In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00452-CV

CITY OF CANADIAN, APPELLANT

V.

JENNY KLEIN, AS NEXT FRIEND OF E.K., A MINOR, APPELLEE

On Appeal from the 31st District Court
Hemphill County, Texas
Trial Court No. 7030, Honorable Steven Ray Emmert, Presiding

May 22, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.[1]

Appellant, the City of Canadian, Texas, brings this interlocutory appeal from an order denying its plea to the jurisdiction.[2] The City contends it is immune from the suit for damages brought by appellee Jenny Klein as next friend of her minor son, E.K. We find that Klein's suit has not invoked a waiver of the City's governmental immunity from

[1] Mackey K. Hancock, retired, not participating.

[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West Supp. 2016).

suit, will reverse the order of the trial court and will render judgment dismissing the suit for want of jurisdiction.

Background

During an afternoon in July 2011, thirteen-year-old E.K. was swimming at the City's public swimming pool. One of the lifeguards on duty was seventeen-year-old C.D. The pool manager on duty was Shannon Burns. The pool had posted rules forbidding, among other things, more than one person on the diving board at a time and "horseplay." Burns was aware of the pool rules and was trained by the Red Cross.

While on a break from his lifeguard duties that day, C.D. was "double bouncing" swimmers from the diving board. The parties' descriptions of the practice of "double bouncing" are similar. The City's description reads: "double bouncing involves two individuals on a diving board, wherein one is a bouncer, and one is the diver. The diver stands at the pool end of the board, and the bouncer stands several feet behind. Together they bounce downward, and the additional weight creates additional upward spring, allowing the diver to get some extra height on his jump. The bouncer remains on the board, and the diver jumps into the water."

Some evidence shows pool manager Burns was aware that double bouncing sometimes took place at the pool and did not object as long as the participants were not young children. On this afternoon, that evidence shows, Burns observed that divers were double bouncing and made no effort to stop C.D. from doing so. E.K. joined in, but was injured during his turn on the board with C.D. Klein's pleadings allege E.K. and the diving board collided, causing his patella tendon to snap, dislocating his knee cap

and breaking a small bone. His treatment required surgery and a six-month convalescence.

Applicable Law

The City presents two issues. First, it challenges the trial court's order denying its plea to the jurisdiction. Second, it contends the trial court erred by overruling its objections to an affidavit offered by Klein. We need discuss only the City's first issue.

A trial court's subject-matter jurisdiction may be challenged through a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 225-26 (Tex. 2004); *Bland Ind. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000). Whether a court lacks subject-matter jurisdiction is a question of law that we review de novo. *State v. Holland,* 221 S.W.3d 639, 642 (Tex. 2007); *Miranda,* 133 S.W.3d at 226. When the pleadings are challenged, we consider the allegations in favor of the plaintiff to determine if the plaintiff alleged facts affirmatively demonstrating the jurisdiction of the trial court to hear the case. *Miranda,* 133 S.W.3d at 226. To the extent relevant to the issue of jurisdiction, we also consider any evidence received by the trial court. *Blue,* 34 S.W.3d at 555; *Texas Tech Univ. v Ward,* 280 S.W.3d 345, 348 (Tex. App.—Amarillo 2008, pet. denied). In our review of evidence bearing on the jurisdictional issue, we take as true all evidence favorable to the plaintiff, and indulge every reasonable inference and resolve any doubts in the plaintiff's favor. *City of El Paso v. Heinrich,* 284 S.W.3d 366, 378 (Tex. 2009). If there is no question of fact as to the jurisdictional issue, a trial court must rule on the plea to the jurisdiction as a matter of law. *Id*.

"Sovereign immunity and its counterpart, governmental immunity, exist to protect the State and its political subdivisions from lawsuits and liability for money damages." *Mission Consol. Indep. Sch. Dist. v. Garcia,* 253 S.W.3d 653, 655 (Tex. 2008); *Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 374 (Tex. 2006).[3] Sovereign and governmental immunities encompass two distinct principles, immunity from suit and immunity from liability. *Miranda,* 133 S.W.3d at 224. Immunity from liability is an affirmative defense subject to waiver, but immunity from suit deprives a court of subject-matter jurisdiction. *Id.; see Rusk State Hosp. v. Black,* 392 S.W.3d 88, 95 (Tex. 2012) (immunity from suit implicates courts' subject-matter jurisdiction). Thus, trial courts lack subject-matter jurisdiction to adjudicate suits for damages against subdivisions of state government, like municipalities, absent a valid statutory or constitutional waiver of governmental immunity. *Suarez v. City of Texas City*, 465 S.W.3d 623, 631 (Tex. 2015).

The Texas Tort Claims Act contains a legislatively-granted, limited waiver of sovereign immunity. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (West 2011 & Supp. 2016). The Tort Claims Act's waiver provides:

> A governmental unit in the state is liable for:
>
> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

[3] We refer to the immunity asserted by the City as governmental immunity. *See City of Watauga v. Gordon,* 434 S.W.3d 586, 589 n.1 (Tex. 2014) (governmental immunity protects subdivisions of the State, including municipalities).

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) 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 (West 2011).

Subsection two of section 101.021 addresses governmental liability for premises defects, and "provides for governmental liability based on respondeat superior for the misuse by its employees of tangible personal property." *DeWitt v. Harris County,* 904 S.W.2d 650, 653 (Tex. 1995); *see Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384-85 (Tex. 2016) (Tort Claims Act expressly waives immunity from suit in three areas when statutory requirements met: use of publicly owned automobiles; injuries arising out of condition or use of tangible personal property; and premises defects). Immunity is waived for claims arising from the use of personal property "only when the governmental unit is itself the user." *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 246 (Tex. 2004).[4]

The recreational use statute places limits on the liability of a landowner who permits the use of its land for recreation. TEX. CIV. PRAC. & REM. CODE ANN. § 75.002 (West 2017); *Stephen F. Austin State Univ. v. Flynn,* 228 S.W.3d 653, 659 (Tex. 2007). It applies to government entities,[5] such that when premises are open to the public for

[4] Like *Cowan*, the case before us does not involve a claim for the provision of property without an integral safety component. *See Cowan*, 128 S.W.3d at 247 (citing *Robinson v. Central Texas MHMR Ctr.*, 780 S.W.2d 169 (Tex. 1989) (swimwear lacked a life preserver)).

[5] To the extent the recreational use statute limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under the Tort

recreational activities the statute "elevates the burden of proof required to invoke the Tort Claims Act's immunity waiver by classifying recreational users as trespassers and requiring proof of gross negligence, malicious intent, or bad faith." *Suarez,* 465 S.W.3d at 627; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(d), (f); *Flynn,* 228 S.W.3d at 660 (recreational use statute modifies the Tort Claims Act's waiver of sovereign immunity, citing *Miranda*); *Miranda*, 133 S.W.3d at 225 (governmental unit waives sovereign immunity under the recreational use statute and the Tort Claims Act only if it is grossly negligent). The recreational use statute "neither creates liability nor waives sovereign immunity." *Suarez,* 465 S.W.3d at 632. Rather, it "limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under [the Tort Claims Act]." *Id.* (citing § 75.003(d)-(g)). Section 75.002(d) of the recreational use statute does not distinguish between injuries caused by condition and those caused by activities. *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006).

Analysis

Here, there is no dispute that E.K. was injured at premises operated by a governmental entity while engaging in recreational activities subject to the recreational use statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 75.001(3)(C) (defining recreation to include swimming). Klein's pleadings assert the negligence of two of the City's employees caused her son's injuries, the lifeguard C.D. and the pool manager Burns. We consider the allegations against them in turn.

Claims Act, the recreational use statute controls. TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.003(g) (West 2017), 101.058 (West 2011).

The Conduct of Burns

As in the trial court, on appeal Klein focuses her argument on the conduct of the pool manager Burns. Klein's pleadings allege and some evidence shows Burns witnessed C.D. double bouncing other lifeguards and swimmers other than E.K. but took no action to stop the conduct even though it violated posted pool rules against two people on the diving board. Such allegations and evidence, however, show only a failure to supervise C.D. properly. There is no allegation Burns had any greater involvement in the assertedly-negligent conduct. The City's Tort Claims Act liability, and the waiver of its immunity, are predicated on its employees' use of property. "Use" of property in section 101.021(2) means "to put or bring into action or service, to employ for or apply to a given purpose." *Cowan*, 128 S.W.3d at 246. Absent an independent waiver of immunity, acts of negligent supervision do not constitute a use of property under that language. As our supreme court has pointed out, including negligent supervision within the definition of use of property to waive immunity would bring the failure to prevent any accident that involves tangible personal property within the statute's purview. *Tex. A & M Univ. v. Bishop*, 156 S.W.3d 580, 583 (Tex. 2005). *See also Dallas Area Rapid Transit v. Whitley,* 104 S.W.3d 540, 542-43 (Tex. 2003) (finding plaintiff's injuries did not arise from bus driver's use of city bus but from the driver's failure to supervise the public which was insufficient to waive immunity under the Tort Claims Act); *Univ. of Tex. Health Sci. Ctr. v. Schroeder,* 190 S.W.3d 102, 106-07 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (finding immunity was not waived for injury or death caused by negligent supervision because negligent supervision claims do not constitute a premises defect or the condition or use of property and the Tort Claims Act

does not waive sovereign immunity for such claims); *Tavira v. Tex. Dep't of Crim. Justice,* No. 07-14-00046-CV, 2016 Tex. App. LEXIS 1972, at *8-9 (Tex. App.—Amarillo Feb. 24, 2016, pet. denied.) (mem. op.). Nor does the waiver of section 101.021(2) extend to errors in judgment by a government employee. *City of Houston v. Rushing,* 7 S.W.3d 909, 915 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (en banc) ("Where the allegation stems from negligent judgment or human error rather than a use or misuse of property, the pleadings fail to satisfy the limited waiver of immunity contained in section 101.021(2)"). The City's liability, whether under a negligence standard or the gross-negligence standard required by the recreational use statute, cannot be predicated on the conduct attributed to Burns.[6]

The Conduct of C.D.

Klein's pleadings also allege C.D. engaged in grossly-negligent conduct by double bouncing E.K. in disregard of posted pool rules.[7] The City contends there is no

[6] Klein asserts Burns, as pool manager, was a vice-principal of the City and was grossly negligent. We have no need to address those questions.

[7] Gross negligence consists of two components:

> (1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed[s] in conscious indifference to the rights, safety, or welfare of others.

Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 785 (Tex. 2001); TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (West Supp. 2016). Under the objective prong of the standard, an extreme risk is "not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." *Mobil Oil Corp. v. Ellender,* 968 S.W.2d 917, 921 (Tex. 1998). Under the subjective component, "actual

evidence raising a fact issue to support either the objective or subjective components of the test for gross negligence. *Lee Lewis Constr.,* 70 S.W.3d at 785; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (defining gross negligence). The objective component requires proof that, viewed objectively from C.D.'s standpoint, double bouncing E.K. carried an extreme degree of risk, considering the probability and magnitude of the potential harm. "Extreme risk," for this purpose, means not a remote possibility of injury or even a high probability of minor harm, but the likelihood of serious injury to E.K. *Lee Lewis Constr.,* 70 S.W.3d at 785; *see Wal-Mart Stores v. Alexander,* 868 S.W.2d 322, 326 (Tex. 1993). The subjective element states the actor, here C.D., had an actual, subjective awareness of the risk involved in double bouncing but nevertheless proceeded in conscious indifference to the safety of E.K. By "actual awareness," we mean C.D. knew about the peril to E.K. but his conduct demonstrated he did not care. *Id*. Klein's proof of C.D.'s actual awareness of an extreme risk from double bouncing does not require that she show C.D. anticipated that E.K. would be the diver injured, or the precise manner in which his injury would occur. *See U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 139 (Tex. 2012).

We find we need not discuss the evidence regarding the level of risk from double bouncing under the objective prong of the test, because we readily conclude the evidence raises no issue that C.D. knew his conduct carried an extreme risk to E.K. or other divers but did not care about the consequences. *See Miranda*, 133 S.W.3d at 232 (also noting it is the defendant's state of mind that separates ordinary negligence from gross negligence); *Louisiana-Pacific Corp. v. Andrade*, 19 S.W.3d 245, 246-47 (Tex.

---

awareness means the defendant knew about the peril, but its acts or omissions demonstrated that it did not care." *Id.*

1999) (same). C.D.'s state of mind may be established by circumstantial evidence. *Andrade*, 19 S.W.3d at 247.

There is no direct evidence that C.D. knew, by experience or through instruction, that double bouncing was dangerous. According to his recorded statement in the record, this was his second summer working as a lifeguard; he previously worked at a pool in another town. Nothing shows C.D. was aware of previous accidents or injuries from double bouncing or similar conduct, or otherwise perceived double bouncing to involve extreme risk.[8] C.D. said on the day of E.K.'s injury "all the kids were having me double jump them." Of E.K., C.D. said in his statement, "I think he landed wrong like [he] expected to jump and do it all by himself so I think his knees locked when he went off and it made him slip off the board so he didn't catch the full board I don't think, and . . . so when I went to double bounce him he slipped off the board and I guess his knees were locked at the same time . . . ." After describing how E.K. made his way to the ladder after going into the water, C.D. concluded, "it's just a lesson learned for me anyway."

Some understanding of C.D.'s subjective awareness of the risk involved in double-bouncing may be inferred from Burns' testimony. The record contains her recorded statement, deposition, and affidavit. In the deposition, Burns testified she was the lifeguard instructor and certified all lifeguards that worked at the pool. She said the pool rules included, "no running, pushing, or horseplay," and "only one person on diving

[8] *See, e.g., Alexander,* 868 S.W.2d at 327 (concluding even though defendant knew about parking lot ridge "well before" plaintiff tripped and fell no evidence showed that defendant's conduct imposed extreme risk creating the likelihood of serious injury as store averaged 50,000 customers per month in three months from opening until plaintiff's fall but no one had tripped and fallen over ridge before plaintiff).

boards and ladders." Lifeguards were required to follow the pool rules. Despite the sign permitting only one person on the diving board, in her recorded statement Burns stated that the lifeguards were permitted to double bounce and double bouncing did not violate any rules. Finally, in her affidavit Burns acknowledged awareness that lifeguards and some "older kids and teenagers" sometimes double bounced. On the day of, but before, E.K.'s injury Burns was aware that C.D. was double bouncing "some of the older kids."

Burns' affidavit contains a paragraph describing her prohibition of double bouncing "younger children." It reads:

> I kept the younger children from double bouncing for a number of reasons. For one, there is a higher probability that a young child cannot swim well enough to be bounced into the deep end of the pool. Additionally, younger children generally lack the motor skills and coordination of older kids and teenagers; because double bouncing involves a little timing and coordination, I did not permit young children to participate.

Klein emphasizes that the statement shows Burns recognized some danger and risk involved in double bouncing. We do not disagree, but neither this statement nor any of Burns' other statements permits a reasonable inference she conveyed to C.D. a notion that double bouncing among teenagers involved an extreme degree of risk, a likelihood of serious injury. Indulging in Klein's favor every reasonable inference that can be drawn from the evidence before us, we are unable to see any evidence seventeen-year-old C.D. knew when he double bounced E.K. that his doing so carried an extreme risk to E.K. but did not care. There is no evidence C.D.'s conduct was grossly negligent.

Because, in this case, the City's tort liability under the recreational use statute depends on proof of gross negligence committed in a use of tangible personal property,

our finding there is no evidence C.D. was grossly negligent requires a conclusion the Tort Claims Act does not provide a waiver of the City's immunity from Klein's suit. *Miranda*, 133 S.W.3d at 225.

A plaintiff is generally entitled to a reasonable opportunity to amend her petition "unless the pleadings affirmatively negate the existence of jurisdiction." *Potter County v. Tuckness,* 308 S.W.3d 425, 431 (Tex. App.—Amarillo 2010, no pet.) (citing *Tex. A&M Univ. Sys. v. Koseoglu,* 233 S.W.3d 835, 839 (Tex. 2007)). Klein presented detailed pleadings and resisted the City's plea to the jurisdiction with evidence, including the statements of C.D. and Burns, Burns' deposition, and secondary materials concerning pool safety. The jurisdictional issue was sharply contested in the trial court. Its resolution requires the application of settled law to a set of facts over which no one now has any control. More detailed pleadings will not alter its outcome.

Conclusion

We conclude the City's governmental immunity from Klein's suit was not waived. We therefore reverse the order of the trial court denying the City's plea to the jurisdiction and render judgment dismissing Klein's suit against the City for want of jurisdiction.

James T. Campbell
Justice