Opinion issued September 1, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00255-CV

CITY OF HOUSTON, Appellant

V.

JOHN ANTHONY BRANCH, Appellee

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2020-31674

DISSENTING OPINION

John Anthony Branch alleged that he was injured when Houston City Councilmember Michael Kubosh hit the gas pedal of a golf cart with his foot, causing the golf cart to strike Branch. The act of hitting the gas pedal—even

inadvertently—distinguishes this case from those in which the Texas Supreme Court has found that the injury did not arise "from the operation or use of a motor-driven vehicle or motor-driven equipment." Taking the facts alleged in Branch's favor, Branch has raised a fact issue on whether the golf cart was in operation or use when it struck him. I respectfully dissent.

ANALYSIS

The Texas Tort Claims Act ("TTCA") states that a governmental unit in the state is liable for personal injury that "arises from the operation or use of a motor-driven vehicle or motor-driven equipment." TEX. CIV. PRAC. & REM. CODE § 101.021(1)(A). The Texas Supreme Court has defined "use" to mean "to put or bring into action or service; to employ for or apply to a given purpose." *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003); *Mount Pleasant Indep. Sch. Dist. v. Est. of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989). The court has rejected the notion that the government employee's use or operation of the vehicle must be intentional. *See PHI, Inc. v. Tex. Juv. Just. Dep't*, 593 S.W.3d 296, 303–04 (Tex. 2019). As the majority correctly notes, *PHI* held that the requirements of section 101.021 were satisfied where an employee exited a government van without setting the emergency brake, causing the van to roll backwards down an incline and crash into a helicopter. *Id.*

In so holding, the Texas Supreme Court emphasized that it must apply the "plain meaning of statutory text 'unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.'" *Id.* at 303 (quoting *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011)). The words "use" and "operation"—the court noted—are "nothing if not common, everyday words." *Id.* When the Texas Legislature opts for such "ordinary" language, "[o]rdinary citizens should be able to rely on the plain language of a statute to mean what it says." *Id.* (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)).

Applying a "simple construction" of the ordinary language to the facts of the case, the court concluded that the driver's failure to engage the emergency break constituted the "operation or use" of a motor vehicle even though the driver was not in the vehicle when it struck the helicopter. *Id.* at 303–04. The court noted that "[i]n terms of the everyday experience of driving, we think it self-evident that ensuring your car will not roll away after you leave it, including engagement of the emergency brake when necessary, is an integral part of the 'operation or use' of a vehicle." *Id.*

The same result should follow here. In an affidavit supporting his response to the City of Houston's motion for summary judgment, Branch averred as follows:

> At the parade City of Houston Councilmember Kubosh was sitting in the passenger seat of a stopped golfcart. Councilmember Kubosh leaned over to the driver's side of the golf cart to speak to someone. When

> Councilmember Kubosh did this, he reached out his hand and leaned his body to the driver's side of the golfcart. Then Councilmember Kubosh's foot hit the gas pedal and I heard the golfcart's engine rev. I then felt the golfcart hit me.

Applying an ordinary construction of the plain statutory language, stepping on the gas pedal of a motor vehicle is an "integral part of the 'operation or use' of a vehicle." *See id.* at 304. Indeed, the application of the gas pedal is the penultimate "operation or use" of a vehicle, given that this act causes the motor vehicle to move. This act squarely fits within *Mount Pleasant's* definition of "use" as meaning "to put or bring into action or service." *See Mount Pleasant Indep. Sch. Dist*., 766 S.W.2d at 211. Nothing in the statute requires this use or operation to be intentional.

The allegation that Councilman Kubosh's foot hit the gas pedal distinguishes this case from those in which the Texas Supreme Court held that the TTCA did not waive immunity. In *LeLeaux v. Hamshire-Fannett Independent School District*, the Texas Supreme Court held that the TTCA does not waive immunity where the vehicle itself is "*only* the setting" for the plaintiff's injury. *See* 835 S.W.2d 49, 52 (Tex. 1992) (emphasis added). In that case, a student jumped into a parked school bus through the emergency rear door and hit her head, causing injury. *Id.* at 51. The bus was not moving, the driver was not aboard, and no students were aboard. *Id.* at 50–51. Simply put, the bus was "nothing more" than the place where the student happened to injure herself. *Id.* at 51. Thus, the TTCA did not waive immunity

because the parked bus was merely the setting for the plaintiff's injury. *Id.* at 52; *see also Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015) (per curiam) (stating that, for immunity waiver in section 101.021(1) to apply, "the vehicle must have been used as a vehicle, and not, e.g., as a waiting area or holding cell").

That is not the case here. Branch's summary judgment evidence refutes the notion that the golf cart was "only the setting" for Branch's injury. Likewise, this is not a case where the golf cart was "nothing more" than the place where the injury occurred. Even if the golf cart was, as the City contends, being used as a holding cell or waiting area for the parade, the golf cart came into use or operation at the point that Councilman Kubosh's foot hit the gas pedal. The fact that the golf cart's resulting motion allegedly caused Branch's injury distinguishes the case from *Mount Pleasant*, where a driver's alleged failure to supervise children at a bus stop could not be characterized as a government agent's negligent use or operation of the bus. *See Mount Pleasant Indep. Sch. Dist.*, 766 S.W.2d at 211–12. Although John Gibbs testified that Councilmember Kubosh's foot did not touch the gas pedal, we are required to take as true all evidence favorable to Branch and indulge every reasonable inference in his favor at this juncture. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). Because Branch's affidavit is some evidence that Councilmember Kubosh's foot did hit the gas pedal, we cannot

disregard it. Consequently, I would hold that Branch has raised a fact issue sufficient to bring this case within the waiver of immunity in section 101.021 for the "operation or use" of a motor vehicle.

I would also hold that section 101.021's immunity waiver is not limited to government-owned vehicles. The majority is correct in noting that "[t]he statute itself—and only the statute—provides the governing rule of decision." *PHI*, 593 S.W.3d at 305. Reading the plain text of section 101.021, I agree with those intermediate courts holding that "[t]here is no requirement that the vehicle in question be a county vehicle, only that a county employee 'used' or 'operated' the vehicle." *See, e.g.*, *Cnty. of Galveston v. Morgan*, 882 S.W.2d 485, 490 (Tex. App.—Houston [14th Dist.] 1994, writ denied). As such, I would affirm the trial court's denial of the City's motion for summary judgment.

April L. Farris
Justice

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.

Justice Farris, dissenting.