AFFIRM; and Opinion Filed October 12, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00538-CV

DALLAS COUNTY HOSPITAL DISTRICT
D/B/A PARKLAND HEALTH & HOSPITAL SYSTEM, Appellant
V.
CONNIE MOON, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF SANDRA MERCADO, Appellee

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-10201

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Lang-Miers

In this interlocutory appeal, Dallas County Hospital District d/b/a Parkland Health & Hospital System ("Parkland") seeks reversal of the trial court's order denying its plea to the jurisdiction. In three issues, Parkland contends it is immune from suit by appellee Connie Moon, as personal representative of the Estate of Sandra Mercado. We affirm the trial court's order.

BACKGROUND

Sandra Mercado was admitted to Parkland in 2014. She was 72 years old and was confined to a wheelchair. Three Parkland employees took Mercado to an examination room and prepared to transfer her from the wheelchair to the examination table. The employees removed the arms from the wheelchair and attempted the transfer. They dropped Mercado in the process,

fracturing her ankle. Connie Moon, Mercado's daughter and the personal representative of Mercado's estate,[1] sued Parkland seeking damages for Mercado's injury.[2]

Parkland filed a plea to the jurisdiction alleging that it is a governmental unit entitled to immunity from Moon's suit. In its operative plea, Parkland contended that Mercado's injury was not caused "by a condition or use of tangible personal or real property," so that Moon's claim did not fall within the Texas Tort Claims Act's limited waiver of sovereign immunity. In her response to Parkland's plea, Moon did not challenge Parkland's allegation that it is a governmental unit. But she argued that Parkland's immunity was waived because Parkland used tangible personal property lacking an integral safety component. At the hearing on Parkland's plea, Moon argued that Parkland's employees misused the wheelchair by removing its arms before attempting to lift Mercado. Moon contended that Mercado would not have fallen or broken her ankle if Parkland's employees had not removed the arms from the wheelchair. Neither party offered evidence at the hearing.

The trial court denied Parkland's plea. This appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West Supp. 2016) (person may appeal interlocutory order granting or denying plea to jurisdiction by governmental unit).

PLEAS TO THE JURISDICTION

A plea to the jurisdiction is a dilatory plea; its purpose is to defeat a cause of action without regard to whether the claims asserted have merit. *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 453 (Tex. 2016). The existence of subject matter jurisdiction is a question of law, and we review de novo the trial court's ruling on a plea to the jurisdiction. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

[1] Throughout this opinion we refer to Moon in her representative capacity.

[2] Although Mercado is now deceased, Moon does not allege that Parkland's negligence was a cause of Mercado's death. Moon claims are for personal injury.

Absent a waiver by the legislature, governmental entities are generally immune from suits for damages. *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 324 S.W.3d 544, 546 (Tex. 2010); *Dallas Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). The Texas Tort Claims Act provides a limited waiver of governmental immunity when injury is caused by a condition or use of tangible personal property. TEX. CIV. PRAC. & REM. CODE ANN. § 101.001–.109 (West 2011 & Supp. 2016); *Dallas Cty. v. Alejo*, 243 S.W.3d 21, 27 (Tex. App.—Dallas 2007, no pet.). "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." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2).

A governmental unit's plea to the jurisdiction can be based on the pleadings or on evidence. *Miranda*, 133 S.W.3d at 226. When a plea to the jurisdiction challenges the pleadings, we look to whether the plaintiff has alleged facts that affirmatively demonstrate the trial court's jurisdiction to hear the case. *Id.* We liberally construe the plaintiff's pleadings in favor of jurisdiction, and we look to the plaintiff's intent, accepting as true the facts alleged. *Id.* at 226, 228.

When a plea challenges the existence of jurisdictional facts, we must consider relevant evidence submitted by the parties to resolve the jurisdictional issues. *Id.* at 227. In reviewing a plea, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Id.* at 227–28. The burden is on the governmental unit to meet the standard of proof to support its contention that the trial court lacks subject matter jurisdiction. *Id.* at 228. Once the governmental unit asserts and provides evidentiary support for its plea, the plaintiff is then required to show only that a disputed fact issue exists. *Id.* If the evidence creates a fact question on the jurisdictional issue, the trial court cannot grant the plea; the fact issue is for the fact finder to resolve. *Id.* at 227–28. If the relevant

evidence fails to raise a fact question or is undisputed on the jurisdictional issues, the trial court rules on the plea as a matter of law. *Id.* at 228.

DISCUSSION

In three issues, Parkland contends the trial court's denial of its plea to the jurisdiction was error because (1) it is immune from suit; (2) Moon did not meet her burden to prove a statutory waiver of Parkland's immunity; and (3) Moon pled only non-use of tangible property, not use of tangible property lacking an integral safety component. We discuss these issues together.

Moon concedes that Parkland is a governmental unit, but contends that under civil practice and remedies code section 101.021(2), Parkland's immunity is waived because Mercado's injury was caused by a condition or use of tangible personal property. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2). Parkland concedes that we construe Moon's pleadings liberally in her favor, but argues that Moon alleged only non-use of property. Non-use of tangible personal property does not waive governmental immunity. *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587–88 (Tex. 2001).

The sole count of Moon's petition alleges "injury by use of personal property." Moon alleges:

> 11. At the time of [Mercado's] injury, Defendant's employees were attempting to lift [Mercado] out of her wheelchair and place her onto the examination table, which was in the course and scope of employment.
>
> 12. Two of Defendant's employees negligently lifted [Mercado] from her wheelchair while the third employee moved the wheelchair from the area, all of which caused [Mercado] to be dropped and injured.
>
> 13. The employees' negligence was the result of the use of the wheelchair and the examination table, both items of tangible personal property. The employees failed to use what is known as a Hoyer lift and sling, which are integral components of the wheelchair and the examination table given [Mercado's] weight and condition at the time of the incident.

Parkland argues that Moon alleges only non-use of a "Hoyer lift and sling," so that its immunity is not waived. *See Miller*, 51 S.W.3d at 587–88. Moon replies that the tangible personal property used by Parkland lacked an "integral safety component," so that her claim falls within an exception to the rule that non-use of property does not waive governmental immunity. *See Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 585 (Tex. 1996) (discussing limits of "integral safety component" exception).

Moon relies on two cases in which the supreme court held that immunity was waived where personal property lacked an integral safety component. *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 300 (Tex. 1976) (immunity waived by failure to provide knee brace as part of football uniform to plaintiff with previous knee injury); *Robinson v. Cent. Tex. MHMR Ctr.*, 780 S.W.2d 169, 171 (Tex. 1989) (providing swimming gear to epileptic patient without life preserver established waiver). But the court "limited the precedential value" of *Lowe* and *Robinson* in subsequent opinions. *City of N. Richland Hills v. Friend*, 370 S.W.3d 369, 372 (Tex. 2012); *see also Clark*, 923 S.W.2d at 585 (*Lowe* and *Robinson* "represent perhaps the outer bounds of what we have defined as use of tangible personal property"). In *Friend*, the court declined to extend the "integral safety component" exception to a city's failure to retrieve and use an automatic external defibrillator device ("AED") to revive a patron who had collapsed at a water park. *Id.* at 370. The city responded with oxygen masks and other airway equipment, but no AED was used until the city fire department arrived twenty-one minutes after the patron's collapse. *Id*. The court rejected the notion that plaintiffs, "through artful pleading, [could] enlarge the scope of the waiver provided by section 101.021(2) by alleging that a governmental actor failed to use one particular type of equipment among a broadly defined class of property that may have been employed." *Id.* at 373.

And in *Clark*, a wrongful death suit against a state hospital, the court distinguished *Lowe* and *Robinson*:

> The precedential value of these cases is therefore limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that the lack of this integral component led to the plaintiff's injuries. For example, if a hospital provided a patient with a bed lacking bed rails and the lack of this protective equipment led to the patient's injury, the Act's waiver provisions would be implicated.

Clark, 923 S.W.2d at 585.

In paragraph 13 of her petition, Moon alleges that the Parkland employees should have used an entirely different piece of equipment—a Hoyer lift or sling—to lift Mercado from the wheelchair on to the examination table. A Hoyer lift or sling is not a component of a wheelchair or an examining table. Rather, Moon alleges that the Parkland employees, like the water park personnel in *Friend*, should have retrieved and used different equipment to lift Mercado. *See Friend*, 370 S.W.3d at 370. We conclude that Parkland's immunity is not waived regarding Moon's claims that Parkland failed to use particular equipment. *See Miller*, 51 S.W.3d at 587–88; *Friend*, 370 S.W.3d at 372–73.

We also agree with Parkland that Moon did not allege any "use" of the examination table that caused Mercado's injury. But Moon did allege use or misuse of the wheelchair. At the hearing on Parkland's plea to the jurisdiction, Moon's counsel argued that if Parkland's employees had not removed the arms of the wheelchair before attempting to lift Mercado, then Mercado would not have been injured. Parkland complains that Moon did not specify this complaint in her pleading. But we are to liberally construe Moon's pleadings, and Moon did allege negligent use of the wheelchair, in paragraphs 11 through 13 of her petition, as quoted above. *See Miranda*, 133 S.W.3d at 226 ("We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent."). Consequently, Moon has pleaded that a use of

tangible personal property caused Mercado's injury. Further, Moon explained in her response to Parkland's plea to the jurisdiction that:

> [a]fter one employee moved the examination table over to allow more room for [Mercado] to enter, the employees prepared to transfer her from the wheelchair to the examination table . . . . The employees then removed [Mercado] from the room and brought her back in backwards . . . . After the employees removed the arms of the wheelchair and talked with each other for some time, they attempted to transfer [Mercado] from the wheelchair to the examination table. During the transfer, the employees dropped [Mercado] onto the floor, fracturing her ankle . . . .[3]

Parkland also argues that the relationship of the wheelchair to the occurrence does not satisfy the causation requirement in section 101.021. Citing *Bossley*, Parkland contends that the gravamen of Moon's complaint is a failure of medical judgment; the wheelchair was merely "involved." *See Bossley*, 968 S.W.2d at 343 ("Property does not cause injury if it does no more than furnish the condition that makes the injury possible."). In *Bossley*, the court held that an unlocked door permitting a patient's escape from a hospital did not cause the patient's subsequent suicide. *Id.* Here, however, Moon pleaded that the manner in which Parkland's employees used the wheelchair caused Mercado's injury.

In summary, in reviewing the trial court's ruling on Parkland's plea to the jurisdiction, we must liberally construe Moon's allegations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2); *Miranda*, 133 S.W.3d at 226, 228; *Alejo*, 243 S.W.3d at 27. Moon has pleaded that Mercado's injury was caused by Parkland's use or misuse of the wheelchair, satisfying her burden to plead facts affirmatively showing the trial court's subject matter jurisdiction. *See City of Dallas v. Heard*, 252 S.W.3d 98, 102 (Tex. App.—Dallas 2008, pet. denied). We conclude that Parkland did not satisfy its burden to assert and support its contention, with evidence, that

[3] Moon's response includes still photographs excerpted from "video footage." Moon concedes that the video footage is not part of the appellate record. In their appellate briefs, the parties have included arguments regarding admissibility of the photographs. Because the trial court determined Parkland's plea to the jurisdiction on the basis of the pleadings, however, we need not address this dispute. *See Miranda*, 133 S.W.3d at 226 (when plea to jurisdiction challenges pleadings, court determines if pleader has alleged facts that affirmatively demonstrate jurisdiction).

the trial court lacks subject matter jurisdiction. *See id.* (discussing burdens). We decide Parkland's issues against it. *See Miranda*, 133 S.W.3d at 228.

CONCLUSION

We affirm the trial court's order denying Parkland's plea to the jurisdiction.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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JUDGMENT

DALLAS COUNTY HOSPITAL DISTRICT D/B/A PARKLAND HEALTH & HOSPITAL SYSTEM, Appellant

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Opinion delivered by Justice Lang-Miers;
Justices Brown and Boatright participating.

In accordance with this Court's opinion of this date, the trial court's order denying appellant Dallas County Hospital District d/b/a Parkland Health & Hospital System's plea to the jurisdiction is **AFFIRMED**.

It is **ORDERED** that appellee Connie Moon, as Personal Representative of the Estate of Sandra Mercado recover her costs of this appeal from appellant Dallas County Hospital District d/b/a Parkland Health & Hospital System.

Judgment entered this 12th day of October, 2017.