



NUMBER 13-14-00570-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JAMES WILKINS,

Appellant,

v.

NUECES COUNTY, TEXAS,

Appellee.

**On appeal from the 105th District Court
of Nueces County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Chief Justice Valdez**

Appellant James Wilkins, acting pro se, appeals from the trial court's grant of a plea to the jurisdiction in favor of appellee Nueces County. By two issues, appellant contends that governmental immunity was waived on his various claims.¹ We affirm.

¹ In his issues presented section, Wilkins states he has four issues. However, in his argument section Wilkins only briefs two issues. To the extent that he may make any contentions not addressed in this memorandum opinion, we conclude that those contentions are inadequately briefed, and we will not address them. See TEX. R. APP. P. 38.1(i).

I. BACKGROUND

Wilkins, an inmate, sued Nueces County pro se in district court claiming he suffered emotional distress and mental anguish when he was, among other things, allegedly not given a blanket, a sheet, and a mattress while in the county jail's holding cell for ten days on four separate instances during his five month period of incarceration. In his original petition, Wilkins sued the County for negligence, gross negligence, fraud, and violations of the Texas Commission on Jail Standards policies and rules. The County filed special exceptions to Wilkins's original petition that were sustained by the trial court, and the trial court ordered Wilkins to amend his original petition. In his amended petition, Wilkins made claims for negligence, gross negligence, forgery, and the same rule violations previously made. Wilkins then filed his second amended petition alleging only a claim for negligent misrepresentation. The County filed a plea to the jurisdiction, which the trial court granted. This appeal followed.

II. DISCUSSION

Wilkins generally claims that immunity has been waived under the Texas Tort Claims Act, see TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (West, Westlaw through 2015), for his claims of fraud and negligence because he received personal injuries as a result of the non-use of personal property.² See *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016) (“[A] governmental unit is immune from suit unless the Tort Claims Act expressly waives immunity, which it does in three areas when the statutory

² We note that Wilkins does not provide a clear and concise argument supporting his assertions. See TEX. R. APP. P. 38.1(h); *Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (providing that pro se litigants are held to the same standards as attorneys and must comply with the Texas Rules of Appellate Procedure). Therefore, we will address his issues to the extent that we understand them.

requirements are met: (1) use of publicly owned automobiles; (2) injuries arising out of a condition or use of tangible personal property; and (3) premises defects.”).

An amended pleading takes the place of the original pleading and all prior pleadings are superseded and are no longer a part of the live pleadings. *Sheerin v. Exxon Corp.*, 923 S.W.2d 52, 55 (Tex. App.—Houston [1st Dist.] 1995). And, “filing an amended petition that does not include a cause of action effectively nonsuits or voluntarily dismisses the omitted claims as of the time the pleading is filed.” *FKM P’ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 632 (Tex. 2008). “Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.” TEX. R. CIV. P. 65.

In the trial court, Wilkins filed a second amended pleading making only a claim for negligent misrepresentation, a claim he did not make in his prior pleadings. Therefore, although Wilkins may have made claims for negligence and fraud in his prior live pleading, any prior pleading was superseded by his amended pleading, which only included a claim for negligent misrepresentation. *See id; Sheerin*, 923 S.W.2d at 55. In addition, because Wilkins’s amended petition superseded his prior pleading, his claims for negligence and fraud were voluntarily nonsuited because he did not include those claims in his second amended pleading. *See FKM P’ship, Ltd.*, 255 S.W.3d at 632. On appeal, Wilkins does not challenge the trial court’s grant of the County’s plea to the jurisdiction on his negligent

misrepresentation cause of action. Therefore, because Wilkins's claims of fraud and negligence were not in his live pleading, we are unable to conclude that any error occurred in the trial court's granting the County's plea to the jurisdiction.

Nonetheless, Wilkins claims that immunity has been waived under the TTCA due to the non-use of tangible property. However, the non-use of tangible property does not waive immunity. See *Sampson*, 500 S.W.3d at 389 (“Allegations of mere non-use of property cannot support a ‘use’ claim under the Tort Claims Act.”); *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216, 224 (Tex. App.—Fort Worth 2003, pet. denied) (explaining that “claims involving a failure to use or the nonuse of property are not within the Act’s sovereign immunity waiver”) (citing *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583, 587–89 (Tex. 2001)). Thus, even assuming, without deciding, that his fraud and negligence causes of action were not superseded by his amended pleading, the trial court properly granted the Count’s plea to the jurisdiction on that theory. See *Sampson*, 500 S.W.3d at 389; *Univ. of N. Tex.*, 124 S.W.3d at 224.

Moreover, in the case of fraud, immunity cannot be waived under the TTCA for intentional torts. *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014) (“[T]o sue a governmental unit under the Act’s limited waiver, a plaintiff may allege an injury caused by negligently using tangible personal property, but to be viable, the claim cannot arise out of an intentional tort.”) (internal citations omitted); *LTTTS Charter Sch., Inc. v. Palasota*, 362 S.W.3d 202, 209 (Tex. App.—Dallas 2012, no pet.) (“Fraud is an ‘intentional tort’ for which the TTCA provides no waiver of immunity.”). Thus, the trial court properly granted the plea to the jurisdiction on that theory. We overrule Wilkins’s first and second issues.

III. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez

ROGELIO VALDEZ

Chief Justice

Delivered and filed the
18th day of May, 2017.