

WINTER 2012 NEWSLETTER

Local Government Case Law Update

by Laura O'Leary

SUPREME COURT OF TEXAS

- 1. *Texas Dep't of Transp. v. Sefzik*, No. 08-0943, 2011 Tex. LEXIS 801 (Tex. Oct. 21, 2011).**

The Uniform Declaratory Judgments Act (DJA) does not waive sovereign immunity when a plaintiff seeks a declaration of his rights under a statute or law, although such a claim can likely be brought against a state official rather than a governmental unit under the ultra vires exception which acknowledges that DJA actions against state officials do not implicate sovereign immunity. When a plaintiff challenges a state's actions under a statute, rather than the validity of the law itself, sovereign immunity is not waived and will bar a DJA claim unless the plaintiff can show some specific waiver of immunity for the underlying claim.

Sefzik filed a permit application with TxDOT seeking to construct a billboard along I-30. His application was denied, and Sefzik appealed the decision within TxDOT. Sefzik's appeal was denied without a hearing. Sefzik then sought relief under the DJA asking that the court declare that the Administrative Procedures Act's contested case procedures entitled him to a hearing.

The trial court granted TxDOT's plea to the jurisdiction, but a divided court of appeals reversed, holding that declaratory judgment claims do not implicate sovereign immunity.

The court held that the DJA itself does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his rights under a statute and that a plaintiff seeking declaratory relief against the state must demonstrate a specific waiver of immunity as to the cause of action underlying plaintiff's DJA claim.

The court noted further that under *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-73 (Tex. 2009), the plaintiff could likely bring his DJA action against the state official who allegedly violated his rights, rather than against the state agency itself. Selzik's underlying claim was in essence that the TxDOT official acted beyond his authority in denying Selzik's application. The court reversed and remanded in order to give Selzik the opportunity to amend his petition to bring his DJA claim against the state official rather than TxDOT.

- 2. *Lowell v. City of Baytown*, No. 07-1011 2011 Tex. LEXIS 933 (Tex. Dec. 16, 2011).**

Sovereign immunity generally bars the award of retrospective relief to plaintiffs who seek money damages from a governmental entity. However, the legislature can authorize payment of retrospective relief and thereby waive sovereign immunity in regard to such claims.

A group of firefighters brought claims for back pay and related damages for improper calculation of pay for assignments previously performed. The court noted that the damages the firefighters sought are the type of retrospective relief that is generally barred by sovereign immunity. However, the court recognized that legislature may have authorized payment of this type of retrospective relief under Local Government Code §§271.151-.160 during the pendency of this action. The court therefore remanded to enable the firefighters to replead in light of Chapter 271.

TEXAS COURTS OF APPEALS

1. Lower Colorado River Auth. v. Riley, No. 10-10-00092-CV, 2011 Tex. App. LEXIS 10236 (Tex. App. – Waco, Dec. 28, 2011, no pet. h.).

A plaintiff cannot seek to control state action through a suit under the Uniform Declaratory Judgments Act (DJA) even if the plaintiff does not seek monetary damages. A request for relief that would control state action implicates sovereign immunity even in the absence of a request for monetary relief.

Riley, a landowner, sought a declaration of rights concerning the Lower Colorado River Authority (LCRA)'s interest in an easement across Riley's property. The court reversed the trial court's denial of LCRA's plea to the jurisdiction regarding Riley's declaratory judgment claim, noting that sovereign immunity is not waived simply by alleging a cause of action otherwise proper under the DJA. The court held that because Riley's request for declaratory relief sought to control LCRA's actions, governmental immunity was implicated even if Riley did not seek monetary damages against LCRA.

2. Hinojosa v. Tarrant Cnty., No. 07-10-00025-CV, 2011 Tex. App. LEXIS 8427 (Tex. App. – Amarillo, Oct. 21, 2011, no pet.).

Absent a waiver of governmental immunity, mandamus will not issue to compel payment by the state of retrospective money damages.

A former employee of Tarrant County sought a writ of mandamus to compel payment in compliance with an order by the civil service commission awarding back pay to Hinojosa.

The court affirmed the trial court's dismissal of the case for want of subject matter jurisdiction, holding that the employee's claim was just one for payment of money damages which, absent an express waiver, was barred by governmental immunity.

3. ***Texas Dep't of Aging and Disability Servs. v. Johnson*, No. 01-11-00526-CV, 2012 Tex. App. LEXIS 44 (Tex. App. – Houston [1st Dist.], Jan. 5, 2012, no pet. h.).**

***City of Houston v. Esparza*, No. 01-11-00046-CV, 2011 Tex. App. LEXIS 8224 (Tex. App. – Houston [1st Dist.], Oct. 7, 2011, pet. filed).**

A plaintiff who files suit under the Texas Tort Claims Act against both a governmental entity and an employee does not, merely by ignoring the election of remedies provision found in Tex. Civ. Prac. & Rem. Code §101.106, forfeit his cause of action against both defendants. Such pleading invokes §101.106(e), which permits dismissal of the suit against the employee, but it does not invoke §101.106(b) which would permit dismissal of the suit against the governmental entity. The claimant's filing of suit against both the employee and the governmental entity results in a forced election of remedies against the governmental entity.

In *Texas Dep't of Aging and Disability Servs. v. Johnson*, Johnson sued both the Texas Department of Aging and Disability Services (DADS) and its employee for injuries incurred when her father fell out of a DADS van while it travelled along a highway. DADS sought dismissal under §101.106(b) of the Texas Tort Claims Act, asserting that a claimant under the Texas Tort Claims Act, must elect whether to sue the governmental entity or the governmental employee, and that a plaintiff who sues both loses the opportunity to recover from the governmental entity by virtue of §101.106(b).

The court disagreed, holding that filing a suit against both the governmental unit and its employee invokes §101.106(e) rather than §101.106(b) and results in an involuntary election of the governmental unit as the exclusive defendant, should the government or its employee seek dismissal of the employee defendant. The governmental unit may not seek its own dismissal solely on the ground that both it and the employee were sued together.

In *City of Houston v. Esparza*, the plaintiff sued both the City and its employee for injuries sustained in a car wreck. The City moved for dismissal of Esparza's claim against its employee pursuant to §101.106(e) and also sought its own dismissal under §101.106(b). The court granted dismissal of the employee, but denied dismissal of the city, noting that a claimant who erroneously fails to choose a defendant has an election foisted upon him by operation of the statute, which retains the action against the governmental entity. A plaintiff's inartful drafting does not, alone, bar his claims against both the governmental entity and the employee.

The court rejected the plaintiff's alternative contention that the Texas Tort Claims Act (TTCA)'s provision of a consent exception, that is that §101.106(b) bars suit against a governmental entity unless that government unit consents, creates a blanket waiver of immunity for suits brought under the TTCA. The court explained that a claimant under the TTCA must meet all of the TTCA's jurisdictional constraints, and that the election of remedies provision is such a jurisdictional constraint. As such, once a plaintiff has made

an election under the TTCA, whether voluntarily or by operation of the statute, he may never satisfy the TTCA's jurisdictional prerequisites for bringing suit against the unelected defendant, regardless of whether the TTCA otherwise waives immunity for the sorts of claims at issue.

The court recognized that its construction of the consent exception in §101.106(b) may conflict with the analysis in recent cases out of Fort Worth, Houston's 14th District, and Austin. *Citing City of Houston v. Johnson*, No. 14-11-00220-CV, 2011 Tex. App. LEXIS 5776 (Tex. App. – Houston [14th Dist.] July 28, 2011, no pet. h.); *City of Houston v. Cooper*, No. 14-11-00092-CV, 2011 Tex. App. LEXIS 5773 (Tex. App. – Houston [14th Dist.] July 28, 2011, no pet. h.); *City of Houston v. Rodriguez*, No. 14-11-00136-CV, 2011 Tex. App. LEXIS 5214 (Tex. App. – Houston [14th Dist.] July 12, 2011, no pet. h.); *Amadi v. City of Houston*, No. 14-10-01216-CV, 2011 Tex. App. LEXIS 5094 (Tex. App. – Houston [14th Dist.] July 7, 2011, pet. granted); *Barnum v. Ngakoue*, No. 03-09-00086-CV 2011 Tex. App. LEXIS 3294 (Tex. App. – Austin April 29, 2011, pet. filed); *City of N. Richland Hills v. Friend*, 337 S.W.3d 387, 392-93 (Tex. App. – Fort Worth 2011, pet. filed).

- 4. *Amadi v. City of Houston*, No. 14-10-01216-CV, 2011 Tex. App. LEXIS 8562 (Tex. App. – Houston [14th Dist.] Oct. 27, 2011, pet. filed) (en banc).**

***Metro. Transit Auth. of Harris Cnty. v. Johnson*, No. 14-11-00651-CV, 2012 Tex. App. LEXIS 55 (Tex. App. – Houston [14th Dist.] Jan. 5, 2012, no pet. h.).**

***City of Houston v. Amazquita*, No. 14-11-00087-CV, 2012 Tex. App. LEXIS 61 (Tex. App. – Houston [14th Dist.] Jan. 5, 2012, no pet h.).**

***City of Houston v. Washington*, No. 14-11-00305-CV, 2011 Tex. App. LEXIS 10083 (Tex. App. – Houston [14th Dist.] Dec. 22, 2011, pet. filed).**

***City of Houston v. Rodriguez*, No. 14-11-00136-CV, 2011 Tex. App. LEXIS 8769 (Tex. App. – Houston [14th Dist.] Nov. 3, 2011, pet. filed) (Substitute opinion).**

In all these cases, the plaintiffs simultaneously sued the governmental units and their employees under the Texas Tort Claims Act (TTCA), Tex. Civ. Prac. & Rem. Code §101.001 *et seq.*, for injuries incurred in motor vehicle accidents. The court refused to grant dismissal to the governmental entities under §101.106(b) of the TTCA, holding that this subsection only bars recovery when the government has not consented to suit, and further holding that the TTCA's waiver of immunity for claims arising from the negligent use of a motor-driven vehicle by a governmental employee, Tex. Civ. Prac. & Rem. Code §101.021, constitutes consent to suit. The court did not rely on §101.106(e) to impose an involuntary election of remedies, because it held that the plain language of §101.106(b) precluded dismissal of the governmental entity defendants.

In *Amadi v. City of Houston*, the court expressly noted its disagreement with the Houston 1st District's interpretation of §101.106(b) in *City of Houston v. Esparza*, (No. 01-11-00046-CV, 2011 Tex. App. LEXIS 8224 (Tex. App. – Houston [1st Dist.], Oct. 7, 2011, pet. filed)), rejecting the 1st District's construction of this subsection as adding new procedural requirements that claimants must satisfy to obtain the benefits of the limited waiver of immunity provided by §101.021 of the TTCA. The court did not address the 1st District's contention that the 14th District's analysis of the consent provision of §101.106(b) creates a blanket waiver of immunity for suits brought under the TTCA.

Although leading to the same result in recent cases, the differences in reasoning between Houston's 1st and 14th Districts may well create differing outcomes in future TTCA suits brought against both a governmental entity and its employee, because the 14th District seems willing to apply §101.106(b) in such circumstances, while the 1st District will apply §101.106(e) to force an election of remedies.