Case Summaries
September 27, 2024

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GRANTED CASES

MEDICAL LIABILITY
Health Care Liability Claims

Leibman v. Waldroup, ___ S.W.3d ___, 2023 WL 2603206 (Tex. App.—Houston [1st Dist.] 2023), *pet. granted* (Sept. 27, 2024) [23-0317]

The main issue in this appeal is whether the plaintiffs' negligence suit against Leibman to recover damages for injuries sustained in a dog attack triggered the Texas Medical Liability Act's expert-report requirement.

Dr. Leibman, a gynecologist, wrote a series of letters to the landlord of his patient, stating that the patient has generalized anxiety disorder; that she has four certified service animals; and that she appears to need these service animals to control her anxiety. The purpose of the letters was to help the patient avoid eviction. At some point after the first note was written, the patient registered her dog Kingston as a service animal through a private company, which gave her a card identifying Kingston as a service dog under the Americans with Disabilities Act. One day the patient dressed Kingston in a "service dog" vest and brought him to a restaurant, where he attacked a toddler.

The toddler's parents sued the restaurant, the patient, and Leibman. The plaintiffs allege that Leibman was negligent in providing the letters without ascertaining whether Kingston is actually a service animal trained to perform specific tasks and that his conduct proximately caused the toddler's injuries by enabling the patient to misrepresent Kingston to the public. Leibman filed a motion to dismiss, arguing that the plaintiffs' suit alleges a health care liability claim under the TMLA and that the claim must be dismissed because the plaintiffs failed to timely serve an expert report. The trial court denied the motion, and the court of appeals affirmed. The court held that the plaintiffs' suit against Leibman does not allege a health care liability claim, as defined in the Act, because it complains about Leibman's representation that Kingston is a certified service animal, rather than his diagnosing the patient with generalized anxiety disorder or his statement that service animals may help her control that disorder.

Leibman filed a petition for review, which the Supreme Court granted.

ADMINISTRATIVE LAW

Administrative Procedure Act

Tex. Dep't of State Health Servs. v. Kensington Title-Nev., LLC, ___ S.W.3d ___, 2023 WL 4373384 (Tex. App.—Austin 2023), *pet. granted* (Sept. 27, 2024) [23-0644]

The Administrative Procedure Act waives sovereign immunity in a suit seeking a declaration about an administrative rule's "applicability." The issue in this case is whether the request for declaratory relief challenges a rule's application (*how* the rule applies) as opposed to its applicability (*whether* the rule applies).

Kensington Title-Nevada, LLC acquired real property on which the occupant had abandoned stored radioactive waste. Kensington initiated decommissioning activities but stopped before completion. The Texas Department of State Health Services then fined Kensington for possessing the material without a license and for failing to decommission in a timely manner. Kensington challenged the fine through a formal administrative hearing. Concurrently, Kensington sued the Department requesting a declaration that the administrative rule could not be applied to force a real property owner like Kensington to accept liability for radioactive materials abandoned on its property. The Department filed a plea to the jurisdiction arguing that Kensington failed to invoke the APA's immunity waiver because it only seeks a determination about the rule's application, not its applicability. The trial court denied the Department's plea, but the court of appeals reversed and dismissed for want of subject-matter jurisdiction.

On petition for review, Kensington contends that the appeals court's failure to apply the immunity waiver rests on an improper rewriting of the request for declaratory relief. The Department's response argues that dismissal was proper because (1) the court's analysis was correct; and (2) Kensington lacks standing for want of a redressable injury. As to the latter, the Department asserts that the administrative action was based on Kensington's exercise of dominion and control over the regulated materials, not ownership of real property.

The Court granted the petition for review.

PROCEDURE—PRETRIAL

Summary Judgment

Myers v. Raoger Corp., ___ S.W.3d ___, 2023 WL 4346826 (Tex. App.—Dallas 2023), *pet. granted* (Sept. 27, 2024) [23-0662]

The issue is whether the evidence is sufficient to create a fact issue about whether it was apparent to a restaurant that its patron was obviously intoxicated.

Nasar Khan went to dinner with Kelly Jones at Cadot Restaurant, where he consumed at least four alcoholic beverages. After driving Jones home, Khan rear-ended Barrie Myers. Khan went to the hospital, where he failed a field-sobriety test and had a 0.139 BAC several hours after the collision.

Myers sued Cadot under the Dram Shop Act, alleging that Cadot is liable because it served a patron who was obviously intoxicated. Cadot filed no-evidence and traditional motions for summary judgment, arguing that Khan did not show any visible signs of intoxication at Cadot. In support of its traditional motion, Cadot submitted deposition and affidavit testimony of several witnesses who interacted with Khan that night, including Jones, Cadot's owner, and the officer who performed Khan's field-sobriety test. Each testified that Khan showed no signs of intoxication. In response, Myers submitted the testimony of several witnesses who claimed that based on Khan's BAC, he would have showed signs of intoxication at Cadot. Myers also submitted Khan's

own testimony that he was overserved and that Cadot should have observed that he was intoxicated. The trial court granted Cadot's motion for summary judgment. The court of appeals reversed, holding that a fact issue exists about whether it was apparent to Cadot that Khan was obviously intoxicated.

Cadot filed a petition for review that challenges the court of appeals' holding. The Court granted the petition.

NEGLIGENCE

Duty

Santander v. Seward, ___ S.W.3d ___, 2023 WL 4576015 (Tex. App.—Dallas 2023), *pet. granted* (Sept. 27, 2024) [23-0704]

The issues include (1) when an off-duty officer working for a private employer is considered to be on duty; (2) whether negligence claims by police officers responding to a request for assistance should have been pleaded as premises-liability claims; and (3) whether the common law "firefighter rule" applies.

Chad Seward was an off-duty police officer employed by Point 2 Point and assigned to work at a Home Depot store. He was asked by a Home Depot employee to issue a criminal trespass warning to a suspected shoplifter. Following police department procedures, Seward checked the suspect for outstanding warrants and then called for assistance. Two officers responded and guarded the suspect while Seward confirmed the warrant. The suspect pulled a gun and shot the officers, killing one and injuring the other.

The officers sued Seward, Home Depot, and Point 2 Point under various negligence theories. The trial court dismissed the claims against Seward based on the Tort Claims Act's election of remedies, concluding that he was on duty. The trial court later granted Home Depot's and Point 2 Point's motions for summary judgment.

The court of appeals largely reversed. Among other things, it concluded a genuine fact issue exists as to whether Seward was on duty before he confirmed the suspect's warrant. The court of appeals also rejected Home Depot's other arguments for summary judgment, including that the officers' claims sound only in premises liability and that the firefighter rule applies.

Seward, Home Depot, and Point 2 Point petitioned for review. Seward and Point 2 Point argue that Seward was on duty during his entire encounter with the suspect. Home Depot challenges the various grounds on which the court of appeals reversed the trial court's summary judgment.

The Supreme Court granted the petition.