Supreme Court of Texas
June 6, 2014

Alexander v. Walker
NO. 11-0606
Case Summary written by Tarryn Johnson, Online Edition Editor.

Per Curiam.

This case involves the election-of-remedies provision of the Texas Tort Claims Act (TTCA) as it applies to government employees. In *Texas Adjutant General's Office v. Ngakoue (TAGO)*, the Court noted that one of the provision's purposes is to encourage individuals to initiate lawsuits against the government instead of a government employee when the suit is based on the employee's conduct within the scope of their employment. Additionally, "a tort suit against a government employee for conduct within the general scope of his employment is considered to have been brought against the government rather than the employee, and thus does not bar suit against the governmental employer."

In this case, April Walker filed suit against two government employees. Walker alleged assault, conspiracy, slander, false arrest, false imprisonment, and malicious prosecution against two Harris County Sheriff's Department employees, Deputy Corey Alexander and Sergeant Jimmie Cook. These claims stemmed from the employees' conduct with Walker's arrest on two separate occasions. Walker first filed a state court action against the officers, but later filed a federal court suit against the governmental unit—Harris County—based on the same state court claims and also alleged the violation of her civil rights. The officers sought summary judgment under the TTCA's election-of-remedies provision. The trial court denied the officers' motion for summary judgment and the officers filed an interlocutory appeal. The appeals court affirmed the trial court's denial.

Issue: Were Deputy Alexander and Deputy Cook entitled to summary judgment under the TTCA's election-of-remedies provision?

The officers were indeed entitled to summary judgment under the election-of-remedies provision. "Application of the TTCA's election-of-remedies provision requires a determination as to 'whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable.'" TEX. CIV. PRAC. & REM. CODE § 101.106 provides that if a suit is brought against a governmental unit, then the plaintiff has makes an irrevocable election which bars subsequent suit against the governmental employee. Similarly, the statute also provides that if a suit is brought against a government employee, then there is an irrevocable election which bars subsequent suit against the governmental unit. Finally, the statute adds that if suit is brought against a government employee for their conduct within the scope of their employment, but could have been brought against the government unit that the employee works for, and the plaintiff does not amend their pleadings to name

the governmental unit as the defendant within thirty days from filing, then on motion by the employee to dismiss, the suit shall be dismissed. § 101.106(a), (b), (f).

Walker's allegations against the Sheriff's Department employees stemmed from her arrest, which occurred while the two employees were acting within the scope of their employment. The Court concluded that Walker's common-law tort claims against the officers could have been brought under the TTCA against the government. Thus, § 101.106(f) applies to Walker's claim, and the suit is considered to be against the employee's in their official capacity only. Next, the Court applied the rule from *TAGO*: " when suit is brought against a government employee for conduct within the general scope of his employment, and suit could have been brought under the TTCA against the government, subsection 101.106(f) provides that 'the suit is considered to be against the employee in the employee's official capacity only.'" Because Walker filed her initial state court suit against the employees, and because the conduct of the employees was within the scope of their employment, and she could have filed under the TTCA against the governmental unit, her suit is considered to be against the government "in all but name only." Subsection (f) is the appropriate avenue for dismissing a government employee considered to have been sued in his official capacity, while subsection (a) bars suit against an employee in his individual capacity. Thus, the election-of-remedies provision bars suit against the employees individually, and both Deputy Alexander and Sergeant Cook were entitled to summary judgment below.

Stinson v. Fontenot
NO. 11-1015
Case Summary written by Tarryn Johnson, Online Edition Editor.

Per Curiam.

The above-mentioned case, *Alexander v. Walker*, controls the out come of this case.

The suit stems from an incident in which Tiffany Stinson was arrested at her home following a traffic stop. Stinson first filed suit in Harris County District Court against Harris County Sheriff's Deputy Stephen Fontenot, asserting various intentional tort claims including slander, trespass, assault and battery, intentional infliction of emotional distress, wrongful arrest, false imprisonment, and malicious prosecution. Several weeks later, Stinson filed an action in federal court arising out of the same incident against Harris County and former Harris County Sheriff Tommy Thomas. The underlying case was removed to federal court and consolidated for pretrial purposes with the federal suit. Following dismissal of the federal claims against Harris County and the Sheriff, the federal district court remanded the tort claims against Fontenot. Fontenot moved for summary judgment, asserting that he was entitled to dismissal pursuant to subsections (a), (e), and (f) of the Texas Tort Claims Act's (TTCA) election-of-remedies provision. See TEX. CIV. PRAC. & REM. CODE CODE § 101.106(a), (e), (f). The trial court denied the motion, and Fontenot appealed. The court of appeals reversed, holding that

under § 101.106(a), " [t]he filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter." The Court specified that Fontenot was indeed entitled to relief, but not under (a). Instead, *Alexander* and *Texas Adjutant General's Office v. Ngakoue (TAGO)* applies.

Issue: Did Stinson's suit in federal court against Harris County and its former Sheriff bar the suit against Fontenot in his individual capacity?

Yes. The Court agreed with the court of appeals that Fontenot was entitled to summary judgment dismissing the claim against him, but clarified that the basis for summary judgment lies under § 101.106(f) rather than § 101.106(a). Reiterating its previous holdings in *Alexander* and *TAGO*, for purposes of the TTCA, an employee is considered to have been sued in his official capacity when the suit (1) is based on conduct within the general scope of his employment, and (2) could have been brought under the TTCA against the government. On that employee's motion, he is entitled to dismissal by the court unless the plaintiff amends her pleadings to substitute the government as a defendant within thirty days.

In this case, Stinson did not dispute that her suit against Deputy Fontenot was based on conduct within the general scope of his employment. The case could also have been brought against the County under the TTCA. "Consequently, Fontenot was considered to have been sued in his official capacity only. For this reason, subsection (a) does not bar the suit, but Fontenot was entitled to dismissal under subsection (f)." Therefore, the Court held that the trial court erred when it denied Fontenot's motion for summary judgment, but the court of appeals correctly reversed. The Court simply clarified the grounds for reversal to align with its simultaneous ruling in *Alexander*.

MAN Engines & Components, Inc. v. Shows
NO. 12-0490
Case Summary written by Tarryn Johnson, Online Edition Editor.

JUSTICE WILLETT delivered the opinion of the Court. JUSTICE BROWN did not participate in the decision.

This is a breach of warranty case in which it is argued that an implied warranty of merchantability should extend to purchasers of used goods. In 2002, Doug Shows purchased a used, fifty-foot yacht through a broker, Texas Sportfishing, for $525,000. The boat was powered by high-performance inboard engines manufactured and sold by a foreign company's United States counterpart, MAN Engines & Components (MAN). Prior to purchase, Shows had the engines inspected by an authorized service dealer for MAN. At the time of purchase, Texas Sportfishing gave Shows a letter from the service dealer's president originally addressed to a broker. The letter, dated September 17, 2001, stated that a two-year express warranty applied to the engines "on everything" and an additional three-

year warranty applied "on major components." Shows also signed a "certification of acceptance of vessel" on Texas Sportfishing letterhead stating that the boat was being sold "as is."

In June 2004, while Shows was fishing with friends, the boat's starboard engine failed because of a bad valve. Although the full two-year warranty had expired by that time, the three-year warranty was still available. Shows filed a warranty claim only to discover that the parts involved were not considered "major components" covered by the warranty. Still, MAN gave Shows a check for about $5,800 for goodwill to help with repair costs, which were nearly $40,000. A year later, in 2005, the same engine failed, this time beyond repair. The failure resulted from the same bad valve. Again, Shows was told the damage was not covered by warranty. Shows replaced the engine and in June 2006 sued MAN for negligence, fraud, negligent misrepresentation, breaches of express and implied warranties, and deceptive trade practices.

Although a jury trial found MAN liable for only the breach of the implied warranty of merchantability claim and awarded Shows almost $ 90,000, the trial judge issued summary judgment n.o.v. because it concluded that Shows could not prevail on an implied-warranty theory because there was a disclaimer from the first sale of the boat and alternatively, a lack of contractual privity between MAN and Shows. The disclaimer was based on a document Shows found online of a 2003 generic warranty issued by MAN. Relevant excerpts of the document included an express disclaimer which stated that "[t]he limited warranty herein set forth is the sole and exclusive warranty with respect to Series D 28 engines. There are no other warranties, expressed or implied, including any warranties of merchantability or fitness for any particular purpose and all such other warranties [are] hereby displaced."

The court of appeals reversed the trial court's summary judgment. The court of appeals refused to consider MAN's express-disclaimer defense, because MAN did not raise it as an affirmative defense in its pleadings and the issue was not tried by consent. This express disclaimer defense became the first issue that the Texas Supreme Court would tackle, along with the question of implied warranties for used goods.

Issues: (1) Whether "express disclaimer" is an affirmative defense under Texas Rule of Civil Procedure 94.

(2) Whether implied warranties apply to used-good purchasers.

MAN raised its express-disclaimer argument for the first time in its Motion for JNOV. From the Court's perspective, this violated the clear requirement that affirmative defenses must be raised in pretrial pleadings. "Disclaimer is an affirmative defense subject to Rule 94 requirements. Rule 94 provides a list of affirmative defenses and then adds a catch-all that sweeps in 'any other matter constituting an avoidance or affirmative defense.' Disclaimer falls into this 'any other matter' catch-all." Additionally, the Court explained that the purpose of Rule 94 is one of fairness: it allows the plaintiff to reasonably prepare to rebut or explain facts distinct from their primary claim. "Accordingly, MAN cannot rely on its

purported express disclaimer of implied warranties issued at the first sale unless it properly raised that defense in the trial court."

Next, the Court addressed the main issue of whether implied warranties apply to used-good purchasers. Relying on the previous case of *Nobility Homes of Texas, Inc. v. Shivers*, where it held that privity does not need to exist between an upstream defendant and a downstream plaintiff in order for the plaintiff to recover on an implied-warranty claim, the Court held that "[a] merchant's legally imposed duty to issue merchantable goods [does not] automatically end when a good passes to subsequent buyers." The Court reasoned that a downstream purchaser who seeks to recover for economic loss under an implied-warranty theory, whether he buys the product new or used, seeks to hold the merchant accountable only for the state of the product when it passed to the first buyer.

MAN argued that a buyer who knowingly purchases a used good and inspects it has effectively waived the implied warranty of merchantability. The Court acknowledged that 2.316(c)(2) provides that examination of goods or refusal to examine goods before entering into a contract serves to waive an implied warranty "with regard to defects which an examination ought in the circumstances to have revealed to [the buyer]." The Court, however, distinguished between an implied-warranty action between a second-hand buyer and an immediate seller, and an implied-warranty action between a second-hand buyer and the original manufacturer. The inspection Shows employed on his boat did not waive the implied warranty of merchantability against the original manufacturer, because as the Court stated: "The buyer's knowledge that a good is used does not automatically erase an implied-warranty claim when a manufacturer makes a defective product. The defect doesn't rub off with use."

Finally, the question of whether an "as is" clause negates an implied warranty claim by a second-hand buyer against the manufacturer could not be reached in this case. In Texas, all implied warranties are nullified by "as is" language unless the circumstances indicate otherwise. Unfortunately, MAN did not plead the "as is" clause in the trial court or the court of appeals. Therefore, procedurally, the Court declined to address the argument.

In sum, if a manufacturer validly disclaims implied warranties from the beginning, then that disclaimer will transfer with the good itself. Without a disclaimer, however, manufacturers remain liable to the subsequent purchasers of a good who rely on an implied warranty that was created from the first sale. "The law imposes an obligation that merchants sell merchantable goods, and when [goods] fall short of this standard, a second-hand buyer who suffers an economic loss from a defect has a right of recovery through an implied-warranty action."

In re S.M.R.
NO. 12-0968
Case Summary written by Tarryn Johnson, Online Edition Editor.

JUSTICE DEVINE delivered the opinion of the Court

In this appeal, the Department of Family and Protective Services (DFPS) appeals the reversal of a parental rights termination. Patricia and Sergio had three daughters together: S.M.R., G.J.R., and C.N.R. The couple never married, but lived together for about four years. During those four years, DFPS investigated allegations of neglect, domestic violence, and substance abuse. Nothing came of those investigations. When the couple separated in 2007, the children remained with Patricia. Unfortunately, between 2007 and 2009, the children endured a volatile living pattern that rotated between their maternal aunt, their father, their mother, and finally, DFPS obtained temporary conservatorship over the children in April 2009. In June, DFPS created a family-service plan that established tasks for the parents to regain custody of the children. By October 2009, Sergio signed a copy of the plan.

The next year, a trial was held for the termination of parental rights. Sergio participated at trial but Patricia was only present for the first day. The trial court concluded that clear and convincing evidence existed that the parents had "knowingly placed or knowingly allowed the child[ren] to remain in conditions or surroundings which endanger the[ir] physical or emotional well-being . . . ." The trial court terminated parental rights, but made no mention of one of the issues DFPS raised alleging that the parents failed to comply with court order. The father appealed, but the mother did not. The court of appeals reversed the termination decision, holding that the evidence was factually insufficient to support the endangerment grounds. DFPS timely filed this appeal seeking reinstatement of the trial court's decision to terminate parental rights, arguing that the termination was partially based on the parents' failure to comply with a court order, and proof on that single ground would support the judgment of termination.

Issues: (1) Whether any termination ground raised by DFPS in their pleadings and sufficiently supported by the evidence may be implied as a substitute for the insufficient ground actually included in the trial court's termination judgment.

(2) Whether DFPS conclusively established a ground for terminating parental rights so that the court of appeals' reversal and remand of the parental termination decision was erroneous.

Texas Rule of Civil Procedure 306 provides that a judgment in a suit filed by a governmental entity to terminate parental rights "must state the specific grounds for termination." The Court found that the trial court's judgment terminating Sergio and Patricia's parental rights complied with this requirement. Additionally, the Court found that the judgment conforms to the statute's requirements of stating specific termination grounds and determining what course of action is in the child's best interests. Applying these findings, the Court ruled that the trial judgment was therefore complete on its face, no element was omitted, and there was no need to imply another ground for termination in support of the judgment, and argument which DFPS advanced under Texas Rule of Civil Procedure 279.

DFPS further argued that the evidence showing Sergio's violation of the court order was conclusively established because the children were in DPFS's custody for

more than nine months as the result of the children's abuse or neglect, the trial court ordered Sergio to complete all services in the family-service plan for reunification with his children, and Sergio failed to comply with material parts of the court order establishing actions necessary for the reunification of the children. The Court determined that this presented a question of law. First, the Court agreed that there was no factual dispute underlying the circumstances of the children's removal. Second, the Court agreed that there was no factual dispute regarding the family-service plan's requirements and that Sergio understood these requirements. Third and finally, however, the Court found a factual dispute in regard to whether Sergio failed to comply with the family-service plan and court order. Because questions of compliance and degree are raised, and because there is a factual dispute with regard to those questions, the Court rejected DFPS's contention that it conclusively established at trial that Sergio violated a court order warranting termination of his parental rights.

The Court also disposed of the last argument of DFPS relating to the court of appeals' review of the evidence supporting termination of parental rights on endangerment grounds. The appellate court found the evidence to be factually insufficient; DFPS argues that this determination was made when the court of appeals "disregarded relevant evidence of [domestic] abuse when performing its factual sufficiency review." On this point, the Court explained that in order to reverse a judgment for factual insufficiency, a court of appeals must detail all of the relevant evidence and explain why it is insufficient to support the judgment. Because the appellate court's decision illustrates that it did indeed apply the standard of detailing and explaining evidentiary insufficiencies, and therefore did not apply an erroneous standard of review.

City of Houston v. Proler
NO. 12-1006
Case Summary written by Tarryn Johnson, Online Edition Editor.

JUSTICE WILLETT delivered the opinion of the Court. JUSTICE BROWN did not participate in the decision.

Proler was a firefighter for the Houston Fire Department. In 2004, Proler was leading a fire suppression crew when a fellow firefighter complained that Proler would not enter a burning apartment building. Because of this accusation, Proler was reassigned to the firefighter training academy. In March 2006, again as a part of a fire suppression crew, Proler arrived at a house fire and was unable to put on his firefighting gear, unable to take orders, and had difficulty walking. A captain on scene reported that Proler did not appear to be aware of his surroundings and appeared either frightened or suffering an acute medical emergency. Proler was later taken to a hospital and diagnosed with "global transient amnesia." After this incident, Proler was again assigned to the training academy. The City of Houston

requested a follow-up medical evaluation from one of Proler's doctors, who noted the incident of amnesia but otherwise approved Proler's return to work.

Proler filed a grievance under the terms of his collective bargaining agreement seeking reassignment to a fire suppression unit, and after a hearing on the matter, he was reassigned to such a unit. The City appealed this decision to the trial court, alleging jurisdiction under the Declaratory Judgments Act and chapter 143 of the Local Government Code. Proler counterclaimed for disability discrimination under federal and state law. Subsequently, after procedural matters were resolved, the disability claim proceeded to trial. The jury found in favor of Proler but awarded no damages; the trial court then enjoined the city from further acts of discrimination and awarded Proler attorney fees.

The court of appeals reversed parts of the trial court's judgment for Proler, but affirmed his award of attorney fees and injunctive relief. On appeal to the Texas Supreme Court, the Court only addressed Proler's claims for disability discrimination.

Issue: Does a firefighter who refuses to fight fires have a "disability" under either state or federal law?

The Court held that Proler did not have a disability under federal civil rights law or under Texas law. The Court began their discussion by noting that:

> [T]he law prohibiting disability discrimination does not protect every person who desires employment but lacks the skills required to adequately perform the particular job. Lacking the required mental, physical, or experiential skill set is not necessarily a disability. Were the law otherwise, any person who, for instance, wishes to be a ballerina or professional basketball player could routinely sue for disability discrimination if the Bolshoi or the San Antonio Spurs declined employment. Under federal law, the applicant must be a "qualified individual," meaning an individual who "can perform the essential functions of the employment position." Texas law similarly extends to "a physical or mental condition that does not impair an individual's ability to reasonably perform a job."

The City of Houston successfully argued that Proler did not suffer from a disability and that he was not reassigned to training because of a disability. Proler did not argue that he in fact suffered from a disability, but instead, that he was perceived as having a disability, which meets the definition of disability under federal and state law. The Court pointed out that evidence at trial indicated that Proler was not removed from his fire suppression unit because he had a disability—real or perceived—but because he was perceived as having a normal person's reaction to entering a burning building: fear. At trial, a district captain testified that firefighting was one of the world's most dangerous jobs and that all firefighters must learn to overcome an instinctive disinclination to go into a fire.

The Court summarized that although psychiatric testimony at trial could lead a jury to believe that Proler may have had depression or other medical disorder that interfered with a major life activity, that the record "yields no evidence that [Proler] was reassigned because of this condition and hence was discriminated against on account of a disability." Several fellow firefighters testified at trial that their perception of Poler was that he was scared but not disabled. Because of this significant lack of evidence, a reasonable and fair-minded jury could only conclude that Poler was reassigned because his ability to perform his job—fighting fires—was in question. Therefore, because no reasonable jury could have found that Poler was reassigned due to a disability or perception of a disability, the Court reversed the court of appeals' judgment affirming the injunctive relief and attorney fees for Proler's disability discrimination claims.

City of Watauga v. Gordon
NO. 13-0012
Case Summary written by Tarryn Johnson, Online Edition Editor.

JUSTICE DEVINE delivered the opinion of the Court.

This case is a result of an interlocutory appeal for issues arising under the Texas Tort Claims Act and governmental immunity. City of Watauga police officers stopped Russell Gordon on suspicion of drunk driving and asked him to submit to a sobriety test. Gordon declined. He was then arrested without resistance. Gordon was handcuffed at the scene and again later when transported from a nearby police station to the city jail. Gordon asserts that on both occasions he informed the officers that his handcuffs were too tight but that his complaints were ignored.

Gordon subsequently sued the City for injuries to his wrists allegedly caused by the officers' negligent use of property—the handcuffs. The City responded with a plea to the jurisdiction, asserting immunity under the intentional-tort exception to the Tort Claims Act's sovereign-immunity waiver. The trial court denied the City's plea, and when the City appealed, the court of appeals affirmed the denial. Because the lower courts' decision conflicts with prior decisions regarding the intentional-tort exception to bar personal injury claims, the Texas Supreme Court accepted the appeal.

Issue: Whether an arrestee's lawsuit against a city for injuries accidentally caused by a police officer's use of handcuffs states an intentional battery or negligence claim.

The Texas Tort Claims Act waives governmental immunity for personal injuries allegedly caused by the negligent use of property, but the Act does not waive immunity when the claim arises out of an intentional tort. The court of appeals concluded that Gordon's pleadings asserted a claim for negligence instead of battery because, as Gordon alleged, the officers did not intend to injure him and he did not resist arrest. Because he did not resist arrest, Gordon argued that he consented to the arrest and negated the contact's offensive nature. The City,

however, argued that Gordon's compliance was not consent and several amici backed them in contending that using restraints on an arrestee is offensive to a reasonable sense of personal dignity, and it would technically constitute a battery in the absence of privilege. Ultimately, the Court agreed with the City that Gordon's compliance was not consent to a battery, thereby negating the intentional nature of the handcuff injury and triggering governmental immunity.

Furthermore, Gordon argued that because the police did not intend to injure him, and therefore not an intentional tort, an accidental injury must necessarily be the result of negligence. The Court clarified, however, that while specific intent to injure is absolutely an intentional tort, specific intent is not an essential element of a battery—all that is required is offensive contact. Thus, Gordon's logic was flawed.

Finally, addressing Gordon's claim of excessive force against the Watauga police officers, the Court concluded that an arrest that is lawful in its inception but escalates into excessive force allegations, the underlying claim is for battery alone. "The Texas Tort Claims Act waives governmental immunity for certain negligent conduct, but it does not waive immunity for claims arising out of intentional torts, such as battery." Thus, because Gordon alleged that officers used excessive force while arresting him, his claim is barred under the governmental immunity provisions of the Texas Tort Claims Act.