

Early Litigation Options in Municipal Litigation

Or PTJ, MTD, MSJ, GTHO

Matthew D. Durham
Assistant City Attorney
Kurt C. Banowsky
Senior Assistant City Attorney
City of Garland, Texas



Tort Claims Act Waivers of Immunity

- * Involves the **operation or use of a motor-driven vehicle or motor-driven equipment**
- * Involves a **condition or use of tangible personal or real property**

Section 101.021, Tex. Civ. Prac. & Rem. Code





Damages Recoverable: Motor Vehicle/Equipment



Property Damage



Personal Injury



Death





Damages Recoverable: Real Property & Personal Property



Property Damage



Personal Injury



Death



Proper Notice – Strict Procedures

- * In order for a waiver of immunity to apply, the plaintiff must comply with the Tort Claims Act's **notice provision**. Section 101.101, Tex. Civ. Prac. & Rem. Code.
- * Must reasonably describe: **damage or injury; time and place of the incident; the incident itself**
- * No later than **6 months** after the date of the incident



Plea to the Jurisdiction (PTJ)

- * Because immunity from suit defeats a trial court's subject matter jurisdiction, it is properly asserted in a PTJ.

Plea to the Jurisdiction: Your BFF

The PTJ is your friend when:

- * Plaintiff fails to plead notice.
- * Plaintiff does not allege facts sufficient to invoke an applicable waiver of immunity
e.g., “The City damaged my wires.”



Pleading Deficiency vs. Jurisdictional Defect

- * Pleader must be given opportunity to amend in response to PTJ only if it is possible to cure pleading defect.

Baylor Univ. v. Sonnichsen (Tex. 2007)



Evidentiary Hearing

“In sum, a court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised.”

Bland Indep. Sch. Dist. v. Blue (Tex. 2000)



Gets the Plaintiff to Say More

- * Plaintiff should amend her petition to comply with the Act and state with greater particularity the theory of the case/how immunity is waived
- * More info helps your case, too.



Motor-Driven Vehicles/Equipment

- * **Use** of the car, tractor, drill, etc. must have actually caused the injury
- * Needs to be more than the site of the incident
- * Operation – doing/performing practical work
- * Use – put or bring into action



Usher v. City of Garland

- * Dallas County District Court, 191st Judicial District (2011) – PTJ granted
- * Driver was:
 - * Not aboard the vehicle
 - * Not using the vehicle
 - * Plaintiff actually struck the driver of the vehicle, not the vehicle itself

Tangible Personal Property

- * Again, look for **use**.
- * “put or bring into action or service; to employ for or apply to a given purpose”
- * There is no use when the gov’t merely allows someone else to use it and nothing more



Tangible Personal Property -- Remember to Pay Attention to Alleged Damages

- * Don't just write a check – research!
- * If a handheld shovel causes property damage, tough luck for the Plaintiff.



Boatman v. City of Garland

- * Court of Appeals, 5th District of Texas at Dallas (2014)
- * Traditional probable cause elements of **(1) cause in fact and (2) foreseeability**

Real Property

- * **Premise Defect**
- * **Special Defect**



Standards of Care (a bad law school flash black)

- * **Invitee** – Duty to maintain premises in reasonably safe condition (“reasonable care”)
- * Includes the duty to inspect and discover conditions involving unreasonable risk of harm. Duty to protect against danger and to make safe any defects or to give adequate warning.



Standards of Care (a bad law school flash black), cont.

- * **Licensee** – Duty not to injure by willful or wanton act or gross negligence.
- * If the licensor knows of a defect, and licensee does not, licensor has duty to warn or make condition reasonably safe.



From the Judge's Mouth

“Do you know how hard it is to win on a premise defect claim against a governmental entity?”



Lamkins v. City of Garland

- * Dallas County District Court, 192nd Judicial District (2014) – PTJ granted
- * Shows the importance of PTJ evidence:
 - * Prior inspections did not reveal pedestrian hazards
 - * No previous reports of personal injury or property damage

Removal

Can you remove to federal court?



Why Federal Court?

- * Judges are more familiar with federal law.
- * Early dismissal options are more plentiful.
- * Larger jury pool usually means more favorable juries.
- * They follow Fifth Circuit precedent.



Federal Courts Are Not Afraid to Dismiss Cases (and it's not personal)

“I firmly believe that Officer Green should have been trained to use better judgment in his approach to volatile and unfortunate situations such as this one.”

“I focus my criticism specifically at the City of Garland police department’s training and tactical response programs. There must be effective ways for police officers to resolve volatile situations that avoid using deadly force.”

Elizondo v. Green, 671 F.3d 506 (5th Cir. 2012)(DeMoss, **concurring**)



The Plaintiffs' Bar Knows It's a Tough Case to Make

“Plaintiffs would show that the Supreme Court case in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), by refusing to apply to local governments and municipal corporations the common law standard of responsibility of corporations and businesses for the acts of their employees, known by the Latin term, *respondet superior*, fosters the kind of irresponsibility as is apparent in this litigation.”

Waller v. City of Fort Worth, et al., No. 3:15-CV-01808-B
[Plaintiff's **Original Complaint**]



Staying the Case

- * Stay pending outcome of criminal trial
- * Servicemembers Civil Relief Act



Why Stay the Case?

- * It gives you additional time to investigate.
- * The Plaintiff's attorney is not likely to work the case during the stay.
- * Your witnesses (generally City employees) can be found.
- * The Plaintiff's witnesses can get lost.



Correcting Plaintiff's Mistakes

- * Official capacity suits
- * Suits against non-jural entities
- * Failure to identify a decision-maker
- * Schultea reply



If The Plaintiff Can Just Replead, Why Bother?

- * The obstinate plaintiff may just ignore the reality of the situation.
- * “The [court] specifically advised Plaintiff that GPD is a non-jural entity and asked if he wanted to amend his complaint to add additional defendants. He did not choose to add an additional defendant.”
- * *Allen v. Officer Burnett, et al.*, No. 3:12-CV-4863-O-BH (N.D. Tex. Feb. 25, 2013).



If The Plaintiff Can Just Replead, Why Bother?

- * The obstinate plaintiff may just ignore the reality of the situation.
- * “The Second Amended Complaint cures all the defects stated in [court’s order on first motion to dismiss] and asks the court to compare the Second Amended Complaint to the First Amended Complaint and decide for itself.”
- * *Wright v. City of Garland*, No. 3:10-CV-1852-D (N.D. Tex. Nov. 13, 2014).



If The Plaintiff Can Just Replead, Why Bother?

- * The Plaintiff only gets to return to the well so many times.
- * Burn a Motion to Dismiss on the easy stuff.



Respondeat Superior

- * *Respondeat Superior* liability for municipalities just doesn't exist in the context of civil rights violations.
- * Liability attaches only “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[.]”
- * *Monell v. Department of Soc. Servs. Of City of New York*, 436 U.S. 658 (1978). *Wright v. City of Garland*



Lack of Standing

- * **Constitutional** Standing is a Jurisdictional Issue (12(b)(1))
- * No Constitutional Standing = No case or controversy
- * **Prudential** Standing is a Rule 12(b)(6) issue
- * Even with Constitutional Standing, the Plaintiff may still not have standing to sue.
- * *Alhamzawi v. State of Texas* (Garland, Texas)



Heck v. Humphries

- * When the Plaintiff has been bad.



Twombley/Iqbal/Evans

- * Raised the bar on pleading requirements.
- * Rule 8 – short and plain statement
- * Now Plausibility Standard
- * Key word in filing Motion to Dismiss – “conclusory”



Official Policy

- * How much does it take to create an official policy out of a custom?
- * The bar has been set “**very high.**”
- * A “close call”: **allegations** that:
 - * (1) the City of Dallas had a policy to shoot first and ask questions later;
 - * (2) a City Councilman informed the media of training issues within the department that had resulted in the killing of an individual;
 - * (3) Dallas is at the top of policy misconduct statistics in the South;
 - * (4) Dallas is ranked number 11 in police misconduct incidents;
 - * (5) that the total number of officer-involved shootings in Dallas was 144;
 - * (6) 86 grand juries had been convened to investigate police misconduct;
 - * (7) 60 unarmed African-American men had been killed by Dallas PD over a 13-year period;
 - * (8) at least 12 other shootings of unarmed individuals by Dallas PD had occurred during the year of the plaintiff’s death; and
 - * (9) there were 94 open Dallas PD investigations into officer-involved shootings.
- * *Flanagan v. City of Dallas*, Civ. Action No. 3:13-CV-4231-M-BK (N.D. Tex. Sep. 23, 2014)



Knowledge of Policymaker

- * Conclusory allegations are insufficient to identify a policymaker that can be charged with actual or constructive knowledge of the alleged custom or policy.
- * Allegations that the policymakers “were aware that their custom and/or policy of condoning and tolerating its officers to commit civil rights violations would lead to more civil rights violations” was not good enough.
- * *Wright v. City of Garland*, Civil Action No. 3:10-CV-1852-D (N.D. Tex. Nov. 13, 2014).



Qualified Immunity

- * Qualified Immunity protects a defendant official not only from liability, but also from suit. Therefore, questions of immunity should be resolved as quickly as possible.
- * *Anderson v. Creighton*, 483 U.S. 635 (1987)



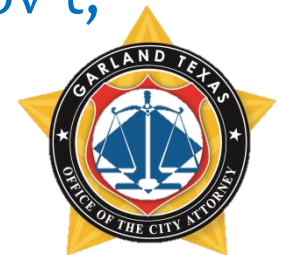
Qualified Immunity – Limited Discovery

- * The bifurcation of the qualified immunity issue is to preserve the defendant's ability to avoid the burdens of discovery. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
- * All other discovery effectively stayed.
- * So what's relevant?
 - * Facts of the incident in question
 - * That's it.



Qualified Immunity – The Bright-Line Test

- * Clearly established right.
- * The defendant official's acts are “held to be objectively reasonable unless **all** reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the plaintiff's asserted constitutional or federal statutory right.”
- * *Cozzo v. Tangipahoa Paris Council – President Gov't*, 279 F.3d 273 (5th Cir. 2002).



Qualified Immunity – The Bright-Line Test

- * This doctrine protects “all but the plainly incompetent or those who knowingly violate the law.”
- * *Malley v. Briggs*, 475 U.S. 335, 341 (1986).



The Pro Se Plaintiff/Defendant

- * *Pro Se* Plaintiffs require special handling.
- * Ethically, an attorney has to make it clear that s/he represents only the interests of the municipality
- * Do not venture into legal advice with the unrepresented.
- * They will get the benefit of the doubt at court.

