

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00188-CV

**TRISHA LYNN WAKAT, AS ADMINISTRATRIX OF THE ESTATE OF JAMES
HENRY MITCHELL, AMBER MITCHELL AND SHARON PATRICK, AS NEXT
FRIEND OF JENNIFER MITCHELL AND STACEY MITCHELL, Appellants**

V.

MONTGOMERY COUNTY, TEXAS, Appellee

**On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 07-03-02613 CV**

MEMORANDUM OPINION

James Henry Mitchell died while confined in the infirmary at the Montgomery County Jail. The administrator of Mitchell's estate and Mitchell's surviving children sued Montgomery County and others in federal court; when the federal court granted summary judgment on the plaintiff's federal claims,¹ they filed a wrongful death case in state court.

¹The Mitchell family's federal lawsuit included a claim that the state actors' deliberate indifference to Mitchell's serious medical needs violated Mitchell's civil rights under color of law. *See Wakat v. Montgomery Cnty., Tex.*, 471 F. Supp. 2d 759, 767

Montgomery County filed a motion for summary judgment, questioning the trial court's jurisdiction over the estate and the children's claims. The trial court granted Montgomery County's motion for summary judgment on the county's plea to the jurisdiction, and this appeal followed.

Mitchell's estate representative and his children contend the trial court erred in granting the County's motion for summary judgment and plea to the jurisdiction. We conclude the trial court properly determined that the County is immune from suit, as Mitchell's death, as a matter of law, was not caused by a condition or governmental use of tangible personal property. Accordingly, we affirm the judgment without addressing the remaining grounds for summary judgment.

Trial Court Pleadings and Motion for Summary Judgment

When the trial court granted summary judgment, the live pleading filed by Trisha Lynn Wakat, as administratrix of Mitchell's estate, Amber Mitchell and Sharon Patrick as next friend of Jennifer Mitchell and Stacey Mitchell, (collectively, "the Mitchell family") asserted (1) a survival claim for personal injuries that resulted in death, (2) a wrongful death claim, and (3) a tort claim that alleged that Mitchell's death was caused by the negligent and reckless acts of Montgomery County and its officers, agents and

(S.D. Tex.), *aff'd*, 246 F.App'x 265 (5th Cir. 2007); 42 U.S.C. § 1983 (West 2003). All of the named defendants, including the County and the jail doctor, filed motions for summary judgment. *Id.* at 762. The district court granted the motions for summary judgment on the federal claims and dismissed the state law claims. *Id.* at 771.

employees.² The Mitchell family's live pleading alleged negligence by Montgomery County and the jail doctor (1) in failing to properly perform medical treatment (2) in failing to recognize symptoms that resulted from treatment or lack of treatment, (3) in failing to transport Mitchell to an outside medical facility, (4) in failing to adhere to acceptable standards of care for patients requiring nursing care, and (5) in failing to provide proper care and protection and guard against the foreseeable consequences of Mitchell's injury, condition, or treatment. Although the factual recitations in the petition allege that Mitchell was placed in a restraint chair for approximately seven hours, the petition neither alleges that the use of the restraint chair resulted in Mitchell's death, nor asserts that the County is liable for a restraint-related injury not resulting in Mitchell's death.

Montgomery County moved for summary judgment on its plea to the jurisdiction. The County raised five independent grounds for summary judgment. First, the County moved for summary judgment on the ground that the alleged injury to Mitchell was not caused by a condition or governmental use of tangible personal property. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (West 2011). Next, the County also asserted that the summary judgment record disproved waiver of immunity through the reckless exercise of police protection in an emergency. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.055(2)(3) (West 2011). Third, the County relied on the intentional tort exception to a

²The trial court granted a summary judgment and dismissed the claims against the jail doctor, then ordered that claim severed. The claims against the doctor are not before the Court.

waiver of immunity. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (West 2011). Fourth, the County moved for summary judgment on the ground that the Mitchell family failed to timely provide an expert report within 120 days of filing the initial claim in federal court. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (West 2011). Fifth, the County maintained that the Mitchell family filed their state court petition after the statutory limitations period had expired on their claims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.251(a) (West 2011).

In response, the Mitchell family argued that the County and its agents were negligent in providing protection, safety, and treatment to Mitchell, and that the County's negligence resulted in Mitchell's death. Relying upon the expert report of a board certified specialist in correctional healthcare, the Mitchell family claimed the jail staff recognized that Mitchell was experiencing detoxification symptoms but then failed to treat Mitchell for five days after his symptoms had developed. According to the Mitchell family's expert, the standard of care required that Mitchell be sent to the hospital rather than being housed in a restraint cell in the jail. The Mitchell family also relied on a correctional forensic psychiatrist's opinion that restraints were used for mental health purposes in a manner inconsistent with the standard of care. Mitchell was strapped in a restraint chair for approximately seven hours on March 21, three days before he died. On March 23, the jail doctor prescribed Ativan. The Mitchell family relied upon a correctional healthcare physician's opinion that a four hour delay in administering the

Ativan in the face of Mitchell's critical illness showed conscious indifference on the part of the attending medic. Referring to FDA approved medication guidelines, which warn that withdrawal reactions may occur when dosage reduction occurs for alprazolam, the Mitchell family argued that the jail doctor negligently failed to adopt policies to provide reasonable medical treatment for persons and failed to provide for an objective professional evaluation to determine whether Mitchell's medications, Xanax and Vicodin, were medically necessary. According to the Mitchell family's forensic psychiatrist, the evaluation and treatment of Mitchell fell below the standard of correctional health care, and the County had inadequate policies and procedures relevant to providing health care to persons confined to the jail. In the forensic psychiatrist's opinion, Mitchell's severe detoxification resulted in psychotic symptoms; but, had Mitchell been properly treated, he would not have been subjected to severe agitation and tremors, nor subjected to extreme physical stress in a person with known cardiac disease. The forensic psychiatrist concluded that with proper procedures and supervision of jail personnel, Mitchell would not have succumbed to severe dehydration, would not have been forced to endure hours in a restraint chair, and Montgomery County would not have attempted to provide a hospital level of care in a jail setting.

Use of Tangible Personal Property

In reviewing a summary judgment, we take as true all evidence favorable to the non-movant, indulge every reasonable inference in favor of the non-movant, and resolve

any doubt in the non-movant's favor. *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The movant on the affirmative defense of governmental immunity must establish all of the essential elements of the defense as a matter of law. *EPGT Tex. Pipeline, L.P. v. Harris Cnty. Flood Control Dist.*, 176 S.W.3d 330, 335 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd). Once the movant establishes its immunity, the burden of production shifts to the non-movant to establish a fact issue on waiver of immunity. *Id.*

“[T]he Tort Claims Act does not waive sovereign immunity for all negligence claims against governmental units.” *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). “A governmental unit in the state is liable for: ... (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.” Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). Claims involving the failure to use, or the non-use of property, do not waive sovereign immunity. *Miller*, 51 S.W.3d at 587. The Mitchell family’s response to the motion for summary judgment does not specifically identify a particular item of personal property used by a County employee through which the County waived its immunity. *Id.* In an appeal from the granting of a summary judgment, “[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.” Tex. R. Civ. P. 166a(c).

Although the Mitchell family did not expressly argue that the use of restraints by jail personnel waived the County's immunity under Section 101.021(2) of the Civil Practice and Remedies Code, their response to the motion for summary judgment notes the use of restraints and refers the trial court to the evidence in the summary judgment record concerning the use of restraints. *See* Tex. Civ. Prac. & Rem. Code Ann. 101.021(2). On appeal, the Mitchell family contends a report and supplemental report by a forensic psychiatrist raise a fact issue connecting Mitchell's injury to the County's use or misuse of tangible personal property. As supplemented, the forensic psychiatrist's report states that restraints were used for mental health purposes in a manner that was not consistent with the standard of care. The forensic psychiatrist's report specifically states that Mitchell's medical records did not include a physician's order for the use of restraints. The jail log records indicate that Mitchell was placed in a restraint chair during the night on March 21, and that he remained in the restraint chair for approximately seven hours. Mitchell then died three days later. Nevertheless, we conclude that the forensic psychiatrist's report is insufficient to support any inference that the use of the restraint chair caused or contributed to Mitchell's death.

While the forensic psychiatrist's report states that had Mitchell been treated properly he would not have been forced to "endure countless hours in a restraint chair," the report does not explain how Mitchell's death, which occurred three days later, was caused by the use of the chair. The use of tangible property must be a proximate cause of

the personal injury and not merely furnish the condition that makes the injury possible. *See Jones v. Tex. Dep't of Criminal Justice-Inst'l Div.*, 318 S.W.3d 404, 404-05 (Tex. App.—Waco 2010, pet. denied); *see also Hardin Cnty. Sheriff's Dep't v. Smith*, 290 S.W.3d 550, 553 (Tex. App.—Beaumont 2009, no pet.). Cause in fact requires that the act or omission be a substantial factor in causing the alleged injury, without which the harm would not have occurred. *See Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

The petition alleges that jail personnel placed Mitchell in a restraint chair when they should have sent him to a hospital for medical treatment. While the Mitchell family's petition alleges a death claim, it does not expressly allege the specific tangible property claimed to have caused Mitchell's death; i.e., that the restraint chair was used in a manner that caused Mitchell's cardiac arrest. If we were to construe the petition to state a death claim based on the County's use of restraints, the summary judgment evidence shows that Mitchell's heart stopped in the process of his detoxification. Therefore, the burden shifted to the Mitchell family to establish the existence of a fact issue concerning the relationship between Mitchell's death and the County's use of tangible property, which in this case consists of the restraints.³ Because the summary judgment record fails

³A pathologist described a possible relationship between Mitchell's restraint in the chair and a dysrhythmia, but the pathologist further explained he could not testify to a reasonable degree of medical probability that, absent the restraint chair, Mitchell would not have died, and the pathologist also stated that he could not offer a qualified opinion that, absent either discontinuation of Xanax or use of the restraint chair, Mitchell would not have experienced a sudden cardiac event. Although the pathologist's deposition and

to raise a fact issue connecting the County's use of restraints to Mitchell's cardiac arrest and resulting death, the County's waiver of immunity has not been established. *See Smith*, 290 S.W.3d at 553 (No waiver of liability occurred, although squad car was used for jail-to-jail transport of a person who had been arrested due to mistaken identity, where car was not operated in a manner that caused injury.).

In the context of a plea to the jurisdiction, when the pleadings “do not contain sufficient facts to affirmatively demonstrate the trial court’s jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff’s should be afforded the opportunity to amend.” *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004); *see also In re B.I.V.*, 870 S.W.2d 12, 13-14 (Tex. 1994) (“A summary judgment should not be based on a pleading deficiency that could be cured by amendment.”). In this case, however, it would be inappropriate to remand the case to allow the Mitchell family to amend their pleadings to allege a claim they have never previously made—that the use of restraints caused an injury other than Mitchell’s death from cardiac arrest. We note that procedurally, the trial court’s judgment followed a summary judgment hearing; we review a summary judgment based upon the pleadings on file at the time of the hearing. *See Tex. R. Civ. P. 166a(c)*. When the trial court enters a summary judgment, grounds

report appear in the summary judgment record, the Mitchell family did not refer to this testimony in their summary judgment response, and they did not argue that this evidence established a fact issue.

not raised in the trial court cannot form the basis for reversal of the judgment. *See* Tex. R. Civ. P. 166a(c). Additionally, a contention that the use of restraints caused an injury, but not Mitchell's death, is not a mere pleading deficiency curable by amending the pleadings. *See Miranda*, 133 S.W.3d at 226-27. The Mitchell family filed a wrongful death suit caused by negligence in providing medical care. The pleadings and the evidence affirmatively demonstrate the trial court's lack of jurisdiction over the only claims the Mitchell family asserted in their petition. *Id.* "The possibility that a party could have pleaded a viable cause of action is not ordinarily reason to reverse a judgment correctly disposing of the claims the party did plead." *Harris Cnty. v. Dillard*, 883 S.W.2d 166, 168 n.4 (Tex. 1994).

The trial court did not specify the ground on which it granted summary judgment. When the grounds upon which the summary judgment motion was granted are not identified, we are required to affirm the summary judgment if any ground raised in the motion for summary judgment has merit. *See Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex. 1999). The trial court was authorized to grant the County's summary judgment because the Mitchell family failed to demonstrate or raise a fact issue that any County employee used tangible property in a manner that caused Mitchell's death. In the absence of a connection between the County's use of tangible property and Mitchell's death, the Mitchell family failed to affirmatively demonstrate the Legislature waived the

County's immunity from suit. Accordingly, we affirm the summary judgment without addressing the remaining grounds supporting the judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on January 13, 2011
Opinion Delivered March 31, 2011
Before Gaultney, Kreger, and Horton, JJ.