In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00046-CV

MARCUS A. TAVIRA, APPELLANT

V.

TEXAS DEPT. OF CRIMINAL JUSTICE, APPELLEE

On Appeal from the 100th District Court
Childress County, Texas
Trial Court No. 10163, Honorable Stuart Messer, Presiding

February 24, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Appellant Marcus A. Tavira appeals the judgment of the trial court sustaining the plea to the jurisdiction filed by appellee, the Texas Department of Criminal Justice, and dismissing his personal-injury lawsuit. We will affirm.

Background

In his live petition, Tavira alleged he was injured in April 2010 while he was incarcerated in the Department's Roach Unit in Childress County, Texas. Tavira was

assigned to the prison's Community Service Squad, which had performed various projects for the City of Childress and on that occasion was working on a youth baseball field.

Tavira further pled that he and another inmate, Eddie Altamira, supervised by a Department employee, Officer Gaylon Betts, were installing netting to prevent foul balls from hitting spectators. To aid in that work, the Childress Little League Association had rented an "LULL Telehandler 1044C-54 high lift machine" to lift workers to elevated heights. Betts authorized Altamira to operate the telehandler.

Tavira's pleading continues:

> Inmate Altamira positioned the telehandler about fifteen (15) feet from the stadium wall and lowered the outriggers for support. The telehandler's boom was extended to the height to apply the netting. Officer Betts instructed the plaintiff, Tavira, to retrieve some ties to hold the netting. The ties were located on the opposite side of the boom. Mr. Tavira walked over to retrieve the ties at the bottom of the stands. The telehandler tipped forward and the platform fell and struck the plaintiff, Tavira. The plaintiff, Mr. Tavira was pinned down by the work platform. Inmate Altamira started the telehandler to draw back the boom. However, the mounted work platform was not secured to the telehandler and the platform slid off the attached forks, striking Mr. Tavira again. Officer Betts telephoned 911.

Tavira's pleading states he "is now a paraplegic as he is paralyzed from the waist down." He pled also that Officer Betts was disciplined for his failure to follow safety procedures.

Tavira sued the Department alleging various acts of negligence proximately caused his personal injuries.[1] He responded to the Department's plea to the jurisdiction with documents from the Department's records supporting his factual allegations. After a hearing, the trial court granted the Department's plea and dismissed Tavira's case with prejudice.

Analysis

The Trial Court's Jurisdiction

We first consider Tavira's contention that the trial court had no jurisdiction to adjudicate the Department's plea to the jurisdiction because the Department vaguely alleged entitlement to sovereign immunity and its pleading was not verified. We overrule the contention. A party's mere failure sufficiently to plead a claim or defense does not preempt a trial court's subject-matter jurisdiction. *See Peek v. Equipment Service Co.,* 779 S.W.2d 802, 805 (Tex. 1989) (holding "the omission of any allegation regarding the amount in controversy from plaintiff's petition did not deprive the court of jurisdiction, but was instead a defect in pleading subject to special exception and amendment. Although defective, the original petition filed in this cause was sufficient to invoke the jurisdiction of the district court").

Tavira's Issues

Tavira challenges the trial court's order sustaining the Department's plea to the jurisdiction through multiple sub-issues.

[1] Tavira's claims against other defendants were severed or otherwise disposed of. This present suit concerns only his claims against the Department.

A contest to a trial court's subject-matter jurisdiction may be asserted in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 225-26 (Tex. 2004); *Bland Ind. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000). Whether a court has subject-matter jurisdiction is a question of law that we review de novo. *State v. Holland,* 221 S.W.3d 639, 642 (Tex. 2007); *Miranda,* 133 S.W.3d at 226. When the pleadings are challenged, we consider the allegations in favor of the plaintiff to determine if the plaintiff alleged facts affirmatively demonstrating the jurisdiction of the trial court to hear the case. *Miranda,* 133 S.W.3d at 226. To the extent relevant to the issue of jurisdiction, we also consider any evidence received by the trial court. *Blue,* 34 S.W.3d at 555; *Texas Tech Univ. v Ward,* 280 S.W.3d 345, 348 (Tex. App.—Amarillo 2008, pet. denied). Unless a jurisdictional fact is challenged and conclusively negated, we must accept it as true when determining subject-matter jurisdiction. *See City of El Paso v. Heinrich,* 284 S.W.3d 366, 378 (Tex. 2009) (court reviewing plea to jurisdiction takes as true all evidence favorable to non-movant, indulging every reasonable inference and resolving any doubts in its favor).

Sovereign immunity deprives a Texas trial court of subject-matter jurisdiction for suits against the state and other governmental units, such as the Department, unless the state consents to suit. *Tex. Dep't of Transp. v. Jones,* 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). The tort claims act provides a limited waiver of sovereign immunity. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (West 2011 & Supp. 2015).[2]

[2] Further references to statutory sections are to the Texas Civil Practice & Remedies Code.

Tavira pled the Department engaged in the following acts of negligence for which immunity from suit was waived:

(1) operation of the telehandler;
(2) failing to "ensure[] the path above telehandler boom was kept clear of anyone walking, standing, or allowing anyone to pass under a raised load";
(3) failing to follow safety precautions;
(4) failing to properly train officers in safety procedures;
(5) failing to properly train inmates in telehandler operation and safety procedures;
(6) instructing Tavira to retrieve ties under the telehandler's boom platform while it was extended;
(7) failing to properly operate the telehandler;
(8) allowing an inexperienced person to operate the telehandler;
(9) failing to provide Tavira a safety helmet;
(10) overextending the telehandler boom to accommodate muddy and unstable ground;
(11) the failure of Department employee Officer Gaylon Betts to secure the work platform to the telehandler; and
(12) using the telehandler instead of a ladder to handle the netting.

Tavira's pleading continues, alleging the Department was negligent per se for failing to follow federal OSHA regulations for training employees, agents, and inmates in safe "fork lift operations . . . ." Tavira further asserts negligence of TDCJ was established under the doctrine of res ipsa loquitur. Among the supporting allegations Tavira alleges, "the Telehandler was within the exclusive control of the defendant's agent/trustee, Inmate Altamira, at the time the negligence occurred. . . . The defendant's agent, inmate Altamira, was negligent in the operation of the Telehandler, and his negligence was a proximate cause of the injuries and damages sustained by [Tavira]."

Operation or Use of the Telehandler, claims (1), (7), (10)

The nub of Tavira's waiver-of-immunity argument is that his personal injuries arise from the Department's operation or use of motor-driven equipment, the telehandler, and the Department's immunity is waived under section 101.021(1).[3]

It is undisputed that inmate Altamira was operating the telehandler when Tavira was injured. Tavira alleged Altamira was the Department's "agent" and "was negligent in the operation of the Telehandler, and his negligence was a proximate cause of the injuries and damages sustained by [Tavira]."

For purposes of the waiver of immunity under section 101.021(1), a governmental unit acts through its employees. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021; *Tex. A & M Univ. v. Bishop,* 156 S.W.3d 580, 583 (Tex. 2005). An employee under the act is "a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(2) (West Supp. 2015). Tavira did not allege that Altamira was a paid employee

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[3] A governmental unit is liable for:

> (1) 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:
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> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
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> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011).

of the Department although he states in his appellate brief the telehandler was operated by "an inmate who was reimbursed or paid and/or was under the direct supervision of the" Department. He made a similar claim in his response in the Department's plea to the jurisdiction in the trial court.

Tavira cites no authority, and we find none, indicating that an inmate on a Department work detail meets the act's definition of an employee. The statute indicates otherwise. In 1995, the Legislature added to the tort claims act section 101.029, which provides a waiver of the Department's immunity for damage or injury caused under some circumstances by the negligence of a prison inmate. TEX. CIV. PRAC. & REM. CODE ANN. § 101.029; *see Texas Dep't of Crim. Justice v. Lone Star Gas Co.,* 978 S.W.2d 176, 177 (Tex. App.—Texarkana 1998, no pet.) (discussing enactment of § 101.029). As the court pointed out in *Lone Star*, the Legislature's enactment of section 101.029 would have been unnecessary if inmates had been treated as employees under pre-existing law. 978 S.W.2d at 177; *cf. Nunnelley v. Livingston,* No. 07-11-0371-CV, 2012 Tex. App. LEXIS 3548, at *3 (Tex. App.—Amarillo May 3, 2012, no pet.) (per curiam) (mem. op.) (finding no authority for idea that inmates are entitled to pay for "work time" or "good time").[4]

Tavira further asserts, concerning the waiver of section 101.021(1), the Department operated or used the telehandler because its employee, Officer Betts, supervised the work and actually directed Altamira with hand signals. But the waiver of immunity under section 101.021 does not extend to negligent supervision absent an

[4] Section 101.029 does not apply, however, to injury sustained by an inmate. § 101.029(d). For that reason, Tavira properly does not rely on section 101.029.

independent waiver of immunity. *City of Laredo v. New Yorkers Apparel, Inc.,* No. 04-04-00887-CV, 2005 Tex. App. LEXIS 8953, at *11 (Tex. App.—San Antonio June 22, 2005, no pet.) (mem. op.) (holding in case under section 101.021(1), negligent supervision theory cannot be advanced absent proof of an independent waiver of immunity) (citing *City of Garland v. Rivera,* 146 S.W.3d 334, 338 (Tex. App.—Dallas 2004, no pet.)). *Cf. Bishop,* 156 S.W.3d at 581, 583. And Officer Betts' actions did not have the legal effect of "operation or use" of the telehandler by an employee of the Department. *See LeLeaux v. Hamshire-Fannett Ind. School Dist.,* 835 S.W.2d 49, 51 (Tex. 1992) (operation or use required under section 101.021(1) is "that of the employee"); *McLennan County v. Veazey,* 314 S.W.3d 456, 462 (Tex. App.—Waco 2010, pet. denied) (allegations that county commissioner was in charge of scene of house-moving, ordered the tow truck driver to back up, and directed movements of the driver did not allege operation or use by county); *Tarkington I.S.D. v. Aiken,* 67 S.W.3d 319 (Tex. App.—Beaumont 2002, no pet.) (also applying *LeLeaux*). Tavira's pleadings cannot be read to allege operation or use of the telehandler by the Department. He has not alleged conduct by the Department subject to the waiver of immunity found in section 101.021(1).

Non-use and Conduct Outside the Waiver

Tavira's allegations, (2)-(6), (8) and (12) are assertions the Department failed to train Altamira, or failed to organize or supervise the work properly. Immunity is not waived for such claims. *State Dep't of Pub. Safety v. Petta,* 44 S.W.3d 575, 580-81 (Tex. 2001) (failure to train); *County of Cameron v. Brown,* 80 S.W.3d 549, 554 (Tex. 2002) ("[T]he act does not waive immunity for discretionary decisions, such as whether

and what type of safety features to provide"). Nor is it waived for Tavira's claim of negligence per se founded on federal regulations. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021.

Failure to Secure the Work Platform, claim (11)

Tavira argues that by not securing the platform that fell on him to the telehandler's boom the Department misused tangible personal property and immunity was waived under section 101.021(2). The argument concerns allegation (11), asserting Officer Betts negligently failed to secure the work platform to the telehandler. We have already concluded Betts' actions regarding the telehandler did not constitute "use" of the machine. The allegation of an additional negligent omission does not transform his conduct into a "use" under the act's limited waiver of immunity. Moreover, "a state entity's failure to act does not invoke the Tort Claims Act's limited waiver of immunity." *University of Texas Medical Branch v. Qi,* 402 S.W.3d 374, 389-90 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see Kassen v. Hatley,* 887 S.W.2d 4, 14 (Tex. 1994) (failure to provide medication claim did not allege an injury arising from the "use" of the medication, but stated a claim for non-use of property that did not trigger waiver of sovereign immunity). Immunity was not waived as to Tavira's allegation (11).

Failure to Provide a Safety Helmet, claim (9)

As for allegation (9), Tavira argues the Department's failure to provide a safety helmet also was a misuse of tangible personal property for which immunity is waived. He relies on *Robinson v. Central Texas MHMR Center,* 780 S.W.2d 169 (Tex. 1989) (providing swimming attire without a life preserver) and *Lowe v. Tex. Tech Univ.,* 540

S.W.2d 297 (Tex. 1976) (providing a football uniform without a knee brace). But the precedential value of *Robinson* and *Lowe* is 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." *Kerrville State Hosp. v. Clark,* 923 S.W.2d 582, 585 (Tex. 1996). Otherwise, under section 101.021(2) immunity is waived "for claims based upon the 'use' of tangible personal property only when the governmental unit itself uses the property." *Rusk State Hospital v. Black,* 392 S.W.3d 88, 97 (Tex. 2012) (citing *San Antonio State Hosp. v. Cowan,* 128 S.W.3d 244, 245-46 (Tex. 2004)). Tavira does not allege a safety helmet was an integral safety component of any property the Department provided him, like the court saw a knee brace was a component of a proper football uniform. *Lowe,* 540 S.W.2d at 300. At most, with respect to the safety helmet, Tavira alleges a nonuse of personal property. The waiver of section 101.021(2) is not invoked by the mere nonuse of property. *City of North Richland Hills v. Friend,* 370 S.W.3d 369, 372 (Tex. 2012).

We find that, even when liberally construed, none of Tavira's claims come within a waiver of the Department's sovereign immunity. Accordingly, the trial court did not err by sustaining the Department's plea to the jurisdiction.

A plaintiff is generally entitled to a reasonable opportunity to amend its petition "unless the pleadings affirmatively negate the existence of jurisdiction." *Potter County v. Tuckness,* 308 S.W.3d 425, 431 (Tex. App.—Amarillo 2010, no pet.) (citing *Tex. A&M Univ. Sys. v. Koseoglu,* 233 S.W.3d 835, 839 (Tex. 2007)). Tavira has alleged at length the facts on which he bases his claims. More detailed pleadings will not alter the legal effect of events over which he had no control.

Motions Carried with the Case

We have carried two motions with the case to disposition. The Department asks us to strike two deposition excerpts attached to the appendix of Tavira's brief because they are not part of the record. Tavira responds with a motion to dismiss the Department's motion. We will deny both motions. Striking the complained-of items from the appendix to Tavira's brief is unnecessary. We gave no consideration to the challenged exhibits because they are not part of the plea to the jurisdiction record. An appellate court may not consider documents that were not filed in the trial court and are therefore not part of the appellate record. *Fox v. Alberto,* 455 S.W.3d 659, 668 n.5 (Tex. App.—Houston [14th Dist.] 2014, no pet.). As for Tavira's motion, striking the Department's motion is unnecessary since it is denied.

Conclusion

Having overruled Tavira's issue and sub-issues, we affirm the judgment of the trial court.

James T. Campbell
Justice