SUMMER 2012 NEWSLETTER

LOCAL GOVERNMENT CASE LAW UPDATE

By Laura O'Leary

Supreme Court of Texas

1. ***City of North Richland Hills v. Friend*, No. 11-0367, 2012 Tex. LEXIS 565 (Tex. June 29, 2012).**

Section 101.021(2) of the Texas Tort Claims Act (TTCA) does not waive governmental immunity when a governmental actor negligently fails to use certain safety equipment during a medical emergency.

Previously, the Court held that mere nonuse of property does not suffice to invoke TTCA §101.021(2)'s waiver. *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994). However, in some cases, the Court held that when a claimant alleges that the state has used property which lacks an integral safety component, immunity is waived under TTCA §101.021(2). *Lowe v. Tex. Tech Univ*., 540 S.W.2d 297, 300 (Tex. 1976); *Robinson v. Cent. Tex. MHMR Ctr*., 780 S.W.2d 169, 171 (Tex. 1989). Subsequently, the Court limited the "use of property lacking an integral safety component" exception, requiring that the integral safety component be completely missing, rather than merely inadequate, and that it was the lack of the missing safety component which led to the plaintiff's injury. *Tex. A&M Univ. v. Bishop*, 156 S.W.3d 580, 584 (Tex. 2005); *Kerrville State Hospital v. Clark*, 923 S.W.2d 582, 585 (Tex. 1996).

In the instant case, the Plaintiffs argued that because the City used some emergency equipment but failed to use a particular type of emergency equipment, an automatic external defibrillator (AED), in the course of attempting to resuscitate a patron at a water park, the City had omitted an integral component of the emergency equipment and therefore fell under the "use of property lacking an integral safety component" exception to the Court's prohibition on recovery under the TTCA for failure to use property.

The Court rejected the Plaintiffs' argument, noting that link between an AED and other emergency equipment was too attenuated and that to expand the "integral safety component" theory in this manner would create a disincentive for governmental units to provide any kind of safety equipment at their establishments.

Texas Courts of Appeals

1. ***City of San Antonio v. Valemas, Inc*., No. 04-11-00768-CV, 2012 Tex. App. LEXIS 4646 (Tex. App. – San Antonio June 13, 2012, pet. filed).**

A subcontractor's pass-through claim brought by a contractor against the City does fall within the waiver of immunity provided under Tex. Loc. Gov't Code § 271.152.

Valemas, contracted with the City to provide services for a park reconstruction project. The City refused to make certain payments under the contract, and Valemas was unable to pay the subcontractor it had hired to work on the project. Valemas sued the City for breach of contract for failing to pay amounts owed under its contract with the City. The contractor brought pass-through claims for payment on behalf of its subcontractor. The City noted that it had no contract with the subcontractor, and argued that Tex. Loc. Gov't Code § 271.152 did not provide a waiver of immunity for such pass-through claims. The City filed a plea to the jurisdiction asserting immunity.

The appellate court noted that the Texas Supreme Court has recognized the existence of pass-through claims but found the question of whether governmental immunity was waived under § 271.152 to be an issue of first impression. After reviewing the plain language of the statute, the statute's legislative history, and analogous holdings applying § 271.152 to assignments, the court held that § 271.152 does waive immunity for pass-through claims that arise from a contract between a governmental unit and a contractor. The court denied the City's plea to the jurisdiction.

2. *Tex. Dep't of Public Safety v. Benavides,* No. 03-11-00708-CV, 2012 Tex. App. LEXIS 6700 (Tex. App. – Austin Aug. 8, 2012, no pet. h.).

The Third District has entered the fray regarding application of the Texas Tort Claims Act ("TTCA")'s election of remedies provisions when plaintiffs initially file suit against both the governmental unit and an employee. In this case, the Third District adopted reasoning which the Fourteenth District previously applied and which the First District has explicitly rejected.

A passenger injured in a car accident involving a DPS employee, Brown, brought a personal injury suit against both Brown and the DPS. Benavides invoked the waiver of immunity provision of section 101.021 of the TTCA.

DPS moved for, and was granted, dismissal of Benavides' claims against Brown, pursuant to section 101.106(e) of the TTCA which provides for mandatory dismissal of claims against an employee when a claimant sues both a governmental unit and any of its employees.

DPS then moved for its own dismissal arguing that section 101.106(b), which provides that the filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents, operates to bar recovery from either defendant when a claimant initially sues both a governmental unit and an employee.

The court denied DPS's motion to dismiss, noting that the district courts have struggled in determining whether both sections 101.106(b) and (e) can simultaneously apply and therefore bar recovery when a plaintiff brings suit against both the governmental unit and its employee. Instead, the court held that the language from section 101.106(b) regarding the governmental unit's consent applies. The court held that the waiver of immunity under section 101.021 of the TTCA suffices as consent to suit under section 101.106(b) and permits a plaintiff to seek recovery against the governmental unit in these circumstances.

This holding brings the Third District into agreement with the Fourteenth District on application of section 101.106(b), following reasoning which the First District has explicitly rejected. See, e.g., *Amadi v. City of Houston*, No. 14-10-01216-CV, 2011 Tex. App. LEXIS 8562 (Tex. App. – Houston [14th Dist.], Oct. 27, 2011, pet. filed) (en banc); *Metro. Transit Auth. of Harris Cnty. v. Johnson*, No. 14-11-00651-CV, 2012 Tex. App. LEXIS 55 (Tex. App. – Houston [14th Dist.], Jan. 5, 2012, no pet.); *City of Houston v. Esparza*, No. 01-11-00046-CV, 2011 Tex. App. LEXIS 8224 (Tex. App. – Houston [1st Dist.], Oct. 7 2011, pet. filed).

3. *City of Houston v. Atkins*, No. 01-12-00190-CV, 2012 Tex. App. LEXIS 4923 (Tex. App. – Houston [1st Dist.] June 21, 2012, pet. filed).

***City of Houston v. Guzman*, No. 01-11-00234-CV, 2012 Tex. App. LEXIS 4361 (Tex. App. – Houston [1st Dist.] May 31, 2012, no pet.).**

***City of Houston v. Lackey*, No. 01-11-00248-CV, 2012 Tex. App. LEXIS 4359 (Tex. App. – Houston [1st Dist.] May 31, 2012, no pet.).**

These cases all involved application of the election of remedies provision of section 101.106(b) of the TTCA. In each of these cases, the First District refused to dismiss suits against the City under section 101.106(b) when the plaintiffs initially brought their actions against both the governmental unit and an employee. Instead, the court reiterated its recent holding in *City of Houston v. Esparza*, No. 01-11-00046-CV, 2011 Tex. App. LEXIS 8224 (Tex. App. – Houston [1st Dist.] Oct. 7, 2011, pet. filed), that section 101.106(b) does not grant the City immunity from suit when the plaintiff sues both the City and its employee in the original petition, but rather that such a circumstance invokes section 101.106(e) resulting in the plaintiff's involuntary election of the governmental unit as the exclusive defendant if the government file a motion to dismiss on behalf of the employee.

In *Atkins*, the court provided a helpful review of First District cases applying this rule and identified recent cases from Amarillo and San Antonio in accord with the First District's position.

4. *Univ. of Tex. Southwestern Med. Ctr. v. Munoz*, No. 05-11-01220-CV, 2012 Tex. App. LEXIS 5626 (Tex. App.—Dallas July 13, 2012, no pet. h.).

***Dallas Metrocare Serv. v. Juarez*, No. 05-11-01144-CV, 2012 Tex. App. LEXIS 5653 (Tex. App.—Dallas July 16, 2012, no pet. h.).**

***Chambers v. Tex. Dep't of Public Safety*, No. 05-10-01573-CV, 2012 Tex. App. LEXIS 6229 (Tex. App.—Dallas July 30, 2012, no pet. h.).**

These cases all involved construction of the waiver of immunity under section 101.021 of the TTCA concerning what constitutes a condition or use of personal property. This section waives governmental immunity in suits for personal injury and death caused by a condition or use of tangible personal property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

In *Munoz*, the court found that the University's requirement that air handling units continue in operation while Munoz and his coworkers made repairs on and around the units constituted a "use of tangible personal property" sufficient to support a contention that the court had jurisdiction over a claim under the TTCA for personal injury due to the operation of one of the air handling units.

In *Dallas Metrocare*, the court held that Juarez successfully invoked the TTCA's waiver of immunity in a suit for personal injury caused when a whiteboard fell on the plaintiff. Although the whiteboard was not being used as a visual aid at the time of the injury, it was on display and available for that purpose, having been placed on a narrow table and propped up against a wall in close proximity to a conference table where patients were seated during group meetings. Because Juarez asserted negligence directly related to the whiteboard and because the whiteboard was the actual instrumentality of his injury, the court upheld the denial of Metrocare's plea to the jurisdiction.

In *Chambers*, plaintiffs argued that a police officer negligently used the tangible personal property of his badge, uniform, and citation book when he improperly investigated a motorcycle accident and issued a citation to Chambers. The court found that this allegation did not fall within the limited waiver of immunity under the TTCA and affirmed the lower court's grant of DPS's plea to the jurisdiction.

5. *City of Dallas v. Brown*, No. 05-12-00116-CV, 2012 Tex. App. LEXIS 5337 (Tex. App. – Dallas July 5, 2012, no pet. h.).

This case involves application of the "ultra vires" exception to governmental immunity in a suit brought under the Declaratory Judgments Act.

Brown was appointed as a municipal judge for the City of Dallas for a two year term set to expire at the end of May in 2012. In January of 2012, the Dallas City Council passed an ordinance removing Brown from office. Brown alleged that the City Council exceeded

its authority under the Texas Constitution by voting to remove her from office. The court held that, by alleging that a governmental officer acted without legal authority, Brown properly invoked the ultra vires exception to governmental immunity identified in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). The court upheld the lower court's denial of the City's plea to the jurisdiction.