TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00294-CV

The City of Austin, Texas, Appellant

v.

Sayeed Anam, Individually and as Independent Administrator of The Estate of Zachary Anam, and Cara Anam, Individually, Appellees

FROM THE PROBATE COURT NO. 1 OF TRAVIS COUNTY
NO. C-1-PB-17-002191, THE HONORABLE GUY S. HERMAN, JUDGE PRESIDING

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

Sayeed Anam, individually and as independent administrator of the Estate of Zachary Anam; and Cara Anam, individually, sued the City of Austin; Macy's, Inc.; Macy's Retail Holdings, Inc.; Gabriel Pedrozza; and Jose Martinez for damages arising from an incident that resulted in death of their son, Zachary. The City filed a plea to the jurisdiction asserting that governmental immunity barred the Anams' claims against it. In response, the Anams argued the Texas Tort Claims Act waived the City's immunity. *See* Tex. Civ. Prac. & Rem. Code §§ 101.001-.109. After the trial court denied the plea to the jurisdiction, the City filed this interlocutory appeal. *See id.* § 51.014(a)(8). We will affirm the trial court's order.

BACKGROUND

In January 2017, employees of the Macy's department store at Barton Creek Square Mall in Austin detained Zachary Anam for allegedly shoplifting. The employees called the police, and Officer Iven Wall responded to the call. Wall arrested Zachary, who was despondent. Wall either did not search Zachary or conducted an inadequate search because Wall did not discover a handgun in a holster that was attached to the front of Zachary's waistband. Zachary was handcuffed with his hands behind his back, then placed in Wall's patrol car. Wall fastened Zachary's seatbelt. Before the vehicle began to move, the video shows that Zachary maneuvered the shoulder strap of the seatbelt behind his back, rather than across his chest. During the drive, the lap belt portion of Zachary's seatbelt became unfastened, which was visible to Wall via the patrol car's backseat video camera. Wall acknowledged he looked at the video of the backseat during the drive and noticed Zachary "squirming around." In addition, after the seatbelt became unfastened, the holster and gun were visible on the video. Wall did not stop to fasten Zachary's seatbelt, but he did ask Zachary "do you have anything else illegal on you?" and explained to that Zachary that he would be searched at the jail and could be charged with another felony. Wall further told Zachary that Zachary would spend the rest of his life behind bars, after which Zachary asked, "Officer, if I'm feeling suicidal, now's the time to tell you, right?" Wall replied, "they'll take care of you at the jail." Zachary then informed Wall, "I have a loaded firearm to my head." The City's brief explains that on hearing that Anam was armed, "Wall immediately stopped the vehicle on Sixth Street." Wall left the car with the engine running while he moved about fifteen feet away. Because he was not restrained by a seatbelt, Zachary was able to position himself across the back seat, while handcuffed, and hold the gun to

his own head. After struggling for about four minutes, while Wall was outside the car, Zachary managed to lay down, then pulled the trigger, resulting in his death.

Appellees sued the City under section 101.021 of the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code § 101.0121. The City filed a plea to the jurisdiction asserting that it was immune from suit and that the waivers of immunity in section 101.021(1) and (2) do not apply. The trial court denied the City's plea, and the City appeals.

ANALYSIS

Governmental immunity from suit implicates a court's subject-matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 926-27 (Tex. 2015); *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Subject-matter jurisdiction is a question of law, which we review de novo. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In reviewing a trial court's ruling on a plea to the jurisdiction, we begin with the plaintiff's live pleadings and determine if the plaintiff has alleged facts that affirmatively demonstrate the trial court's jurisdiction. *Id.* We construe the plaintiff's pleadings liberally, taking all factual assertions as true, and look to the plaintiff's intent. *Id.* If the pleadings fail to allege sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency, and the plaintiff should be afforded the opportunity to amend. *Id.* at 226-27. If, on the other hand, the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to replead. *Id.* at 227.

In addition, if a plea to the jurisdiction challenges the existence of jurisdictional facts, the court should consider evidence submitted by the parties and must do so when necessary to resolve the jurisdictional issues raised. *Id.* at 226 (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)). When the challenged jurisdictional facts implicate the merits of plaintiff's claims, as is the case here, the party asserting the plea must overcome a burden similar to a movant's burden on a traditional summary-judgment motion. *Id.* at 227-28; *Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.); *see* Tex. R. Civ. P. 166a(c). That is, the party asserting the plea must negate the existence of the challenged jurisdictional facts, which we would otherwise presume to be true. *Bacon*, 411 S.W.3d at 171. To meet its burden, the governmental unit asserting the plea must present evidence to support its assertion, which then shifts the burden to the plaintiff to show that a disputed material fact exists regarding the jurisdictional issue. *Miranda*, 133 S.W.3d at 228. If the relevant evidence (1) is undisputed and establishes that there is no jurisdiction, or (2) is disputed but fails to raise a fact issue regarding the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 227-28.

The Texas Tort Claims Act provides a limited waiver of governmental immunity for certain torts created by the Act. *See* Tex. Civ. Prac. & Rem. Code § 101.025. As relevant here, section 101.021 indicates:

> A governmental unit in the state 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:

> (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
>
> (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.

The Anams argue that either the waiver for death caused by use of a motor-driven vehicle or for death caused by a condition or use of tangible personal property applies. We first consider the vehicle-use requirement of section 101.021(a), which we strictly construe. *See LeLeaux v. Hamshire—Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992) (emphasizing the limited nature of waiver under the Tort Claims Act). The City argues that the vehicle-use requirement did not apply because Zachary's injury did not arise from the use of a motor vehicle. In construing the requirement that the injury "arise from" the use of a motor vehicle, the Texas Supreme Court has explained that "arises from" means "a 'nexus between the operation or use of the motor-driven vehicle or equipment and a plaintiff's injuries.'" *See Ryder*, 453 S.W.3d at 928 (quoting *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 543 (Tex. 2003)). The Court has "also described the threshold as something more than actual cause but less than proximate cause." *Id.* at 928-29 (*citing Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) ("'[A]rise out of' means . . . there is but[-]for causation, though not necessarily direct or proximate causation."). "Accordingly, plaintiff *can* satisfy the 'arising from' standard by demonstrating proximate cause," *id.* at 929 (emphasis added), but there is no requirement that a plaintiff do so—the plaintiff may instead show that an injury arose from use or operation of a

motor vehicle by showing that there is "but[-]for causation, though not necessarily direct or proximate causation," *Whitley*, 104 S.W.3d at 543.

The Anams allege that Wall's negligent failure to properly fasten Zachary's seatbelt proximately caused Zachary's death. Wall acknowledged his duty to keep Zachary safe and agreed that policy required him to fasten Zachary's seatbelt. He further agreed that it was his responsibility to refasten a seatbelt that came unfastened "if [he] notice[d] it." He agreed that it is well known that people with mental illness or suffering depression or who have been detained may be suicidal. The City urges that Zachary's death did not "arise from" use of the patrol car because there is no "nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment." *LeLeaux*, 835 S.W.2d at 51. "This nexus requires more than mere involvement of property." *Whitley*, 104 S.W.3d at 543. The Texas Supreme Court has explained that the use or operation "must have actually caused the injury." *Texas Nat. Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 869 (Tex. 2001).

To establish a waiver of immunity under the vehicle-use exception, the Anams must establish that their son's death "arose from" Wall's failure to fasten Anam's seatbelt and that failure to fasten the seatbelt constituted operation or use of a motor vehicle. Wall testified that department policy required him to fasten Zachary's seatbelt to keep Zachary safe. Although the parties agree that Zachary shot himself, the Anams urge that Wall's failure to safely transport Zachary by ensuring that his seatbelt remained fastened was also a cause of Zachary's death because "had the seatbelt been restraining Zachary, he could not have drawn the handgun." *See PHI, Inc. v. Texas Juvenile Justice Dep't*, 593 S.W.3d 296, 303-304 (Tex. 2019) (concluding a fact issue existed as to whether accident "arose from" parking vehicle without engaging the

emergency parking brake even though a worn gear-shift mechanism caused an accident in which the unoccupied vehicle rolled into a helicopter). The City relies on *Montoya v. Houston Independent School District*, 177 S.W.3d 332 (Tex. App.—Houston [1st Dist.] 2005, no pet.), to assert that allowing Zachary's seatbelt to remain unfastened merely "furnish[ed] the condition" that made the injury possible. In *Montoya*, a child jumped out of the emergency door of a school bus after unfastening a special childproof harness. *Id.* at 334-35. The First Court of Appeals in *Montoya* held that the allegations related to the bus driver's duty to respond to a child's conduct rather than the operation or use of the bus, and thus the vehicle-use waiver did not apply. *Id.* at 337. However, the First Court later recognized in *City of Houston v. Nicolai* that its opinion in *Montoya* "pre-dates the Texas Supreme Court's opinion in *Ryder*," in which the supreme court determined that a collision between two eighteen-wheeled trucks arose from use of a police cruiser because the cruiser was being positioned such that its headlights blinded or distracted one of the drivers involved in the collision. 539 S.W.3d 378, 391 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *see Ryder*, 453 S.W.3d at 928-30 ("Cause in fact is essentially but-for causation. In other words, a tortious act is a cause in fact if serves as 'a substantial factor in causing the injury and without which the injury would not have occurred.'" (quoting *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 774 (Tex. 2010))). *Nicolai* affirmed the denial of plea to the jurisdiction where an officer either did not fasten or improperly fastened the decedent's seatbelt and the decedent was killed when another driver collided with the patrol car. *Nicolai*, 539 S.W.3d at 385.

The City also relies on *City of Sugarland v. Ballard*, 174 S.W.3d 259, 265-66 (Tex. App.—Houston [1st Dist.] 2005, no pet.), to argue that not fastening a seatbelt cannot give rise to liability under the Tort Claims Act and to further argue that Wall could not be liable

because he was not "actively" operating or using the vehicle. *Ballard*, like *Montoya*, predates *Ryder* and *Nicolai*. The *Ballard* court concluded that "non-use" of property, such as a restraint, did not constitute use or operation of a motor vehicle. *Ballard*, 174 S.W.3d at 268. However, the Texas Supreme Court has recently held that that the vehicle-use waiver applied when a plaintiff alleged an accident arose from a driver's failure to engage an emergency parking brake. *PHI*, 593 S.W.3d at 302. In *PHI*, an unoccupied, parked vehicle rolled into and damaged a helicopter. *Id.* at 303. The primary cause of the accident was a worn gear-shift mechanism, but the court determined that failure to use the emergency parking brake also caused the accident. Thus, non-use of property, such as the emergency brake, could give rise to liability under the Tort Claims Act. *PHI* then expressly rejected the argument that the Tort Claims Act requires use or operation of a vehicle to be "active," explaining that "no court has the authority, under the guise of interpreting a statute, to engraft extra-statutory requirements not found in a statute's text." *Id.* at 305.

As *Ryder* and *PHI* illustrate, improper use or failure to use a vehicle's safety equipment can constitute use of a motor vehicle, and we conclude that under the circumstances presented here, Wall's failure to secure Zachary's seatbelt constitutes use or operation of a motor vehicle. Appellees allege and the City does not dispute that, had Zachary been properly restrained, he would have been unable to access the gun or position himself in a way that allowed him to shoot himself in the head. On the facts of this case and the record before us, we conclude the Anams have raised a fact issue as to whether Zachary's death arose from Wall not refastening Zachary's seatbelt. *Cf. Nicolai*, 539 S.W.3d at 385.

In arguing that section 101.021(1) does not apply, the City does not mention proximate cause except to use that phrase in conjunction with its argument that the vehicle

merely provided a setting for the injury—an argument that goes to whether the injury arose from the use of a motor vehicle. Although the City did not at any point argue to the district court or this Court that Zachary's injuries were not foreseeable, the dissent sua sponte raises that argument and concludes that Anam's injury was not foreseeable. We disagree. In addition to showing that Zachary's injuries arose from the use of a motor vehicle (and, correspondingly that the failure to use the seatbelt was at least an actual cause of Zachary's death), Appellees have raised a fact issue regarding whether Zachary's death was foreseeable. *See Ryder*, 453 S.W.3d at 929 (noting the components of proximate cause are cause in fact and foreseeability). Appellees' pleading states that Wall had a duty to ensure Zachary's seatbelt was securely fastened and that, had he done so, he would have discovered the handgun in Zachary's waistband or, alternatively, that a properly fastened seatbelt would have kept Zachary from accessing the gun. The dissent declares, without any basis in the record, that the sole foreseeable injury when a seatbelt is not fastened is injury arising from a collision or other abrupt stop. The dissent's speculation regarding the purpose of securing handcuffed detainees in a seatbelt could be met with further speculation that detainees are secured in seatbelts to prevent them from hurting themselves, hurting other people, or damaging patrol cars by kicking out the windows. The dissent's speculation also ignores the standard for foreseeability and the pleadings and evidence we are compelled to review, in a light most favorable to the plaintiff, in resolving this plea to the jurisdiction.

"Foreseeability requires only 'that the injury be of such a general character as might reasonably have been anticipated; and that the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen.'" *Ryder*, 453 S.W.3d at 929 (citing *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d

546, 551 (Tex. 1985)). "[F]oreseeability does not require that the exact sequence of events that produced an injury be foreseeable." *County of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex. 2002) (citing *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996)); *see Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex. 1970) (stating that foreseeability prong of proximate cause does not "require that [defendants] anticipate just how injuries will grow out of [the] dangerous situation" and "[t]he act of a third person which intervenes and contributes a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer if such act ought to have been foreseen"); *cf. Doe v. Boys Club of Greater Dall., Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) (determining that if club had discovered a volunteer's DWI convictions, the "information would not have caused the club reasonably to anticipate his subsequent sexual assaults on the minor plaintiffs"). "Instead, only the general danger must be foreseeable." *Id.* (declining to hold as a matter of law that it is unforeseeable that an unexpected change in lighting on a highway could impair a motorist's ability to avoid obstacles ahead and noting that the decedent's lack of care "may be an issue of comparative responsibility for the jury to decide, *see* Tex, Civ. Prac. & Rem. Code § 33.012, it does not render the subsequent harm in this case unforeseeable"). In this case, Wall acknowledged in his deposition that detainees are often mentally unstable or suicidal and that the use of a seatbelt was intended to keep detainees safe. His statement was not limited in its application to safety from a collision or abrupt stop. He acknowledged that he could see the video, which showed that for several minutes before the vehicle left the mall where Anam was apprehended, the shoulder strap of the seatbelt was behind Anam's back rather than across his chest. Less than three minutes after the car began moving, the video shows the lap belt of Anam's seatbelt clearly unbuckled and the holster at Zachary's waist. About seven minutes later, while the vehicle was briefly stopped, Zachary stood up from the seat to reposition himself,

after which Wall asked Zachary whether he had "anything else illegal" on him and informed him that he would be charged with an additional felony if anything else were found on him at the police station. At his deposition, Wall acknowledged having asked this question because he was concerned Zachary might have been in possession of something illegal because "lots of weapons are missed" when suspects are taken to jail. Wall commented on how Zachary was "squirming around" in the back seat. About four minutes after Wall asked whether Anam had anything else illegal—nearly eleven minutes after the unbuckled seatbelt and holster are visible on the backseat camera that Wall acknowledged viewing during the drive—Anam stated that he had a loaded gun to his head. At that point, Wall left the car and moved about fifteen feet away. He explained that Zachary remained in the backseat of the vehicle, while Wall warned others nearby who might have been endangered to "keep going" and "get out of the way"[1] during the four minutes between when Wall left the vehicle and Zachary pulled the trigger.

Given Wall's testimony regarding the suicidal tendencies of detainees, his awareness that Zachary was despondent, his general awareness that even detained suspects are often in possession of weapons, and the video showing that for most for the drive, Zachary was not properly restrained by the seatbelt and was evidently in possession of a weapon, we conclude the Anams have met their burden of raising a fact issue regarding foreseeability. Accordingly, we hold the trial court did not err in denying the City's plea to the jurisdiction. Having determined that the vehicle-use waiver applies, we need not address whether Zachary's death was caused by a condition or use of tangible personal property.

[1] *See Clark v. Waggoner*, 452 S.W.2d 437, 439-40 (Tex. 1970) (stating "foreseeability . . . does not require that [the defendant] anticipate just how injuries will grow out of that dangerous situation").

CONCLUSION

For the foregoing reasons, we affirm the trial court's order denying the City's plea to the jurisdiction.

Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Triana and Smith
Dissenting Opinion by Chief Justice Rose

Affirmed

Filed: July 30, 2020