

## **WINTER 2019 NEWSLETTER**

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

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*City of Dallas vs. Hernandez-Guerrero*, No. 05-18-00033-CV, 2018 WL 6427641 (Tex. App. – Dallas, Dec. 7, 2018)

This case was an appeal by the City of Dallas of a denial of a plea to the jurisdiction. The underlying lawsuit was a suit for personal injuries arising out of an automobile accident between a Dallas Police Department car and a private vehicle. At the time of the accident, the officer driving the police vehicle was responding to a Code 3 emergency and was operating its lights and siren.

After suit was filed, the City of Dallas filed a plea to the jurisdiction claiming that the Court lacked subject matter jurisdiction because the City was entitled to governmental immunity from the Plaintiff's claims. Specifically, the City alleged that the police officer driver of the City's vehicle was entitled to the defense of official immunity. As such, he could not be "personally liable according to State law" and the Plaintiff's claims therefore did not fall within the limited waiver of governmental immunity provided by the Texas Tort Claims Act. The trial Court denied the plea to the jurisdiction, and the City appealed.

On appeal, the Dallas Court of Appeals noted that official immunity is an affirmative defense protecting governmental employees from suit when a claim is based on the performance of their discretionary duties, within the scope of their authority, and when undertaken in good faith. The good faith inquiry is an objective analysis, without regard to an employee's subjective state of mind. Objective good faith is established if a reasonably prudent officer could have believed the action at issue was reasonable. Good faith depends on how a reasonably prudent officer would have assessed the need to which the officer responds along with the risks brought about by the manner in which the officer chooses to respond.

In the context of an emergency response situation, a need for an officer's response is determined by factors such as the seriousness of the crime or incident to which the officer is responding, whether the officer's immediate presence is necessary to prevent injury or loss of life, and what alternative courses of action, if any, are available. Consideration of risks involves analysis of the countervailing public safety concerns, the nature and severity of harm that the officer's actions could cause, the likelihood that harm will occur, and whether a risk of harm is clear to a reasonably prudent officer.

The Court of Appeals noted that the City supported its plea to the jurisdiction with an affidavit from the police officer driver. That affidavit established that he was responding to a Code 3 "disturbance emergency" call which, in the officer's experience, required an immediate response because victims could be in imminent danger, and the presence of police officers may be necessary to prevent serious bodily injury. In going to the scene of the incident, the officer stated that he activated his lights and siren and, as he approached the intersection where the accident ultimately occurred, slowed to 21 m.p.h. The roadway conditions were dry, visibility was clear, and the officer's affidavit stated what he saw as he approached the intersection

indicated that there was minimal chance of any accident. Because the call that he was responding to was urgent, involving a potential risk of harm to life, and the facts and circumstances as he approached the intersection demonstrated a minimal chance of an accident occurring, the officer chose to proceed through the intersection without coming to a complete stop. Additionally, the affidavit established that 13 other vehicles had noted his vehicle's lights and siren and pulled over to allow him to pass as he was approaching the intersection.

The Plaintiff argued that the affidavit was insufficient to establish that the officer was entitled to official immunity. Specifically, Plaintiffs noted that the affidavit admitted that the officer failed to come to a complete stop before proceeding through the intersection, as was required by City policy. The Plaintiff further noted that an administrative review of the accident found that the officer had acted improperly and that he was reprimanded for violating City policy regarding coming to a complete stop. According to the Plaintiff, these facts indicated that the officer's actions were unjustified and not objectively reasonable.

The Court of Appeals disagreed. First, the Court noted that Section 546.001(2) of the TEXAS TRANSPORTATION CODE specifically allows the operator of an emergency vehicle to proceed past red lights or stop signals, after slowing as necessary for safe operation. The fact that an accident occurred does not amount to showing that the statute has been violated and is insufficient to raise an issue of fact that an officer acted recklessly. The Court further noted that a police officer can rely upon his/her own affidavit to establish good faith, and that objective good faith is not rebutted simply by evidence that the Department's policy might have been violated. Examining the record, the Court of Appeals found that the need to which the officer was responding was a potentially life-threatening emergency situation. Further, the evidence showed that the officer slowed as he approached the intersection and made an appropriate assessment of the risk of harm if he proceeded through without stopping. The fact that the road was dry, that the officer had his emergency lights and siren activated, and that 13 other vehicles had stopped in response to his emergency sirens and lights further indicated the reasonableness of the officer's decision. The Court of Appeals found that the officer's affidavit adequately established that he had engaged in the appropriate risk-need analysis regarding his decision to enter the intersection without stopping, and that it was sufficient to establish his entitlement to official immunity. As such, the City's plea to the jurisdiction should have been granted and the Court of Appeals reversed and rendered judgment for the City.

***City of Killeen vs. Cheney***, No. 03-18-00139-CV, 2018 WL 5832088 (Tex. App.—Austin Nov. 8, 2018) (mem. op.)

This is a case arising from a fatality accident in Killeen, Texas. The operator of a motorcycle was proceeding through sequential intersections. He had a green light at the first intersection, but a red light at the second intersection, which he failed to perceive. He entered the intersection and was struck by a vehicle traveling on the cross street and was killed. His wife thereafter sued the City of Killeen, alleging that the City negligently installed traffic control at the intersection. The City filed a plea to the jurisdiction, which was denied, and the City appealed.

The evidence revealed that the location where the accident occurred was known as the Rosewood Interchange. The interchange consisted of two sequential intersections on Rosewood Drive between a frontage road running parallel to U.S. 190. The traffic engineering plans for the Rosewood Interchange allowed for operation of the traffic signals at the sequential intersections to be accomplished in a variety of ways. Ultimately, the City of Killeen decided to install a

three-phase signal operation at the interchange. In a three-phase operation, traffic traveling on Rosewood Drive through the two intersections would get a green light at one intersection and a red light at the next. By contrast, in a four-phase signal operation, traffic traveling on Rosewood Drive would receive a green light at both intersections on Rosewood Drive at the same time. While the City had decided it was going to install a three-phase signal operation at the interchange, at the time it was initially installed, the City did not have sufficient equipment for such an operation. As such, when the interchange was first open to the public, the intersection operated in a four-phase signal operation.

Several days after the interchange had been in operation, the City changed it to a three-phase signal operation. After completing the change, several traffic department employees remained at the intersection to confirm that the signals were operating appropriately. They then left the location. Approximately 15 minutes after they left, the Decedent traveled down Rosewood Drive through the first intersection on a green light. He failed to stop at the second intersection which had a red light and was struck by a vehicle traveling on the cross street, killing him. Six days after this accident, after several additional accidents had also occurred at the second intersection, the City erected a large sign warning motorists, "Traffic Signal Timing Changed. Use Caution."

Decedent's wife sued the City of Killeen under the Texas Tort Claims Act for negligence. The suit contended that the Decedent had encountered a green light at the first intersection of the interchange and had erroneously assumed that he would also have a green light at the second intersection, just as he had on every day prior to the accident at the exact same intersection. According to the Plaintiff, the City's decision to change from a four-phase signal operation to a three-phase signal operation created an unreasonably dangerous condition for motorists, and the City had actual knowledge that implementing such a change to the traffic signal's programming with no advance warning would likely cause traffic accidents. The City filed a plea to the jurisdiction asserting that it was immune from the Plaintiff's claims. In response, Plaintiff contended that the plea should be denied because she had sufficiently alleged a premises defect claim against the City, which is allowed under Section 101.022 of the Texas Tort Claims Act. The trial court denied the plea and the City appealed.

On appeal, the Court of Appeals noted that the Texas Tort Claims Act provides a limited waiver of governmental immunity for certain torts. With respect to premises defect claims, Section 101.022 provides that a governmental unit owes the public the same duty owed by a private property owner to a licensee. This duty provides that a land owner must not injure a licensee by willful, wanton, or grossly negligent conduct, and must use ordinary care to warn the licensee of, or make reasonably safe, any unreasonably dangerous conditions of which the land owner has actual knowledge and which the licensee does not. The Court of Appeals noted that the Texas Tort Claims Act also contains several exceptions. One of these is found at Section 101.060, which provides that a governmental unit retains governmental immunity from claims arising from the "absence, condition, or malfunction of a traffic or road sign, signal, or warning device unless the absence, condition, or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice."

The City of Killeen claimed that the Plaintiff's claims were governed exclusively by Section 101.060 of the Texas Tort Claims Act because the suit was based on the condition of the traffic control signals at the Rosewood Interchange. The Court of Appeals disagreed. Under prior precedent, a "condition" of a traffic signal under Section 101.060 means a traffic signal is either:

(1) unable to convey intended traffic control information; or (2) conveys traffic control information other than what it was intended to. In this case, the Plaintiff was not alleging that the traffic signals at the Rosewood Interchange were malfunctioning or otherwise conveying information other than what they were intended to convey. Rather, Plaintiff was claiming that the decision to change the Rosewood Interchange from a four-signal operation to a three-signal operation created a dangerous condition that the City was aware of. As such, it was a claim for a premises defect that is governed by Section 101.022 of the Texas Tort Claims Act.

Analyzing the Plaintiff's claims under Section 101.022 of the Texas Tort Claims Act, the Court of Appeals concluded that the Plaintiff had failed to state a claim within the Act. The Court of Appeals noted that to state a premises defect claim against the City, the Plaintiffs must show that the City failed to use ordinary care to warn the Decedent of an unreasonably dangerous condition of which the City was actually aware and the Decedent was not, or must make that condition reasonably safe. A condition is unreasonably dangerous if it presents an unreasonable risk of harm. The Plaintiff's liability theory was that, at the time of the accident: (1) at least some motorists would have been accustomed to the four-phases operation of the traffic signals that had been occurring at the interchange on previous days; (2) based on that experience, some of those motorists would anticipate that the traffic signal at the second intersection would be green; and (3) based on that anticipation, some motorists would fail to properly notice the red light in the second intersection.

The Court of Appeals found that the Plaintiff's allegations failed to allege an unreasonably dangerous condition. There was no dispute that the traffic signals were operating as intended. As such, there was no "condition" for the City to correct. Rather, at most, the Plaintiff's pleadings suggested that it was the decision to change from a four-signal operation to a three-signal operation that was improper. Further, the Court of Appeals found that any possible danger at the Rosewood Interchange created by the change to a three-signal operation would be negated by motorists' expected and required compliance with traffic control signals. A danger of collision would arise only when motorists, like the Decedent, failed to pay proper attention and comply with the red light at the second intersection. The Court found that ordinary drivers should expect to encounter traffic signals and must react to them accordingly, regardless of how particular traffic signals may have operated in the past. As such, the Court found as a matter of law that the Plaintiff failed to plea the existence of an unreasonably dangerous condition under premises defect law. As such, the Plaintiff failed to plead a cause of action within the Texas Tort Claims Act's limited waiver of immunity and the plea to the jurisdiction should have been granted.

***Brazoria Drainage District No. 4 vs. Matties***, 2018 WL 3468531 (Tex. App.—Houston [1<sup>st</sup> District] July 19, 2018)

This case arose from an automobile accident when the vehicle the Plaintiff was driving collided with a cow that was standing in the middle of a roadway. The accident occurred on County Road 48 in Brazoria County, and the cow was owned by George Alford. The Plaintiff asserted that Defendant Alford was negligent in letting his cow roam free. The Plaintiff sued the Brazoria Drainage District under the Texas Tort Claims Act, alleging that the District created a dangerous condition and failed to adequately restrain the cow by failing to secure the gate that enclosed the pasture where the cow had been, and further alleged that the area where the incident occurred was the responsibility of the Drainage District. The Drainage District filed a plea to the

jurisdiction asserting the claim was barred by governmental immunity. The trial Court denied the plea and the Drainage District appealed.

The Court of Appeals noted that the Drainage District was entitled to governmental immunity, except to the extent that immunity is waived by the Texas Tort Claims Act. The Texas Tort Claims Act provides a limited waiver of governmental immunity. Section 101.021(2) waives governmental immunity for conditions or uses of tangible personal or real property. Section 101.022 of the Act waives governmental immunity for premises or special defects. Plaintiff asserted she was not bringing a cause of action for a premises defect, but was instead suing for a negligent condition or use of tangible property on a contemporaneous activity claim, pursuant to 101.021(2) of the Act. The Drainage District asserted that the Plaintiff's claim was for a premises defect and was therefore governed by Section 101.022. The Court of Appeals did not answer whether the case was a premises defect claim or a contemporaneous activity claim, but instead held the Plaintiff had failed to state a claim within the Texas Tort Claims Act under *either* theory.

In regards to the claim for premises defect, the Court noted that Section 101.022 imposes upon a governmental unit the duty owed by a private property owner to a licensee. To state a claim under a licensee standard of care, a plaintiff must first show that a defendant possessed (owned, occupied, or controlled) the premises where the injury occurred. Moreover, a plaintiff must show that the owner had actual knowledge of a dangerous condition, that the condition posed an unreasonable risk of harm, that the owner did not exercise reasonable care to reduce or eliminate the risk of harm, and that the owner's failure was the proximate cause of the injury to the plaintiff. In this case, the Plaintiff did not allege that the Drainage District owned, occupied, or controlled, the premises that presented the alleged danger, that is, the unsecured gate. Moreover, Plaintiff did not present any facts demonstrating that the Drainage District had actual knowledge of the dangerous condition. As such, the Plaintiff had failed to state a claim.

Turning to the Plaintiff's contention that she was bringing a contemporaneous activity/ negligent condition or use of tangible property claim under 101.021(2) of the Tort Claims Act, the Court noted that a negligent activity claim requires affirmative, contemporaneous conduct by a defendant that causes injury to the plaintiff. Moreover, to state a claim under 101.021(2), the governmental unit itself must be the user of the tangible property at issue. Examining the Plaintiff's Petition, the Court noted that the alleged failure to secure the gate was not supported by any facts demonstrating that the Drainage District itself, as opposed to someone else, had left the gate unsecured. The Plaintiff had further failed to plead facts demonstrating when the gate had been unsecured, and whether the failure to secure the gate was contemporaneous with the Plaintiff's injuries. As such, the Plaintiff had failed to state a claim within the Texas Tort Claims Act's limited waiver of governmental immunity under a contemporaneous activity theory.

The Court of Appeals therefore reversed the District Court's denial of the plea to the jurisdiction, but remanded the case back to the District Court to afford the Plaintiff an opportunity to re-plead her case.