Albert, No. 07-0284 2011 Tex. LEXIS 636, (Tex. Aug. 26, 2011).***

If a local government entity waives governmental immunity by asserting counterclaims in a suit, it cannot reinstate governmental immunity by simply filing a non-suit as to its counterclaims.

Police officers brought suit against the city alleging breaches of a contract concerning officers’ pay. The city counterclaimed, seeking to recover possible overpayments made to the officers. The city subsequently non-suited its counterclaims and filed a plea to the jurisdiction asserting governmental immunity from suit.

The court held that the city could not reinstate governmental immunity by filing a non-suit as to its counterclaims. Noting that a governmental entity which has asserted an affirmative claim for relief is subject to a trial court’s jurisdiction on those claims and on certain offsetting claims and defenses, the court noted that such a governmental entity must participate in the litigation process as an ordinary litigant. Ordinary litigants are prevented from using a non-suit to prejudice the rights of an adverse party, so the city could not, by filing a non-suit, prejudice the officers’ rights to be heard on the claims over which the court had gained jurisdiction due to the city’s claims for affirmative relief.

#### **Texas Courts of Appeals**

***1. Solis v. City of Laredo, No. 04-10-00751-CV, 2011 Tex. App. LEXIS 7614 (Tex. App. – San Antonio, Sept. 21, 2011, no pet. h.).***

A local government entity that seeks affirmative recovery in a lawsuit waives its immunity only as to claims or counterclaims brought within that same lawsuit, not to claims which are brought in other cases.

In a prior case, the city sued Solis for payment of a bid bond when Solis declined to enter into a contract to provide services to the city. Solis initially brought counterclaims against the city but later dropped the counterclaims.

Solis subsequently brought a separate suit against the city including claims for breach of contract arguing that the city had waived its immunity by asserting claims for affirmative relief in the prior suit.

The court upheld the grant of the city's plea to the jurisdiction, noting that under *Reata*, (*Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006)) a government entity's waiver of immunity is limited to the particular case in which the governmental entity asserts its claims to affirmative relief.

This case presented an issue similar to that recently decided by the Texas Supreme Court in *City of Dallas v. Albert*, (No. 07-0284 2011 Tex. LEXIS 636, (Tex. Aug. 26, 2011)). While the cases are factually distinguishable, the court in *Solis* did not address *City of Dallas v. Albert* in its opinion and thus, arguably, could have come to a different conclusion if it had considered the Supreme Court's recent decision.

**2. *City of Deer Park v. Ibarra*, No. 01-10-00490-CV, 2011 Tex. App. LEXIS 6899 (Tex. App. – Houston [1st Dist.] Aug. 25, 2011, no pet.).**

Employees of a subcontractor working on a contract for a local government entity might have the right as third party beneficiaries to sue the local government entity for breach of contract.

Claims against a local government entity for negligent administration of contract do not fall within the Texas Tort Claims Act's waiver of immunity.

Workers hired by a subcontractor for a road construction project for the city sued the city for breach of contract and negligent administration of contracts when they did not receive their wages from their employer, the subcontractor.

The city filed a plea to the jurisdiction claiming that the workers failed to allege a waiver of governmental immunity. In denying the city's plea to the jurisdiction, the court noted that the city may have waived governmental immunity as to the contract and that the workers should be allowed an opportunity to plead facts demonstrating their status as third party beneficiaries under the contract at issue. The city did not contend that the waiver of immunity under Texas Local Government Code § 271.152 cannot be invoked by third party beneficiaries.

The court granted the city's plea to the jurisdiction as to the workers' negligent administration claims, holding that such claims did not fall within the Texas Tort Claims Act's waiver of immunity and that the workers did not demonstrate that the city had consented to such a suit.

**3. *City of Beaumont v. Fowler*, No. 09-11-00068-CV, 2011 Tex. App. LEXIS 6240 (Tex. App. – Beaumont, Aug. 11, 2011, no pet.).**

A member of a collective bargaining unit has standing to sue a local government for breach of the collective bargaining agreement.

Fowler, a police officer for the City of Beaumont, sued the city for breach of contract alleging that the city's promotional exams were not conducted in accordance with the

requirements of the city's labor agreement with the Beaumont Police Officer's Association. The city filed a plea to the jurisdiction arguing that Fowler lacked standing to sue for breach of the labor agreement. The trial court denied the city's plea.

Following *City of Houston v. Williams*, No. 09-0770, 2011 Tex. LEXIS 229; 54 Tex. Sup. Ct. J. 713 (Tex. Mar. 18, 2011), the court denied the city's plea to the jurisdiction, echoing the *Williams* court's holdings that collective bargaining agreements are third party beneficiary contracts and that a member of the union has standing as a third party beneficiary to sue for breach of the collective bargaining agreement, even without invoking the union's grievance procedures. The court noted further that the question of a union member's failure to exhaust administrative remedies is not jurisdictional but rather a matter more properly decided in a motion for summary judgment.

**4. *Forge v. Nueces County*, No. 13-11-00106-CV, 2011 Tex. App. LEXIS 7190 (Tex. App. – Corpus Christi, August 31, 2011, no pet. h.).**

The Courts of Appeals in Texas are split as to whether the presentment requirement of Local Government Code Section 89.004, which requires that claimants present their claims against a county to the county prior to filing suit, is mandatory or jurisdictional. If the requirement is merely mandatory, then the court can simply abate the lawsuit pending expiration of the statutory waiting period before filing suit. However, if the requirement is jurisdictional then failure to comply with the presentment requirement would require the court to dismiss the lawsuit.

Forge was a jailer with the Nueces County Sheriff's Department who sued the county for racial discrimination and a hostile work environment after his employment was terminated. Although Forge timely filed discrimination claims with the EEOC and TWC, he did not present his claims to the county under Local Government Code Section 89.004 prior to filing suit. The county sought dismissal of the action arguing that Forge's failure to follow the Section 89.004 presentment requirement deprived the court of jurisdiction over the claim.

The court noted that the Texas Supreme Court previously held that the Section 89.004 presentment requirement is mandatory but not jurisdictional. The court acknowledged but disagreed with a prior case from the Dallas Court of Appeals (*Dallas County v. C. Green Scaping, L.P.*, 301 S.W.3d 872, 877-879 (Tex. App. – Dallas 2009, no. pet.), which concluded that an amendment to Government Code Section 311.034 caused the Section 89.004 presentment requirement to become jurisdictional. Instead, the court created a split in the appellate courts by holding that because a party's failure to comply with the Section 89.004 presentment requirement results in abatement rather than dismissal of a suit, the presentment requirement is in fact mandatory but not jurisdictional. The court reversed the lower court's dismissal of Forge's suit.

**5. *Christus Spohn Health System Corp. v. Ven Huizen*, No. 13-10-400-CV, 2011 Tex. App. LEXIS 3805 (Tex. App. – Corpus Christi, May 19, 2011, pet. denied).**

A hospital district management contractor is a local government entity and is therefore entitled to governmental immunity from claims by its patients.

The Ven Huizens sued a hospital district management contractor for injuries caused during their daughter's birth.

The court upheld the grant of the defendant's plea to the jurisdiction noting that under Section 285.071 of the Texas Health and Safety Code, the hospital district management contractor was a governmental unit. Both the contractor and its employees were therefore entitled to governmental immunity, and the Ven Huizens' claims did not fall within the limited waiver of immunity provided by the Texas Tort Claims Act.

**6. *City of Combine v. Robinson*, No. 05-10-01384-CV, 2011 Tex. App. LEXIS 6467 (Tex. App. – Dallas, Aug. 16, 2011, no pet. h.)**

A local government can comply with the Texas Open Meetings Act by meeting a second time in an open meeting to authorize actions previously improperly authorized in a closed meeting.

In order to prevail on an assertion of legislative or official immunity in a suit for defamation against a government official, the government actor must demonstrate that he was performing the duties of the office when the defamatory statements were made.

Several members of the city's police force sued the city and members of the city council after the city council voted to terminate their employment. The police officers alleged violations of the Texas Open Meetings Act and alleged defamation by the defendants. The defendants filed a plea to the jurisdiction which the trial court denied.

The court granted the plea to the jurisdiction as to the city, noting that although the city council's first, closed meeting regarding the police officers' termination violated the Texas Open Meetings Act, because the city had subsequently met in open session to reconsider the police officers' termination, the city complied with the Texas Open Meetings Act. Furthermore, the police officers could not bring claims for defamation against the city because the Texas Tort Claims Act did not waive governmental immunity for intentional torts.

The court upheld the lower court's denial of the individual defendants' plea to the jurisdiction as to the police officers' defamation claims because the individual defendants had not demonstrated that they were performing the duties of their office when the allegedly defamatory statements were made. The individual defendants failed therefore to establish that their actions were protected by legislative or official immunity.