NO. 12-17-00182-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

RONALD COOPER, APPELLANT	***§***	***APPEAL FROM THE 3RD***
V.		
	§	***JUDICIAL DISTRICT COURT***
TEXAS DEPARTMENT OF CRIMINAL JUSTICE CORRECTIONAL INSTITUTIONS DIVISION, APPELLEE	***§***	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

Ronald Cooper appeals from the trial court's summary judgment by which it dismissed Cooper's personal injury suit against the Texas Department of Criminal Justice Correctional Institutions Division (TDCJ). In two issues, Cooper asserts the trial court erred in determining that TDCJ is immune from suit. We affirm.

BACKGROUND

While an inmate in TDCJ's Eastham Unit, Cooper, a trustee working on a maintenance crew, was injured when he fell off a ladder. Cooper sued TDCJ, asserting that TDCJ provided an unsafe and faulty ladder, breaching duties owed to him, and proximately causing his injuries.

TDCJ filed a motion for summary judgment claiming that the evidence does not meet the heightened standard for gross negligence required by Texas Government Code Section 497.096,[1] resulting in TDCJ's immunity, and it is entitled to sovereign immunity via the official immunity of its employee. The motion is supported by excerpts from Cooper's deposition testimony, excerpts from deposition testimony of TDCJ's risk manager, Thomas Warren, and the affidavit of

[1] *See* TEX. GOV. CODE ANN. § 497.096 (West 2012).

TDCJ Maintenance Supervisor Kevin Shafer. Arguing that the trial court lacked jurisdiction, TDCJ requested dismissal of Cooper's lawsuit.

In his response to the motion for summary judgment, Cooper contended that government code Section 497.096 does not apply, or if it does, there is sufficient evidence to overcome the motion, and TDCJ did not raise official immunity or prove that its employees were entitled to official immunity. The trial court granted the motion for summary judgment and dismissed Cooper's claims with prejudice.

IMMUNITY

In his first issue, Cooper contends the trial court erred "by determining [TDCJ] was immune from liability under Texas Government Code § 497.096 . . . ."[2] He contends the court erred in granting the motion for summary judgment because it erroneously concluded that TDCJ was not grossly negligent. He argues that two TDCJ employees, the "tool crib attendant" and Shafer, Cooper's supervisor, were required to inspect the ladder prior to giving it to Cooper for his use. He asserts that TDCJ failed to prove that both employees acted without gross negligence. He further complains that, because TDCJ destroyed documentation that would have identified the attendant, it is "purportedly impossible for TDCJ to meet its burden."

Standard of Review

A party moving for traditional summary judgment bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). A defendant who conclusively negates at least one of the essential elements of the cause of action or conclusively establishes an affirmative defense is entitled to summary judgment. ***Frost Nat'l Bank v. Fernandez***, 315 S.W.3d 494, 508 (Tex. 2010). Once the defendant establishes its right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. ***Simulis, L.L.C. v. Gen. Elec. Capital Corp.***, 439 S.W.3d 571, 575 (Tex. App.—Houston [14th Dist.] 2014, no pet.). To determine if there is a fact issue, we review the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. ***Mann Frankfort Stein &***

[2] Immunity from liability and immunity from suit are two distinct principles. Immunity from liability protects the state from judgment even if the legislature has expressly consented to suit. ***Tex. Dep't of Transp. v. Jones***, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). This case involves immunity from suit.

Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009). The evidence raises a genuine issue of fact if reasonable and fair minded jurors could differ in their conclusions in light of all the summary judgment evidence. ***Goodyear Tire & Rubber Co. v. Mayes***, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

Applicable Law

Pursuant to the doctrine of sovereign immunity, the State of Texas cannot be sued in her own courts without her consent and then only in the manner indicated by that consent. ***Wichita Falls State Hosp. v. Taylor***, 106 S.W.3d 692, 694 (Tex. 2003). Absent the State's consent to suit, a trial court lacks subject matter jurisdiction. ***Jones***, 8 S.W.3d at 638. The Texas Tort Claims Act provides a limited waiver of immunity, allowing suits against governmental units under certain, narrowly defined circumstances. ***Tex. Dep't of Criminal Justice v. Miller***, 51 S.W.3d 583, 587 (Tex. 2001). The Act provides that a governmental unit is liable for personal injuries caused by a condition or use of tangible personal 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) (West 2011).

When the governmental unit's liability under Section 101.021(2) is based on respondeat superior for an employee's negligence, the liability is derivative. ***DeWitt v. Harris Cty.***, 904 S.W.2d 650, 654 (Tex. 1995). An employee of a political subdivision is not liable for damages arising from an act or failure to act in connection with an inmate activity if the act or failure to act was not intentional, wilfully or wantonly negligent, or performed with conscious indifference or reckless disregard for the safety of others. TEX. GOV'T CODE ANN. § 497.096. Recklessness requires a subjective awareness of, and indifference to, the risk posed by the defendant's conduct. ***Moncada v. Brown***, 202 S.W.3d 794, 802 (Tex. App.—San Antonio 2006, no pet.). Not only must the actor have actually known of the peril but also his acts or omissions must demonstrate subjectively that he did not care about it. ***Id***.

Analysis

Sham Affidavit

Before addressing the summary judgment motion, we must address Cooper's assertion that TDCJ's immunity argument is based on a sham affidavit that should have been disregarded. He contends that Shafer's affidavit contradicts an earlier judicial admission by TDCJ's risk manager, Warren. In his deposition testimony, Warren said he was unaware of whether Shafer

ever inspected the ladder. Cooper characterizes that statement as an "admission" which was inconclusive on the issue but binding, asserting that the admission cannot be undone by contradictory testimony. Warren testified that he did not ask Shafer if he inspected the ladder and agreed with counsel that "we don't know whether he did or did not." However, Shafer stated in his affidavit that he visually inspected the ladder before he checked it out and put it to use. He further clarified that he did not see that the ladder was missing any rubber grommets or that there was any issue with the ladder at all.

TDCJ asserts that Cooper failed to preserve this complaint for review. Whether an affidavit constitutes a sham affidavit is a contention that there is a defect in form. ***Wolfe v. Devon Energy Prod. Co. LP***, 382 S.W.3d 434, 452 (Tex. App.—Waco 2012, pet. denied). A party is required to object and obtain a ruling on that objection to preserve error regarding defects in form of a summary judgment affidavit. ***Brown v. Brown***, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2014, pet. denied). The granting of a summary judgment motion, without more, does not provide an implicit ruling that either sustains or overrules objections to summary judgment evidence. ***Well Solutions, Inc. v. Stafford***, 32 S.W.3d 313, 317 (Tex. App.—San Antonio 2000, no pet.). Cooper did not obtain a ruling on his objection that TDCJ presented a sham affidavit. However, Cooper reasserted his sham affidavit argument in his motion to reconsider, which was overruled by operation of law. Therefore, his objection to the evidence based on the sham affidavit argument was preserved for appellate review. *See* TEX. R. APP. P. 33.1(b); ***Lissiak v. SW Loan OO, L.P.***, 499 S.W.3d 481, 488 (Tex. App.—Tyler 2016, no pet.).

A sham affidavit is one that conflicts with deposition testimony presented by the affiant, not a different witness. *See Sham Affidavit*, BLACK'S LAW DICTIONARY (10th ed. 2014) (An affidavit that contradicts clear testimony given by the same witness, usually in an attempt to create an issue of fact in response to a motion for summary judgment.); ***Farroux v. Denny's Rests., Inc.***, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.). Here, the affidavit complained of was not presented by the same witness who gave the deposition testimony, and the complained-of testimony does not conflict. Shafer's affidavit is not a sham and it was properly considered by the trial court.

TDCJ's Motion

In its motion for summary judgment, TDCJ claimed immunity from suit pursuant to application of Section 101.021(2) and Section 497.096. It argued that Cooper did not meet the

statute's heightened standard for gross negligence.[3] Specifically, it contended that the evidence does not establish that the acts or omissions complained of involve an extreme degree of risk or that TDCJ had subjective awareness of the risk but chose to disregard it. Claiming that Cooper only reaches gross negligence if the fact finder determines that TDCJ breached its duty by failing to inspect the ladder before giving it to Cooper, TDCJ presented evidence showing that TDCJ was not aware of the risk, or consciously indifferent to any risk.

In support of the motion, TDCJ presented Shafer's affidavit, in which he stated in pertinent part:

> On May 1, 2013, I know that I visually inspected the ladder before I checked it out and put it to use. Rubber grommets are one of the things I look for when visually inspecting the ladder. In this case, I did not see that the ladder was missing any rubber grommets, or that there was any issue with the ladder at all.

TDCJ also presented Cooper's deposition testimony in which he explained that he visually inspected the ladder, which "looked sound." He testified that he did not see anything wrong with the ladder, did not notice rubber pieces missing, and did not think Shafer intentionally used a defective ladder.[4]

This evidence shows that Shafer, the TDCJ employee who provided the ladder for Cooper's use, had no subjective awareness of, or indifference to, any risk posed by use of the ladder. *See* ***Moncada***, 202 S.W.3d at 802–03. Therefore, TDCJ cannot be held liable for Cooper's damages sustained when he fell from the ladder. *See* TEX. GOV. CODE ANN. § 497.096. It follows that, because TDCJ conclusively established immunity under Section 497.096, it proved entitlement to summary judgment. *See* ***Fernandez***, 315 S.W.3d at 508; ***Moncada***, 202 S.W.3d at 803.

Cooper's Response

The burden then shifted to Cooper to present evidence raising a fact question on immunity. *See* ***Simulis, L.L.C.***, 439 S.W.3d at 575. In his response, Cooper argued that both Shafer and the "tool crib attendant" were required to inspect the ladder before issuing it to

[3] Cooper initially contested the applicability of Section 497.096 to this case but, at oral argument, counsel conceded that it does apply here.

[4] Although not summary judgment evidence, we note that, in his petition, Cooper stated that "[w]hile wiring a light fixture, the eight foot (8') ladder, inspected by Mr. Cooper's supervisor, on which Mr. Cooper was standing broke."

Cooper, and that TDCJ had the burden to prove that neither committed gross negligence. He also asserted that he is entitled to a spoliation presumption because the ladder and the log that would have identified the attendant were destroyed.

In support of his response, Cooper relied on Warren's deposition testimony. Warren explained that, as risk manager, he designs policies, procedures, and standards of protocol. He explained that the "tool crib attendant" is the offender or maintenance employee that checks out the equipment to those who need to use it. He testified that the attendant has a duty to actively inspect equipment, looking for visible signs of defects. He further explained that, by policy, equipment is inventoried and inspected as it is being issued. Warren testified that "[a]ccording to policies, when [the ladder] is checked out, it is safe." He also stated that there is no way to show if policy was followed. Warren testified that it is TDCJ's contention that the procedure was followed by the person issuing the ladder, but he did not know who that person was. The "tool crib attendant" keeps a log identifying the item issued and who checked it out. The log does not indicate if the attendant inspected the equipment. Because it "met records retention," the log was destroyed. The ladder, an eight foot fiberglass ladder manufactured in 1990, was destroyed at the discretion of the maintenance department on the day of Cooper's injury.

Cooper argues that, to prove entitlement to immunity, in addition to addressing Shafer's actions, TDCJ was required to prove the attendant did not commit gross negligence. In his reply brief on appeal, Cooper contends that "TDCJ's policy itself is evidence that gross negligence on the part of the Tool Crib Attendant could create a likelihood of serious injury or death to the operator of a ladder that is not properly inspected." This argument is based on nothing more than Warren's testimony that TDCJ policy requires a "tool crib attendant" to inspect equipment. We disagree with Cooper's circular logic which is vaguely reminiscent of the theory of negligent implementation of policy.

The Texas Supreme Court has concluded that information contained in policy and training manuals is not tangible personal property. ***Tex. Dep't of Pub. Safety v. Petta***, 44 S.W.3d 575, 580-81 (Tex. 2001). The Texas legislature has not waived the State's sovereign immunity for the use, misuse, or non-use of information in policy manuals. *See* ***id***. Thus, before a plaintiff may complain of negligent implementation of policy, he must first establish a waiver of immunity under some other provision of the Act. ***Guadalupe-Blanco River Auth. v. Pitonyak***, 84 S.W.3d 326, 342 (Tex. App.—Corpus Christi 2002, no pet.).

Cooper argues that policy, that is information, is evidence that TDCJ employees knew of the risks of failing to inspect the ladder and their failure to do so is indicative of their conscious disregard for Cooper's peril. Although couched in terms of evidence, Cooper's policy argument is akin to a claim of negligent implementation of policy, worded in a manner to bypass the requirement that a plaintiff must first affirmatively demonstrate waiver of immunity from suit. Because information is not tangible personal property, evidence regarding policy cannot raise a fact question on whether TDCJ acted in a manner to waive immunity. Evidence that TDCJ had a policy of requiring an attendant to inspect equipment, standing alone, does not raise a fact question regarding whether there was an attendant, whether he was an inmate or employee, whether he inspected the ladder, or whether the ladder was safe.

Cooper invites speculation about possible fact questions that might arise in connection with TDCJ policy. Evidence that allows the trier of fact to speculate about its impact does not raise a fact question. *See* ***Hill v. Hill***, 460 S.W.3d 751, 759 (Tex. App.—Dallas 2015, pet. denied); s*ee also* ***Marathon Corp. v. Pitzner***, 106 S.W.3d 724, 727–28 (Tex. 2003) (per curiam) (stating that a finding of fact cannot be based on conjecture or speculation and "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence"). Summary judgment evidence that raises no more than a surmise or suspicion of a fact in issue does not show a genuine issue of material fact exists to defeat summary judgment. ***Hill***, 460 S.W.3d at 759.

TDCJ met its burden on the issue of immunity by showing that Shafer, Cooper's immediate supervisor and the individual who provided him with the ladder, inspected the ladder and found it to be in safe working condition. Cooper has provided no authority for the contention that TDCJ policy requiring another individual to inspect equipment results in the necessity of proving that individual complied in order to avoid waiver of immunity. Cooper's arguments in his response to the summary judgment motion, based on speculation as to whether or not TDCJ followed its policy, do not raise a fact question.

Spoliation Presumption

Cooper argues that he was entitled to a "spoliation presumption" because TDCJ "destroyed a significant amount of evidence that would have more than likely assisted [him] in proving his claims." He complains that TDCJ destroyed the log that would have identified the "tool crib attendant." He further complains that his counsel was deprived of the opportunity to

inspect the ladder because it was destroyed on the day of the incident. He argues that he was entitled to a spoliation instruction for the log, unobtainable attendant testimony, and the ladder. Asserting that such instruction could cause a reasonable trier of fact to impose gross negligence liability on TDCJ, he contends that a material issue of fact existed.

Spoliation is the improper destruction of evidence, proof of which may give rise to a presumption that the missing evidence was unfavorable to the spoliator. *See* ***Wal-Mart Stores, Inc. v. Johnson***, 106 S.W.3d 718, 721 (Tex. 2003); ***Clark v. Randalls Food***, 317 S.W.3d 351, 356 (Tex. App.−Houston [1st Dist.] 2010, pet. denied). When a party believes that another party has improperly destroyed evidence, it may either move for sanctions or request a spoliation presumption instruction. ***Trevino v. Ortega***, 969 S.W.2d 950, 953 (Tex. 1998). A spoliation instruction is an instruction given to the jury outlining permissible inferences they may make against a party who has lost, altered, or destroyed evidence. ***Tex. Elec. Coop. v. Dillard***, 171 S.W.3d 201, 208 (Tex. App.—Tyler 2005, no pet.). We review the denial of a spoliation instruction for an abuse of discretion and reverse only if the trial court's denial of the instruction was arbitrary or unreasonable. *See* ***Trevino***, 969 S.W.2d at 953; *see also* ***Brookshire Bros., Ltd. v. Aldridge***, 438 S.W.3d 9, 14 (Tex. 2014) (held that trial court has broad discretion to impose remedy that must be proportionate). In determining a remedy, the trial court should consider the level of culpability of the spoliating party and the degree of prejudice suffered by the non-spoliating party. ***Brookshire Bros., Ltd.***, 438 S.W.3d at 14. The harsh remedy of a spoliation instruction is utilized only when the trial court finds that (1) the spoliating party intentionally concealed discoverable evidence and (2) a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation. ***Id***. Prejudice requires that the unavailable evidence would have been probative of dispositive issues. *See* ***Ham v. Equity Residential Prop. Mgmt. Servs., Corp.***, 315 S.W.3d 627, 635 (Tex. App.—Dallas 2010, pet. denied).

Assuming that TDCJ had a duty to preserve evidence, and negligently or intentionally spoliated evidence, we consider whether the spoliation prejudiced Cooper's ability to present his case. Cooper complains that the destruction of the written log and the ladder constituted spoliation of evidence of TDCJ's liability. As explained above, TDCJ established immunity from suit. The log and the ladder were immaterial to the question of whether Shafer inspected the ladder and found it to be safe. The missing evidence would not have provided a factual basis on which a jury could conclude TDCJ did not inspect the ladder and determine that it appeared safe

before allowing Cooper to use it. TDCJ's immunity defense is unaffected by the allegedly spoliated evidence. Because neither the log nor the ladder were probative of immunity, the dispositive issue, we conclude that the alleged spoliation did not prejudice Cooper's ability to present his case. *See* ***id***.

The summary judgment evidence, including the properly considered Shafer affidavit, shows that TDCJ did not act with intentional, willful, or wanton negligence or with conscious indifference or reckless disregard for Cooper's safety. Further, Cooper did not raise a fact question and was not entitled to a spoliation instruction. Accordingly, the trial court did not err in granting TDCJ's immunity-based motion for summary judgment. *See* ***Fernandez***, 315 S.W.3d at 508. We overrule Cooper's first issue and need not consider his second issue. *See* TEX. R. APP. P. 47.1.

DISPOSITION

Because TDCJ showed entitlement to summary judgment based on its immunity from suit, the trial court did not err in dismissing Cooper's claims against TDCJ.

We ***affirm*** the trial court's order.

BRIAN HOYLE
Justice

Opinion delivered April 25, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 25, 2018

NO. 12-17-00182-CV

RONALD COOPER,
Appellant
V.
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
CORRECTIONAL INSTITUTIONS DIVISION,
Appellee

Appeal from the 3rd District Court

of Houston County, Texas (Tr.Ct.No. 15-0085)

THIS CAUSE came to be heard on the oral arguments, appellate record, and the briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the trial court's order of dismissal.

It is therefore ORDERED, ADJUDGED and DECREED that the order of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellant, **RONALD COOPER**, for which execution may issue, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.