In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00473-CV

CITY OF BEAUMONT, TEXAS, Appellant

V.

JAY BROCATO AND WIFE, VALERIE BROCATO, INDIVIDUALLY AND AS NEXT FRIENDS OF M.B., Appellees

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On Appeal from the 136th District Court
Jefferson County, Texas
Trial Cause No. D-183,620

MEMORANDUM OPINION

After a jury trial, appellant City of Beaumont, Texas ("the City") appeals the trial court's determination of its subject-matter jurisdiction, as well as trial issues. We reverse the trial court's judgment and remand the case for a new trial.

BACKGROUND

Appellees Jay Brocato and wife Valerie Brocato, individually and as next friends of M.B. ("the Brocatos"), filed suit against the City, seeking damages for personal injuries allegedly sustained by M.B. in an automobile accident between the vehicle M.B.

was driving and a squad car driven by Beaumont Police Officer Lance Carmouche. In their petition, the Brocatos argued that the City is liable for Officer Carmouche's alleged negligence and negligence *per se* under the theory of *respondeat superior*. The City asserted in its answer that the trial court lacked subject matter jurisdiction because the City was immune from suit and had not waived its immunity. In its response to the Brocatos' written motion for a spoliation instruction, the City again asserted that the trial court lacked jurisdiction because no waiver of governmental immunity existed. The record does not reflect that the City obtained a ruling on its challenge to the trial court's subject-matter jurisdiction.[1] The case proceeded to trial, after which the jury found in favor of the Brocatos and awarded damages.

When the accident occurred, Officer Carmouche was a probationary police officer, and he was being trained by his passenger, Officer Danny Kaspar. Officer Carmouche had heard a radio call from another officer, Hubbard, in which Officer Hubbard indicated that he had stopped a vehicle containing multiple occupants. Officer Carmouche was not dispatched to the scene. However, according to Kaspar, when an officer stops traffic and checks on a vehicle with multiple occupants, backup would normally be dispatched, so Officers Carmouche and Kaspar "went ahead and started heading over there just to save time from someone dispatching someone over there, because . . . [they] were very close."

[1] The issue of whether a trial court has subject- matter jurisdiction may be raised for the first time on appeal, and subject-matter jurisdiction may not be conferred by waiver or estoppel. *Van ISD v. McCarty*, 165 S.W.3d 351, 354 (Tex. 2005); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993).

Beaumont Police Department's policy concerning pursuit and apprehension of suspects classifies dispatch calls as either "Code 1" or "Code 3[.]" Code 1 is defined as "[o]peration in conformity with state and local traffic laws[,]" while Code 3 is defined as "[e]mergency – using emergency lights and siren." The policy authorized Code 3 operation of a police vehicle for, among other circumstances, "[i]n an emergency situation where there is an immediate threat to a person (i.e., officer in danger and needs assistance)." Officers Kaspar and Carmouche both testified the situation to which they were responding when the accident occurred was not an "emergency" under the terms of the written policy, so Officer Carmouche was required to obey the traffic laws. However, Officer Kaspar explained that there is an unwritten practice that "when an officer calls out where if he's on several units or out on several people where he needs . . . is gonna need some backup, then we try to get there as quickly as we can." Officer Kaspar testified that although the written policy defined the situation as a non-emergency, he considered Officer Hubbard's request for backup to be an emergency call.

When the accident occurred, Officer Carmouche was exceeding the speed limit, and the overhead lights and siren on his squad car were not turned on. When Officer Carmouche realized a collision was imminent, he took evasive action, although the testimony conflicted concerning whether he steered the squad car to the left or the right. Officer Kaspar explained that because the speed limit does not apply to patrol units that are operating on patrol, Officer Carmouche's operation of the squad car complied with

Code 1 procedures. According to Officer Kaspar, Officer Carmouche's operation of the squad car did not create a high degree of risk of serious injury.

ISSUES ONE, THREE, AND FOUR

In issue one, the City argues that Officer Carmouche had discretion to exceed the speed limit, and therefore the City is immune from suit under section 101.056 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.056 (West 2011) (discretionary powers). However, the record does not indicate that the Brocatos' claim arises out of the formulation of policy; thus, section 101.056 is inapplicable to this case. *See Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001) ("[T]he Tort Claims Act waives sovereign immunity from suit for claims that an officer negligently carried out governmental policy."); *see also City of Brownsville v. Alvarado*, 897 S.W.2d 750, 754 (Tex. 1995) (Immunity is preserved for claims arising out of negligent formulation of policy); *State v. Terrell*, 588 S.W.2d 784, 787 (Tex. 1979) ("[I]f the negligence causing an injury lies in the formulating of policy . . . the government remains immune from liability."). In issue three, the City argues that it is immune from suit under section 101.055(3) for claims "from the failure to provide or the method of providing police . . . protection." Tex. Civ. Prac. & Rem. Code Ann. § 101.055(3) (West 2011). As the City notes, section 101.055(3) "distinguishes between the formulation of policy and the negligent implementation of policy." Accordingly, section 101.055(3) does not apply to this case. *See Petta*, 44 S.W.3d at 580; *see also*

Alvarado, 897 S.W.2d at 754; *Terrell*, 588 S.W.2d at 787. In issue four, the City contends that it is immune from suit for intentional torts under section 101.057. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (West 2011). The record does not indicate that the Brocatos assert that Officer Carmouche committed an intentional tort. *See id.* For these reasons, we overrule issues one, three, and four.

ISSUE TWO

In issue two, the City argues that the trial court lacked subject-matter jurisdiction under section 101.055(2) of the Texas Civil Practice and Remedies Code. The City is a political subdivision of the State. *See generally Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003) (stating that in the context of governmental immunity, political subdivisions of the State include counties, cities, and school districts). A plaintiff who sues the State must demonstrate the State's consent to suit. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Otherwise, the trial court lacks subject-matter jurisdiction. *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002) (citing *Jones*, 8 S.W.3d at 638). The question of whether a trial court had subject-matter jurisdiction is an issue of law that we review *de novo*. *Id.* (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998)).

"A governmental unit is immune from suit and liability unless the immunity has been waived. With certain exceptions, the Texas Tort Claims Act waives immunity for claims arising from the use of a motor-driven vehicle by a governmental entity's

employee." *Jefferson Cnty., Tex. v. Hudson*, No. 09-11-00168-CV, 2011 Tex. App. LEXIS 6986, at *2 (Tex. App.—Beaumont Aug. 25, 2011, no pet. h.) (mem. op.) (citations omitted). However, "[t]he Texas Tort Claims Act does not waive governmental immunity for claims asserting only negligence arising from the action of a government employee who is responding to an emergency call or reacting to an emergency situation." *Id*. at *3 (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.055(2) (West 2011)). Rather, section 101.055(2) states that governmental immunity exists for claims arising from a governmental employee's actions while "responding to an emergency call or reacting to an emergency situation[.]" Tex. Civ. Prac. & Rem. Code Ann. § 101.055(2). In such a case, the plaintiff must show that an operator of an emergency vehicle in an emergency was reckless; that is, that the operator "committed an act that he knew or should have known posed a high degree of risk of serious injury." *Hudson*, 2011 Tex. App. LEXIS 6986, at *3 (citing *City of Amarillo v. Martin*, 971 S.W.2d 426, 430-31 (Tex. 1998)). Undisputed facts may establish that an emergency situation existed under section 101.055(2), and that the conduct was not reckless. *Id*. at *4 (citing *City of San Antonio v. Hartman*, 201 S.W.3d 667, 672-73 (Tex. 2006)).

Because the case proceeded to trial despite the City's challenge to the trial court's subject-matter jurisdiction, we assume that the trial court decided each of the City's challenges adversely to the City as a matter of law, including the City's challenge under section 101.055(2). *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.055(2); Tex. R. Civ. P.

279 ("If no . . . written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment."). At the charge conference, the City requested submission of a question concerning section 101.055, but the trial court refused to submit the question. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.055; s*ee also* Tex. R. Civ. P. 276. When refusing the City's requested instruction, the trial judge commented, "Well, I believe there was ample evidence that this was not considered an emergency by virtue of the City's policies. And, therefore, your objection's overruled, and your tender is marked 'Refused.'"

Officers Carmouche and Kaspar heard Officer Hubbard's radio call, in which Officer Hubbard stated that he had stopped a vehicle that contained multiple occupants. Officer Kaspar testified that because backup would normally be sent in such a situation, he and Officer Carmouche headed toward Officer Hubbard's location because they believed Officer Hubbard's stop of a vehicle with multiple occupants constituted an emergency situation. Pursuant to Beaumont Police Department's written policy, response to Officer Hubbard's radio call was not an emergency situation that would have permitted Code 3 operation of the squad car.

The Texas Tort Claims Act does not define "emergency situation." *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001, 101.055(2) (West 2011). Beaumont Police Department's written policy indicates that an emergency situation exists "where there is an immediate threat to a person (i.e., officer in danger and needs assistance)." As we

noted when discussing a county's policy in *Hudson*, we believe the Legislature did not intend for the exception to apply only in such limited circumstances; rather, we believe the Legislature meant to encompass "unforeseen circumstances that call for immediate action." *Hudson*, 2011 Tex. App. LEXIS 6986, at *9. A radio call from an officer who has stopped a vehicle containing multiple occupants may necessitate an immediate or urgent response by the police without the situation necessarily posing an immediate threat to a person. *See generally id*. "The emergency exception in the Tort Claims Act deprives a court of the power to engage in judicial second-guessing for momentary lapses in judgment by emergency personnel responding to emergency situations[,]" and the Legislature has not waived governmental immunity for mere failures of judgment in such situations. *Id*. at **9-10. Under the facts presented, we conclude that the trial court erred by impliedly finding that Officer Carmouche was not responding to an emergency situation. *Id.* Accordingly, the trial court erred in overruling the City's objection to the defective submission, and in refusing to submit a question, with instructions, concerning section 101.055(2).

The accident in this case occurred at night on a multi-lane city street. It is undisputed that Officer Carmouche did not activate his emergency lights or siren, and he was exceeding the speed limit. Officer Carmouche also took evasive action, although the testimony conflicted concerning whether he steered the squad car to the left or the right. The evidence adduced at trial did not establish as a matter of law that Officer Carmouche

was reckless; that is, that he acted in a way that he knew or should have known posed a high degree of risk of serious injury. *See Hudson*, 2011 Tex. App. LEXIS 6986, at *3 (citing *Martin*, 971 S.W.2d at 430-31). An issue of fact exists on whether his conduct was reckless under the circumstances and it is the jury's role to resolve disputed issues of fact.

Essentially, in this case the trial court applied the wrong standard in determining what constitutes an emergency, and erroneously ruled that there was no emergency as a matter of law. The trial occurred prior to our decision in *Hudson.* The Brocatos attempted to submit controlling issues on their cause of action given the trial court's ruling that there was no emergency. The City requested a proper submission of the controlling issues, and objected to the defective submission. Under these circumstances, the appropriate remedy is to grant a new trial so that controlling issues of fact may be determined by the jury. *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 44 (Tex. 2007).

We sustain issue two in part. We need not address the City's remaining issues, as they would not result in greater relief. *See* Tex. R. App. P. 47.1. We reverse the trial court's judgment and remand the case for a new trial.

REVERSED AND REMANDED.

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STEVE McKEITHEN
Chief Justice

Submitted on September 6, 2011
Opinion Delivered October 6, 2011
Before McKeithen, C.J., Gaultney and Kreger, JJ.