

Bond Case Briefs

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Texas Department of Aging and Disability Services v. Cannon

Supreme Court of Texas - January 9, 2015 - S.W.3d - 2015 WL 127829

Representative of state school resident's estate filed suit against Department of Aging and Disability Services, which operated school, and several school employees, asserting claims for wrongful death and survival and claims under § 1983, arising out of resident's death by asphyxiation while employees were attempting to physically restrain resident. The District Court denied Department's plea to jurisdiction and employees' motion to dismiss. Defendants appealed. The Houston Court of Appeals affirmed in part and reversed in part. Defendants petitioned for review.

The Supreme Court of Texas held that trial court could consider amended petition, asserting § 1983 claims against employees, which was filed after Department and employees filed motion to dismiss, disapproving *Villasan v. O'Rourke*, 166 S.W.3d 752, *City of Arlington v. Randall*, 301 S.W.3d 896, and *Brown v. Ke-Ping Xie*, 260 S.W.3d 118.

Department of Aging and Disability Services employees did not have an absolute right to dismissal of action upon filing of motion to dismiss under election of remedies provision of Tort Claims Act, but instead, a court order along with certain findings was required to effectuate dismissal, and thus trial court could consider amended petition, asserting § 1983 claims against employees, which was filed after Department and employees filed motion to dismiss, in tort action arising when state school resident died while Department employees were attempting to restrain him. Although election of remedies provision required that employees be "immediately" dismissed upon filing of motion, such language indicated only that dismissal by the trial court is mandatory, not discretionary, and did not preclude court from considering claims in amended petition prior to ruling on the motion, disapproving *Villasan v. O'Rourke*, 166 S.W.3d 752, *City of Arlington v. Randall*, 301 S.W.3d 896, and *Brown v. Ke-Ping Xie*, 260 S.W.3d 118.

In an action under the Tort Claims Act that has been filed against both a governmental unit and its employees, when the governmental unit files a motion to dismiss the employees under the election of remedies provision of Tort Claims Act, the plaintiff is not foreclosed from amending her petition to assert claims that are not brought under the Tort Claims Act, and such claims are properly before the court for its consideration in ruling on the motion to dismiss.