



In The
Eleventh Court of Appeals

No. 11-15-00288-CV

**MICHAEL KELLY, INDIVIDUALLY AND AS NEXT FRIEND
OF TRAVIS KELLY AND MIKAYLA KELLY, AND AS A
REPRESENTATIVE OF THE ESTATE OF CHRISTY KELLY,
Appellant**

V.

**PERMIAN BASIN COMMUNITY CENTERS FOR MHMR,
TURNING POINT, Appellee**

**On Appeal from the 70th District Court
Ector County, Texas
Trial Court Cause No. A-139,994**

MEMORANDUM OPINION

Christy Kelly was a patient of Permian Basin Community Centers for MHMR, Turning Point. When she became Appellee's patient, Appellee was told that Christy had previously attempted to commit suicide. As a part of the intake process,

Appellee had new patients evaluated by a doctor. Appellee's personnel used a van to take clients to the doctor and to the pharmacy to obtain any required prescriptions. On the day of Christy's death, as Appellee's employee drove Christy and one other client back to the facility from such an evaluation, Christy, who was seated alone in the backseat of the van, opened the door and jumped out of the van; she died from the fall.

In Appellant's subsequent lawsuit against Appellee and others, Appellee filed a plea to the jurisdiction and claimed that it was protected by governmental immunity. The trial court granted Appellee's plea to the jurisdiction. In a single issue on appeal, Appellant claims that the trial court erred when it held that his lawsuit was barred by governmental immunity. Appellee counters that immunity has not been waived because there were no pleadings that Christy Kelly's death arose from the operation or use of a motor-driven vehicle or motor-driven equipment. We affirm.

"Sovereign immunity protects the State from lawsuits for money damages." *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006) (quoting *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002)). Governmental immunity provides this same protection to political subdivisions of the State, such as Appellee, and it is derived from the State's sovereign immunity. *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011); see TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(B) (West Supp. 2016).

Whether subject-matter jurisdiction exists is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). A plea to the jurisdiction can be based on the pleadings or on evidence. *Id.* When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the

case. *Id.* We must look to the allegations in the pleadings, construe them in the plaintiff's favor, and look to the pleader's intent. *See Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *Peek v. Equip. Serv. Co. of San Antonio*, 779 S.W.2d 802, 804 (Tex. 1989). The plaintiff bears the burden to allege facts that affirmatively demonstrate the trial court's jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). When a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties to determine if a fact issue exists. *Miranda*, 133 S.W.3d at 227. The existence of subject-matter jurisdiction is a question of law, and we review the trial court's ruling on a plea to the jurisdiction de novo. *Miranda*, 133 S.W.3d at 226. Neither party presented any evidence at the hearing on Appellee's plea. Therefore, it was Appellant's burden to plead facts to show that the trial court had subject-matter jurisdiction.

The Texas Tort Claims Act (TTCA) provides a limited waiver of governmental immunity. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655–56 (Tex. 2008); *Miranda*, 133 S.W.3d at 224. Section 101.021(1)(A) of the TTCA waives governmental immunity when, among other things not relevant here, “death [is] proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if: (A) the . . . death arises from the operation or use of a motor-driven vehicle or motor-driven equipment.” CIV. PRAC. & REM. § 101.021(1)(A) (West 2011).

Property does not cause an injury if it does no more than furnish the condition that makes the injury possible. *Dallas Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998) (citing *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995)). In *Bossley*, the decedent was being treated for depression and had displayed suicidal tendencies. While personnel prepared to

transfer him from one facility to another, the decedent ran out through an unlocked door and escaped. As hospital personnel pursued him, he jumped in front of a truck and was killed.

The decedent's parents sued Dallas County MHMR and others. A majority of the Supreme Court of Texas held that there had been no waiver of immunity because the substance of the parents' pleading was that the decedent's "death was caused, not by the condition or use of property, but by the failure of . . . staff to restrain him once they learned he was still suicidal. The Tort Claims Act did not waive . . . immunity from such a complaint." *Bossley*, 968 S.W.2d at 343; *accord Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542–43 (Tex. 2003); *City of Sugarland v. Ballard*, 174 S.W.3d 259, 266–67 (Tex. App.—Houston [1st Dist] 2005, no pet.).

The cases relied upon by Appellant are distinguishable from *Bossley*, *Ballard*, and *Whitley* and from the case before us. In those cases relied upon by Appellant, there was a nexus between the actual use of a motor vehicle and the injury suffered. The vehicle was more than merely involved. In *Finnigan v. Blanco County*, a deputy sheriff left his cruiser running while he went inside the office to obtain some paperwork. 670 S.W.2d 313, 314 (Tex. App.—Austin 1984, no writ). An inmate stole the cruiser and collided with another vehicle; a death resulted. *Id.* *Ryder Integrated Logistics v. Fayette County* involved a nighttime situation in which a deputy parked his cruiser facing oncoming traffic. 453 S.W.3d 922, 926 (Tex. 2015). He had turned on the headlights, high-beam spotlight, and the emergency lights on the vehicle. The lights interfered with the sight of the drivers of oncoming vehicles and resulted in a fatal accident. *Id.* In both of those cases, the vehicles were more than merely involved; the use of the vehicles was the actual cause of the deaths.

The same is not true here according to the pleadings. For the Section 101.021(1)(A) waiver to apply, there must be a nexus between the operation or use of the vehicle and the plaintiff's injuries. *Whitley*, 104 S.W.3d at 543; *LeLeaux v. Hamshire–Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992). More than mere involvement of property is required. “[T]he [vehicle]’s use must have *actually caused* the injury.” *Whitley*, 104 S.W.3d at 543 (second alteration in original) (emphasis added) (quoting *Tex. Nat. Res. Conservation Comm’n v. White*, 46 S.W.3d 864, 869 (Tex. 2001)). “Thus, as with the condition or use of property, the operation or use of a motor vehicle ‘does not cause injury if it does no more than furnish the condition that makes the injury possible.’” *Id.* (quoting *Bossley*, 968 S.W.2d at 343). We believe that *Bossley* is determinative of this appeal. As in *Bossley*, Appellant’s pleadings show that the deceased’s tragic death was not caused by the operation or use of a motor-driven vehicle. Any negligence alleged by Appellant was separate and apart from the operation or use of the van. The transport van was only the condition that made Christy’s death possible. As we have said, that is not sufficient to result in a waiver of governmental immunity. We overrule Appellant’s sole issue on appeal.

We affirm the order of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

August 31, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.