

**Reversed and rendered in part, Dismissed in part, Majority and Dissenting Opinions
filed June 29, 2000.**



In The

Fourteenth Court of Appeals

NO. 14-99-00406-CV

HARRIS COUNTY, Appellant

V.

**DAVID BALL, SR., AND CRUZ BALL, INDIVIDUALLY AND AS NEXT FRIENDS
AND HEIRS OF DAVID CARROLL BALL, JR., AND ELEZ AND MURVETTE
HAXHIJAJ, INDIVIDUALLY AND AS NEXT FRIENDS AND HEIRS OF BUJAJ
HAXHIJAJ, Appellees**

**On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 95-017405**

MAJORITY OPINION

Harris County appeals from the denial of summary judgment in a lawsuit filed by David Ball, Sr., and Cruz Ball, individually and as next friends and heirs of David Carroll Ball, Jr., and Elez and Murvette Haxhijaj, individually and as next friends and heirs of Bujaj Haxhijaj, against Harris County; Sheriff Johnny Klevenhagen; Lt. Jay O. Coons; W.B. Jordan; Thomas William Finuf, individually and doing business as Spring Wrecker Service; and George Caswell Hopper doing business as Klein Paint & Body. Jordan and Coons had joined the notice of appeal, but

their appeals were dismissed by this court's order on July 8, 1999. As for Harris County's appeal, we reverse and render in part and dismiss in part.

This case arises from a high-speed automobile chase by a Harris County sheriff's deputy during which David Carroll Ball, Jr., and Bujaj Haxhijaj were killed. In 1996, Harris County, Klevenhagen, Jordan, and Coons filed their first motion for summary judgment, which was denied by the trial court. The defendants appealed the interlocutory order denying summary judgment. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon Supp. 2000). On October 8, 1998, we reversed the trial court's judgment and granted summary judgment on all negligence claims stemming from the actual automobile pursuit. *See Harris County v. Ball*, No. 14-97-00135, 1998 WL 724780 (Tex. App.—Houston [14th Dist.] Oct. 8, 1998, no pet.) (not designated for publication). Other negligence claims against the county and Klevenhagen remained, including (1) failing to properly hire, train, or supervise county employees; (2) failing to have proper policies and procedures; (3) failing to enforce its policies and procedures; (4) failing to abide by and obey state law; (5) failing to protect the state constitution and the statutory rights of citizens while discharging official duties and acting under color of law; and (6) failing to have a competent supervising officer monitor and intervene to terminate the chase. On December 31, 1998, Harris County and Klevenhagen, in his individual capacity, filed a second motion for summary judgment. Klevenhagen moved for summary judgment on grounds of official immunity. Harris County moved for summary judgment on grounds of sovereign immunity. The trial court granted Klevenhagen's motion for summary judgment, but denied the county's.

Harris County complains that the trial court erred by denying its motion for summary judgment after it dismissed the claims against Klevenhagen on official immunity grounds.

An appeal ordinarily may be taken only from a final judgment. *See North E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex.1966). Generally, denial of a motion for summary judgment is not a final judgment and therefore is not appealable. *See Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex.1980). We have the legislative authority to review the denial of summary judgment based on the assertion of immunity by an individual who is an officer or employee of the state or of a political entity of the state. *See* § 51.014(5). We also

have the authority to review the denial of a summary judgment as to a governmental entity where the entity's claim for immunity is based on the assertion of official immunity by an officer or employee. *See City of Beverly Hills v. Guevara*, 904 S.W.2d 655, 656 (Tex. 1995).

We review the denial of a summary judgment by the same standard by which we review the granting of one. *See Harris County v. Ochoa*, 881 S.W.2d 884, 886 (Tex. App.—Houston [14th Dist.] 1994, writ denied). The movant for summary judgment must show that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). To be entitled to summary judgment, a defendant must either (1) conclusively negate at least one essential element of each of the plaintiff's causes of action, or (2) conclusively establish each element of an affirmative defense to each claim. *See Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). Both sovereign immunity and official immunity are affirmative defenses. *See City of Houston v. Kilburn*, 849 S.W.2d 810, 812 (Tex. 1993) (official immunity); *Smith v. Davis*, 999 S.W.2d 409, 416 (Tex. App.—Dallas 1999, no pet.) (sovereign immunity).

Harris County argues that because the trial court granted judgment to Klevenhagen on grounds of official immunity, the county also is entitled to immunity. In its summary judgment motion, Harris County argued that (1) sovereign immunity had not been waived by the Tort Claims Act, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997); (2) the Tort Claims Act does not apply to the failure of a governmental unit to perform an act that the unit is not required by law to perform; or a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 1997); and (3) where the individual government employee is immune, such immunity extends to the governmental unit, *see DeWitt v. Harris County*, 904 S.W.2d 650, 652-533 (Tex. 1995).

Sovereign immunity and official immunity are distinguishable. *See id.* Official immunity protects individual officials from liability; sovereign immunity protects governmental entities from liability. *See id.* Both Harris County and Klevenhagen

independently face negligence claims. Klevenhagen's successful assertion of official immunity for his actions renders Harris County immune from any vicarious liability based on Klevenhagen's acts. The summary judgment in favor of Klevenhagen does not, however, bar claims arising from the county's independent negligence, if any.

In its summary judgment motion, Harris County asserted sovereign immunity not only based on Klevenhagen's official immunity but also as a general defense to any independent negligence claims. As for the denial of summary judgment to Harris County in connection with the independent negligence claims, we have no jurisdiction to review the trial court's decision. We have jurisdiction to review the denial of summary judgment only if based on an assertion of official immunity. The trial court erred by failing to grant summary judgment to Harris County as to those claims for which the county asserts immunity based upon Klevenhagen's assertion of official immunity. In connection with those claims for which Klevenhagen has official immunity, we reverse that portion of the order and render judgment for Harris County. Having no jurisdiction to review the denial of judgment in connection with any other claim, including those based on Harris County's independent negligence, we dismiss that portion of the appeal.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered majority and dissenting opinions filed June 29, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish – TEX. R. APP. P. 47.3(b).

Reversed and Rendered in Part, Dismissed in Part, and Majority and Dissenting Opinions and Opinion filed June 29, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00406-CV

HARRIS COUNTY, Appellant

V.

**DAVID BALL, SR., AND CRUZ BALL, INDIVIDUALLY AND AS NEXT FRIENDS
AND HEIRS OF DAVID CARROLL BALL, JR., AND ELEZ AND MURVETTE
HAXHIJAJ, INDIVIDUALLY AND AS NEXT FRIENDS AND HEIRS OF BUJAJ
HAXHIJAJ, Appellee**

**On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 95-17405**

DISSENTING OPINION

I respectfully dissent solely to the narrow holding reversing a portion of the trial court's summary judgment. The summary judgment motion relied on by Harris County in this appeal was on behalf of not only Sheriff Johnny Klevenhagen and Harris County but also Harris County deputies Jay O. Coons and W. B. Jordon. The trial court granted the summary judgment on behalf of the Sheriff only. That left Harris County, and its deputies Coons and

Jordon. Although, Coons and Jordon originally appealed, that appeal was dismissed by this court July 8, 1999. That procedurally leaves us without jurisdiction to review not only the portion of the summary judgment dealing with Coons and Jordan but also the derivative liability, if any, of Harris County for the acts of Coons and Jordon. A government's respondent liability is dependent on the liability of its employees. *See DeWitt et al. v. Harris County* 904 S.W.2d 650, 654 (Tex. 1995.) Accordingly, we are without authority to say Harris County has no liability as a matter of law in this case. Even if we had jurisdiction, because the trial court ruling denying the motion of Coons/Jordon necessarily implicates Harris County, then that ruling is correct or in any event not challenged on this appeal. In other words, the trial court had other grounds not before us which justified the denial of the Harris County motion for summary judgment. We are charged to consider all summary judgment grounds the trial court rules on. *See Cincinnati Life Insurance Co. v. Cates*, 927 S.W.2d 623 (Tex. 1996.)

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed June 29, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).