

Waiver of Immunity
Waco Court of Appeals Broadens the Tort Claims Act in
Kevin Glenn Schronk, et al. v. City of Burleson

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Can a city be held liable under the Texas Tort Claims Act for the death of an individual on whom a nonfunctioning Automatic External Defibrillator is used? According to a rogue opinion from the Waco Court of Appeals, the answer is “maybe.”

Kevin Schronk (Schronk) called 911 when his wife suffered a cardiac arrest. The city’s EMTs responded and tried to resuscitate her with an Automatic External Defibrillator (AED), but the AED did not work properly because of a low battery. Another AED was ultimately used, but by that time it was too late to resuscitate her. She was pronounced dead on arrival at the hospital.

Schronk filed suit against the city and the manufacturer of the AED. He alleged that the city was liable for negligence based on its failure to properly maintain the AED, and for violations of various statutes applicable to emergency services providers. The city responded with a plea to the jurisdiction on the issue of sovereign immunity. The trial court granted the city’s plea to the jurisdiction, and Schronk appealed.

Schronk argues that the city’s immunity was waived under the Texas Tort Claims Act because a tangible piece of city personal property proximately caused his wife’s death. Section 101.021 of the Texas Government Code waives a city’s immunity 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.

In a plea to the jurisdiction, all the allegations are taken in the light most favorable to the plaintiff. *Tex. Dep’t of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). To go forward with a claim after subject matter has been contested, the plaintiff must “show that there is a disputed material fact regarding the jurisdictional issue.” *Id.*

As to the facts, there appears to be no dispute that the EMTs used the city’s nonfunctioning AED on Mrs. Schronk. Rather, the main issue was whether *the use* of a nonfunctioning AED caused her death. “Causation” means the “proximate cause” of her death. *See Wise Reg’l Health Sys. v. Brittain*, 268 S.W.3d 799, 808 (Tex. App.—Fort Worth 2008, no pet. h.). “In particular, cause in fact requires that the allegedly negligent act or omission constitute ‘a substantial factor in bringing about the injuries, and without it, the harm would not have occurred.’” *Id.* (quoting *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004)). The court of appeals noted that, in cases involving injury or death, cause is shown by evidence that the injury or death was in “reasonable medical probability” or in “reasonable probability” caused by the defendant’s negligent act or omission. *Park Place Hosp. v. Est. of Milo*, 909 S.W.2d 508, 511 (Tex. 1995) (medical malpractice case); *Kramer v. Lewisville Mem’l Hosp.*, 858 S.W.2d 397, 400 (Tex. 1993) (medical malpractice case).

The court of appeals reviewed the law on the issue of how to determine cause of death or injury where a preexisting injury or illness has already increased the likelihood of injury or death to the injured individual. *Kramer*, 858 S.W.2d at 400. “[R]ecoverly is barred when the defendants’ negligence deprived the [plaintiff] of only a fifty percent or less chance of survival.” *Park Place Hosp.*, 909 S.W.2d at 511. The court incorrectly applied that medical malpractice case law to the question of whether the non-use of a functioning AED caused Mrs. Schronk’s death (as if it directly follows from the line of reasoning in medical malpractice cases, which may or may not have any bearing on a Texas Tort Claims Act case).

The court states that the use of the AED was the proximate cause of Mrs. Schronk’s death. That reasoning is faulty. No evidence is mentioned that the AED burned Mrs. Schronk or caused her heart attack. The only evidence is that the AED basically did nothing to help Mrs. Schronk. In contrast to the facts in this case, in *Wise Reg’l Health Sys.*, the allegations were that the medication given to the injured individual may have worsened her condition. 268 S.W.3d at 809. The use of a nonfunctioning AED did not worsen Mrs. Schronk’s condition. It simply did not improve it. The court’s holding appears to be that the use of a city’s tangible personal property - that does nothing to improve a situation - can be treated as “causing” an injury, and therefore the city’s immunity is waived. That holding puts a heavy burden on cities. Each city that engages in any kind of medical activity may now have to ensure that not only does the assistance not make a condition worse, but also that employees’ actions actually improve the condition of the individual. While such a standard appears to be a worthwhile goal, it does not comport with Texas Tort Claims Act jurisprudence and could discourage a city from doing anything for fear of liability.

The court also states that it was the non-use of a functioning AED that caused Mrs. Schronk’s injury and death, and that the non-use should waive the city’s immunity. “Use” under the Texas Tort Claims Act means “to put or bring into action or service; to employ for or apply to a given purpose.” *Tex. Natural Res. Conserv. Comm’n v. White*, 46 S.W.3d 864, 869 (Tex. 2001). In *White*, the Supreme Court of Texas noted that “to invoke the Tort Claims Act’s waiver of immunity, [the] injury must have been caused by the [the governmental agency’s] actual use of the pump, not [it’s] failure to use it.” *Id.* at 869. The Supreme Court goes even further, stating that, “[t]his Court has never held that non-use of property can support a claim under the Texas Tort Claims Act.” *Id.* See *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996); *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994). The Supreme Court reasoned that limiting liability to actual “use” of property was inherent in the Legislature’s intent and that any broadening to include “non-use” would mean the total destruction of any immunity, instead of the limited waiver the Legislature intended. *White*, 46 S.W.3d at 869-70. The court of appeals appears to ignore the Supreme Court’s holding that a city is not liable for the non-use of tangible personal property.

Essentially, both lines of reasoning put forth by the court of appeals as to why the city’s immunity should be waived are faulty: (1) that the use of the AED was a “substantial factor” in bringing about Mrs. Schronk’s death; or (2) that the non-use of a working AED caused Mrs. Schronk’s death. Under the Texas Tort Claims Act, use of personal property waiver and its

corresponding case law (some of which the Waco Court of Appeals cited), would deflate both of the court's lines of reasoning for waiving the city's immunity.

As usual, Chief Justice Gray dissented to the Waco Court's opinion. Chief Justice Gray did not issue his own opinion, but noted:

The claim is based entirely on the fact that the AED the fire department first attempted to use did not work properly. As such, it is either a suit for the failure to use a working AED device--in essence non-use of tangible personal property which is not actionable. In the alternative, it was for the use of an AED that did not work. But it is undisputed that the AED device did not cause her death. The Court gets around this problem by finding the Fire Department violated the law in an emergency by failing to properly check or test the AED batteries. But that negligence, if any, was not part of the emergency, and the waiver of immunity for such activity is not implicated--if anything, it was simple negligence of a governmental employee for which sovereign immunity is not waived.

The court of appeals held that the case should move forward, but the city has asked for rehearing.

The opinion at is available at:

<http://www.10thcoa.courts.state.tx.us/opinions/HTMLOpinion.asp?OpinionID=9603>.