In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00168-CV

JEFFERSON COUNTY, TEXAS, Appellant

V.

MIKE HUDSON AND CATHY HUDSON, Appellees

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-185,208

MEMORANDUM OPINION

Jefferson County appeals the denial of its plea to the jurisdiction in a tort suit filed by Mike and Cathy Hudson. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (West 2008). The Hudsons suffered injuries in a car accident. Their car collided with a patrol car driven by Jefferson County Sheriff's Deputy Daniel Powell. The evening of the accident, while Powell was on traffic patrol, another Jefferson County Sheriff's Deputy, Patricia Berry, learned one of the passengers in a vehicle she had stopped was wanted on a felony warrant. The collision occurred while Powell was on his way to assist Berry.

The Hudsons sued Jefferson County. The County filed a plea to the jurisdiction asserting that Powell was responding to an emergency situation. The Hudsons filed a motion for partial summary judgment. The trial court denied the County's plea to the jurisdiction, determined the accident was solely caused by Powell's negligence, and granted the Hudsons' motion for partial summary judgment. The court's order indicates the only issue for trial concerns damages. The County filed this appeal. In two issues, the County claims the trial court erred in denying its plea to the jurisdiction and in ruling as a matter of law that no emergency existed.

A governmental unit is immune from suit and liability unless the immunity has been waived. *See Tex. Dep't of Transp. v. Garza*, 70 S.W.3d 802, 806 (Tex. 2002). 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. Tex. Civ. Prac. & Rem. Code Ann. § 101.021(1) (West 2011). An exception from the waiver of governmental immunity applies for emergency situations, if the government employee's action (1) is in compliance with any laws and ordinances applicable to emergency action, or (2) if there are no applicable laws or ordinances, is free from conscious indifference or reckless disregard for the safety of others. *Id.* § 101.055(2). As a result, the 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.* The plaintiff must show that an operator of

an emergency vehicle in an emergency was reckless: that is, he committed an act that he knew or should have known posed a high degree of risk of serious injury. *See City of Amarillo v. Martin*, 971 S.W.2d 426, 430-31 (Tex. 1998).

We review a trial court's ruling on a plea to the jurisdiction *de novo*. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). A defendant's plea may challenge either the plaintiff's pleadings or the existence of jurisdictional facts. *Id.* at 226-28. If the government unit raises the emergency exception in a plea to the jurisdiction, the plaintiff has the burden to raise disputed fact issues as to whether the actions complained of were not taken in response to an emergency, or were reckless. *See Tex. Dep't of Pub. Safety v. Little*, 259 S.W.3d 236, 238-40 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see also City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 (Tex. 2006). Undisputed facts may establish as a matter of law an emergency situation existed under section 101.055(2), and the conduct was not reckless. *See, e.g.*, *Hartman*, 201 S.W.3d at 672-73 (when unprecedented flooding was present and the city officially declared a disaster, an emergency situation existed as a matter of law under section 101.055(2)).

The Hudsons attached to their motion for partial summary judgment deposition transcripts, which were incorporated by reference into the Hudsons' response to the County's plea to the jurisdiction. In Powell's deposition, he testified he heard over the radio Berry checking on the individuals who were in the vehicle she had stopped. Powell

heard the dispatcher inform Berry that one of the men had a felony warrant out for his arrest. Powell radioed that he was going to the scene to assist. Berry did not ask for his assistance and Powell had no further radio communication with Berry.

Powell received a cell phone call from Berry after the dispatch call but prior to the accident. Powell testified she told him that she was going to wait until Powell arrived to "take him." Powell told her he "was a ways out so hang tight." There was nothing about the telephone call that concerned Powell about Berry's safety or welfare. Powell testified that although Berry did not indicate that she was having serious problems or feeling pressure, Powell thought it was important for him to assist her. He stated that if Berry's testimony was that there was no immediate threat of serious bodily injury or death, he would agree with her.

Berry testified at her deposition that after she initiated the traffic stop she called in the names and license numbers of the driver and the two passengers. She did not call for backup. After the dispatcher informed her that one of the passengers had a felony warrant, Berry learned that Powell would be her backup. Berry testified regarding the Jefferson County Sheriff's Department Emergency Operation of Vehicles Policies and Procedures. Berry agreed that those policies and procedures define an emergency as "solely when the immediate presence of the police is required in order to protect a person from probable death or serious injury[.]" When Berry learned Powell was on the way, she did not tell him that there was an immediate threat of serious injury to her and she did not

tell him then that she needed someone there immediately to protect her. Berry told Powell in a cell phone conversation that she was going to be searching the vehicle, and Powell volunteered to assist. Berry explained that the minimum staffing for the area she patrols is three deputies and a supervisor per shift. After Powell's accident, Berry did not call anyone else to assist her and she successfully made the arrest.

The County argues that the facts here are indistinguishable from those in *Little*, 259 S.W.3d at 236. In that case, the Court explained that Texas DPS Trooper Cheshire had been eating with other troopers when he received a dispatch to respond to a "10-99" code, which meant an officer had requested assistance with a wanted person. *Little*, 259 S.W.3d at 237. Cheshire testified that "[a] 10-99 subject is a wanted person. And when an officer is asking for assistance with a 10-99 subject, it is considered by law enforcement officers as an emergency call similar to an officer down." *Id.* at 237 n.1. A DPS corporal testified that "[o]ur dispatcher called Trooper Cheshire to go assist a game warden who was out on a wanted person." *Id.* Cheshire left the other troopers and began driving to the location given by dispatch. *Id.* at 237. He was driving five or ten miles over the speed limit. *Id.* He activated his emergency lights to cross an intersection and a railroad crossing, then deactivated the lights. *Id.* He did not use the vehicle's siren. *Id.* Cheshire attempted to contact the dispatcher using a cell phone and while looking at the phone, inadvertently allowed his vehicle to cross the opposing lane of traffic. *Id.* He lost control of the vehicle, and collided with a vehicle in which Little was a passenger. *Id.* Little sued

and alleged that the Department was liable because her injuries were caused by Cheshire's negligence while acting within his scope of employment. *Id.* In reversing the trial court's order denying the Department's plea to the jurisdiction, the Fourteenth Court of Appeals found that the evidence conclusively established that Cheshire was responding to an emergency call at the time of the accident. *Id.* at 239-40.

Section 101.055(2) provides governmental immunity for claims arising from a governmental employee's actions while "responding to an emergency call," as well as for the employee's reactions to an "emergency situation." *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.055(2). In *Little,* Cheshire received a dispatch to respond to a "10-99," which he testified was considered by law enforcement officers as an emergency call. *Little*, 259 S.W.3d at 237 n.1. A DPS corporal testified that the dispatcher called Cheshire to assist. *Id.* The Fourteenth Court of Appeals acknowledged that the dispatcher may have miscoded the call and the request should have been a "10-66," indicating an officer requested assistance with a Department warrant which, according to Cheshire, could be a non-emergency. *Id*. at 239. The Court nevertheless concluded that at the time of the accident, Cheshire was responding to an emergency call. *Id.*

In this case, Jefferson County argued in its plea to the jurisdiction that Powell was responding to an emergency situation, not an emergency call. The evidence showed that Powell overheard the dispatcher inform Berry that one of the passengers of the stopped vehicle had a felony warrant. A dispatcher did not dispatch Powell to the location, and

Berry did not request his assistance. But even if there was no "emergency call," the County can demonstrate immunity under section 101.055(2) if Powell was responding to an "emergency situation." *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.055(2).

The Act does not define "emergency situation." Essentially, the Hudsons suggest we apply the term as the County's policy does: a situation where immediate police presence is necessary to protect someone from death or serious injury. That is not the common definition of emergency, however, and we do not believe the Legislature intended the exception to apply only in those limited circumstances. More commonly, an "emergency" refers to unforeseen circumstances that call for immediate action. *See* Webster's Third New International Dictionary, 741 (2002). We believe that is the meaning intended by the Legislature. *See First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008) (holding that a court must interpret the words of a statute according to their common meaning). The urgency of the situation underlies the decision-making. A felony warrant may present a necessity of immediate or urgent response by police without the situation necessarily placing someone at risk of death or serious injury, yet the need for a split-second decision may still exist. Emergency personnel take calculated risks in responding under pressure to situations that require urgent or immediate response. 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. *See Martin*, 971 S.W.2d at 430.

Governmental immunity to suit has not been waived "for what amounts to a mere failure of judgment" in those circumstances. *Id.*

There is at least a fact question at this stage, precluding the summary judgment the trial court granted for the plaintiffs, as to whether a reasonably prudent officer could have believed these circumstances called for immediate action. If so, the circumstances presented the type of situation where the Legislature intended that liability be imposed only for reckless conduct, not simply inattention or a momentary lapse in judgment.

The County asks that we render judgment dismissing the claims. The County does not expressly argue, however, that there is no fact issue as to whether the conduct was reckless. Immunity to suit is waived, even if an emergency situation existed, if Powell's conduct was reckless. The Supreme Court has explained how we must address a possible jurisdictional fact issue in the immunity context, as follows:

> If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. . . . [B]y reserving for the fact finder the resolution of disputed jurisdictional facts that implicate the merits of the claim or defense, we preserve the parties' right to present the merits of their case at trial.

Miranda, 133 S.W.3d at 227-28.

The accident that is the basis of the Hudsons' claim happened at night on city streets. Powell apparently did not activate his emergency lights or sirens, at least not for the intersection where the accident happened. He was exceeding the speed limit. He

failed to see the stop sign. He applied his brakes, and after he realized he would not be able to come to a complete stop, he accelerated. On seeing the Hudsons' vehicle, he turned his steering wheel in an attempt to avoid the accident.

Whether Powell was reckless is in dispute, but we need not resolve that dispute in this interlocutory appeal. At this stage there are disputed material fact questions regarding jurisdictional issues. The jurisdictional facts in this case implicate the merits of the claim. The trial court has discretion in deciding "whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case[.]" *Id.* at 227.

We set aside the portion of the order granting the Hudsons' motion for partial summary judgment. The trial court's order denying the plea to the jurisdiction is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

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DAVID GAULTNEY
Justice

Submitted on June 29, 2011
Opinion Delivered August 25, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.