

FALL 2017 NEWSLETTER

LOCAL GOVERNMENT CASE LAW UPDATE

By Stephen D. Henninger

Sarigollu v. City of Arlington, 2017 WL 2687537 (Tex. App. – Ft. Worth June 22, 2017)

This case involved a Plaintiff homeowner suing the City of Arlington for damages to his home caused by a sewage leak. Plaintiff called 911 after sewage began seeping into his home. A utilities department crew and a fire department crew responded and spent an hour unsuccessfully looking for the blockage causing the sewage leak. The utilities crew eventually located the blockage after fire department personnel suggested that the utilities crew was looking in the wrong place.

After the event, the Plaintiff requested reimbursement for expenses and damages to his home, which the City refused to pay. The Plaintiff then filed suit alleging the City of Arlington was negligent in:

1. Failing to perform proper and timely inspections of the sewer system;
2. Failing to keep proper maps or diagrams of the sewer system;
3. Failing to properly train its employees to locate sewer problems in a timely manner;
4. Failing to locate the sewer blockage in a timely manner;
5. Failing to repair the blockage in a timely manner; and,
6. Failing to properly maintain the sewer system.

The City filed a motion for summary judgment seeking dismissal of the Plaintiff's negligence claims alleging that none of them fell within the limited waiver of immunity provided by the Texas Tort Claims Act. The trial court granted the motion for summary judgment and dismissed Plaintiff's claims, and the Plaintiff appealed.

On appeal, the Court of Appeals noted that Plaintiff's claims involved functions related to health, sanitation, and sanitary sewers. These are matters that are expressly defined by the Texas Tort Claims Act to be governmental functions. Accordingly, the City of Arlington could only be liable if the Plaintiff's claims fell within the limited waiver of immunity provided by the Texas Tort Claims Act. The Texas Tort Claims Act waives immunity for property damage, personal injury, and death caused by the negligent operation or use of a motor-driven vehicles or motor-driven equipment; for personal injury and death caused by condition or uses of tangible personal or real property; and for claims arising from premise or special defects. The Court of Appeals then noted that when claims involve negligent conditions or uses of real property, they can only be brought under premises defect theories. The Texas Tort Claims Act waives immunity for premises defect claims to the extent of the duty owed by a landowner to a licensee. That duty requires a landowner not to injure a licensee by willful, wanton, or grossly negligent conduct, and requires a landowner to use ordinary care to warn of, or make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not. Further, the Court of Appeals noted that the Texas Tort Claims Act does not waive immunity for a condition or use of

property that merely furnishes a condition that makes an injury possible. Instead, the condition or use must actually cause the injury.

Turning to an analysis of Plaintiff's allegations, the Court of Appeals found that none of them stated a cause of action for a premises defect within the Texas Tort Claims Act's waiver of governmental immunity. First, allegations that the City failed to perform proper and timely inspections of the sewer systems, keep proper maps or diagrams, and properly train employees do not allege an injury arising from a condition or use of real property. Second, the allegation that the City failed to maintain its sewer system is not an allegation that a condition of property caused an injury. At most, a failure to maintain a sewer system furnishes a condition that makes an injury possible. Finally, the court found that Plaintiff's allegation that the City failed to locate and repair the sewage blockage in a timely manner also failed to state a claim. Assuming that a sewage blockage constitutes a dangerous condition, the court found that the Plaintiff had failed to allege that the City was aware of the blockage and that Plaintiff was not. On the contrary, based on the pleadings, Plaintiff knew of the sewage blockage before the City did and the City, once the Plaintiff informed it of the leak, promptly took steps to fix it. There was, therefore, no allegations that the City failed to take steps to warn Plaintiff, or make the condition reasonably safe. Accordingly, the Court of Appeals found that Plaintiff failed to state a claim within the Texas Tort Claims waiver of governmental immunity and affirmed the dismissal of his lawsuit.

City of San Antonio v. Hays Street Bridge Restoration Group, 2017 WL 776112 (Tex. App. – San Antonio, March 1, 2017)

This case concerns the waiver of governmental immunity for breach of contract claims provided by Chapter 271 of the Texas Local Government Code. The City of San Antonio and a real estate development group entered into a memorandum of understanding for a bridge restoration project. According to the real estate development group, the memorandum of understanding required the City to develop a section of property into a park. Once the project started, the City ended up selling the real estate that the development group contended was to be turned into a park to Alamo Beer Company for commercial purposes. The real estate development company then sued the City on the memorandum of understanding, claiming that the City had breached the contract, and requesting specific performance requiring the City to develop the land into a park area.

In response to the suit, the City filed a plea to the jurisdiction asserting that, to the extent that the memorandum of understanding was a contract, the City's immunity had not been waived under the Local Government Contract Claims Act (Chapter 271 of the Texas Local Government Code), because that Act did not specifically provide for a waiver of immunity for claims seeking specific performance. The trial court denied the plea to the jurisdiction, the case proceeded to trial, and a judgment was entered requiring specific performance of the development of the park. The City then appealed.

On appeal, the Court of Appeals noted that waiver of immunity of governmental entities on contract claims is governed by the Texas Local Government Contract Claims Act found at Chapter 271 of the Texas Local Government Code. That statute specifically provides that local governmental entities that enter into certain contracts waive their immunity from suit for lawsuits for breach of those contracts, but only to the extent set out in the Act. At the time of the contract made the basis of the case, the statute specifically allowed the recovery of damages for the balance due and owed under the contract; for the amount owed for change orders or additional

work in connection with the contract; and for interest as allowed by law. The Act did not specifically provide that a plaintiff could recover specific performance. Plaintiff argued that because the Act was silent on the recovery of specific performance, and did not specifically prohibit its recovery, that immunity had been waived and the suit could proceed. The Court of Appeals disagreed, noting that waivers of governmental immunity must be clear and unambiguous. Because the statute did not plainly provide for a waiver of immunity for specific performance, the Court of Appeals found that the City retained its immunity from suit.

Plaintiff argued that if the Court found the City was immune from suit, the case should be remanded back to the trial court to allow the Plaintiff to amend its pleadings to assert that the City was engaged in proprietary activities, rather than governmental ones, such that governmental immunity would not apply. The Court of Appeals rejected this argument, noting that the Texas Tort Claims Act specifically defines bridge construction and maintenance, and community development and urban renewal activities as governmental functions. The memorandum of understanding between Plaintiff and the City of San Antonio concerned these precise issues. Accordingly, any amendment by the Plaintiff to allege proprietary activities would be improper.

University of Texas M.D. Anderson Cancer Center v. McKenzie, 2000 WL 3316689 (Tex. App. – Houston [14th Dist.] August 3, 2017)

This case involved the Texas Tort Claims Act's waiver of immunity in a medical malpractice cause of action. Plaintiff was the representative of the estate of Decedent Courtney McKenzie-Thue, who died following a surgical procedure performed at the M.D. Anderson Cancer Center. Decedent had been receiving an experimental treatment protocol for advanced stage cancer of the appendix. The protocol called for a multi-part procedure, one of which involved the peritoneal cavity being flushed or "perfused" with a chemotherapy agent mixed with fluid. In the Decedent's surgery, the chemotherapy agent was combined with a water solution containing dextrose known as D5W. M.D. Anderson Cancer Center provided both the chemotherapy agent and the D5W, however, the Decedent's peritoneal cavity was actually perfused by an independent contractor employed by Specialty Care, Inc. The independent contractor performed the procedure, however, under the oversight and direction of M.D. Anderson Cancer Center physicians. Additionally, following the perfusion procedure, an M.D. Anderson doctor flushed the decedent's system with more D5W.

After undergoing the procedure, the Decedent's condition deteriorated. Her brain swelled, and she passed away. Her estate then sued M.D. Anderson Cancer Center asserting that it negligently employed tangible personal property by misusing the chemotherapy agent and D5W and that this negligence was the cause of the Decedent's death. The hospital filed a plea to the jurisdiction that was denied, and the hospital appealed.

On appeal, the Court of Appeals first looked at whether the Plaintiff had stated a claim within the Texas Tort Claims Act's waiver of Immunity for a negligent use of a tangible property by a governmental employee. The hospital asserted that the Plaintiff failed to state a claim because the person that actually used the chemotherapy agent and D5W was employed by an independent contractor, not the hospital. The Court of Appeals noted that it is only when governmental employees negligently use tangible property that a claim has been stated within the Texas Tort Claims Act. Immunity is not waived when a governmental entity allows someone else to use property. The Court of Appeals then noted that it was undisputed that M.D. Anderson

Cancer Center provided the chemotherapy agent and the D5W for use during the procedure. It was further undisputed that an M.D. Anderson Center doctor used D5W to flush out the patient's body following the perfusion procedure that had been performed by the independent contractor. The Court held this was legally sufficient evidence that the M.D. Anderson Cancer Center had used tangible personal property during the procedure. Additionally, the Court noted that there was evidence that during the perfusion procedure performed by the independent contractor M.D. Anderson Cancer Center physicians massaged and manipulated the patient's body to facilitate the distribution of the drug throughout her system. The Court held this also constituted sufficient evidence that the Cancer Center used tangible personal property during the surgical procedure.

The hospital then argued that the Plaintiff's claims were actually claims for errors in medical judgment, rather than claims involving a misuse of tangible property. The Court of Appeals disagreed holding that, viewing the Plaintiff's claims as a whole, they were more than complaints about medical judgment, but instead complained of specific uses of tangible personal property. Finally, the Court of Appeals noted there was also evidence that the chemotherapy agent and D5W were the direct cause of the Decedent's death. As such, they did more than simply furnish a condition that made the Decedent's death possible, but instead were alleged to be the proximate cause of the event. Accordingly, the Court of Appeals affirmed the denial of the hospital's plea to the jurisdiction.

Bates v. Pecos County, 2017 WL 1164597 (Tex. App. – El Paso, March 29, 2017)

This case concerns the waiver of governmental immunity provided by the Texas Whistleblower Act. Plaintiff was an emergency medical technician employed by Pecos County from 2008-2011. In March 2011, she believed that the County had improperly shorted her overtime pay. She became very upset and uttered a loud, expletive filled statement at her workplace, which her supervisor overheard. Her supervisor confronted her about the improper statement and told her it violated departmental policy. Plaintiff then advised him of her complaint about the overtime pay, which he addressed. The same day, Plaintiff was placed on suspension and her employment was ultimately terminated for violation of policy because of the expletive laden outburst.

Plaintiff thereafter filed a discrimination claim with the EEOC, part of which contended that the County systematically shorted its employees on overtime pay. After receiving a right to sue letter, Plaintiff filed suit against the County asserting a claim under the Texas Whistleblower Act, as well as causes of action for breach of contract, negligence, and intentional infliction of emotional distress. The County filed a motion for summary judgment/plea to the jurisdiction asserting that it was immune from Plaintiff's claims, which the district court granted. Plaintiff then appealed.

The Court of Appeals noted that Pecos County is entitled to governmental immunity from suit except and to the extent that immunity has been expressly waived. One such waiver of immunity is provided by the Texas Whistleblower Act, which says that a governmental entity may not take adverse personnel action against a public employee because that employee in good faith reported a violation of law by the employer to an appropriate law enforcement authority. Plaintiff filed suit under the statute, alleging that she had reported violations of law regarding the County's overtime payment practices, and that this report was the cause of her termination. Plaintiff claimed that she had reported the overtime issue to her immediate supervisor, who was a shift captain, to other members of the emergency medical services department at the County, to

the County Treasurer's office, and to the County Judge. The County contended that the Plaintiff had failed to raise a fact issue that she had reported a violation of law to an appropriate law enforcement authority, nor that any such report was the cause of her termination.

In regards to "appropriate law enforcement authority", the Court of Appeals noted that a plaintiff in a Whistleblower case must demonstrate a good faith belief that the report was made to an appropriate law enforcement authority. That good faith belief contains a subjective and objective component. First, the plaintiff must show that he or she actually believed that the person to whom they reported the violation of law was an appropriate law enforcement authority; and second, the plaintiff must then show that belief was reasonable in light of the employee's training and experience. The Court of Appeals then went on to note that it was established that for an entity or person to constitute an appropriate law enforcement authority under the Whistleblower Act, the entity or person must have authority to enforce, investigate, or prosecute violations of the law against third parties outside of the entity itself, or must have authority to promulgate regulations that govern the conduct of third parties outside of the governmental entity itself. Persons or entities with authority to enforce legal requirements *within* the organization do not constitute an "appropriate law enforcement authority".

The Court noted that the law implicated by the Plaintiff's overtime pay complaints was the Fair Labor Standards Act. The Court then stated that Plaintiff had failed to demonstrate that any of the persons to whom she allegedly reported the overtime pay issue had authority to prosecute third parties outside of Pecos County for violations of the Fair Labor Standards Act, nor did they have authority to promulgate regulations governing the conduct of third parties outside of Pecos County. The Court of Appeals further found that the Plaintiff had failed to raise a genuine issue of material fact that any alleged reports of violations of the Fair Labor Standards Act were the cause of her termination. The Court of Appeals noted that Plaintiff primarily relied upon the rebuttable presumption created in the Act that an adverse employment action taken within 90 days of a report of a violation of law can be presumed to be the cause of a termination. The Court of Appeals found that Plaintiff had failed to establish that the adverse acts against her occurred within 90 days of any report she had made. Further, the Court of Appeals found that the Plaintiff had failed to present any summary judgment evidence of who the decision maker on her termination was, and whether that person even knew about the Plaintiff's alleged reports of overtime pay issues. Accordingly, Plaintiff had also failed to raise any issue of material fact that her alleged reports were the cause of her termination. The Court of Appeals therefore affirmed the dismissal of Plaintiff's Whistleblower claims.

In regards to Plaintiff's common law claims for breach of contract, negligence, and intentional infliction of emotional distress, the Court of Appeals found that Plaintiff had failed to establish any waiver of governmental immunity for her purported contract claim, and that her negligence and intentional infliction of emotional distress claims did not fall within the limited waiver of immunity provided by the Texas Tort Claims Act. Accordingly, the Court found those claims were also properly dismissed.