

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00191-CV

MARILYN STERN-DUHON, Appellant

V.

LAMAR INSTITUTE OF TECHNOLOGY, Appellee

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-181,362

MEMORANDUM OPINION

Appellant Marilyn Stern-Duhon sued Lamar Institute of Technology (LIT) under the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West 2011). The trial court granted LIT's plea to the jurisdiction and motion to dismiss, and appellant filed this appeal. We conclude LIT did not waive sovereign immunity, and therefore we affirm the trial court's order dismissing appellant's suit.

BACKGROUND

As part of their clinical education, students in LIT's associate degree program in dental hygiene provide dental hygiene services to the general public. Appellant paid the

annual fee for services offered by LIT through its clinic. She went to the clinic to have her teeth cleaned. A dental hygiene student performed the cleaning procedure.

Called an “operator,” the room in which the student cleaned appellant’s teeth had a dental chair in which appellant sat during the procedure. The dental chair was located in the middle of the room. The room exit was located to the right and in front of the dental chair. Attached to the chair was a movable tray table with a swivel arm. Because the student is left-handed, she positioned the swivel arm and tray to the right side of the dental chair. Located at the foot of the chair and affixed to the floor was an electrical junction box similar in color to the floor. Appellant testified the junction box was square and approximately four to six inches high. When the student completed the teeth-cleaning procedure and while she was waiting for the instructor to enter the room and inspect her work, appellant stated she needed to go to the restroom. The student asked her to “hurry up”; the supervisor was going to be coming in shortly. Because the swivel arm and tray were on the right side of the chair, appellant exited on the chair’s left side. The pleadings and evidence reflect that as she left the room, she tripped over the electrical junction box, fell, and hit the wall and the floor.

PLEADINGS

Appellant alleged premises liability and negligent use claims under the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). She asserted that because of the positioning of the swivel arm and tray table on the chair’s right side, she

had to get up from the chair on the left side. That meant she had to go around the front of the chair and the junction box to leave the room. In doing so, she tripped over the junction box and fell. Appellant also alleged that the junction box constituted a premises defect. She further claimed that the student's actions constituted a "negligent implementation of the design of the operatory."

THE LAW

The State of Texas retains sovereign immunity from suit, and may only be sued if the Legislature waives immunity in "clear and unambiguous language." Tex. Gov't Code Ann. § 311.034 (West Supp. 2010); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). The Tort Claims Act waives sovereign immunity in three contexts: use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property. *Miranda*, 133 S.W.3d at 225; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 101.021.

A plea to the jurisdiction seeks dismissal of a case for lack of subject-matter jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Whether a court has subject-matter jurisdiction is a question of law. *Miranda*, 133 S.W.3d at 226. We review *de novo* the trial court's ruling on a plea to the jurisdiction. *Id.* at 228. The Supreme Court has described two types of challenges that may be asserted in a plea to the jurisdiction. *See id.* at 226-27. A plea to the jurisdiction challenging the plaintiff's pleadings contends that those pleadings fail to allege "facts that affirmatively

demonstrate” the trial court’s jurisdiction to hear the cause. *Id.* at 226. The plaintiff bears the burden of alleging facts demonstrating jurisdiction. *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010). When the defendant challenges the pleadings, we consider the allegations in favor of the plaintiff to determine if the plaintiff alleged facts affirmatively demonstrating jurisdiction. *Miranda*, 133 S.W.3d at 226. When the plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court reviews the relevant evidence to determine whether a fact issue exists. *Hayes*, 327 S.W.3d at 116. If the evidence raises a fact question on jurisdiction, the trial court cannot grant the plea, and the trier of fact must resolve the fact issue. *Id.* If the evidence is undisputed or does not raise a fact question, the trial court must rule on the plea as a matter of law. *Id.*

USE OF TANGIBLE PERSONAL PROPERTY

Appellant argues that LIT waived sovereign immunity “by negligent use of tangible personal property.” “‘Use’ means ‘to put or bring into action or service; to employ for or apply to a given purpose.’” *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583, 588 (Tex. 2001) (quoting *Tex. Natural Res. & Conservation Comm’n v. White*, 46 S.W.3d 864, 869 (Tex. 2001)). The use of the property must have actually caused the injury. *Id.* Appellant maintains that it was the student’s negligent use and positioning of the dental chair and its attachments that proximately caused appellant’s injuries. In her deposition, appellant testified that after she fell, the instructor “ran over” and indicated that the student should have had the swivel arm and the tray on the other

side of the dental chair so that appellant could exit to the right of the dental chair and avoid the junction box. Appellant asserts that because the swivel arm was affirmatively placed to the right side of the chair and prevented her from leaving the dental chair on the right, she tripped over the junction box, fell, and was injured.

For the State's immunity from suit to be waived under the applicable statutory provision, the injury must be proximately caused by the use of the property. *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 342-43 (Tex. 1998). Property which merely furnishes the condition that makes injury possible is not a proximate cause of an accident. *Id* at 343. Finding waiver whenever property is involved would conflict with the Act's purpose of waiving immunity only to a limited degree, because few injuries do not somehow involve property. *Id*. The student's actual use of the swivel arm and tray table must have been a proximate cause of the injury for waiver to be found. *See Miller*, 51 S.W.3d at 588.

The use of the swivel arm and tray ceased when appellant rose from the chair. She did not trip over, fall against, or strike the swivel arm, tray table, or the chair. She fell when she tripped on the electrical junction box as she walked toward the exit. The use of the swivel arm and tray table did no more than create a condition that made the fall possible. LIT did not waive sovereign immunity under the negligent use of property provision of section 101.021(2). *See Tex. Civ. Prac. & Rem. Code Ann. § 101.021(d)*. We overrule this issue.

PREMISES LIABILITY

Stern-Duhon asserts that LIT waived sovereign immunity on the basis of a premises defect. LIT argues that the exception to the waiver of sovereign immunity in section 101.056 applies here. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.056 (West 2011). The Act's waiver provisions do not apply to claims based on (1) the governmental unit's failure to perform an act that the unit is not required by law to perform; or (2) "a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit." *Id.* This statute is commonly referred to as the "discretionary function" exception. *Perez v. City of Dallas*, 180 S.W.3d 906, 910 (Tex. App.—Dallas 2005, no pet.).

The Texas Supreme Court has stated that the "[d]esign of any public work, such as a roadway, is a discretionary function involving many policy decisions, and the governmental entity responsible may not be sued for such decisions." *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002) (quoting *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999)). The design of a building is discretionary, and therefore immunity from liability applies. *Perez*, 180 S.W.3d at 911. Also, decisions concerning the installation of safety features are considered discretionary decisions. *Id.*; *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bruen*, 92 S.W.3d 24, 26-27 (Tex. App.—San Antonio 2002, pet. denied) (Claims that an auditorium ramp was dangerous, and should have been

redesigned and various safety features added to it, were exceptions to the waiver of sovereign immunity in the Tort Claims Act.); *see also Tex. Tech Univ. v. Gates*, No. 07-03-0138-CV, 2004 WL 2559937, at **3-4 (Tex. App.—Amarillo 2004, pet. denied) (mem. op.). Appellant does not reference any law, rule, or regulation that circumscribes LIT’s decisions regarding the design or position of the chair, its attachments, or the junction box. The design of the room and the decisions regarding the placement and configuration of the dental chair and electrical junction box were within the discretionary-function exception to the waiver of sovereign immunity.

NEGLIGENT IMPLEMENTATION OF POLICY OR DESIGN

Appellant also asserted that the student’s action in positioning the swivel arm and tray on the dental chair’s right, rather than the left, side constituted negligent implementation of the design of the operatory. “[S]overeign immunity is preserved for the negligent discretionary formulation of policy, but not for the negligent implementation of the policy at the [operational/ministerial] level.” *Fort Bend County Toll Road Auth. v. Olivares*, 316 S.W.3d 114, 122 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (quoting *Guadalupe-Blanco River Auth. v. Pitonyak*, 84 S.W.3d 326, 342 (Tex. App.—Corpus Christi 2002, no pet.)). Before a plaintiff can invoke a claim of negligent implementation of policy, she must state a waiver of immunity under some provision of the Tort Claims Act. *Jones v. Tex. Dep’t of Criminal Justice—Institutional Div.*, 318 S.W.3d 398, 405 (Tex. App.—Waco 2010, pet. denied). A claim of negligent

implementation of policy does not establish a waiver of immunity if the injury does not arise from the use or condition of tangible personal property. *Dimas v. Tex. State Univ. Sys.*, 201 S.W.3d 260, 266-67 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Here, the negligent implementation of policy claim does not establish a waiver of immunity for use of the swivel arm and tray, because the pleadings and evidence relevant to the jurisdictional issues show that the fall was the result of appellant’s tripping over the junction box rather than the use or implementation of the swivel arm and tray table. *See Dimas*, 201 S.W.3d at 268. We overrule appellant’s issues and affirm the trial court’s order.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on November 29, 2010
Opinion Delivered April 14, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.