

## **FALL 2014 NEWSLETTER**

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

**By Stephen D. Henninger**

*Tejano Center for Community Concerns, Inc. v. Olvera*, 2014 Tex. App. LEXIS 9657 (Tex. App – Edinburg, August 29, 2014)

This is a case construing the Texas Tort Claims Act's limited waiver of governmental immunity for school districts. Plaintiffs brought suit against an open enrollment charter school (which are considered "local governmental entities" under the Texas Tort Claims Act) for injuries sustained when student Lizbeth Olvera sustained injuries by falling while riding on one of the school's buses. Plaintiffs alleged that the driver of the bus asked Lizbeth to take attendance while the bus was in motion, and while bus floors were wet and slippery. As Lizbeth was standing in the bus aisle taking attendance, the driver suddenly braked, causing Lizbeth to fall and break her arm.

Plaintiffs brought suit against the school alleging that the driver was negligent in failing to keep a proper lookout, failing to warn Lizbeth of the danger of having her standing in the aisle while the bus was in motion, and for failing to maintain the floor of the bus in a reasonably safe condition. The school filed a plea to the jurisdiction alleging that Plaintiffs claims failed to fall within the Texas Tort Claims Act's limited waiver of immunity for school districts. The trial court denied the plea and the school appealed.

The Court of Appeals first noted the Texas Tort Claims Act waives immunity for school districts only for claims arising from the operation or use of a motor-driven vehicle or motor-driven equipment. A school district's immunity is not waived for claims arising from the condition or use of tangible personal or real property, nor for premises defect claims, as it is for other governmental entities. The school district alleged that Plaintiffs were bringing a claim for a premises defect based on the allegations about the condition of the bus.

The Court of Appeals noted that "premises" is commonly defined to be a building or part of a building with its grounds and appurtenances, and is a term generally associated with real property. The Court then held that a school bus is not real property. Accordingly, the Court of Appeals held that a claim that a dangerous condition existed on a school bus is not a premises defect claim. Construing the Plaintiff's pleadings liberally, the Court found that it was a claim implicating the potential operation or use of the school bus.

The Court of Appeals then turned to an analysis of whether Plaintiff's suit arose from the "operation or use" of the school bus. The Court noted prior authority establishing that claims arising from the operation or use of a motor-driven vehicle or equipment require a nexus between the injury and the operation or use of the vehicle. There must be more than simply involvement of a motor vehicle driven vehicle or equipment. Rather, the vehicle or equipment's use or operation must have actually caused the injury. In discussing this distinction, the Court noted the difference between negligence claims arising from the operation or use of a school bus, and those arising from alleged negligent supervision of students on a bus. Immunity is waived for the former, but not for the later.

The Court examined Plaintiffs' allegations and noted that Plaintiffs were alleging that the bus driver was negligent for abruptly braking the school bus after having directed Lizbeth to stand in the aisle of the bus while the floors were wet and slippery. The Court found that it was the combination of the alleged improper braking, the wet floor, and the instruction to take attendance that caused the fall and injury. Thus, unlike cases in which a bus was merely the location of an injury, or when an injury resulted from improper supervision, the Plaintiffs petition in this case directly asserted negligence in the manner in which the bus was operated. Accordingly, it stated a cause of action within the Texas Tort Claims Act's limited waiver of governmental immunity for school districts.

The school also asserted that Plaintiffs had failed to properly provide it with notice of claim as required by the Texas Tort Claims Act. Within the required six months of the incident, the Plaintiffs' lawyers had provided a letter to the school noting that the firm had been retained to represent the Plaintiffs for personal injuries sustained as a result of a fall on a school bus, and referencing an attached accident report. The accident report that was attached made note of Lizbeth injuring herself when she slipped on the wet floor of the school bus. Neither the letter from the lawyers, nor the accident report referenced any improper braking or action by the school bus driver. The school alleged that this letter and accident report failed to provide it with required notice, as it only referenced the wet floor theory of liability, which presented a premises defect claim, and did not assert any improper action by the driver.

The Court of Appeals rejected the Plaintiff's argument. The Court stated that the purpose of the notice requirement of the Texas Tort Claims Act is to insure prompt reporting of claims so that a governmental entity can gather necessary information to investigate the incident and prepare for potential litigation. The notice requirement does not require a specification of the precise legal and factual theories that may ultimately be pursued by the claimant. In this instance, the letter and attachment provided the school district with all necessary information to allow it to identify the event that formed the basis of the claim and fully investigate the facts underlying the claim and a potential lawsuit. Accordingly, the notice requirement was satisfied.

***Ruggeri v. Baylor College of Medicine***, 2014 Tex. App. LEXIS 9728 (Tex. App.- Houston [1<sup>st</sup> Dist.], August 29, 2014)

This was a case interpreting the Texas Tort Claims Act's waiver of immunity for alleged medical negligence. Plaintiffs were the parents of a young woman who died of liver failure. Plaintiffs sued Baylor hospital for medical negligence, alleging that their daughter had a history of drug abuse and that her liver failure was caused by an overdose of medication that had been prescribed to her by physicians working at the Ben Taub Hospital. Baylor Hospital filed a plea to the jurisdiction which was granted, and the Plaintiffs appealed.

The Court began by noting that Chapter 312 of the Texas Health and Safety Code classifies Baylor Hospital as a unit of state government whose immunity is waived for alleged negligence in the provision of medical services only to the extent that immunity is waived for governmental entities under the Texas Tort Claims Act. Plaintiffs first contended that they need not satisfy the requirements of the Texas Tort Claims Act, however, because they were suing based upon acts of alleged medical negligence and discretion, rather than any "official" or "governmental" decision making. Plaintiffs pointed to previous precedent establishing that government employed physicians were not protected by official immunity from claims involving

their medical discretion. The Court of Appeals rejected this argument. First, the Court stated that the Plaintiffs had not sued any individual medical professionals but had instead sued Baylor Hospital. The official immunity arguments that the Plaintiffs were making would be applicable to claims against individual persons, not to Baylor Hospital. Second, the Court noted that the case law Plaintiff's cited to regarding official immunity for government physicians had been abrogated but the legislature's amendment of §101.106 of the Texas Tort Claims Act in 2003. The amendments to the statute effectively provided that government employed personnel *did* have immunity from actions arising from their medical discretion.

The Court then turned to an analysis of Plaintiffs' claims to determine if they fell within the Texas Tort Claims Act's limited waiver of immunity. The Court noted that §101.021(2) of the Texas Tort Claims Act waives immunity for personal injury or death caused by a condition or use of tangible personal or real property. Plaintiffs asserted that they satisfied this because they were alleging that Baylor Physicians had used their daughter's medical records and prescribed certain medications that eventually caused her death, despite her documented medical history of drug abuse. Plaintiffs claimed that placing the prescriptions on tangible property (the prescription documents) and providing those documents to their daughter constituted a use and condition of tangible personal property. The Court of Appeals rejected this argument. The Court rejected this, holding that a governmental unit does not use property when it merely allows someone else to use property. In this case, it was the Plaintiff's daughter's use of the property (the prescription and the medication that was ultimately obtained with it) that caused her liver failure and death. The medical records and prescriptions created by the hospital did not cause it. The Court noted that merely furnishing a condition that makes an injury possible does not waive a governmental entity's immunity. Instead, it is the actual use of property that must cause the injury. The Court also noted three prior Court of Appeals decisions which held that writing prescriptions and administering medications are not acts that waive immunity within the Texas Tort Claims Act limited waiver of governmental immunity. Accordingly, the Court found that allegations that physicians wrote prescriptions that provided the Plaintiffs' daughter with the ability to obtain medication which was then used and caused her death, did not state the claim within the Texas Tort Claims Act of limited waiver of immunity. The granting of the plea to the jurisdiction was affirmed.

***Collins v. City of Houston***, 2014 Tex. App. LEXIS 7239 (Tex. App.- Houston [14<sup>th</sup> Dist.], July 3, 2014)

This case analyzed assertions of official immunity by a police officer, as well as the emergency exception to the Texas Torts Claim Act waiver of immunity found at §101.055. The case involved an automobile accident between Plaintiff and a Houston police officer. The evidence revealed that Houston police officer James Brown was on duty in his patrol car when a dispatch came over the radio indicating that a male on a motorcycle was driving recklessly. The dispatcher requested assistance by any units who might be nearby. Officer Brown was only 1½ miles from the approximate location of the motorcycle and so he decided to respond. In the course of doing so, Officer Brown rear-ended the vehicle driven by the Plaintiff and she sued the City for negligence for her resulting personal injuries.

The City of Houston filed a plea to the jurisdiction alleging it was entitled to governmental immunity under the Texas Tort Claims Act. The City first argued that it was entitled to governmental immunity because Officer Brown was entitled to official immunity. The City further argued that because Officer Brown was responding to an emergency situation, it

was entitled to the protections of §101.055(2) of the Texas Tort Claims Act. That section provides that immunity is not waived for a cause of action arising from the acts of employees responding to an emergency situation unless the employee violates applicable laws or ordinances or responds with conscious indifference or reckless disregard. The trial court granted the City's plea to the jurisdiction and the Plaintiff appealed.

The Court of Appeals first addressed the City's assertion that Officer Brown was entitled to official immunity. The Court noted that when a governmental employee has no liability because they are entitled to official immunity, then the governmental entity that employs that person cannot be liable under the Texas Tort Claims Act. Official immunity is an affirmative defense that protects governmental employees for the performance of discretionary duties, within the scope of their authority, that are undertaken in good faith. Plaintiff did not dispute that Officer Brown was acting within the course and scope of his authority, but contended that he was not performing discretionary acts and that he failed to establish he acted in good faith. The Court of Appeals stated that in determining whether an act is discretionary, you look at whether an employee is performing a discretionary function, not at whether an employee has the discretion to do a wrongful act while performing that function. The Court held that a police officer's operation of a vehicle is discretionary in some situations such as high speed chases, investigations, and traffic stops. Absent special circumstances, however, the operation of a vehicle by a police officer is a ministerial function. The Court rejected Plaintiffs' contention that the operation of a vehicle can never be discretionary unless there is an emergency. Rather, the Court stated you look to whether the officer is exercising personal deliberation, decision, and judgment. In this instance, Officer Brown was responding to a request for assistance in apprehending a reckless motorcyclist. Officer Brown was not required to respond, but elected to do so after determining he was in a position to effectively provide assistance. The Court of Appeals held this was evidence that Officer Brown had exercised personal deliberation, decision, and judgment. As a result, his actions were discretionary.

The Court of Appeals then turned to the issue of good faith. The Court of Appeals noted that in the context of a police pursuit case, an officer acts in good faith if a reasonably prudent officer, under the same or similar circumstances, could have believed the need to immediately apprehend the suspect outweighed the risk of harm to the public in continuing the pursuit. The Court of Appeals held this same analysis would apply in emergency responses. This is an objective standard that generally requires expert testimony to fulfill. In this case, the City had offered affidavits by other police officers establishing Officer Brown's good faith at the time of the events. The City's experts, however, discussed whether Officer Brown's actions were undertaken in good faith in the context of the need to respond to a motorcyclist who had evaded a traffic stop and fled from police. The Court of Appeals noted that this was not the situation that Officer Brown had been confronted with. Rather, Officer Brown had received a dispatch noting that a motorcyclist was driving recklessly. The dispatch did not claim that the motorcyclist had evaded arrest, or was actively fleeing from police. Thus, the Court of Appeals held that the City had failed to establish good faith, as its experts had analyzed the situation relying on assumptions that were not supported by the record. Accordingly, the City had failed to establish that Officer Brown was entitled to official immunity.

The Court of Appeals then turned to an analysis of the emergency exception found at §101.055(2) of the Texas Tort Claims Act. The Court of Appeals found that the City had failed to establish that Officer Brown was responding to an emergency situation at the time of the incident giving rise to the claim. The Court of Appeals noted that the evidence the City

produced to demonstrate that the situation was an emergency were affidavits from officers stating that Officer Brown was responding to a call that a motorcyclist had evaded arrest and was fleeing from police. As it had done when analyzing the official immunity issue, the Court of Appeals noted that the evidence did not support that Officer Brown had been dispatched on such a call. Rather, the dispatch simply noted that there was a motorcyclist driving recklessly. Because the City had failed to present evidence that a reckless motorcyclist is an emergency situation in circumstances that do not involve evading arrest or fleeing from police, the Court held that the City was not entitled to assert the emergency exception found in §101.055(2). Accordingly, the Court of Appeals reversed the trial court's order that had granted the plea to the jurisdiction and remanded the case back to the trial court.