Reversed and Rendered and Memorandum Opinion filed September 26, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00117-CV

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Appellant

V.

MIGUEL MENDOZA, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 16-DCV-229688

M E M O R A N D U M O P I N I O N

An inmate of the Texas Department of Criminal Justice (TDCJ) who was secured in a van parked on the shoulder of a highway was injured when the van was hit by a speeding car. The inmate sued TDCJ, alleging that governmental immunity was waived under the Texas Tort Claims Act because his injuries were caused by the negligent operation of a motor vehicle by the TDCJ employee who was driving the van. The trial court agreed, and denied TDCJ's plea to the jurisdiction. We

reverse the trial court's order and render judgment dismissing the claims against TDCJ for lack of subject matter jurisdiction.

Factual Background

On September 3, 2014, TDCJ employee James Walton parked a 2009 Ford F-350 van, which was pulling a trailer, in a grassy area along the shoulder of State Highway 6 in Arcola, Texas. The TDCJ van was parked facing east at the 12,200 block. Walton pulled over to purchase lunch for Mendoza and another inmate, who remained secured in the TDCJ van. Meanwhile, Brandon Milligan was traveling eastbound on the highway at a high rate of speed when he became distracted inside his car and struck the parked TDCJ trailer and van from behind. Mendoza alleges that he sustained serious bodily injuries as a result of the accident.[1]

Mendoza sued Milligan and TDCJ. As to TDCJ, Mendoza alleged that his injuries and damages were proximately caused by the negligent acts or omissions of TDCJ's employee in failing to park the van in an area designated for parking; failing to have or adhere to adequate protocols involving the safe operation of a motor vehicle; failing to timely render aid to Mendoza after the collision; operating the van in a manner inconsistent with the manner in which an ordinarily prudent person would have operated the vehicle under the same or similar circumstances; and violating the Texas Transportation Code, constituting negligence per se. Mendoza alleged that these acts or omissions constituted negligence or negligence per se that proximately caused his injuries and damages.

TDCJ filed a plea to the jurisdiction, asserting that Mendoza's claims against it were barred because they do not fall within the Texas Tort Claims Act's waiver of

[1] We reproduce in substance TDCJ's statement of facts because it is unchallenged by Mendoza. *See* Tex. R. App. P. 38.2(a)(1)(B) (providing that an appellee need not include a statement of facts "unless the appellee is dissatisfied with that portion of the appellant's brief").

sovereign immunity. Mendoza responded that immunity was waived under the Act because Mendoza's injuries arose from TDCJ's negligent operation or use of the van. On November 21, 2016, the trial court denied TDCJ's plea to the jurisdiction. TDCJ filed this interlocutory appeal, asserting that Mendoza did not allege the "operation or use" of a motor vehicle, and the alleged negligence of its employee did not cause Mendoza's injuries.

I. Standard of Review and Applicable Law

We review a trial court's ruling on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "In a suit against a governmental unit, the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). The plaintiff must allege facts that affirmatively establish the trial court's subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). In determining whether this burden has been satisfied, we must construe the pleadings liberally in the plaintiff's favor and deny the plea if the plaintiff has alleged facts affirmatively demonstrating jurisdiction to hear the case. *Miranda*, 133 S.W.3d at 226.

If the governmental entity challenges the plaintiff's jurisdictional allegations, then the plaintiff must adduce some evidence to support jurisdiction. *Miranda*, 133 S.W.3d at 227–28. In such a case, the trial court then considers the relevant evidence submitted by the parties. *Id.* at 227. If the evidence creates a fact question regarding jurisdiction, then the trial court must deny the plea, and the fact issue will be resolved by the fact finder. *Id.* at 227–28. But if the evidence is undisputed, as it is here, then the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

A unit of state government is immune from suit and liability unless the state consents, and governmental immunity from suit defeats a court's subject matter

jurisdiction. *Whitley*, 104 S.W.3d at 542. Under the Texas Tort Claims Act, a governmental unit's sovereign immunity is waived 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" the property damage, personal injury, or death "arises from the operation or use of a motor-driven vehicle or motor-driven equipment." Tex. Civ. Prac. & Rem. Code § 101.021(1).

The courts strictly construe section 101.021's requirement of "operation or use" of a vehicle. *Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 927 (Tex. 2015). The Supreme Court of Texas has held that "operation" means "doing or performing of a practical work," and "use" means "to put or bring into action or service; to employ for or apply to a given purpose." *LeLeaux v. Hamshire–Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992) (quoting *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989)).

The phrase "arises from," as it is used in the statute, requires a nexus between the injury and the operation or use of the vehicle. *Whitley*, 104 S.W.3d at 543; *LeLeaux*, 835 S.W.2d at 51. This nexus requires more than mere involvement of the property. *Whitley*, 104 S.W.3d at 543. Rather, the vehicle's use must have "actually caused" the injury. *Id.*; *City of Kemah v. Vela*, 149 S.W.3d 199, 204 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). 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." *Whitley*, 104 S.W.3d at 543 (quotation omitted); *Vela*, 149 S.W.3d at 204.

II. TDCJ's Sovereign Immunity is Not Waived

In a single issue, TDCJ contends that Mendoza failed to plead facts to show that his injury was proximately caused by the "operation or use" of a motor vehicle so as to waive sovereign immunity under the Tort Claims Act. TDCJ argues that its

van was parked and not in use as a vehicle, but rather was being used as a "waiting area or holding cell" in which Mendoza was sitting. Further, TDCJ asserts that the parked TDCJ van did not proximately cause Mendoza's injuries; it merely furnished the condition which caused his injury.

Mendoza argues that he pleaded sufficient facts to show that his injury was caused by the operation or use of the TDCJ van. Specifically, Mendoza asserts that even though the TDCJ employee had left the vehicle to get food, he was still using the van "as a secured motorized vehicle to transport and confine the prisoners." Mendoza points to his allegation that he was not allowed to leave the van after the collision for nearly an hour until TDCJ obtained proper clearance to release him to paramedics. Mendoza also maintains that his injuries were proximately caused by the use of TDCJ's van because the inmates were left secured in a van that was negligently parked along a high-speed highway with no emergency flashers, and it is foreseeable in those circumstances that the van could be struck by a passing motorist.

Recently, in *Ryder*, the Supreme Court of Texas summarized the Tort Claims Act's limited waiver relating to the operation or use of a motor vehicle in practical terms directly relevant to the present case: (1) a government employee must have been actively operating the vehicle at the time of the incident; (2) the vehicle must have been used as a vehicle, and not as "a waiting area or holding cell"; (3) the tortious act alleged must have related to the defendant's operation of the vehicle rather than to some other aspect of the defendant's conduct; and (4) when the vehicle itself was only the setting for the defendant's wrongful conduct, any resulting harm will not give rise to a claim for which immunity is waived under section 101.021. *See* 453 S.W.3d at 927–28 (citing, among others, *LeLeaux* and *Vela*). Based on *Ryder*'s summation of the applicable law, as well as the decisions in *LeLeaux* and

Vela, we must conclude that sovereign immunity is not waived in this case.

In *LeLeaux*, a band student was injured when she hit her head while trying to close the rear emergency door of a school bus. *See* 835 S.W.2d at 50. The student sued the school district and bus driver for damages, arguing that sovereign immunity was waived because the school district negligently loaded and unloaded band students and their instruments through the emergency rear doors of the buses. *Id.* at 51–52. The supreme court concluded that the bus was not in operation or use because at the time the student was injured the bus was parked and empty, the motor was off, and the driver was not on board. *Id.* at 51. The court explained that the bus "was nothing more than the place where [the student] injured herself." *Id.* Even if the school district and driver were negligent as alleged, the court held that the student's injuries did not arise from the alleged negligence, as the student was not injured while being loaded onto or off of the bus, she was not returning to her seat, she was not retrieving something from the bus or putting something on the bus, and she was not preparing to leave. *Id.* at 52. Consequently, the court held that the school district's sovereign immunity was not waived. *Id.* ("When an injury occurs on a school bus but does not arise out of the operation of the bus, and the bus is only the setting for the injury, immunity for liability is not waived.").

In *Vela*, Gabriel Vela was injured while sitting in a City of Kemah police officer's patrol car when a truck ran into another patrol car parked behind the patrol car in which Vela was being detained, pushing it into the patrol car housing Vela. *See* 149 S.W.3d at 201. Vela sued the City, claiming that its police officers negligently parked or stopped their patrol cars in a turning lane of a highway, and but for their operation or use of the patrol car to house Vela upon his arrest, the accident in which he was injured would not have occurred. *Id.* at 204. This court reversed the trial court's denial of the City's plea to the jurisdiction, holding that the

use of the patrol car did not cause Vela's injuries; rather, it "merely furnished the condition that made Vela's injuries possible." *Id.* We explained that the police officers were not in their patrol cars or operating them when the accident occurred, Vela was merely sitting in one of the patrol cars, and Vela's injuries were caused by the driver who ran into the patrol car behind Vela. *Id.* at 205 (citing *LeLeaux*, 835 S.W.2d at 51–52).

Much like the plaintiff in *Vela*, Mendoza alleges that the TDCJ employee was negligent in "failing to park the van in an area designated for parking" and that this negligence was the proximate cause of his injuries. But, the van was parked and the TDCJ driver was not inside it when Milligan's car collided with the van and its trailer, injuring Mendoza. Thus, the van was not being actively operated or used as a vehicle; it was merely being used to confine Mendoza and the other inmate while the driver got them lunch. *See Vela*, 149 S.W.3d at 201 (noting that Vela was arrested, put in handcuffs, and placed in back seat of patrol car); *see also Ryder*, 453 S.W.3d at 927 (stating that for purposes of the Tort Claims Act, a government employee "must have been actively operating the vehicle at the time of the incident" and the vehicle must have been used as a vehicle, and not as a "waiting area or holding cell"). Further, assuming that the TDCJ driver negligently parked the car, this action was not the proximate cause of Mendoza's injuries. Mendoza's injuries were caused by Milligan's car colliding with the van and its trailer—the van merely furnished the condition that made Mendoza's injuries possible. *See LeLeaux*, 835 S.w.3d at 51–52; *Vela*, 149 S.W.3d at 204–05. On these facts, sovereign immunity is not waived.

Mendoza attempts to distinguish *Vela*, noting that both of the patrol cars in that case had their emergency lights on, but the motorist ignored the flashing lights when he ran into the patrol car behind Vela, injuring him. *See* 149 S.W.3d at 204.

Mendoza maintains that the police officers' use of the emergency lights demonstrates that the use of the vehicle was not the cause of Vela's injuries. In contrast, Mendoza argues, the TDCJ driver parked along a dangerous highway, left the inmates secured in the vehicle, and failed to put on emergency lights while he left to get lunch. According to Mendoza, the TDCJ driver's failure to activate his emergency lights while negligently parked on the side of a highway was at least one proximate cause of Mendoza's injuries.

In support of this contention, Mendoza cites *Elgin Independent School District v. R.N.*, 191 S.W.3d 263 (Tex. App.—Austin 2006, no pet.). In that case, a parent brought suit against the school district after a bus driver allegedly left her five-year-old child locked in the bus without adequate ventilation, water, and supervision for the majority of the day. *Id.* at 265. The court held that the school district's sovereign immunity was waived because the child was "injured by the negligent locking of the bus door." *Id.* at 272. Similarly, Mendoza argues, he was locked in a van without any emergency flashers on the side of a highway and placed in danger by a government employee. Mendoza also argues that it is foreseeable that a van and trailer parked on the side of a highway with no emergency flashers could be struck by a passing motorist, citing *Allen v. Knippa*, 552 S.W.2d 528, 533 (Tex. Civ. App.—Corpus Christi 1977, writ dism'd) (stating that it was foreseeable that parking a truck-trailer on the paved portion of a roadway at night in bad weather without lights or other indicators to warn approaching motorists might result in a collision).

Again, we must disagree. As previously discussed, TDCJ's use of the van to house Mendoza was not the cause of his injuries; the cause of Mendoza's injuries was the negligence of Milligan, who was distracted, veered off the road, and hit the TDCJ van. *See id.* at 205. Even if the TDJC driver had failed to turn on the van's

emergency lights to warn oncoming traffic, on these facts, this allegation amounts to a "non-use" that does not waive immunity. *See City of Soccorro v. Hernandez*, 508 S.W.3d 1, 5 (Tex. App.—El Paso 2015, pet. denied) (holding that officers' failure to use patrol car's flashers to warn oncoming motorists was tantamount to a non-use that does not waive immunity); *see also Tex. Nat. Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 869–70 (Tex. 2001) ("This Court has never held that non-use of property can support a claim under the Texas Tort Claims Act."). Finally, *Allen* is not instructive because, in addition to being factually distinguishable, the case did not address a waiver of governmental immunity based on the "operation or use" of a motor vehicle under the Tort Claims Act.

CONCLUSION

Having sustained the sole issue of the Texas Department of Criminal Justice, we reverse the trial court's order and render judgment dismissing Miguel Mendoza's claims against the Texas Department of Criminal Justice for lack of subject matter jurisdiction.

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Brown, and Wise.