

## **2015 YEAR IN REVIEW**

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

**By Stephen D. Henninger**

*Lawson v. City of Diboll, Texas*, 2015 WL 5458763 (Tex. 2015)

In this case, the Supreme Court of Texas reversed the decision of the Tyler Court of Appeals in the case *City of Diboll, Texas v. Lawson*, 2014 WL 6792679 (Tex. App – Tyler, 2014), discussed in our Winter, 2015, newsletter. That 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 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 had 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 did constitute recreation under the Statute. Because the Plaintiff had conceded that she was not alleging or attempting to prove that the City had acted with gross negligence, the Tyler Court of Appeals found that Plaintiff had failed to state a claim and granted the City’s plea to the jurisdiction dismissing all claims.

The Texas Supreme Court granted Plaintiff’s petition for review and reversed the Tyler Court of Appeals. In doing so, the Texas Supreme Court expressly held that spectating a sporting event is not considered “recreation” under the Recreational Use Statute.

This was a premises liability case brought against the Brazos River Authority. Plaintiff had driven her family to Possum Kingdom Lake to go swimming. They specifically went to the North D&D Public Use Area, a swimming and beach area on Possum Kingdom Lake owned by the Brazos River Authority. Plaintiff entered the North D&D Public Use Area by driving her pickup through the entrance gate to the property and up to a gatekeeper booth that was on the North D&D Public Use Area premises. While in her vehicle, the Plaintiff asked the attendant if there was room for her family to swim and the attendant responded that there was. Plaintiff then pulled the pickup closer to the booth, exited the vehicle, and walked up a step onto a concrete slab where the gatekeeper booth was located. After paying the attendant for a day pass, the Plaintiff turned around to go back to her pickup. When she stepped off the slab and onto the step, she fell to the ground, breaking her ankle.

Plaintiff filed suit against the authority, alleging that the step was loose and gave way when she stepped on it, and that this condition constituted a premises defect. She further alleged that she was an invitee of the Brazos River Authority at the time of the injury. The Brazos River Authority filed a plea to the jurisdiction, asserting at the time of her injury the Plaintiff was engaged in recreation and that the claim was governed by the recreational use statute, and that Plaintiff's claims were barred by governmental immunity. The trial court granted the plea, and Plaintiff appealed.

On appeal, the Plaintiff contended that she was not engaged in recreation at the time of the accident and therefore that the recreational use statute should not apply. The Court of Appeals began its analysis by noting that Plaintiff's claims were brought under Section 101.022 of the Texas Tort Claims Act, which waives immunity for personal injuries arising from premises defects. The court noted that that section of the Tort Claims Act provides that the government owes a plaintiff a duty owed to a licensee, unless the claimant pays for the use of the premises. If the claimant pays, then the duty owed is that owed to an invitee. The Court of Appeals went on to note, however, that Section 101.058 of the Tort Claims Act provides that governmental duties of care are limited by the recreational use statute found at Chapter 75 of the Texas Civil Practice & Remedies Code. That statute provides that the liability of the government to persons on land for recreational purposes is limited to the duty owed to a trespasser, if the claimant engages in recreation on the premises.

The Court of Appeals then examined the recreational use statute and its application to the case. First, the Court noted the statute sets out a non-exclusive list of activities that constitute recreation. Among those is swimming. The Court then noted that in determining whether a particular activity is considered recreational under the statute, the pertinent inquiry is what the claimant was doing at the time she was injured. The Court went on to note that the recreational use statute further defines premises to include not only the land itself but also any roads or buildings attached to or located on the land.

Plaintiff argued that the recreational use statute did not apply to her claim because she was not engaged in the recreational activity of swimming at the time of the occurrence, and had not yet done so. The Court of Appeals noted that prior cases had concluded that the recreational statute contemplates "recreation" to include not only the act of engaging in the recreational activity, but also includes when the person is on the premises traveling to and from the

recreational area. Thus, the Court concluded that a person is engaged in recreation under the recreational use statute whenever that person is on premises for recreational activity and is traveling to or from the recreational area. In this case, it was undisputed that the Plaintiff was on the premises of the Brazos River Authority at the time of the event and that she was on her way to the recreational area to engage in swimming.

Thus, because the Plaintiff was engaged in recreation at the time of the event, the recreational use statute applied. That statute imposes the duty of care owed to a trespasser, which requires a premises owner not to injure a person through willful, wanton, or grossly negligent conduct. The Plaintiff had failed to make any claim of willful or wanton conduct, or gross negligence, and therefore the Brazos River Authority was immune. The Court of Appeals affirmed the granting of the plea to the jurisdiction.

One Justice filed a dissenting opinion, finding there was a distinction between traveling *to* a recreational area and traveling *from* a recreational area. According to this Justice, it was only after engaging in recreational activity and traveling away from that activity that a person should be found to be engaging in recreation. If a person has not yet engaged in recreational activity, but is still on their way to the recreational activity, this Justice would find that the recreational use statute does not apply.

***Ryder Integrated Logistics, Inc. v. Fayette County, Texas***, 2015 WL 496303 (Tex., March 13, 2015)

This case involved analysis of the Texas Tort Claims Act's limited waiver for governmental immunity for claims arising from the negligent operation or use of motor driven vehicles by a governmental entity. The suit arose from an accident between two 18-wheel trucks. A Fayette County Deputy Sheriff had pulled over an 18-wheeler for a routine traffic stop. The truck pulled to the shoulder of the road facing eastbound, and the Sheriff Deputy stopped immediately behind him. After the deputy's vehicle stopped, the 18-wheeler began rolling backwards towards the his car, at which point the deputy repositioned his vehicle by driving around the shoulder and turning his vehicle around so that it faced eastbound traffic on the right shoulder. When it did so, its headlights and high beam spotlight, and emergency lights were directed at oncoming eastbound traffic. Within seconds of the deputy's car turning to face oncoming traffic, and while the deputy was still operating the vehicle, another 18-wheeler traveling eastbound veered to the right and struck the back of the stationary 18-wheeler on the shoulder, causing the driver of the stopped truck to sustain injuries.

That driver subsequently sued the owner of the 18-wheeler that struck him, Ryder Integrated Logistics, Inc. Ryder then filed a third-party claim against Fayette County alleging that the deputy's negligence was the cause of the accident. The County filed a plea to the jurisdiction, arguing that the accident had not arisen from any use or operation of the vehicle such that immunity was waived. The trial court sustained the plea and the Court of Appeals affirmed, holding that a claim of distraction by headlights is more properly classified as a condition that makes an accident possible, rather than as an injury arising from the use or operation of a vehicle.

The Texas Supreme Court reversed the finding of the Court of Appeals and remanded the case to the district court for further proceedings. The Court noted that prior precedent

established several principals for interpreting the Texas Tort Claims Act's limited waiver of immunity for claims arising from the negligent operation or use of vehicles. First, a governmental employee must have been actively operating a vehicle at the time of the incident giving rise to the claim. Moreover, the vehicle must have been being used as a vehicle for immunity to be waived. Further, the alleged tortious act by the governmental employee must relate to the operation of the vehicle, rather than to some other aspect of the employee's conduct. For example, a school bus driver's supervision of children at a bus stop may be negligent, but such negligence could not be accurately described as relating to the operation of a bus.

Using these principals, the Texas Supreme Court concluded that the claim arose from a governmental employee's operation or use of a vehicle. The Court noted there was no dispute that the deputy was actually operating his vehicle at the time of the alleged injury. Fayette County did not deny that the Sheriff's vehicle was being driven, approaching eastbound traffic when the accident between the 18-wheelers collided. Thus, the Sheriff's Deputy was doing more than simply using headlights at the time of the collision; he was actually operating the vehicle. Further, the Texas Supreme Court found that Ryder had adequately alleged negligence by claiming that the Deputy breached legal duties by turning his patrol car in such a fashion as to blind and distract oncoming traffic, which caused errant driving. Further, the Court found that it was reasonably foreseeable that shining your headlights into oncoming traffic could create confusion and cause problems for oncoming traffic.

The Texas Supreme Court noted that the Court of Appeals had relied on the case *Texas Department of Public Safety v. Grisham* in finding that Ryder had presented a claim that did not arise from the operation or use of a vehicle but from a condition that simply made the injury possible (headlights shining into oncoming traffic). The Texas Supreme Court noted that in the *Grisham* case, an accident was allegedly caused by a police car that was parked on the shoulder of a road, with its emergency lights activated. The Texas Supreme Court distinguished this case because the deputy's vehicle was not parked or stationary but was actually being driven by the deputy at the time of the event. Thus, he was "operating" the vehicle. As such, Ryder had stated a claim within the Texas Tort Claims Act's limited waiver of immunity for the negligent operation or use of motor driven vehicles.

***Mackey v. Midland-Odessa Transit***, 2015 WL 1501466 (Tex. App – Eastland, March 31, 2015)

This case was a survival action arising from an incident that occurred on a Midland-Odessa Transit public bus. The suit was brought on behalf of the Estate of Decedent Violet Childs. Childs was a heavy-set diabetic who was a double leg amputee. She used a three wheel motorized scooter to get around. She often rode the Midland-Odessa bus system and had been previously transferred on several occasions by one of its drivers, Kimberly Thompson. Whenever Childs rode the bus, her motorized scooter would be secured to the bus through the use of "Q-Strings", which had a ricketing mechanism that automatically tightened to hold the scooter in place on floor of the bus. Childs refused to wear the seatbelt that was attached to her scooter because it was too tight. Instead, bus driver Thompson would put a seatbelt around Childs that was attached to the Q-Strings, and Childs herself would then tighten and adjust the seatbelt. The bus driver Thompson did not adjust it for her. Childs also always refused the use of a shoulder strap.

On the day in question, Childs boarded the bus and Thompson attached the scooter to the floor of the bus with the Q-Strings. Childs then tightened and adjusted her seatbelts. While Thompson was operating the bus, she took a left turn and heard Childs call her name. Thompson turned around and saw Childs holding onto a pole of the bus because her scooter had tilted over. Thompson pulled the bus over and repositioned the scooter. At the time, Childs denied any injuries and no ambulance was called.

Subsequent to this, Childs passed away, and the representative of her estate sued, claiming that the alleged injuries from the incident on the bus had caused her death. Midland-Odessa Transit filed a plea to the jurisdiction asserting that the Plaintiff had failed to state a cause of action within the Texas Tort Claims Act limited waiver of immunity. The trial court granted the plea, and Plaintiff appealed.

The Eastland Court of Appeals first analyzed whether Plaintiff had stated a claim pursuant to Section 101.021(1) of the Texas Tort Claims Act, which waives immunity for the negligent operation or use of motor driven vehicles. Plaintiff asserted the incident occurred because the bus driver had made a sudden and negligent turn. The Court of Appeals found, however, that Plaintiff had failed to present any evidence in support of the assertion that the turn had been sudden or negligent. Thus, the Plaintiff had failed to state a cause of action within the waiver of immunity provided by Section 101.021(1).

The Court of Appeals then turned to the waiver of immunity provided by Section 101.021(2) for claims arising from the use or misuse of tangible property. Plaintiff alleged she had stated a cause of action within this section by claiming that Midland-Odessa Transit had misused personal property by failing to properly secure Childs in her scooter. The Court of Appeals found however, that Plaintiff had failed to present sufficient evidence to raise a fact issue. First, the evidence established that the driver had been properly trained on how to place Q-strings to secure a scooter to the floor of the bus, and Plaintiff made no contention that the scooter itself had not been properly fastened to the floor with the Q-strings. Rather, Plaintiff was arguing that Childs had been improperly restrained in the chair. However, the Court of Appeals found that the evidence demonstrated that the bus driver was not involved in the adjustment and tightening of the seatbelt that restrained Childs in the chair. Rather, the evidence was that Childs undertook all of those actions herself. Thus, Plaintiff had only demonstrated that the governmental employee had provided property that was subsequently misused by Childs. There was no evidence that the governmental had negligently used that property. Finally, Plaintiff alleged that the bus driver was negligent in not requiring Childs to wear a shoulder strap. The evidence, however, demonstrated that Childs had affirmatively refused to use a shoulder strap. The Court of Appeals noted that a failure to use property or a nonuse of property has been long held to not constitute a waiver of immunity under the Texas Tort Claims Act.

Accordingly, the Court of Appeals found that Plaintiff had failed to state a cause of action within the Texas Tort Claims Act's limited waiver of governmental immunity and affirmed the trial court's granting of the plea to the jurisdiction.

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 of 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 spike strip that 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.

*Green v. City of Houston*, 2015 WL 1967582 (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.