

FALL 2018 NEWSLETTER

LOCAL GOVERNMENT CASE LAW UPDATE

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Harris County vs. Annab, 2018 WL 2168484 (Supreme Court of Texas, May 11, 2018)

Rule of law: An allegation that a governmental unit enabled, authorized, or allowed a third-party to use personal property does not state a claim within the Texas Tort Claims Act's limited waiver of governmental immunity. An employee of the governmental unit must use the personal property.

This is a case involving a negligence claim against Harris County under the Texas Tort Claims Act. The Plaintiff had been shot by an off-duty Harris County Deputy Constable following a road rage incident. The off-duty deputy constable fired his personal firearm in the incident, and was in his personal vehicle at the time of the incident. The Plaintiff sued Harris County under the Texas Tort Claims Act, asserting that Harris County used tangible personal property when the off-duty deputy constable shot her. The trial court granted the County's plea to the jurisdiction and dismissed the case. On appeal, the Court of Appeals agreed that the Plaintiff had failed to state a cause of action within the Texas Tort Claims Act's limited waiver of governmental immunity, but remanded the case to allow the Plaintiff to re-plead and conduct additional discovery. Harris County then sought review with the Texas Supreme Court, asserting that the remand of the case for further discovery and re-pleading was improper.

First, the Supreme Court determined that the Plaintiff had failed to state a viable claim under the Texas Tort Claims Act. The Supreme Court noted that for a governmental unit's immunity to be waived, it must be done in clear and unambiguous language. The Texas Tort Claims Act waives immunity for certain tort claims, including those caused by a condition or use of tangible personal or real property. The Plaintiff's contention was that she had been injured by the County's use of tangible personal property, to wit, the firearm that was used to shoot her. The Texas Supreme Court rejected this. It noted that for several years it has been established that a governmental unit does not "use" personal property merely by allowing someone else to use it. Thus, allegations of use that are actually allegations that a governmental unit authorized, approved, or allowed someone else to use property fail to state a claim within the Texas Tort Claims Act's limited waiver of governmental immunity. Rather, for a government to "use" tangible personal property, the governmental unit must itself be the user. An allegation that Harris County enabled, authorized, or approved someone else's use of a firearm does not satisfy the standard.

The Plaintiff also attempted to overcome Harris County's immunity by arguing that Harris County's various administrative decisions regarding the deputy's employment amounted to a "use" of tangible personal property. This allegation arose from the Plaintiff's contention that the deputy had a troubled employment history during his time as a constable, and that the County should have been aware of this and withdrawn any authorization it had given the deputy to use a firearm. The Supreme Court rejected this, noting that it was essentially a claim that Harris County had negligently used information. It is established that claims based upon a use of information fail to state a cause of action within the Texas Tort Claims Act's waiver of

immunity, as information is not tangible property. (The Texas Supreme Court also went on to note that any allegation that the County had “authorized” the deputy’s use of the firearm was inaccurate. The evidence that had been developed during discovery demonstrated that the deputy had obtained the firearm on his own, for personal use, and had not required or sought any authorization or approval from the County).

Lastly, the Supreme Court turned to the propriety of the Court of Appeals remanding the case to allow the Plaintiff to conduct further discovery and re-plead. The Texas Supreme Court found this was improper and should not have been done by the Court of Appeals. The Supreme Court noted that Plaintiffs are often given a right to re-plead to address jurisdictional arguments. However, if the Defendant can demonstrate that the pleadings on file conclusively negate jurisdiction, or that a Plaintiff has already had a full and fair opportunity to develop the record and amend its pleadings, then no such opportunity need be afforded. In reviewing the record, the Texas Supreme Court found that, prior to the case being taken to the Court of Appeals, the Plaintiff had already conducted discovery, and thereafter had multiple opportunities at the Court of Appeals to articulate a valid legal or factual theory under which she could sue Harris County. The Plaintiff had failed to do so. Moreover, the Texas Supreme Court, looking at the undisputed factual allegations, found that it could not envision any possible way that the Plaintiff could state a cause of action within the Texas Tort Claims Act’s limited waiver of immunity. As such, the Plaintiff was not entitled to an opportunity to re-plead or conduct additional discovery.

West Odessa Volunteer Fire Department, Inc. vs. Contreras, 2018 WL 1750839 (Tex. App.—Eastland, April 12, 2018)

Rule of law: Unpaid volunteers of a governmental unit are not “employees” under the Texas Tort Claims Act, which requires that “employees” be in the paid service of the governmental entity. The provision of life insurance benefits to a volunteer does not change volunteer status.

This was a wrongful death and survival action brought against the West Odessa Volunteer Fire Department. It arose out of an incident that occurred when two members of the Department, Shane Alletto and Dakota Gibson, responded to a motor vehicle accident. Prior to arriving at the scene, they received a call from a captain with the Odessa Fire Department, who requested their assistance in diverting traffic off of the highway. To do so, Shane Alletto parked a West Odessa Volunteer Fire Department firetruck across both lanes of the highway, perpendicular to traffic. Shortly thereafter, two persons who were riding a motorcycle on the highway collided with the firetruck and were killed. Their family members brought a wrongful death and survival action against the West Odessa Volunteer Fire Department under the Texas Tort Claims Act.

The Volunteer Fire Department filed a motion for summary judgment and plea to the jurisdiction contending that it was immune from the Plaintiffs’ claim because Shane Alletto and Dakota Gibson were unpaid volunteers, not employees. The trial court denied the Motion for Summary Judgment and plea to the jurisdiction, and the Department took an interlocutory appeal.

On appeal, the Court of Appeals noted that the Plaintiffs’ pleadings asserted a cause of action under Section 101.021 of the Texas Tort Claims Act. Section 101.021(1) of the Act waives immunity for claims for property damage, personal injury, or death, caused by the

wrongful acts or omissions of employees of a governmental unit and that involved the negligent operation or use of motor-driven vehicles or equipment. “Employee” is defined by the Act as a person who is in the *paid* service of a governmental entity. The Court of Appeals noted that the evidence offered by the Volunteer Fire Department in support of its motion for summary judgment and plea to the jurisdiction established that Shane Alletto and Dakota Gibson were unpaid volunteers of the Department. As such, they were not “employees” and Plaintiffs claim could not fall within the Texas Tort Claims Act’s limited waiver of immunity. The Plaintiffs argued that Shane Alletto should be considered an employee because there was some evidence that the Department provided life insurance benefits to him. The Court of Appeals rejected this contention, citing to other Court of Appeals’ opinions, as well as regulations under the Federal Fair Labor Standards Act, providing that volunteers can be paid expenses and reasonable benefits without losing their volunteer status. Based on these authorities, the Court of Appeals found that the provision of life insurance benefits to Shane Alletto did not convert him from a volunteer to a paid employee.

The Plaintiffs then contended that they had stated a cause of action within Section 101.021(2) of the Texas Tort Claims Act. That provision provides that governmental immunity is waived for personal injury and death caused by condition or use of tangible personal or real property. Unlike Section 101.021(1), this Section does not specifically refer to the acts of an employee of a governmental unit. The Plaintiff thus contended that immunity could be waived under Section 101.021(2) whether the person upon whom liability is based is an employee or not. The Court of Appeals rejected this contention, citing the previous Court of Appeals decisions which had looked at the issue and determined that, while Section 101.021(2) does not expressly refer to the acts of an “employee,” the statute nonetheless requires that any alleged negligence be committed by a paid employee, just as with Section 101.021(1).

The Plaintiffs then claimed that the Volunteer Fire Department’s immunity had been waived because Alletto and Gibson were acting under the direction of a captain of the Odessa Fire Department, who was a paid employee for the City of Odessa. The Court of Appeals rejected this argument, noting that while the City of Odessa might be subject to suit for the actions of its paid Fire Department captain, in this case the Plaintiffs were suing the West Odessa Volunteer Fire Department, a completely separate entity that did not employ the Fire Department captain who had given instructions to Shane Alletto and Dakota Gibson.

Finally, the Plaintiffs alleged that immunity was waived under Section 101.062 of the Texas Tort Claims Act. That provision states that the Tort Claims Act only applies to claims arising from the actions of employees or volunteers providing 911 service if their alleged actions violate criminal statutes or ordinances. The Court of Appeals held that Section 101.062 does not provide any greater waiver of governmental immunity than that provided by Section 101.021, and the Plaintiffs therefore could not proceed under that provision of the Texas Tort Claims Act. The Court of Appeals thus reversed the trial court and entered judgment granting the motion for summary judgment and plea to jurisdiction of the West Odessa Volunteer Fire Department.

City of the Colony, Texas vs. Rygh, 2017 WL 6377435 (Tex. App.—Fort Worth, December 14, 2017)

Rule of law: For a governmental entity to be liable for property damage, the operation or use of motor-driven vehicles or equipment must actually cause the alleged property damage. Moreover, an alleged failure to warn a plaintiff of possible adverse consequences that might arise from a use of motor-driven vehicles or equipment does not state a cause of action within the Texas Tort Claims Act's limited waiver of governmental immunity, as that is an allegation related to negligent communication of information, not the negligent operation or use of motor-driven vehicles or equipment.

This is a case interpreting the section of the Texas Tort Claims Act that waives governmental immunity for claims of property damage. The Plaintiffs were homeowners whose home was flooded with raw sewage through the sewer line to their home provided by the City's utility system. The Plaintiffs alleged that the flooding occurred sometime between 7:30 a.m. and 8:00 a.m. on April 23, 2014, which they discovered upon returning home from taking their grandson to school. Prior to this time, at approximately 7:15 a.m., the Plaintiffs' neighbor notified the City that an overflow pipe on the side of his house was expelling sewage into his yard. The City responded to this by dispatching a crew to the area. The crew determined that the problem was likely being caused by a blockage in the sewer line and decided to use a Vac truck to clear up the blockage. Vac trucks clear backed sewer lines by pushing a nozzle that is attached to a hose that is powered by the engine on the truck. The engine sends pressurized water through the hose, which then pushes the nozzle upstream towards the line blockage. Pressurized water is propelled downstream out the back of the nozzle as it travels upstream. Sometime after the crew had used the Vac truck to clear the blockage, the Plaintiffs approached them and advised that sewage had backed up into their residence.

The Plaintiffs subsequently sued the City, alleging that the employees' negligent use of the Vac truck to break through the sewer line blockage had caused sewage to back into their residence. The City filed a motion for summary judgment or, alternatively, a plea to the jurisdiction, which the trial court denied. The City then took an interlocutory appeal.

The Court of Appeals began its analysis by noting that the Texas Tort Claims Act waives the City's governmental immunity in claims for property damages if the damage arises from the operation or use of a motor vehicle or equipment, and the employee would be personally liable under Texas law. The Court of Appeals further noted that the phrase "arises from" requires a nexus between the operation or use of motor-driven vehicles or equipment and the property damage that is alleged. This means that the operation or use of the vehicle or equipment must have actually caused the injury. The Court of Appeals then examined the evidence that had been submitted in support of the plea to the jurisdiction/motion for summary judgment and determined that, as a matter of law, there was no causal nexus between the operation of the Vac truck and the damages alleged by the Plaintiffs.

First, the Court of Appeals noted that all the evidence demonstrated that the pressurized water put out by the Vac truck would always flow downstream, away from the Plaintiffs' home, and not upstream, towards the home. As such, the use of the Vac truck could not have been the cause of the sewage backing up into the Plaintiffs' residence. Moreover, the evidence further established that the City crew did not begin using the Vac truck to remedy the sewer line blockage until sometime after 8:00 a.m. According to the Plaintiffs, their house was fully

flooded between 7:30 a.m. and 8:00 a.m. Therefore, the flooding would have occurred prior to the use of the Vac truck by the City employees.

The Plaintiffs also alleged that the City was negligent in failing to advise them, either before or after the use of the Vac truck, that the residence could flood with sewage as a result of the use of the truck. The Court of Appeals found that this failed to state a cause of action within the Texas Tort Claims Act, since failing to notify the Plaintiffs of the use of the truck had nothing to do with the operation or use of the equipment. Rather, that is a claim related to human communications, or the lack thereof. Thus, the Court of Appeals stated that the trial court improperly denied the plea to the jurisdiction/motion for summary judgment. The Court of Appeals reversed the trial court's order and rendered judgment dismissing all claims against the City.