

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-19-00246-CV

CARYN SUZANN CAIN, Appellant

V.

**THE CITY OF CONROE, TEXAS, JEFF CHRISTY, STEVE HURD,
AND SHANNON WARRIOR, Appellees**

**On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 18-05-05808-CV**

MEMORANDUM OPINION

Pro se appellant Caryn Suzann Cain brings this interlocutory appeal from the trial court's order granting appellees' motion to dismiss, plea to the jurisdiction, and traditional motion for summary judgment. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(5), (8). We affirm the trial court's judgment dismissing Cain's claims against appellees, the City of Conroe, Texas, Jeff Christy, Steve Hurd, and Shannon Warrior.

BACKGROUND

In May 2018, Cain filed a *pro se* civil case against the Conroe Police Department (“the Department”) alleging police negligence in their investigation and disposal of her complaints regarding several incidents involving disputes with her neighbors at her apartment complex. In August 2018, the trial court issued a show cause order requesting Cain to show good cause why the case should not be dismissed for want of prosecution. Cain responded and argued that the Department had failed to render police assistance and file an incident report after she was allegedly assaulted by her neighbor’s dog, and that the Department showed bias towards her neighbor, a state correctional officer, who allegedly continued to harass her over a period of eighteen months. According to Cain, the Department lacked immunity due to its “special relationship” and “state-endangered liability” and because the Department’s actions were intentional, oppressive, devious, obstructive, and violated constitutional law and her civil rights.

Cain filed an amended petition, adding the City of Conroe (“the City”) as a defendant, alleging that the City is accountable for alleged gross police misconduct, including abuse of official capacity, oppression, and constitutional violations, perpetuated by the Department and Officers Steven Hurd and Shannon Warrior. Cain’s amended petitions added Jeff Christy, the Chief of the Department, and

Officers Hurd and Warrior as defendants in her suit.¹ Cain alleged that she depended upon the Department's assistance to comply with her Apartment Lease Agreement's requirement that she obtain an incident report for insurance purposes. According to Cain, Hurd had a premeditated discriminatory mindset against her and favored her neighbor because he was a correctional officer, and Cain maintained that Hurd intimidated her and implied that she should not call the Department for assistance. Cain argued that Warrior exhibited the same mindset, refused to issue an incident report, and "victim-shamed" her. Cain asserted that the Department ignored her complaints about Hurd and Warrior's "police bias" towards her neighbor, and that her neighbor continued to harass her, forcing her to move. According to Cain, she later discovered that Hurd and Warrior had allegedly filed false internal reports misconstruing her complaints.

In her amended petitions, Cain alleged that she was suing defendants for use of excessive force in violation of the Fourth Amendment, inflicting cruel and unusual punishment under the Eighth Amendment, and depriving her of her rights, privileges, property, due process, and/or equal protection of law pertaining to the Fifth and Fourteenth Amendments. According to Cain, defendants violated 42 U.S.C. §§ 1981 and 1983 by denying local government law enforcement services to

¹We will collectively refer to the City of Conroe, Chief Jeff Christy, Officer Steve Hurd, and Officer Shannon Warrior as "defendants."

a disabled person due to defendants' unlawful attempt to hide a special relationship with her neighbor. Further, the terms of her Lease Agreement stated that the Department was to provide law enforcement services as needed to her apartment complex. Cain also alleged that the City had violated the Texas Tort Claims Act ("TTCA") and that her personal injuries were caused by the City's inaction, the negligence of its law enforcement, the use of the City's motor-driven police vehicle, and a condition or use of the City's tangible real or personal property. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021.

Cain alleged that the City and the Department conspired against her, which she contends is evidenced by documentation proving abuse of official capacity, evidence tampering and disposal, and false reporting, and that the City's motive was to hide the Department's special relationship with her neighbor. According to Cain, the City is liable for damages arising from its governmental function of police protection, and the City's violation of constitutional law and discrimination against her, a disabled person, waived the City's immunity from suit.

The City filed an answer alleging that sovereign, qualified, and official immunity protected it from liability; Cain's claims were not actionable under the TTCA; and the actions about which Cain complains do not constitute a constitutional violation. The City also alleged that Cain's claims against Christy in his official capacity were redundant of her alleged causes of action against the City. Hurd and

Warrior filed an answer alleging that sovereign, qualified, and official immunity protected them from liability. Cain filed a response alleging that Hurd and Warrior acted outside the scope of discretionary authority and perpetrated unlawful, wrongful, and negligent actions that waived their immunity.

Defendants filed a motion to dismiss, plea to the jurisdiction, and traditional motion for summary judgment. Defendants argued that the state law causes of action against Christy, Hurd, and Warrior in their official capacities are redundant of Cain's claims against the City and should be dismissed under section 101.106(e) of the TTCA. *See id.* §§ 101.106(e), 101.021. Defendants maintained that the trial court did not have subject matter jurisdiction over Cain's state law claims because they did not fall within the exceptions that create a waiver of liability under the TTCA. According to defendants, Cain's allegations that Warrior used her patrol car and her patrol car's communication equipment or cellphone device while responding to the incident are not sufficient to allege a cause of action under the TTCA, because there is no nexus between the use of the vehicle or the property and Cain's alleged injuries. Defendants argued that Cain's intentional tort claims are exempted from the TTCA's waiver of immunity, and that under Texas law, police officers have no special duty to make an arrest on behalf of an injured person. In their traditional motion for summary judgment, defendants argued that Cain's claims for violations of her civil

rights should be dismissed, because there is no constitutional right to an investigation or prosecution of an alleged criminal offense.

Cain filed a response, arguing that defendants' motion to dismiss and summary judgment did not fully address each of her causes of action. Cain alleged that a genuine issue of material fact exists regarding the fabrication of evidence and bad faith spoliation due to Hurd submitting a false call log entry and the City destroying audio recordings of Cain's conversations with dispatch and Hurd. According to Cain, defendants are not entitled to summary judgment on her claims that their actions violated her Fifth and Fourteenth Amendment rights, because defendants' immunity was waived due to their constitutional violations. Cain also argued that the City's immunity was waived under the TTCA, because a police vehicle was used and that her federal claims show that the defendants violated 42 U.S.C. § 1983 due to their alleged *de facto* policy of concealing and suppressing an investigation into police misconduct and maintaining a code of silence.

Defendants replied to Cain's response and asserted that the Fifth Circuit has never recognized a state-created danger claim, and that Cain's claims that defendants created a danger must fail because Cain was not placed in any danger. Defendants argued that the officers investigated Cain's complaints and determined that no crimes were committed. Defendants further argued that the City was not liable for alleged constitutional violations by failing to take additional actions after the

incidents, because Cain failed to show that the City was the moving force behind the alleged violations. According to defendants, Cain is merely dissatisfied with the response to her complaints, and even Cain's former attorney withdrew from representing her due to the lack of facts that would support Cain's contention that a crime had been committed. Defendants argued that Cain failed to establish a causal connection between the City and the alleged deprivation of her constitutional rights. The trial court granted defendants' motion to dismiss, plea to the jurisdiction, and traditional motion for summary judgment and dismissed Cain's claims against defendants with prejudice, and Cain appealed.

Standard of Review and Applicable Law

A plea to the jurisdiction is a dilatory plea, which governmental entities may use to challenge a court's power to resolve the merits of a plaintiff's claims. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Governmental immunity protects governmental units of the State from suit. *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). Unless the governmental unit has consented to suit, a trial court lacks subject matter jurisdiction to consider a claim against it. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003); *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). Whether subject matter jurisdiction exists is a question of law, and we review the trial court's ruling on a plea to the jurisdiction *de novo*. *State v. Holland*, 221

S.W.3d 639, 642 (Tex. 2007); *Miranda*, 133 S.W.3d at 226, 228. The plaintiff must plead facts that affirmatively demonstrate that governmental immunity has been waived and the trial court has subject matter jurisdiction. *Holland*, 221 S.W.3d at 642. When a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties to determine if a fact issue exists. *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). We take as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Miranda*, 133 S.W.3d at 228.

Generally, trial courts do not possess subject matter jurisdiction over a suit against a governmental entity unless the Legislature has enacted a statute waiving the entity's immunity for the type of claim the plaintiff has asserted in the suit. *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997); *Duhart v. State*, 610 S.W.2d 740, 741 (Tex. 1980). Governmental immunity protects political subdivisions of the State, including cities, from lawsuits for damages. *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 324 (Tex. 2006); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(B).

In cases involving torts, the Legislature waived the immunity that governmental entities otherwise enjoy if the plaintiff's claim is one that falls within the requirements of the statutory waiver. *See* Tex. Civ. Prac. & Rem. Code Ann. §§

101.021-.029. Section 101.021 of the TTCA allows a plaintiff to sue a governmental unit for damages if the requirements in the TTCA apply to the plaintiff's claim. *See id.* § 101.021. Section 101.021(1) provides that a governmental unit is liable for property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if (1) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment, and (2) the employee would be personally liable to the claimant according to Texas law. *Id.* § 101.021(1). Section 101.021(2) provides that a governmental unit is liable for "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." *Id.* § 101.021(2). In addition to waiving a governmental unit's immunity from liability, section 101.021 also waives immunity from suit. *Id.* § 101.025(a); *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001).

Official immunity is an affirmative defense that shields governmental employees from suit arising from the good faith performance of their discretionary duties as long as they are acting within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Sovereign immunity shields the governmental employer from vicarious liability when official immunity shields a

governmental employee from liability. *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000); *see* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(1)(B). Sovereign immunity is properly asserted in a plea to the jurisdiction because it defeats a trial court's subject matter jurisdiction. *Miranda*, 133 S.W.3d at 225-26.

We review a trial court's ruling on a traditional summary judgment motion *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We "must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). We "consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the motion." *Id.* at 756. For a defendant to prevail on summary judgment, it must show that there is no genuine issue of material fact concerning one or more essential element of the plaintiff's cause of action, or establish each element of an affirmative defense as a matter of law. Tex. R. Civ. P. 166a(c); *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990).

Analysis

In her *pro se* appellate brief, Cain asserts that the trial court erred by granting defendants' plea to the jurisdiction, motion to dismiss, and traditional motion for summary judgment and dismissing all of her claims, because defendants violated

city ordinances, state laws, and federal constitutional laws. Cain argues that she asserted valid state law claims under the TTCA that waive the City's sovereign immunity and also asserted valid constitutional claims.

Plea to the Jurisdiction

We first determine whether Cain's pleadings are sufficient to raise a claim for use of a motor-driven vehicle and for use of property with the TTCA's purview. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.021(1), (2). Defendants argue that Cain's claims do not arise from the use of a motor-driven vehicle, and that Cain's claims that Warrior's use of her patrol car's communication equipment or cellphone device do not fit within the parameters of the type of "use" provided within the statute. According to defendants, there is no nexus between the use of the vehicle or the property and Cain's alleged injuries.

For injuries that arise from a municipality's operation of motor-driven vehicles, the TTCA waives immunity from suit if the municipality's employee was acting in the scope of his employment, the collision "arises from the operation or use of a motor-driven vehicle[.]" and "the employee would be personally liable to the claimant according to Texas law[.]" Tex. Civ. Prac. & Rem. Code Ann. § 101.021(1), (2). The TTCA does not define the terms "operation" or "use," but the Texas Supreme Court has explained that "operation," as it is used in the TTCA, refers to "a doing or performing of a practical work[.]" *LeLeaux v. Hamshire-*

Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992) (quoting *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989)). The *LeLeaux* Court explained that the term “use” means “to put or bring into action or service; to employ for or apply to a given purpose[.]” *Id.*

A municipality is not liable for a personal injury proximately caused by a negligent employee unless the injury “arises from the operation or use of a motor-driven vehicle[.]” Tex. Civ. Prac. & Rem. Code Ann. § 101.021(1)(A). The phrase “arises from” requires a nexus between the injury that was allegedly caused by the governmental employee and the operation or use of a motor-driven vehicle. *LeLeaux*, 835 S.W.2d at 51. Here, there is no evidence that Cain’s alleged injuries arose from Warrior’s use or operation of the patrol car. *See id.* at 51-52. We conclude that Cain’s pleadings fail to allege facts that affirmatively demonstrate that her injuries arose from the operation or use of a motor-driven vehicle. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(1); *LeLeaux*, 835 S.W.2d at 51-52.

Concerning Cain’s allegation that Warrior’s use of her patrol car’s communication equipment or cellphone device caused her injuries, we note that the “mere involvement of tangible personal property in an injury will not, in and of itself, waive liability.” *Tex. Tech Univ. Health Sci. Ctr. v. Jackson*, 354 S.W.3d 879, 884 (Tex. App.—El Paso 2011, no pet.). The tangible personal property must do more than merely furnish the condition that makes the injury possible. *Id.* “A plaintiff must

show that the tangible personal property was the instrumentality of harm.” *Id.* By its express language, the TTCA limits the waiver of sovereign immunity to injuries proximately caused by a condition or use of personal property. *Id.* at 885; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). To state such a claim, the injury must be contemporaneous with the use of the property and using that property must have actually caused the injury. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 388-89 (Tex. 2016). We conclude that Cain’s pleadings fail to allege facts that affirmatively demonstrate that her injuries arose from the City’s use of tangible personal property. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2); *Sampson*, 500 S.W.3d at 389; *Jackson*, 354 S.W.3d at 884. We further conclude that Cain has failed to show that the City’s immunity from suit has been waived under the TTCA.

While Cain included in her petitions and appellate brief several city ordinances which she alleged the City violated, she has failed to show that any of the ordinances contain a provision waiving immunity from suit. *See Schmitz v. Denton Cty. Cowboy Church*, 550 S.W.3d 342, 354 (Tex. App.—Fort Worth 2018, pet. denied). Cain has also failed to show any waiver of immunity for her claims under the Texas Health and Safety Code or the Texas Local Government Code. *See* Tex. Health & Safety Code Ann. §822.041(2)(A),(B); Tex. Loc. Gov’t Code Ann. §§ 143.001, 143.009, 143.010. While Cain has alleged that defendants committed intentional torts in exercising their police protection function by failing to properly

deal with her complaints, the TTCA does not waive immunity for intentional torts against a governmental entity. Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2); *City of Hempstead v. Kmiec*, 902 S.W.2d 118, 122 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

Additionally, absent legislative consent, municipalities in Texas generally have immunity from suit when they are performing governmental functions. *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007). Section 101.0215 of the Texas Civil Practice and Remedies Code states that police protection and control are governmental functions. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(1). Section 101.055 of the Civil Practice and Remedies Code provides that Chapter 101 does not apply to a claim arising from the failure to provide, or the method of providing, police protection. *Id.* § 101.055. We conclude that Cain has failed to show immunity from suit has been waived for any state law claims regarding the governmental function of police protection.

Regarding the immunity of the City's employees, defendants filed a motion to dismiss the state law claims against Christy, Hurd, and Warrior pursuant to section 101.106 of the TTCA. *See id.* § 101.106(a), (e). Defendants argued that because Cain elected to file suit against the City, she is barred from filing suit against any individual employee of the City regarding the same subject matter. Defendants further argued that because Cain's claims against Christy in his official capacity are

redundant of her claims against the City, they are considered claims against the City. *See id.* § 101.106(f).

Section 101.106 of the TTCA contains an election of remedies provision forcing plaintiffs, at the outset of their suits, to determine whether to sue governmental employees in their individual capacity or to sue the governmental entity. *Id.* § 101.106(a)-(f); *see also Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008). The TTCA provides that once the plaintiff elects by filing suit, the TTCA “immediately and forever” bars the plaintiff from suing others regarding the same subject matter. *Molina v. Alvarado*, 463 S.W.3d 867, 870 (Tex. 2015) (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.106(a)-(b)). Cain filed suit against the City and its employees, and the City filed a motion to dismiss its employees from suit pursuant to subsection 101.106(e), effectively confirming that the employees were acting within the scope of their employment and that the City was the proper party. *See Tex. Adjutant General’s Office v. Ngakoue*, 408 S.W.3d 350, 358 (Tex. 2013). We conclude that the trial court properly granted defendants’ motion to dismiss Cain’s state law claims against Christy, Hurd, and Warrior, because they were entitled to dismissal under subsection 101.106(e). *See Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e); Ngakoue*, 408 S.W.3d at 358.

Having determined that Cain failed to allege facts that affirmatively demonstrate that governmental immunity has been waived under the TTCA and that

the trial court has subject matter jurisdiction over her state law claims, we conclude that the trial court did not err by granting defendants' plea to the jurisdiction. *See Holland*, 221 S.W.3d at 642.

Summary Judgment

Cain complains that the trial court erred by granting defendants' motion for traditional summary judgment on her federal constitutional claims. Cain argues that defendants violated her constitutional rights because the City has a *de facto* policy of concealing or suppressing investigations into police officer misconduct, and because defendants followed the City's *de facto* policy, abused official capacity, and engaged in a conspiracy to deny her police service and destroy evidence of her complaints.

Cain was required to present the trial court with sufficient pleadings to demonstrate that defendants violated one of more of her constitutional rights. Generally, to state a valid claim for violating a plaintiff's federal constitutional rights under 42 U.S.C. § 1983, a plaintiff must "(1) allege a violation of a right secured by the Constitution or laws of the United States[,] and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Doe ex rel. Magee v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 854-55 (5th Cir. 2012); *see* 42 U.S.C. § 1983. Defendants argue that the trial court did not err in granting summary judgment, because Cain has no viable civil rights claims against defendants based

on her allegations that defendants failed to investigate or take action concerning her complaints of her neighbors' alleged criminal offenses.

Regarding the liability of a local government under section 1983, the United States Supreme Court concluded that “Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.” *Monell v. Dep. of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). “[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” *Id.* at 694. However, because a local government may not be held liable under section 1983 for the unconstitutional acts of its non-policymaking employees, liability may not rest on a theory of *respondeat superior*. *Flores v. Cameron Cty., Tex.*, 92 F.3d 258, 263 (5th Cir. 1996). Supervisory officials may be held liable for their subordinates only if they affirmatively participated in acts that caused constitutional deprivation or implemented unconstitutional policies that result in a plaintiff’s injury. *Lang v. City of Nacogdoches*, 942 S.W.2d 752, 761 (Tex. App.—Tyler 1997, writ denied).

To maintain her section 1983 claim, Cain had to show that there was a municipal policy or custom that, when executed or implemented, produced a constitutional tort, that caused her injuries. *See id.* at 762. Cain’s petition reveals that

she did not allege sufficient facts showing that an unconstitutional policy or custom was being implemented or executed by the City, which may have caused the alleged constitutional tort and injury. *See id.* Nor does her petition allege that Christy affirmatively participated in acts that caused constitutional deprivation or that he implemented unconstitutional policies that caused Cain's alleged injuries. *See id.* Based on her pleadings, we conclude that Cain has failed to state a valid section 1983 claim against the City or Christy. *See Doe ex rel. Magee*, 675 F.3d at 854-55; *Lang*, 942 S.W.2d at 762. We further conclude that Cain has failed to state a valid First Amendment claim against the City for violating her right of free speech due to its alleged *de facto* policy of concealing or suppressing investigation into police misconduct and its alleged code of silence. *See* U.S. Const. amend. I.

Cain also complains that defendants violated her right to due process, but the Due Process Clause does not require the State to protect life, liberty, and property of its citizens against invasion by private actors, and it generally confers no affirmative right to government aid. *DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 196 (1989); *see also* U.S. Const. amend. XIV. Thus, Cain's allegation that defendants failed to protect her against her neighbors does not constitute a violation of the Due Process Clause. *See id.* at 197. Additionally, the City did not have a constitutional duty to protect Cain based on the language in her lease agreement, and defendants did not play any part in creating the alleged dangers that Cain faced nor

did defendants do anything to render Cain more vulnerable to them. *See id.* at 200-01. We conclude that Cain has failed to show a violation of due process under the Fourteenth Amendment.

While Cain argues that defendants violated the Eighth Amendment by inflicting cruel and unusual punishment, the Eighth Amendment prohibits cruel and unusual punishment for crimes. *See* U.S. Const. amend. VIII. Cain cannot maintain an Eighth Amendment violation claim against defendants because she has not shown that she was convicted of any crimes. *See Johnson v. City of Dallas, Tex.*, 61 F.3d 442, 444, n.5 (5th Cir. 1995). Additionally, Cain cannot prevail on her equal protection claim merely by showing that the officers knew facts that would have justified an arrest, because a police officer's authority to act does not imply that the officer has a constitutional duty to do so. *See McKee v. City of Rockwall, Tex.*, 877 F.2d 409, 414 (5th Cir. 1989). Cain must show that the non-arrest was the result of discrimination against a protected class, and Cain maintains that she was discriminated against based on her disability. *See id.* Cain cites to the City's website to show that the City has a policy of protecting the disabled, but Cain failed to allege any facts showing that the police officers' inactions in handling her complaints were a consequence of discrimination based on a protected class. *See id.* at 416.

Cain also alleged a section 1983 excessive force claim, arguing that defendants used excessive force by asserting police bias and failing to act in violation

of the First and Fourteenth Amendments. To prevail on a section 1983 excessive force claim, a plaintiff must show that she was seized and that she ““suffered (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable.”” *Harris Cty. v. Coats*, 607 S.W.3d 359, 381 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (quoting *Flores v. City of Palacios*, 381 F.3d 391, 396 (5th Cir. 2004)). We conclude that Cain cannot maintain an excessive force claim, because she failed to show that she was seized. *See* 42 U.S.C. § 1983. Cain has failed to establish a *prima facie* case under sections 1981 and 1985. *See Johnson v. Tex. Commerce Bank Nat’l Ass’n*, 835 S.W.2d 755, 757 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *see also* 42 U.S.C. §§ 1981, 1985.

We conclude that defendants have proven, as a matter of law, that Cain cannot prevail on at least one of the essential elements of each of her federal constitutional claims. *See* Tex. R. Civ. P. 166(c); *Black*, 797 S.W.2d at 27. Accordingly, the trial court did not err in granting defendants’ traditional motion for summary judgment and dismissing Cain’s federal constitutional claims. Having concluded that the trial court did not err in granting defendants’ plea to the jurisdiction, motion to dismiss, and traditional summary judgment, we overrule each of Cain’s issues and affirm the trial court’s judgment dismissing all of Cain’s claims against defendants.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on May 6, 2020
Opinion Delivered November 25, 2020

Before McKeithen, C.J., Horton and Johnson, J.J.