

2018 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2018

LOCAL GOVERNMENT CASE LAW UPDATE

By Stephen D. Henninger

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

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)

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.

Texas Southern University v. Mouton, 2018 WL 358463 (Tex. App. – Houston [14th Dist.], January 11, 2018)

This was a suit brought against Texas Southern University (TSU) by the mother of a freshman student who was killed on campus. Plaintiff's son was walking to class outside his dormitory when he was shot and killed by a non-student. The evening prior to this, another shooting had occurred in the parking lot at the same dormitory. Plaintiff's mother sued TSU for negligence and gross negligence alleging that TSU had committed negligent acts by: selecting an inadequate amount of security, failing to warn parents about known dangers to their minor children while attending TSU; failing to warn the decedent about the potential threat posed by criminals at the university, failing to lock down the campus after the previous shooting; failing to hire more security after the previous shooting; hiring incompetent security that failed to prevent criminals from entering onto the premises of the campus, failing to adequately supervise and monitor criminal activities on the campus; failing to take reasonable steps to provide a safe and secure campus; failing to provide properly trained security staff; and failing to detect, prevent, or

intervene in the crime against the decedent. TSU filed a plea to the jurisdiction, alleging that the Plaintiff had failed to state a cause of action from the Texas Tort Claims Act's limited waiver of governmental immunity. The trial court granted the plea but gave the Plaintiff 30 days to amend their petition. TSU, however, asserting that the petition affirmatively negated the existence of jurisdiction, filed a notice of interlocutory appeal before the Plaintiff could amend her petition.

The Court of Appeals noted that Section 101.021(2) of the Texas Tort Claims Act provides that immunity is waived for personal injury and death caused by a condition or use of tangible personal real property if a governmental unit would, if it were a private person, be liable under Texas law. The Court further noted that allegations concerning conditions of real property implicate premises defects, which are subject to heightened pleading requirements. When a claim arises from a premises defect, a claimant is required to adequately plead that a property owner's failure to exercise ordinary care to protect the Plaintiff from danger was the proximate cause of injury to the Plaintiff. The Court further noted longstanding authority that there must be a nexus between a use or condition of property and an injury. A condition or use of property must have actually *caused* an injury, not simply furnish a condition that makes an injury possible.

Turning to the Plaintiff's claims of negligence, the Court found that they fell into three broad categories:

1. Providing inadequate security;
2. Failing to warn of dangers on campus; and
3. Failing to make the campus safe after previous acts of violence.

In regards to the inadequate security allegations, the Court noted that a failure to supervise or provide security, by itself, is an allegation of a failure to act, not a condition or use of property for which immunity is waived. The Court found that Plaintiff's allegations of inadequate security measures related only to a condition that made the injury to the decedent possible, not an allegation that a condition or property proximately caused any injury. As such, TSU was immune. In regards to Plaintiff's failure to warn of claims, such allegations are generally consistent with a premises defect claim. The Court found, however, that Plaintiff's allegations essentially contended nothing more than that TSU had failed to warn the decedent and his parents of a risk of harm on the campus, but failed to allege any facts that, if true would establish that the failure was the cause of the injury to the Plaintiff's son. The Court noted that allegations that a plaintiff is injured by another person's purposeful misbehavior on property do not rise to a claim for a premises defect. The Court found that the cause of the injury in this case was the intentional criminal conduct of the shooter, not any failure to warn. Finally, in regards to Plaintiff's allegations regarding an alleged failure to make the campus safe, the Court again found this could potentially state a premises defect claim. However, there must be a causal link between the alleged failure to make property safe and the injuries suffered by a plaintiff. In other words, "the realty itself must be the cause of the injury, not merely the backdrop." In this case, the cause of the injury to the decedent was him being intentionally shot by a third-party. No realty or property of TSU was the cause of any injuries. As such, Plaintiff failed to state a claim for premises defect, and TSU was immune.

Metropolitan Transit Authority of Harris County, Texas v. Douglas, 2018 WL 1057629 (Tex. App. – Houston [14th Dist.], February 27, 2018)

This was an employment discrimination and retaliation case under the Texas Commission on Human Rights Act (TCHRA). Plaintiff was a female employee of the Metro Police Department who applied for a Captain position in 2014, along with two male co-workers. Plaintiff alleged that rather than following procedures to use outside agencies to conduct competency assessments, the department instead allowed the Chief of Police to appoint a five person panel of Metro employees to interview candidates. The panel scored Plaintiff as the highest ranking candidate. However, following an interview by the police chief, both male candidates were promoted and Plaintiff was not. Plaintiff contended the decision not to promote her was based on the fact that a female had been selected to replace the current police chief as the first female chief of police, and the acting chief wanted to avoid promoting too many women to high ranking leadership roles in the department.

Plaintiff thereafter filed a discrimination charge with the Texas Workforce Commission (TWC) alleging gender discrimination. Following the expiration of 180 days without a determination from the TWC, in September 2015, Plaintiff filed a gender discrimination suit under the TCHRA. Plaintiff later amended her petition in July, 2016, contending that after she had filed a discrimination charge with the TWC, the police department had requested that Plaintiff's supervisor lower her performance rating. After Plaintiff amended her petition to assert the retaliation claim, the Defendant filed a plea to the jurisdiction requesting that the Court dismiss the retaliation claim for failure to exhaust administrative remedies, which was denied. Subsequent to that, in February 2017, Plaintiff amended her petition again, asserting that she had filed a charge with the TWC alleging retaliation on December 19, 2016, and had been issued a notice of right to sue letter. She therefore contended that her administrative remedies had been exhausted.

The Defendant filed an interlocutory appeal of the denial of its plea to jurisdiction claiming that the trial court had erred in refusing to dismiss Plaintiff's retaliation claim for failure to exhaust administrative remedies. The Defendant also argued that the Plaintiff had failed to plead a *prima face* case of retaliation because she had not alleged a materially adverse employment action.

The Court of Appeals first addressed the materially adverse employment action issue. The Court noted that the TCHRA makes retaliation for certain protected activities actionable, provided an "adverse employment action" occurred. The Court then noted that adverse employment actions encompass things more than simply ultimate employment decisions. Rather, adverse employment actions can include anything that a reasonable employee would find materially adverse. This means actions that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Factors relevant to making this determination are:

1. The effect the act had on the employee's prestige;
2. The effect the act had on the employee's opportunity for advancement;
3. The effect the act had on the employee's pay;
4. The effect the act had on the employee's core job duties; and,
4. The effect the act had on the employee's ability to obtain outside employment.

The presence or absence of any one of these factors is not dispositive. Rather, the effect of the challenged action must be considered as a whole in light of all the circumstances. Applying this test to the downgrading of Plaintiff's employment evaluation that was the alleged retaliatory act in the case, the Court of Appeals found that it qualified as a materially adverse employment action. The Court found such an action could have lowered the Plaintiff's prestige and also reduced her opportunities for advancement. Thus, it qualified as an adverse employment action that could support a retaliation claim.

The Court of Appeals then turned to the Defendant's allegation that the Plaintiff had failed to exhaust her administrative remedies in that she had never filed a complaint of retaliation with the TWC prior to making the claim in the lawsuit. Plaintiff contended that the 5th Circuit decision in *Gupta v. East Texas State University* creates an exception to the exhaustion requirement. In the *Gupta* case the 5th Circuit had found that the exhaustion requirement did not apply to a retaliation claim arising out of alleged actions taken in retaliation for the filing of an EEOC complaint after a lawsuit had been filed. Defendant argued that the Supreme Court decision in *National Railroad Passenger Corp. v. Morgan* had abrogated the *Gupta* case. In *Morgan*, the Supreme Court had held that Title VII plaintiffs could not use a "continuing violation" theory to assert claims that were based on employer acts outside of the 300 day deadline for filing an EEOC charge. The Court of Appeals noted there is a split of authority in federal courts about whether *Morgan* applies only to acts that occurred more than 300 days before an EEOC charge was filed, or also applies to acts occurring *after* the EEOC charge is filed. After analyzing the cases that have addressed the issue, Court of Appeals held that the *Morgan* case does not apply to retaliation claims that grow out of discrimination charges filed with the EEOC or TWC. Thus, there is no exhaustion of administrative remedies requirement for retaliation claims growing out of an earlier filed EEOC/TWC charge. In this case, the Plaintiff alleged that the Defendant had retaliated against her based upon her filing an EEOC charge. Therefore, there was no exhaustion requirement, and the trial court had properly denied the Defendant's plea to the jurisdiction.