Reverse and Render and Opinion Filed December 7, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00385-CV

DALLAS COUNTY SCHOOLS, Appellant
V.
SABRINA VALLET, INDIVIDUALLY AND AS NEXT FRIEND OF T.J., A MINOR, Appellee

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-14249

MEMORANDUM OPINION

Before Justices Francis, Fillmore, and Myers
Opinion by Justice Francis

Dallas County Schools appeals from the trial court's amended order denying its motion to dismiss for lack of jurisdiction the suit brought by Sabrina Vallet, individually and as next friend of her son, T.J. The issue on appeal is whether Vallet alleged facts demonstrating a valid waiver of DCS's immunity under the Texas Tort Claims Act. Because we conclude she has not, we reverse the trial court's order and render judgment dismissing this suit for want of jurisdiction.

Vallet sued DCS for negligence and intentional infliction of emotional distress after a DCS bus driver left six-year-old T.J. on the side of a highway. In her amended petition, Vallet alleged T.J. was a kindergarten student at an elementary school in Irving and was also enrolled in afterschool care at a child care facility responsible for picking him up at school and transporting and supervising him until Vallet picked him up. The petition alleged that on February 25, 2015,

T.J. was escorted by his teacher to the area for departing students. The day care vehicle, however, left without T.J. The petition further alleged:

> At some point later, Defendant Dallas County Schools opens the bus doors and places the 6 year old Plaintiff on a Dallas County School bus, closing the bus doors, confining the minor Plaintiff on the bus and left [the elementary school] grounds. At any number of times, minor Plaintiff tried to communicate to the female bus driver of Defendant Dallas Public Schools [sic] that he was supposed to go to his "daycare" and was not supposed to be on a school bus.
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> At no time did Defendant Dallas Public Schools [sic] bus driver communicate this information to [the elementary school]. [The elementary school] first realized minor Plaintiff was missing when in receipt of a call from Defendant Adventure Discovery Centers that Plaintiff was missing. At that point, [elementary school] employees became frantic, running from classroom to classroom searching for minor Plaintiff.
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> At some point later, the Dallas County School bus pulled over to the side of the road, opened the bus doors expelling the child to the side of the highway, closing the bus doors leaving the child standing on the side of the highway. The Dallas County School bus was placed into gear and proceeded down the highway, leaving the child behind which was the cause of minor Plaintiff's emotional and physiological injuries.

The petition alleged these facts constituted the following acts of negligence: failing to exercise such care as a person of ordinary prudence would have kept under similar circumstances; failing to follow DCS Transportation Procedures; failing to follow the DCS Employee Handbook; failing to follow the DCS Policy Manual; and violating provisions of the Texas Transportation Code.

Vallet alleged DCS's immunity was waived because its employee "was negligent in the operation of a motor vehicle by the opening and closing of the school bus doors," which prevented T.J. from exiting the bus at the elementary school. The petition alleged T.J. was "confined on the school bus" and then left stranded, causing him "extreme psychological injuries." The petition also asserted DCS's immunity was waived for intentional infliction of emotional distress, alleging DCS "had intent to falsely confine" T.J. on the incorrect school bus. According to the petition, T.J. repeatedly asked to be returned to his school because he was

supposed to be on his way to day care and suffered emotional distress when he witnessed the bus drive away, abandoning him on the side of the highway.

DCS filed a motion to dismiss the claims for want of jurisdiction. DCS asserted Vallet's negligence claim failed to fall within the limited waiver of immunity afforded under the Texas Tort Claims Act because it relates to the supervision or control of the student and not the operation of a motor vehicle. As for intentional infliction of emotional distress, DCS asserted the Act expressly provides there is no waiver of immunity for intentional torts. The trial court denied the motion.

A unit of state government is immune from suit and liability unless the state consents. *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). Governmental immunity from suit defeats a court's subject matter jurisdiction. *Id*. In a suit against a governmental unit, the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity. *Id.* Whether a court has subject matter jurisdiction and whether a plaintiff has alleged facts that affirmatively demonstrate subject matter jurisdiction are questions of law that we review de novo. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). If the pleadings alone are determinative of the issue, then in our review we rely on them alone, construing them in the plaintiff's favor. *See id.* No one disputes that DCS, as a school district, is a governmental unit under the Texas Tort Claims Act. Therefore, we review the pleadings to determine if Vallet's claims come within a statutory waiver.

School districts are immune from suit for all torts under the TTCA except in suits involving the operation or use of motor vehicles. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.051 (West 2011); *Kerrville Indep. Sch. Dist. v. Botkin*, No. 04-07-00733-CV, 2008 WL 312788, at *2 (Tex. App.—San Antonio Feb. 6, 2008, pet. denied) (mem. op.). Specifically, a

school district is liable only for "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; and (B) the employee would be personally liable to the claimant according to Texas law. . . ." *Id.* § 101.021(1)(A)-(B). The TTCA does not define the terms "use" or "operation," so we apply their common and ordinary meanings. *Austin Indep. Sch. Dist. v. Gutierrez*, 54 S.W.3d 860, 863 (Tex. App.—Austin 2001, pet. denied). "Operation" means "a doing or performing of practical work," and "use" means "to put or bring into action or service; to employ for or apply to a given purpose." *Whitley*, 104 S.W.3d at 542. The "arises from" language in the statute requires a nexus between the injury and the operation or use of the motor vehicle. *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992). This nexus requires more than mere involvement of the vehicle; rather, the operation or use of the vehicle must have actually caused the injury. *Whitley*, 104 S.W.3d at 543. 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.*

On appeal, DCS argues it is immune from Vallet's negligence claim because it does not arise from the operation or use of a motor vehicle. Rather, DCS contends the complained-of act—"boarding a student on a bus and leaving him at an incorrect location"—relates to supervision or control of the student. We agree.

In general, when applying the term "use" or "operation" in school bus cases, appellate courts have examined whether the employee's act involved actual use or operation of the vehicle, rather than the supervision of children. *Gutierrez*, 54 S.W.3d at 863. When a plaintiff's injuries arise from an employee's "affirmative action" actually using or operating the bus, the school district's immunity has been waived. *Breckenridge Indep. Sch. Dist. v. Valdez*, 211 S.W.3d 402,

408 (Tex. App.—Eastland 2006, no pet.); *Elgin Indep. Sch. Dist. v. R.N.*, 191 S.W.3d 263, 272 (Tex. App.—Austin 2006, no pet). If the employee's act involved supervision or control of a child, immunity has not been waived, even if the act took place on or near the motor vehicle. *Gutierrez*, 54 S.W.3d at 863. Specifically, passenger injuries attributable to a bus driver's decisions and actions regarding whether and when passengers disembark the bus, and their safety in doing so, are considered supervisory in nature. *R.N.*, 191 S.W.3d at 272.

For example, in *R.N.*, a school bus driver picked up five-year-old R.N. to take her to pre-kindergarten class; a bus monitor was also on the bus. *Id*. at 265. Once they arrived at the school, the bus driver and monitor got off the bus without R.N., who had fallen asleep during the ride to school. *Id*. When R.N. woke up, she tried to get off the bus but the door was locked, and she remained on the bus for several hours. *Id*. R.N.'s mother sued the school district, alleging the bus driver and monitor "failed and refused to look in their bus to assure that [R.N.] was off the bus and in school," that both locked R.N. inside the bus from late-morning to mid-afternoon, and that R.N. was physically and emotionally injured as a result of being locked in the bus. *Id*. at 265–66.

After a thorough analysis of the case law, the Austin court concluded the failure to unload R.N. from the bus involved a failure to supervise her and R.N.'s injuries arising from this allegation did not arise from a use or operation of the bus. *Id.* at 271–72. The court, however, also examined the allegation that the bus driver and bus monitor locked the bus door. The court concluded the affirmative act of locking the door constituted a use of the bus, distinguishing this allegation from those stating injuries caused by negligent supervision. *Id.* To the extent R.N. alleged injuries arising from the use of the bus, the plaintiff alleged a valid waiver of immunity. *Id*.

Several other governmental immunity cases illustrate circumstances involving supervision and control of passengers, rather than operation and use of a motor vehicle. *See, e.g.*, *Whitley*, 104 S.W.3d at 542–43 (DART bus driver forced disabled passenger off bus after fight with another passenger and said he would return; in meantime, other passenger exited the bus two blocks later, recruited friends, and attacked disabled man at place where bus left him); *Austin Indep. Sch. Dist. v. Salinas*, No. 03-14-00209-CV, 2016 WL 1566707, at *6 (Tex. App.—Austin Apr. 14, 2016, no pet.) (mem. op.) (child with disability opened back exit door, triggering buzzer, and then jumped out of moving school bus; court concluded allegations of bus driver's failure to use rear-view mirror correctly or to respond to buzzer, applying gas pedal instead of brakes after buzzer sounded, and failing to drive attentively involved bus driver's failure to supervise and control child to prevent him from jumping out door and references to certain parts of school bus did not alter nature of allegations); *King v. Manor Indep. Sch. Dist.*, No. 03-02-00473-CV, 2003 WL 21705382, at *4 (Tex. App.—Austin Jul. 24, 2003, no pet.) (mem. op.) (student hit by car after being dropped off by school bus); *Ransom v. Ctr. for Health Care Servs.*, 2 S.W.3d 643, 645 (Tex. App.—San Antonio 1999, pet. denied) (bus driver dropped off adult man with mental capacity of four-year-old across the street from his home, and man was hit by intoxicated driver while crossing street) (op. on mot. for reh'g en banc); *Goston v. Hutchison*, 853 S.W.2d 729, 731 (Tex. App.—Houston [1st Dist.] 1993, no writ) (school bus driver dropped off two students at non-designated stop where they were picked up by friend and subsequently injured in accident).

In her amended petition, Vallet pleaded that DCS was negligent in operating the bus by opening and closing the doors, confining T.J. inside the bus during transport and preventing him from exiting the bus at his elementary school. Further, Vallet contends DCS was negligent in opening the doors and "expelling the child" on the side of a busy highway and driving away.

She argues that had DCS officials and their bus driver not "forced" the child onto the school bus he "vehemently protested boarding" and had not "forcefully transported" the child on their bus and "later deserted him alone alongside a busy and dangerous highway," the child "would have remained safely on school grounds where he would have been found by school officials." She asserts these circumstances constitute use and operation of a motor vehicle. We cannot agree.

Similar to the allegations made by plaintiffs in the above-cited cases, the gravamen of Vallet's allegations is not the use or operation of the bus. T.J. was not injured by the opening or closing of the school bus doors nor by the manner in which he was transported. Rather, any injury to T.J. arose from the decisions to place him on the bus and to expel him from the bus. As in the cases cited above, these acts involved supervision or control of T.J. Further, the allegations in her amended petition do not show the required nexus between the use or operation of the school bus and T.J.'s injuries. At most, the allegations show the use or operation of the school bus furnished the condition that made T.J.'s injuries possible.

In reaching this conclusion, we are unpersuaded by the two cases Vallet relied upon in her brief: *Hitchcock v. Garvin*, 738 S.W.2d 34 (Tex. App.—Dallas 1987, no writ.) and *Austin Independent School District v. Gutierrez*, 54 S.W.3d 860 (Tex. App.—Austin 2001, pet. denied). In *Hitchcock*, this Court concluded a bus driver's alleged negligence in failing to activate the bus's warning lights when a student disembarked constituted an "act or omission arising from the operation or use" of the vehicle. *Hitchcock*, 738 S.W.2d at 37. In *Gutierrez*, the Austin court concluded the bus driver's honking of the bus's horn to signal to the student it was safe to cross the street was sufficient to allege the operation or use of the vehicle to waive immunity. *Gutierrez*, 54 S.W.3d at 866. In both cases, the students were struck by a car after disembarking. Contrary to the case before us, both cases involved more than merely the bus driver's decision to

let the students off; the bus driver engaged (or failed to engage) in some action involving the bus itself that contributed to the accidents.

Nor are we persuaded by Vallet's reliance, at oral argument, on *Contreras v. Lufkin Independent School District*, 810 S.W.2d 23 (Tex. App.—Beaumont 1991, writ denied). There, a six-year-old school girl was let off a school bus around the corner from her home and was struck by a car while trying to get home. The petition alleged the school district breached its duty to let the child off the school bus in a location from which she knew how to get home without exposing her to danger while crossing the street. 810 S.W.2d at 24. But the Beaumont court did not hold immunity was waived in this instance; rather, it reversed the defendant's summary judgment because the sole ground on which it was based, that the plaintiff had not pled waiver of immunity, was without merit. *Whitley*, 104 S.W.3d at 543 (explaining *Contreras* holding); *Tarkington Indep. Sch. Dist. v. Aiken*, 67 S.W.3d 319, 325 (Tex. App.—Beaumont 2002, no pet.) (explaining *Contreras* did not find waiver of immunity and limiting case to its procedural facts).

Taking Vallet's factual allegations in the amended petition as true, we conclude they do not demonstrate T.J.'s alleged injuries arose from the operation or use of a motor vehicle or that a nexus exists between the District's use or operation of a motor vehicle and T.J.'s alleged injuries. Thus, Vallet has failed to demonstrate a valid waiver of DCS's governmental immunity. We sustain DCS's first issue.[1]

In its second issue, DCS asserts it is immune from Vallet's claim for intentional infliction of emotional distress. We agree.

[1] Within this issue, DCS also asserts Vallet has not alleged a physical injury, only emotional distress, and has therefore pleaded only a negligent infliction of emotional distress claim, which is not cognizable. DCS argues that because its employee could not be held personally liable for negligently inflicted emotional distress, the TTCA does not waive immunity for the claim. Given our disposition, we need not address this ground.

Section 101.057(2) of the Tort Claims Act makes clear the general waiver of sovereign immunity "does not apply to a claim . . . arising out of assault, battery, false imprisonment, or any other intentional tort . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (West 2011); *see City of Galveston v. State*, 217 S.W.3d 466, 470 (Tex. 2007) (citing section 101.057 as example of Legislature's having "exempt[ed] a variety of activities from any waiver at all"). Vallet's claim for intentional infliction of emotional distress is an intentional tort for which immunity has not been waived under the Tort Claims Act. *See Hardin Cnty. Sheriff's Dep't v. Smith*, 290 S.W.3d 550, 553 (Tex. App.—Beaumont 2009, no pet.). We sustain the second issue.

Finally, we next consider Vallet's request to remand the case to the trial court to give her an opportunity to replead to cure any deficiencies in her negligence claim. Generally, if the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Miranda*, 133 S.W.3d at 227. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id*.

Here, as stated previously, Vallet's negligence claim centers on school officials' decisions in placing T.J. on the bus and then leaving him on the side of a highway unattended, which do not involve use or operation of the bus. Vallet has not suggested how to cure this jurisdictional defect and, in fact, amended her pleadings after DCS filed its plea to the jurisdiction. Because pleading more facts will not cure the jurisdictional defect, we decline her request.

We reverse the trial court's order denying DCS's amended motion to dismiss and render judgment dismissing this cause for want of jurisdiction.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DALLAS COUNTY SCHOOLS, Appellant

No. 05-16-00385-CV V.

SABRINA VALLET, INDIVIDUALLY AND AS NEXT FRIEND OF TYLER JACKSON, A MINOR, Appellee

On Appeal from the 191st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-14249.
Opinion delivered by Justice Francis;
Justices Fillmore and Myers participating.

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's order denying appellant Dallas County Schools' amended motion to dismiss and **RENDER** judgment dismissing this cause suit for lack of jurisdiction.

It is **ORDERED** that appellant Dallas County Schools recover its costs of this appeal from appellee Sabrina Vallet, individually and as next friend of Tyler Jackson, a minor.

Judgment entered December 7, 2016.