

WINTER 2014 NEWS LETTER

LOCAL GOVERNMENT CASE LAW UPDATE

By: **Stephen D. Henninger**

City of Corpus Christi v. Ferguson, 2014 Tex. App. LEXIS 1299 (Tex. App.- Corpus Christi 2014)

This is a case involving premises liability claims and the recreational use statute. Plaintiff had gone to Corpus Christi on December 4, 2009 where she planned to participate with her family in the Harbor Lights Festival Boat Parade scheduled for the following day at the Corpus Christi Marina. The Marina is owned and operated by the City. Plaintiff arrived on December 4, 2009, and spent the night on her family's sailboat, which was kept in a slip at the Marina. The next morning, December 5, 2009, Plaintiff went to the Marina's bathroom facilities to take a shower. When she was walking back to the sailboat along the pier, she passed thru a gate and slipped and fell on a sheet of ice, sustaining injuries.

Plaintiff then sued the City for general and gross negligence and premises liability. The City filed a plea to the jurisdiction alleging that immunity had not been waived under the Texas Tort Claims Act, as the recreational use statute applied and Plaintiff could not demonstrate gross negligence. The trial court denied the plea, and the City appealed. The Court of Appeals began by noting the Texas Tort Claims Act waives immunity in three scenarios:

1. The negligent operation or use of a motor vehicle or motor-driven equipment;
2. The negligent use of tangible personal or real property; or,
3. Premises defects.

The Court went on to note that premises liability claims were further subject to the provisions of Section 101.058 of the Texas Tort Claims Act, which modifies the waiver of immunity by imposing the limitations on liability set forth in the recreational use statute. The recreational use statute provides that when a person enters a premises owned, operated, or maintained by a governmental unit and *engages in recreation* on those premises, then the governmental unit owes only the duty of care owed to a trespasser.

In the case, the City argued that the Plaintiff was engaged in recreation at the time of the event made the basis of the suit, as she had come to the marina to engage in a boating activity.

Plaintiff asserted she was not engaged in recreation at the time of the event, but was instead walking back to her boat after taking a shower, which was matter of personal hygiene necessity and not related to recreation or leisure.

The Court of Appeals announced that when determining whether a person is engaged in recreation for purposes of the statute, a fact specific analysis is required. In doing so, the Court noted that Plaintiff's ultimate purpose in going to the Marina was to participate in a boating activity, the Harbor Lights Boat Parade. In order to do so, she had come to the Marina a day early and camped overnight on the sailboat. The evidence further established that the Marina showers were for the use of "boaters," and that Plaintiff had used the Marina showers rather than the showers on the sailboat, because the boat did not have enough hot water. Analyzing the evidence as whole, the Court of Appeals found that the Plaintiff's activity in sleeping overnight on the boat and getting ready the next morning were merely one stage of the broader boating activity for which the Plaintiff had gone to the Marina in the first place. The Court found it would be inappropriate to carve out of that boating activity the few moments Plaintiff spent in walking to and from the shower.

Thus, the Court of Appeals held that Plaintiff was engaged in "recreation" at the time of the event, and that the City owed her the same duty of care owed to a trespasser. The Court went on to find, however, that the Plaintiff had presented sufficient evidence of potential gross negligence by the City to raise an issue of fact and therefore affirmed the denial to of the plea to the jurisdiction and remanded the case for further proceedings.

Dallas Metrocare Services v. Juarez, 2013 Tex. LEXIS 950 (Tex. 2013)

In this per curiam opinion, the Texas Supreme Court considered whether the Court of Appeals had improperly refused to hear certain jurisdictional arguments that were raised for the first time on appeal and also interpreted what constitutes a "use" of property under Texas Tort Claims Act Section §101.021(2).

Defendant Dallas Metrocare Services was a public non-profit organization providing mental health services to Dallas County residences. The Plaintiff had attended a counseling session at the facility. During the session, he was seated at one end of the table in a conference room and a 4 x 8 foot white board had been propped on a table behind him. During the session, the white board fell, hitting the Plaintiff on the head. At the time this occurred, no one was writing on, moving, or otherwise using the whiteboard or the table on which it was sitting. Plaintiff filed suit against Dallas Metrocare Services. The facility filed a plea to the jurisdiction alleging that Plaintiff had failed to allege facts for which immunity had been waived under the Texas Tort Claims Act, claiming that no proper allegation of "use" under Section 101.021(2) had been made, nor had a proper premises liability claim been stated. In response, the Plaintiff amended his petition to add four additional allegations of negligent conduct, including a claim of an "unsafe condition." After the trial court denied the plea, the facility filed an interlocutory appeal. On appeal, Dallas Metrocare Services attempted to raise jurisdictional arguments concerning the Plaintiff's amended causes of action. The Court of Appeals, however, refused to hear such arguments, holding that it could not consider such arguments for the first time on appeal, and that it was limited to the grounds set forth in the plea to the jurisdiction at the trial court level. Dallas Metrocare Services then filed a petition for review to the Texas Supreme Court.

The Texas Supreme Court held that the trial court had improperly refused to hear the new jurisdictional arguments of Dallas Metrocare Services. The Court found that an appellate court must consider all of the Defendant's immunity defenses presented to it, whether those defenses were first raised at the trial court, or are made for the first time on appeal.

Additionally, the Court went on to find as a matter of law that Plaintiff could not maintain a cause of action for "use" of tangible personal property under Section 101.021(2). The Court noted that 101.021(2) only waives immunity for use of tangible personal property when the governmental unit uses the property. There is no use of property where it is simply provided, furnished, or allowed access to. The undisputed evidence in the case showed that at the time of the events the whiteboard was simply sitting on the table and was not being used in any sense by a governmental employee. Therefore, Plaintiff could not assert a claim for negligent use of the whiteboard under Section 101.021(2). The Texas Supreme Court declined to consider whether Plaintiff could state a claim for a negligent "condition" of the whiteboard, nor whether a premises liability claim was properly alleged.

City of Smithville v. Watts, 2013 Tex. App. LEXIS 15051 (Tex. App. – Austin 2013)

This case involved a claim for personal injuries made by Plaintiff, who was injured when he was in an automobile accident with a fire tanker truck owned by the City of Smithville, but being driven by the Smithville Volunteer Fire Department. Plaintiff did not sue the driver of the truck, nor the Volunteer Fire Department, but instead sued the City of Smithville, arguing that its governmental immunity had been waived under Section 101.021(1) of the Texas Tort Claims Act because the City of Smithville's maintenance employees had negligently failed to properly inspect, maintain, and repair the truck. Plaintiff claimed that one of the truck's tires blew out, or there was some other vehicle malfunction, that had caused the collision. The City filed a plea to the jurisdiction, which was denied.

On appeal, the Court noted that the City had presented sufficient evidence that employees of the Volunteer Fire Department were not employees of the City, and that the Volunteer Fire Department was a wholly separate entity from the City of Smithville. The Court then turned to the Plaintiff's claims that immunity had been waived based upon the City of Smithville's alleged negligent inspection, maintenance, and repair of the truck. The Court of Appeals found that such claims did not implicate any waiver of governmental immunity, citing to prior precedent holding that allegations of failing to inspect, maintain, or repair equipment do not satisfy the requirements of the Tort Claims Act that an injury arise from the operation or use of a motor vehicle or equipment. The Court noted that a governmental unit does not use property within the meaning of the Texas Tort Claims Act when it merely allows someone else to use it. Accordingly, the Court of Appeals reversed the trial court and entered judgment granting the plea to the jurisdiction and dismissing the Plaintiff's claims.