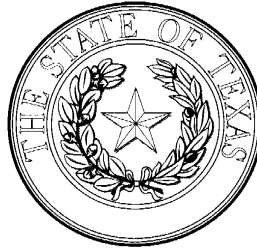


Opinion issued July 27, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00653-CV

**J. MARCELINO E. CORNEJO GARCIA AND WIFE ERNESTINA
RANGEL, AND CHILDREN, M.C.J., J.J.C., AND M.C., Appellants**

V.

CITY OF WEST COLUMBIA, TEXAS, Appellee

**On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Case No. 82509-CV**

MEMORANDUM OPINION

J. Marcelino E. Cornejo Garcia sued the City of West Columbia for injuries he allegedly sustained as a result of his work on a municipal water and sewer project. His wife and children alleged derivative claims for loss of consortium. The City moved for traditional and no-evidence summary judgment on several grounds. The

trial court granted the City’s summary-judgment motion without stating a particular basis. Cornejo Garcia appeals. We affirm the trial court’s summary judgment.

BACKGROUND

Prior Appeal

This is the second time this suit is before us. In the first appeal, we addressed the City’s plea to the jurisdiction, in which it asserted governmental immunity. The trial court denied the City’s jurisdictional plea, and we affirmed in part and reversed in part. *City of W. Columbia v. Cornejo Garcia*, No. 01-16-00139-CV, 2016 WL 5940481, at *1 (Tex. App.—Houston [1st Dist.] Oct. 13, 2016, no pet.) (mem. op.).

Cornejo Garcia was employed by Matula & Matula Construction, Inc., which contracted with the City to work on a municipal water and sewer project. *Id.* Cornejo Garcia subsequently sued the City alleging that he was injured due to exposure to contaminated water while working on the project.¹ *Id.* He asserted claims for intentional infliction of emotional distress, premises liability, and negligence. *Id.* His wife and children asserted derivative claims for loss of consortium.

In the prior appeal, which was interlocutory, we held that the trial court erred in denying the City’s plea to the jurisdiction with respect to Cornejo Garcia’s claims for intentional infliction of emotional distress and premises liability, and we

¹ Cornejo Garcia also sued his employer. They settled their disputes.

dismissed both of those claims. *Id.* at *4. But we affirmed the trial court’s denial of the City’s jurisdictional plea with respect to Cornejo Garcia’s negligence claim. *Id.*

Cornejo Garcia alleged that the City was negligent in two ways. First, he alleged that the City had exercised control over the water and sewer project as a whole to such an extent that the City was vicariously liable for his employer’s failure to provide him with a respirator and other necessary safety equipment that would have prevented his injuries. *Id.* at *1, *3. Second, he alleged that the City maintained control over motor-driven water pumps in particular and that the City failed to adequately maintain these pumps. *Id.* at *3. Had the City adequately maintained the pumps, Cornejo Garcia alleged, they would have drained the contaminated water from the project site and thereby prevented his exposure. *Id.*

In its plea to the jurisdiction, the City argued that it merely had a contractual relationship with Cornejo Garcia’s employer and that the City had not exercised control over his employer’s work. *See id.* at *3. The City further argued that Cornejo Garcia’s water-pump claim was in actuality one for non-use of the pumps. *See id.* Under these circumstances, the City argued, it had not waived its governmental immunity. *Id.*

We concluded that the trial court had not erred in denying the City’s jurisdictional plea as to either of the types of negligence alleged by Cornejo Garcia. *Id.* at *3–4. As to his safety-equipment claim, we held that the City did not

conclusively show it had not exercised control over the project as a whole to such an extent as to subject it to liability. *Id.* at *3. As to his water-pump claim, we similarly held that the City did not conclusively show it had not used the water pumps. *Id.* at *4. In both cases, our ruling was based on the record as it then existed. *Id.* at *3–4.

Present Appeal

Several months after our mandate issued, the City moved for traditional and no-evidence summary judgment. The City argued that there was no evidence that it exercised any control over Cornejo Garcia’s employer or its employees or that any City personnel or equipment were used in the water and sewer project. Thus, the City argued, Cornejo Garcia could not show that the City had waived its governmental immunity under the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.021 (waiving governmental immunity for negligent conduct of government employees and injuries caused by use of tangible property). The City also submitted an affidavit made by the City Manager and a copy of the contract between the City and Cornejo Garcia’s employer as evidence in support of the City’s contentions that it did not control the project or provide personnel or equipment. In the City Manager’s affidavit, she stated that the City did not provide any personnel or equipment for use in the project. The contract stated that Cornejo Garcia’s employer was responsible for all work done under the project.

In opposition, Cornejo Garcia filed his own affidavit, in which he stated that between one to three City employees were always present while he worked on the project. According to Cornejo Garcia, these City employees provided him with equipment, like connectors and wrenches, whenever he lacked it. Cornejo Garcia further stated that a pump was used to clear his work area of dirty water. Sometimes his employer provided this water pump. Other times the City provided the water pump. Cornejo Garcia stated that City employees sometimes operated the pump. Cornejo Garcia signed his affidavit by thumbprint. Two employees of a nursing and rehabilitation center, in turn, signed affidavits stating they witnessed Cornejo Garcia affix his thumbprint to his affidavit.²

Cornejo Garcia also submitted photos of the work site and personnel. But the photos do not identify the personnel or equipment depicted.

The City later filed an amended motion for summary judgment. Relying on its contract with Cornejo Garcia's employer, the City again argued that it exercised no control over the water and sewer project. The City emphasized that the contract required Cornejo Garcia's employer to:

² In his brief, Cornejo Garcia's counsel states that Cornejo Garcia "has been continuously paralyzed since the occurrence and has not been able to communicate with counsel and translators or family members." As the City did not obtain rulings on the admissibility or legal sufficiency of Cornejo Garcia's affidavit in the trial court and does not raise these issues on appeal, we note but disregard them.

- provide trench protection for trenches deeper than five feet;
- exercise precautions for the safety of persons and bear responsibility for all damages to persons resulting from the work;
- furnish all necessary equipment, labor, and supervision; and
- assume responsibility for all work done under the contract.

The City further argued that Cornejo Garcia's affidavit and photographs did not create a genuine issue of material fact as to the City's control of Cornejo Garcia's employer or Cornejo Garcia because the mere presence of City personnel is not evidence of control as a matter of law. But the City did not address Cornejo Garcia's statements that City employees supplied him with equipment or used water pumps.

Instead, the City argued that Cornejo Garcia had admitted that his claim with respect to water pumps was that the City had not used them. In support, the City cited Cornejo Garcia's responses to requests for admissions. In these responses, Cornejo Garcia admitted that he contended the City had failed to use a pump that otherwise would have drained the contaminated water from the site.

The City also added two additional grounds for summary judgment. First, it argued that Cornejo Garcia had no evidence that the water at the worksite contained a toxin capable of causing his injuries or that it did cause his injuries. Second, it argued that Cornejo Garcia's exclusive remedy is workers' compensation. As Cornejo Garcia failed to exhaust the process for workers' compensation benefits, the City argued that the trial court lacks jurisdiction over his claims.

Finally, the City argued that any loss of consortium claim was derivative of Cornejo Garcia's negligence claim and thus failed for the same reasons.

Cornejo Garcia did not file any additional evidence in response to the City's amended summary-judgment motion.

The trial court granted the City's amended traditional and no-evidence motion for summary judgment. The court did not specify a particular basis for summary judgment; it stated only that Cornejo Garcia and his family had "failed to establish a genuine issue of material fact in support of their claims."

Cornejo Garcia, his wife, and his children appeal.

DISCUSSION

Cornejo Garcia contends that he pleaded facts sufficient to show that the City has waived its governmental immunity. Because he has pleaded sufficient facts to show waiver of immunity, Cornejo Garcia asks that we reverse the trial court's summary judgment. Liberally construing his brief, Cornejo Garcia contends that genuine issues of material fact exist concerning the City's involvement in the water and sewer project that preclude summary judgment. But Cornejo Garcia's brief does not address the City's alternative summary-judgment arguments premised on causation or the workers' compensation statute.

Standard of Review

We review a summary judgment de novo. *Farmers Grp. v. Geter*, 620 S.W.3d 702, 708 (Tex. 2021). Traditional summary judgment is required when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). No-evidence summary judgment is required when the movant challenges one or more essential elements of the nonmovant's claims or defenses and the nonmovant fails to respond with evidence raising a genuine issue of material fact as to the challenged elements. TEX. R. CIV. P. 166a(i).

Applicable Law

The City moved for summary judgment on multiple grounds. The trial court granted summary judgment in favor of the City without specifying the particular ground or grounds. To prevail on appeal under these circumstances, Cornejo Garcia must negate all possible grounds on which the trial court's summary judgment could have been based. *Miner Dederick Constr. v. Gulf Chem. & Metallurgical Corp.*, 403 S.W.3d 451, 463 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *see also Hanson v. Republic Ins. Co.*, 5 S.W.3d 324, 327 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (appellate court may affirm on any meritorious ground when summary-judgment motion raises multiple grounds for summary judgment).

Analysis

Failure to Exhaust Administrative Remedies

Assuming that Cornejo Garcia qualifies as an employee, rather than an independent contractor, the City argues that the trial court and this court lack jurisdiction over Cornejo Garcia's negligence claim because Cornejo Garcia failed to exhaust his administrative remedies under Texas's workers' compensation statute. In support of this argument, the City asserts that both it and Cornejo Garcia's employer were subscribers under the workers' compensation statute, Cornejo Garcia filed a workers' compensation claim against his employer but did not complete the administrative appeals process relative to his claim, and he did not file a workers' compensation claim against the City at all within the one-year statutory deadline. *See* TEX. LAB. CODE §§ 408.001, 409.003(2) (workers' compensation is exclusive remedy for work-related injury when employee is covered by workers' compensation insurance, and claim for workers' compensation must be made within one year of when employee knew or should have known that occupational disease was related to his employment).

We agree that the workers' compensation statute generally requires exhaustion of remedies as a prerequisite to suit. LAB. § 410.251; *see Mendoza v. Old Republic Ins. Co.*, 333 S.W.3d 183, 185–86 (Tex. App.—El Paso 2010, pet. denied)

(summarizing workers' compensation process). But on its own terms, the City's exhaustion argument turns on the existence of jurisdictional facts, namely that:

- Cornejo Garcia's employer had workers' compensation insurance;
- the City had workers' compensation insurance;
- Cornejo Garcia filed a workers' compensation claim under his employer's policy and received an adverse decision but failed to appeal from it; and
- Cornejo Garcia did not file a workers' compensation claim under the City's policy.

The City's brief does not contain citations to the record conclusively showing any of these jurisdictional facts for purposes of summary judgment. Thus, we cannot affirm the trial court's summary judgment on the basis of the City's exhaustion argument even though Cornejo Garcia has not addressed it. *See Croysdill v. Old Republic Ins. Co.*, 490 S.W.3d 287, 296 (Tex. App.—El Paso 2016, no pet.) (record must affirmatively reflect failure to exhaust administrative remedies); *Mendoza*, 333 S.W.3d at 187 (reversing summary judgment because defendant workers' compensation carrier did not prove failure to exhaust as matter of law).

Causation in the Context of a Toxic Tort Claim

Causation is an essential element of negligence. *IHS Cedars Treatment Ctr. of DeSoto, Tex. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). In a toxic tort or chemical exposure lawsuit, like this one, a plaintiff must present evidence that the toxin or chemical at issue can cause the specific injuries he alleges in human beings in general and that it caused his injuries in particular. *E.g.*, *Bostic v. Georgia-Pac.*

Corp., 439 S.W.3d 332, 348 (Tex. 2014) (asbestos/mesothelioma); *Merck & Co. v. Garza*, 347 S.W.3d 256, 262 (Tex. 2011) (prescription drug/heart attack); *Brookshire Bros. v. Smith*, 176 S.W.3d 30, 36–37 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (commercial cleaning products/reactive airways dysfunction syndrome); *Daniels v. Lyondell–Citgo Ref. Co.*, 99 S.W.3d 722, 725–26 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (benzene/lung cancer); *Coastal Tankships v. Anderson*, 87 S.W.3d 591, 601–02 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (naphtha/bronchiolitis obliterans organizing pneumonia). This necessarily requires a plaintiff to prove he was exposed to the toxin or chemical in question. *E.g.*, *Lockett v. HB Zachry Co.*, 285 S.W.3d 63, 67–74 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (affirming summary judgment as plaintiff did not offer proof of exposure to benzene and thus could not show it caused his leukemia).

Cornejo Garcia alleges that he was exposed to contaminated water while working on the City’s water and sewer project, but he does not identify a particular contaminant. Cornejo Garcia further alleges that this unidentified contaminant caused his injuries, which include paralysis, Guillain-Barré syndrome, and deep vein thrombosis.

In its amended summary-judgment motion, the City asserted that Cornejo Garcia had failed to identify a contaminant and had no evidence that his exposure caused his injuries. Cornejo Garcia did not respond to this aspect of the City’s

motion. On appeal, Cornejo Garcia does not cite any evidence of causation. We therefore hold that the trial court did not err in granting no-evidence summary judgment as to Cornejo Garcia's negligence claim.

Derivative Claims for Loss of Consortium

A claim for loss of consortium is derivative of a claim for personal injury. *Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990). Thus, the trial court also did not err in granting summary judgment as to the claims of Cornejo Garcia's wife and children. *See id.* (defense to personal-injury claim is defense to consortium claim).

CONCLUSION

We affirm the trial court's judgment.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Hightower, and Rivas-Molloy.