

Reversed and Rendered and Memorandum Opinion filed July 29, 2010



In The

Fourteenth Court of Appeals

NO. 14-09-00878-CV

**THE UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON,
Appellant**

V.

CYNTHIA MALVEAUX AND LOUIS MALVEAUX, Appellee

**On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 08CV0755**

MEMORANDUM OPINION

This is an accelerated appeal from the trial court's denial of appellant The University of Texas Medical Branch at Galveston's ("UTMB") plea to the jurisdiction, motion to dismiss appellees Cynthia Malveaux and Louis Malveaux's claims, and no-evidence motion for summary judgment. On appeal, UTMB contends the Malveauxes' claims of lack of informed consent and alleged negligent medical judgment do not fall under the Texas Tort Claims Act; hence, the trial court erred in denying its plea to the jurisdiction. Additionally, UTMB argues the Malveauxes have not established that a condition or use of tangible personal property caused the injuries; therefore, the

Malveauxes failed to prove UTMB waived its sovereign immunity. UTMB also complains the trial court erred in overruling its objections to two exhibits attached to the Malveauxes' response to UTMB's plea to the jurisdiction. Finally, UTMB contends the trial court improperly denied its no-evidence motion for summary judgment. We reverse and render judgment dismissing the Malveauxes' claims for want of subject-matter jurisdiction.

I

In 2003, as treatment for breast cancer, Cynthia Malveaux underwent a lumpectomy, chemotherapy, and radiation therapy. When she sought breast-reduction surgery in 2006, physicians told Mrs. Malveaux that the radiation rendered the tissue in her right breast inoperable. But Dr. Lisa Gould, a surgeon at UTMB, disagreed and maintained that she could operate on the irradiated tissue. On July 19, 2006, Dr. Gould performed a bilateral reduction mammoplasty on Mrs. Malveaux at UTMB. After the surgery, Mrs. Malveaux's right breast failed to heal, and she suffered extensive ulceration and fat necrosis. As a result, Mrs. Malveaux has undergone numerous procedures, including an unsuccessful skin graft and a total mastectomy of her right breast.

The Malveauxes sued UTMB and the doctors at UTMB alleging professional negligence. On May 29, 2009, following a hearing on the Malveauxes' expert report, the trial court dismissed all of their claims, except their "claims of negligence concerning informed consent, the advice to proceed with surgery which shall include the advice to operate on previously radiated breast tissue, and the failure to perform the surgery in a pattern that excludes the radiated tissue."

UTMB then filed a plea to the jurisdiction, motion to dismiss, and a no-evidence motion for summary judgment. Before the trial court ruled on UTMB's motions, the Malveauxes filed their first-amended petition, which removed the doctors as defendants. The trial court heard the plea, motions, and objections on September 15, 2009. After the hearing, the trial court denied UTMB's plea and both motions. The court also overruled

UTMB's objections to the exhibits the Malveauxs had attached to their response to the plea. This appeal followed.

II

Plea to the Jurisdiction

In Texas, sovereign immunity defeats a trial court's subject-matter jurisdiction. *Tex. Dep't. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225 (Tex. 2004); *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). The trial court must decide at the earliest opportunity whether it has statutory or constitutional authority to hear the case before allowing the litigation to proceed. *Miranda*, 133 S.W.3d at 226. The plaintiff bears the burden of affirmatively proving the trial court has subject-matter jurisdiction over a case. *Brazoria County v. Van Gelder*, 304 S.W.3d 447, 451 (Tex. App.—Houston [14th Dist.] 2009, pet. filed). A defendant may then file a plea to the jurisdiction, which is a dilatory plea that challenges the court's authority to determine the subject matter of the action. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The existence of subject-matter jurisdiction is a question of law we review de novo. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007); *Miranda*, 133 S.W.3d at 226.

A court reviewing a plea to the jurisdiction is not limited to reviewing just the pleadings, but it may also consider evidence when necessary to resolve the jurisdictional issues. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555. "When a plea to the jurisdiction challenges the existence of facts alleged to establish the trial court's subject[-]matter jurisdiction, the trial court must consider relevant evidence offered by the parties to determine if a fact issue exists." *Arnold v. Univ. of Tex. Sw. Med. Ctr. at Dallas*, 279 S.W.3d 464, 467 (Tex. App.—Dallas 2009, no pet.) (citing *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554). When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the non-movant. *Univ. of Tex. Med. Branch v. Thompson*, No. 14-06-00014-CV, 2006 WL

1675401, at *3 (Tex. App.—Houston [14th Dist.] June 20, 2006, no pet.) (mem. op.) (citing *Miranda*, 133 S.W.3d at 226). Much like the summary-judgment standard, we indulge every reasonable inference and resolve all doubts in favor of the non-movant. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 554. If the evidence is undisputed or fails to raise a fact issue on the jurisdictional issue, then the trial court rules on the plea to the jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 228.

The Tort Claims Act

In Texas, a governmental unit is immune from tort liability unless the legislature has waived immunity or the governmental unit consents to the suit. *Miranda*, 133 S.W.3d at 224 (discussing consent to suit); *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998) (discussing the legislature waiving immunity). We review the applicable statute to see if the legislature has provided the governmental unit with immunity from suit. *Bossley*, 968 S.W.2d at 341; *Dimas v. Tex. State Univ. Sys.*, 201 S.W.3d 260, 265 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The Tort Claims Act provides a limited waiver of sovereign immunity, which allows suits to be brought against governmental units only in narrowly-defined circumstances. *See* Tex. Civ. Prac. & Rem. Code Ann §§ 101.001–.009 (Vernon 2005); *Tex. Dep’t. of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). Thus, UTMB—which no one disputes is a governmental entity—is immune from suit unless the Tort Claims Act expressly waives immunity. *Miranda*, 133 S.W.3d at 224–25.

The specific Tort Claims Act provision under which the Malveauxs allege waiver provides that a “governmental unit in the state is liable 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.” Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (Vernon 2005). Texas courts have consistently required a nexus between the condition or use of the property and the injury.

Whitley, 104 S.W.3d at 543; *Miller*, 51 S.W.3d at 588; see *Bossley*, 968 S.W.2d at 342–43.

The Texas Supreme Court has defined the word “use” as “to put or bring into action or service; to employ for or apply to a given purpose.” *Miller*, 51 S.W.3d at 588. Claims that involve failure to use or the non-use of property are not within the waiver of sovereign immunity. *Id.* at 587–88. Claims, however, that involve use or misuse of property do affect waiver. *Id.* at 588; *Sheth v. Dearen*, 225 S.W.3d 828, 832 (Tex. App.—Houston [14th Dist.] 2007, no pet.). But the nexus between the use of the property and the injury requires more than mere involvement of property; the use must actually proximately cause the injury. *Bossley*, 968 S.W.2d at 343. Additionally, property does not cause an injury if it does nothing more than furnish the condition that makes the injury possible. *Miller*, 51 S.W.3d at 588; *Bossley*, 968 S.W.2d at 343.

UTMB argues the trial court improperly denied its plea to the jurisdiction because the Malveauxes’ claims of lack of informed consent and error in medical judgment do not invoke waiver of the Tort Claims Act. Furthermore, UTMB asserts the Malveauxes did not establish their injuries were caused by a condition or use of tangible property; hence, the trial court should have granted UTMB’s plea to the jurisdiction because it did not waive its immunity under the Tort Claims Act. The Malveauxes argue their injuries were not solely caused by lack of informed consent or an error in medical judgment, but by “the misuse of equipment in excising the tissues, using an improper pattern to excise the tissue and failure to properly use the supplies.” To support this contention, the Malveauxes point to both Mrs. Malveaux’s medical records and the affidavit of Eugenio Aguilar, M.D., a licensed and board-certified plastic surgeon.

In the Malveauxes’ first-amended petition, which was filed after the trial court ruled on the expert report and after UTMB filed its plea to the jurisdiction, the Malveauxes claimed UTMB was negligent in:

[f]ailing to perform the breast reduction surgery in a pattern that excluded the previously irradiated breast tissue; [f]ailing to inform Mrs. Malveaux that a risk or hazard of surgery was an inability of the irradiated breast tissue to heal; and [p]erforming breast reduction surgery on the irradiated tissue of Mrs. Malveaux's right breast.

Construing the pleadings in favor of the Malveauxs and looking at their intent, we now determine whether the Malveauxs have pleaded sufficient facts to bring their claim under the waiver of immunity under the Torts Claims Act. *See Arnold*, 279 S.W.3d at 468.

Lack of Informed Consent

In its first issue, UTMB contends the Malveauxs' claim for lack of informed consent does not invoke a waiver of its sovereign immunity. To their response to UTMB's plea to the jurisdiction, the Malveauxs attached Dr. Aguilar's affidavit, in which he states "[f]ailing to inform Mrs. Malveaux that she was not appropriate for surgery was a breach of the standard of care, which caused Mrs. Malveaux damages." UTMB contends this allegation fails to raise the notion of tangible-personal-property condition or use. UTMB also cites this court's decision in *Mitcham v. University of Texas Medical Branch at Galveston* for the proposition that a claim of lack of informed consent does not invoke waiver of its sovereign immunity under the Tort Claims Act.

In *Mitcham*, the appellant claimed that when she was admitted to the hospital for an arteriogram, her doctor failed to inform her the procedure could cause severe complications. 818 S.W.2d 523, 524 (Tex. App.—Houston [14th Dist.] 1991, writ denied). After the doctor performed the procedure, the appellant developed blood clots which led to the amputation of her right foot. *Id.* The appellant sued the doctor and UTMB (the hospital where the procedure was performed) alleging that inserting a needle into her artery without informing her the procedure could lead to blood clots was a misuse of tangible personal property. *Id.* This court concluded the appellant's argument focused on her discussion with her doctor and not the use or misuse of the needle. *Id.* at

525. We held “that the alleged failure to provide the appellant with information does not involve tangible property in the sense contemplated by the [Tort Claims Act].” *Id.*

In the Malveauxes’ pleadings, they claim the doctors at UTMB failed to inform Mrs. Malveaux of the risks involved in operating on the irradiated breast tissue in her right breast. Like the appellant in *Mitcham*, the Malveauxes appear to argue this lack of informed consent constitutes a waiver of the Tort Claims Act. But the alleged failure to provide Mrs. Malveaux with information about the hazards or risks of her surgery “does not involve tangible personal property in the sense contemplated by the [Tort Claims Act].” *Id.* As the real substance of this claim is lack of informed consent, the Malveauxes’ cause of action does not invoke the Tort Claims Act’s waiver of sovereign immunity. Accordingly, we sustain UTMB’s first issue.

Error in Medical Judgment

In its second issue, UTMB argues the Malveauxes’ complaints that breast-reduction surgery should not have been performed on the irradiated tissue of Mrs. Malveaux’s right breast are claims concerning an alleged error in medical judgment. UTMB contends there is no sovereign-immunity waiver because the complaints do not involve tangible property. In response, the Malveauxes emphasize their claim does not solely involve “medical judgment, because the claim, in part, is based upon the misuse of the equipment in excising the tissues, using an improper pattern to excise the tissue and failure to properly use the supplies including sutures, Blake Drain, and all other items used to improperly perform the surgery and close the wounds, which caused the delayed healing, ulceration, and necrosis.”

In *Texas Department of Criminal Justice v. Miller*, the Texas Supreme Court reviewed a suit for negligence filed against the staff members at the Texas Department of Criminal Justice (“TDCJ”). 51 S.W.3d at 585. An inmate at the TDCJ facility began suffering from multiple symptoms including nausea and severe headaches. *Id.* TDCJ’s

staff members treated the inmate, but his symptoms persisted. *Id.* The inmate died one month later from cryptococcal meningitis, which was diagnosed after the inmate was transferred to an off-site hospital. *Id.* The inmate’s surviving spouse sued TDCJ alleging that its staff members “improperly administer[ed] pain medication and intravenous fluids which masked the symptoms of meningitis.” *Id.* But the court concluded that while the staff members’ treatment of the inmate may have suppressed the symptoms of meningitis, the treatment did not actually cause his death. *Id.* at 588. The court held the inmate’s “meningitis became progressively worse due to the passage of time and an alleged error in medical judgment; there [was] no evidence that any defendant’s acts hastened or exacerbated his decline.” *Id.*

Arnold v. University of Texas Southwestern Medical Center at Dallas is also instructive. 279 S.W.3d at 469–70. The appellant had received breast-augmentation surgery. *Id.* at 466. After discovering that the implants had ruptured, the appellant consulted with a doctor at the University of Texas Southwestern Medical Center, who performed a surgery to replace the implants. *Id.* Although no complications occurred during the surgery, the appellant complained to the doctor about the large size of the new implants. *Id.* She sued the doctor, claiming the large implants amounted to a deformity and that he had failed to comply with her desire for smaller implants. *Id.* at 467. The court noted that she did not complain that the implants themselves were defective, but focused instead on the doctor’s medical decisions. *Id.* at 469–70. The court held “any damages from the larger implants were caused by the alleged negligence of [the doctor] in using his medical judgment . . . [and] errors in medical judgment do not provide waiver of immunity under the [Tort Claims Act].” *Id.* at 470.

Likewise, the decision to perform breast-reduction surgery on the irradiated tissue of Mrs. Malveaux’s right breast did not involve the use of tangible property. The decision to operate, if anything, is an alleged error in medical judgment by the doctors at UTMB. As discussed in *Miller* and *Arnold*, an error in medical judgment is not within

the Tort Claims Act's waiver of immunity. *See Miller*, 51 S.W.3d at 588; *Arnold*, 279 S.W.3d at 470. Accordingly, we sustain UTMB's second issue on appeal.

Condition or Use of Tangible Personal Property

In its third issue, UTMB attacks all of the Malveauxs' claims on the ground that they have not established that Mrs. Malveaux's injuries were caused by a condition or use of tangible personal property. The Malveauxs respond that their claims are overrun with allegations concerning the tangible use of personal property. Both in their briefs and in their response to UTMB's plea to the jurisdiction, the Malveauxs maintain that the "gravamen of [their] complaints concern[s] failure in performance of the surgery and the use of medical equipment, to include surgical equipment, scalpels, sutures and any other surgical equipment used to excise the radiated tissue." The Malveauxs point especially to their claim that "the failure to perform the surgery in a pattern that excludes the radiated tissue" as an allegation that the misuse of surgical equipment proximately caused Mrs. Malveaux's injuries.

In their first-amended petition, the Malveauxs allege the doctors at UTMB used or misused "medical supplies and dressings, by failing to use dressings and medical equipment to promote full healing of Mrs. Malveaux's irradiated right breast . . . [and the doctors at UTMB] misused medical equipment, including but not limited to scalpels and surgical equipment to operate on Mrs. Malveaux's irradiated right breast." Dr. Aguilar's affidavit, which was attached to the Malveauxs' response to the plea to the jurisdiction, comprises the thrust of their allegations against UTMB. In his affidavit, Dr. Aguilar states:

[The doctors at UTMB] performed surgery on Mrs. Malveaux's previously radiated right breast and failed to perform the surgery in a pattern that excludes the radiated tissue. This is necessary because radiated tissue does not contain the blood flow that is necessary to ensure proper healing. It is the standard of care for a surgeon not to operate on tissue that has been previously subject to radiation, or to otherwise perform the surgery in a

manner to exclude the tissue that has been damaged from radiation. It was a breach of the standard of care for [the doctors at UTMB] to perform a reduction surgery on Mrs. Malveaux's right breast, and to perform the surgery in a manner that included the radiated tissue on her right breast. This breach caused the loss of the right breast tissue, skin and glandular tissue, delayed healing, loss of breast volume due to necrosis, and the necessity of a TRAM flap reconstruction. From an operative perspective, the care provided by UTMB . . . fell below the standard of care because the providers: Failed to properly use scalpels and surgical equipment to operate on Mrs. Malveaux's irradiated right breast; [and] [f]ailed to perform the breast reduction surgery in a pattern that excluded the previously irradiated breast tissue.

The Malveauxs also attached the operative report from Mrs. Malveaux's medical records to their response, which discusses her entire procedure from start to finish. The Malveauxs contend the affidavit coupled with the operative report demonstrate the doctors at UTMB misused equipment while excising the radiated tissue in Mrs. Malveaux's right breast.

Although the Malveauxs allege in their first-amended petition that scalpels and surgical equipment were misused during Mrs. Malveaux's operation, there is no evidence their use or misuse caused her injuries. The Malveauxs emphasize that a 19 French Blake drain caused Mrs. Malveaux's injuries, but the evidence in the record reflects only that the drain was used in the surgery; nothing indicates that the drain was misused or that anything about it contributed to Mrs. Malveaux's injuries. In fact, according to the operative report, there were no complications during the procedure. And nowhere in his affidavit does Dr. Aguilar mention or even hint that the drain or any other piece of tangible property actually caused the injuries. *Compare Tejada v. Rowe*, 207 S.W.3d 920, 922–23, 925 (Tex. App.—Beaumont 2006, pet. filed) (plaintiff's expert report includes averments that during the birth of the plaintiff's twins, the doctors negligently administered the drug Pitocin, which increased the force of uterine contractions, and delivered the twins using forceps, which were improperly employed and injured the babies; thus, the twins' cerebral palsy was the direct result of the misuse of tangible

property—Pitocin and forceps), *with Miers v. Tex. A&M Univ. Sys. Health Sci. Ctr.*, 311 S.W.3d 577, 579–80 (Tex. App.—Waco 2009, no pet.) (concluding although the plaintiff listed several pieces of equipment that were misused during the procedure, there was no evidence the use or misuse of the equipment caused the plaintiff’s injuries; therefore, there was no waiver of sovereign immunity); *Ager v. Wichita Gen. Hosp.*, 977 S.W.2d 658, 661–62 (Tex. App.—Fort Worth 1998, no pet.) (conclusory allegations that failure to recognize symptoms (1) resulted from misuse or condition of medical devices including stethoscopes and thermometers, and (2) proximately caused plaintiff’s injuries, failed to sufficiently allege that any tangible item of property or its use was a contributing factor of plaintiff’s injuries); *Taylor v. Univ. of Tex. Health Ctr. at Tyler*, No. 12-01-00381-CV, 2002 WL 31323413, at *5–6 (Tex. App.—Tyler Oct. 9, 2002, pet. denied) (not designated for publication) (alleging the injuries were caused by the operating room, surgical area, and forty-eight individual items is insufficient if unaccompanied by description of some defective condition or an explanation of how the items were negligently used or misused).

As this court has held previously, not every case involving a procedure at a public facility can invoke the Tort Claims Act’s waiver of immunity. *See Sheth*, 225 S.W.3d at 833. If it did, a patient’s complaint that “a different form of treatment than the one employed would have been more effective” would always succeed so long as the offending doctor uses some form of tangible property. *See id.* That is why the nexus between the use of the property and the injury requires more than mere involvement of property; the use must actually cause the injury. *See Bossley*, 968 S.W.2d at 343. Because the Malveauxs did not plead sufficient factual allegations that the use or misuse of tangible property caused Mrs. Malveaux’s injuries, and no evidence established a causal connection between the use or misuse of the tangible property and the harm, the Malveauxs’ claims do not invoke the Tort Claims Act’s waiver of sovereign immunity. *See Wise Reg’l Health Sys. v. Brittain*, 268 S.W.3d 799, 811 (Tex. App.—Fort Worth 2008, no pet.) (*citing Ager*, 977 S.W.2d at 662 (“Without proof that a specific act or item

of property contributed to injury, there can be no proximate cause.”)). Accordingly, we sustain UTMB’s third issue.

* * *

Through our disposition of UTMB’s first three issues, we have determined that the trial court had no subject-matter jurisdiction over the claims in this case. Thus it is unnecessary to address UTMB’s remaining issues. For the forgoing reasons, we reverse the trial court and render judgment dismissing the Malveauxes’ claims for want of subject-matter jurisdiction.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Seymore, and Brown.