FILED
22-0585
10/13/2022 4:14 PM
tex-69207310
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

CAUSE NO. 22-0585

IN THE SUPREME COURT OF TEXAS

TEXAS DEPARTMENT OF TRANSPORTATION,
Petitioner,

v.

MARK SELF AND BIRGIT SELF,
Respondents.

On Petition for Review from the Second Court of Appeals,
Fort Worth, Texas; Cause No. 02-21-00240-CV

RESPONDENTS' PETITION FOR REVIEW

Nicholas P. Laurent
State Bar No. 24065591
laurent@barronadler.com
Andrew York
State Bar No. 24066318
york@barronadler.com
Blaire A. Knox
State Bar No. 24074542
knox@barronadler.com
BARRON, ADLER, CLOUGH & ODDO, LLP
808 Nueces Street
Austin, Texas 78701
(512) 478-4995 | (512) 478-6022 (fax)

ATTORNEYS FOR RESPONDENTS MARK SELF & BIRGIT SELF

IDENTITY OF PARTIES AND COUNSEL

Petitioner:	Texas Department of Transportation ("TxDOT" or "Petitioner")
Trial and Appellate Counsel:	Catherine Fuller State Bar No. 24107254 catherine.fuller@oag.texas.gov Assistant Attorney General Transportation Division P.O. Box 12548 Austin, Texas 78711-2548 Telephone: (512) 936-1116 Facsimile: (512) 936-0888
Respondents:	Mark Self & Birgit Self ("the Selfs" or "Respondents")
Trial and Appellate Counsel:	Nicholas P. Laurent State Bar No. 24065591 laurent@barronadler.com Andrew York State Bar No. 24066318 york@barronadler.com Blaire A. Knox State Bar No. 24074542 knox@barronadler.com BARRON, ADLER, CLOUGH & ODDO, LLP 808 Nueces Street Austin, Texas 78701 Telephone: (512) 478-4995 Facsimile: (512) 478-6022
Non-Appealing Defendant:	T.F.R. Enterprises, Inc. ("TFR")
Trial Counsel:	Jennifer D. Aufricht State Bar No. 01429050 jaufricht@thompsoncoe.com Sean R. Hicks

State Bar No. 24072479
shicks@thompsoncoe.com
THOMPSON COE
700 N. Pearl Street, 25th Floor
Dallas, Texas 75201-8209
Telephone: (214) 871-8200
Facsimile: (214) 871-8209

Non-Appealing Defendant: Lyellco, Inc. ("Lyellco")

Trial Counsel:

Catherine L. Kyle
State Bar No. 1177860
ckyle@chmc-law.com
Scott G. Marcinkus
State Bar No. 24099703
smarcinkus@chmc-law.com
CHAMBERLAIN MCHANEY, PLLC
901 S. MoPac Expressway
Bldg. I, Suite 500
Austin, Texas 78746
Telephone: (512) 474-9124
Facsimile: (512) 474-8582

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page

Rules and Statutes

STATEMENT OF THE CASE

Nature of the Case:	The Plaintiffs, Mark Self and Birgit Self, sued the Texas Department of Transportation (TxDOT) under the Texas Tort Claims Act and for inverse condemnation after Plaintiffs' trees were removed from the Plaintiffs' property during a TxDOT tree and brush removal project off FM 677 in Montague County. CR.180-86; 210-25.
Trial Court:	The Honorable Jack A. McGaughey, presiding in the 97th Judicial District Court of Montague County, Texas.
Trial Court Disposition:	The trial court denied TxDOT's plea to the jurisdiction on July 7, 2021. CR.468. (App. A).
Court of Appeals Disposition:	Justice Bassel, joined by Justices Wallach and Walker, in a memorandum opinion on rehearing reversed the portion of the trial court order denying the plea to the jurisdiction on the inverse condemnation claim, but affirmed in part and reversed in part the denial of the plea on the TTCA claim. *Tex. Dep't of Transp. v. Self*, No. 02-21-00240-CV, 2022 WL 1259094 (Tex. App.—Fort Worth Apr. 28, 2022, pet. filed) (mem. op.) (Apps. C & D). Motions for rehearing and rehearing en banc were denied.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal because the appeal presents a question of law that is important to the jurisprudence of the state, and because it involves the construction of a statute.

ISSUES PRESENTED

1. Whether the record presents fact issues as to the elements of the immunity waiver in Section 101.021 of the Civil Practice and Remedies Code, such that TxDOT's plea to the jurisdiction on the Selfs' Tort Claims Act claim was properly denied?

2. Whether Section 101.021 of the Civil Practice and Remedies Code—assuming proximate causation by an employee is established—requires that the damage at issue arise from the operation or use *by an employee in close physical proximity to and direct control of* a motor-driven vehicle/equipment, or simply that the damage arise from the operation or use of a motor-driven vehicle/equipment?

3. Whether the record presents fact issues as to the elements of the Selfs' inverse condemnation claim, such that TxDOT's plea to the jurisdiction on that claim was properly denied?

I.
STATEMENT OF FACTS

The record contains extensive evidence that (a) acts and omissions of TxDOT employees proximately caused the damage at issue, (b) the damage arose from the use of motor-driven equipment and vehicles, and (c) a direct nexus exists between the "injury negligently caused by a governmental employee" and the machine operation of such equipment and vehicles.

A. The Selfs own property fronting FM 677.

The Selfs own the real property at issue, which is located in Montague County on FM 677 (the "Property"). CR 180–81; 228; 240–44.

B. TxDOT hired TFR to clear brush and remove trees along FM 677.

In January 2020, TxDOT and T.F.R. Enterprises, Inc. ("TFR") entered into Contract No. 12194216 for "Tree and Brush Removal in Montague County" (the "Contract"). CR 331–438. Among other things, the Contract called for:

- "Trees to be removed shall be *marked* by the State with a red, white or orange 'X', painted on the trunk" [CR 335]
- Quantities for tree removal "shall be *identified* by the engineer prior to work being performed" [CR 337]
- "For trees *marked* for removal, the diameter is determined by . . ." [CR 338]
- At formal pre-construction conference: (a) "discussed perform work within *designated work spaces only*," (b) "Trees to be removed shall be *marked* by the State with a red, white or orange 'X', painted on the

trunk," (c) "trimming/brush removal . . . from *right-of-way line to right-of-way line*" [CR 256–57]

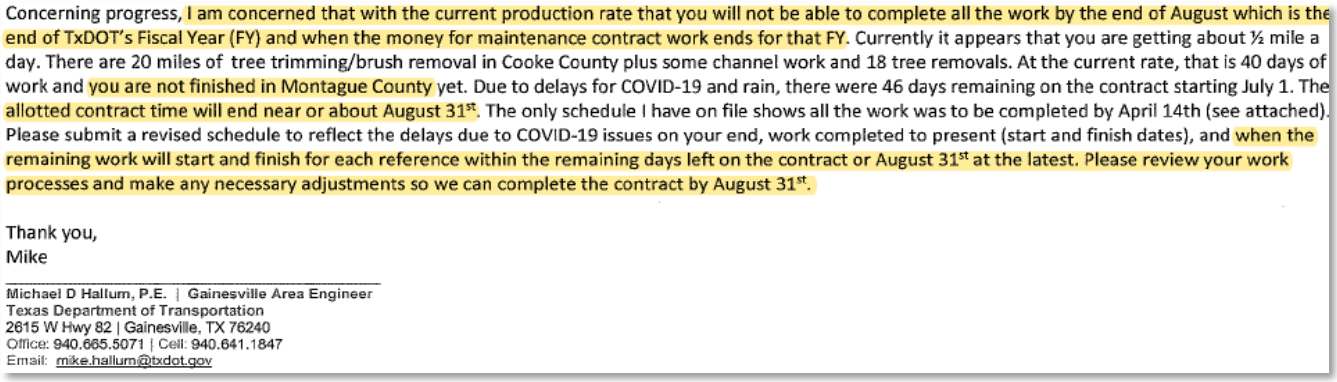
- "Perform tree and brush removal and trimming from *right of way line to right of way line* or other widths and locations shown on the *plans*. . . . Remove trees of various diameters as shown on the *plans*, or as directed." [CR 275; 359]

The contract price for the Contract was approximately $336,000 [CR 431], with possible adjustments up or down depending on the number of trees actually removed by TFR. To that end, the pre-construction conference notes included:

- "Coordinate the day after work performed to get item quantities established for payment" [CR 264]
- "Mark additional trees to be removed (not on plans) and get quantities to Chris for $ approval" [*Id.*]

C. TFR fell behind in its work on behalf of TxDOT.

However, in July 2020, TxDOT expressed concerns that TFR was not moving quickly enough:



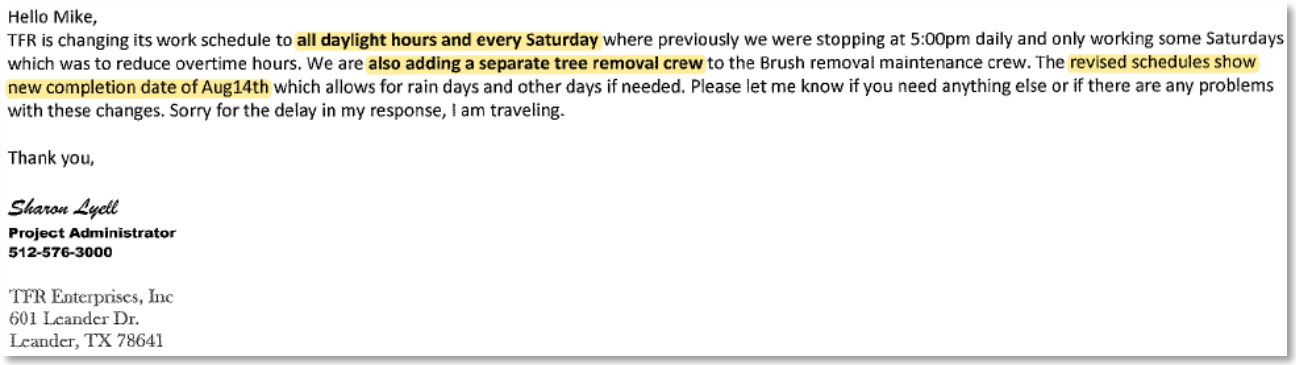
Concerning progress, I am concerned that with the current production rate that you will not be able to complete all the work by the end of August which is the end of TxDOT's Fiscal Year (FY) and when the money for maintenance contract work ends for that FY. Currently it appears that you are getting about ½ mile a day. There are 20 miles of tree trimming/brush removal in Cooke County plus some channel work and 18 tree removals. At the current rate, that is 40 days of work and you are not finished in Montague County yet. Due to delays for COVID-19 and rain, there were 46 days remaining on the contract starting July 1. The allotted contract time will end near or about August 31st. The only schedule I have on file shows all the work was to be completed by April 14th (see attached). Please submit a revised schedule to reflect the delays due to COVID-19 issues on your end, work completed to present (start and finish dates), and when the remaining work will start and finish for each reference within the remaining days left on the contract or August 31st at the latest. Please review your work processes and make any necessary adjustments so we can complete the contract by August 31st.

Thank you,
Mike

Michael D Hallum, P.E. | Gainesville Area Engineer
Texas Department of Transportation
2615 W Hwy 82 | Gainesville, TX 76240
Office: 940.665.5071 | Cell: 940.641.1847
Email: mike.hallum@txdot.gov

CR 279.

In response, in an email dated July 16, TFR agreed to start working essentially around the clock, and added a new crew with apparently minimal (if any) experience with this type of project:



Hello Mike,
TFR is changing its work schedule to **all daylight hours and every Saturday** where previously we were stopping at 5:00pm daily and only working some Saturdays which was to reduce overtime hours. We are **also adding a separate tree removal crew** to the Brush removal maintenance crew. The revised schedules show new completion date of Aug14th which allows for rain days and other days if needed. Please let me know if you need anything else or if there are any problems with these changes. Sorry for the delay in my response, I am traveling.

Thank you,

Sharon Lyell
Project Administrator
512-576-3000

TFR Enterprises, Inc
601 Leander Dr.
Leander, TX 78641

CR 279.

D. TFR hired Lyellco to help with the TxDOT project.

This effort to fast-track the project to beat an artificial budgetary deadline led to TFR executing a subcontract with Lyellco Inc. ("Lyellco") in July 2020. CR 440–45. According to public Secretary of State records, the president and registered agent of Lyellco is Sharon Lyell, who signed the email above as TFR's project administrator. Thus, this was not an arms-length relationship.

E. Defendants removed 22 trees from the Selfs' Property.

Days later, on July 23, Lyellco personnel removed the twenty-two trees at issue from the Property.[1]

[1] At least 30 trees were removed in total. Of those, at least 22 were located either entirely or partially within the Property's boundaries (and outside of the public right-of-way). CR 228; 232–38.

TFR has confirmed in discovery that the tree damage "arose from" the use of chainsaws and a Bobcat provided by Lyellco, and a "bucket truck" provided by TFR:

INTERROGATORY NO. 3: Please identify the equipment used to remove trees on Plaintiffs' Property, on any properties that immediately adjoin Plaintiffs' Property, and on any FM677 public right-of-way adjacent to Plaintiffs' Property. In answering this interrogatory, please state if any such equipment is motor-driven.

ANSWER:

Lyellco used its own chainsaws and Bobcat, and also used a bucket truck provided by TFR. Also, see bates labeled documents: DEF_TFR_000264-274, which are incorporated by reference.

CR 292.

Lyellco's work records confirm the same:

ACTIVITY	QTY	RATE	AMOUNT
Tree Removal -July 20-24 3 Man Work Crew Truck, Trailer, Bobcat. Chainsaws (4 work days at $1,500/day)	4	1,500.00	6,000.00
	BALANCE DUE		**$6,000.00**

CR 296.

F. TxDOT instructed TFR and Lyellco on what trees to remove.

Finally, there is ample evidence that one or more TxDOT employees—including Todd Russell—directed TFR and/or Lyellco to clear "fence to fence." CR 229 (Self Declaration: "After learning of the tree destruction, I contacted TxDOT, as set forth in more detail in Exhibit 4. I was informed by TxDOT personnel that the

right-of-way was not surveyed, and the contractors were simply instructed to 'clear everything between the fences.'").

This admission against interest by TxDOT is confirmed by contemporaneous TxDOT emails, showing that Mr. Russell provided the instructions for which trees should be removed:

From: Glenn Allbritton
Sent: Thursday, July 23, 2020 2:57 PM
To: Michael Beaver
Cc: Larry Gulley
Subject: FW: FM 677 ROW Stump Removal

Mike – Just to let you know, Shane contacted me earlier today about a property owner upset about trees cut down near his property. Todd did direct the contractor to cut the trees down, but they were on the state highway side of the fence. Since this complaint, they did determine that it is a 100' ROW out there and after measuring with a wheel one of the trees is maybe 6" on his property and all others are within that 50' ROW from centerline. Of course, we are not exactly perfect when measuring from the centerline with a wheel. It appears that the property owner might get a survey. Regardless, I directed Shane to give him the OCC claim address to send his concern into. I'm not 100% sure that's the right place to go with this issue, but I think it's a good start on the claim process should his survey prove that those trees are in fact on his property.

Glenn

CR 307.

This "fence-to-fence" instruction is further confirmed by TxDOT's discovery responses:

Request for Interrogatories No. 6:
Please identify any efforts TxDOT or T.F.R. took to ensure it was only clearing or maintaining trees or vegetation within the FM677 public right-of-way and not on private property.

OBJECTION(S):

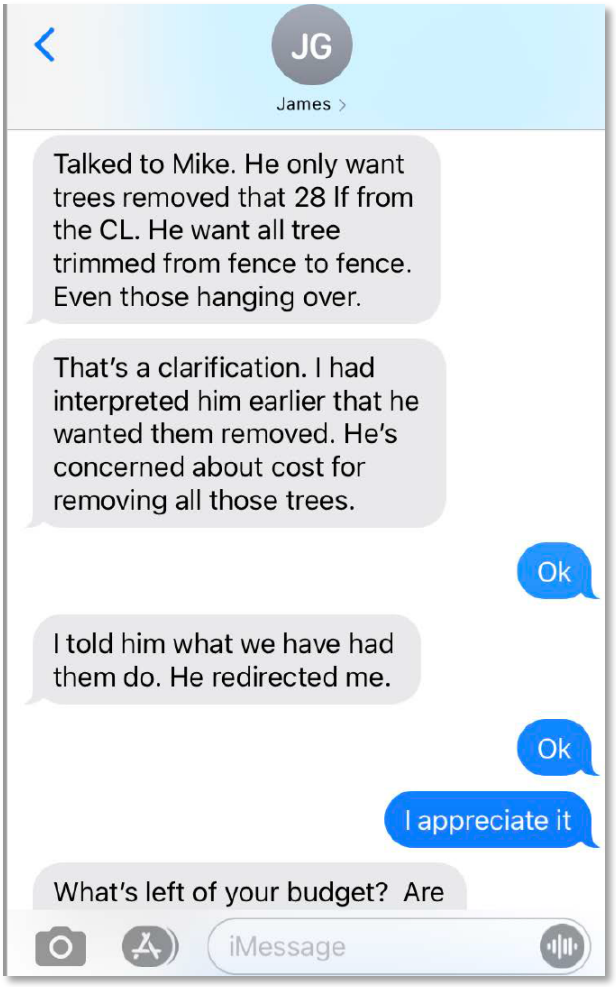
Overly Broad
TXDOT objects on the basis that the request is overly broad, vague and ambiguous and is beyond the scope of discovery allowed by the Texas Rules of Civil Procedure. Plaintiffs' interrogatory amounts to nothing more than a fishing expedition which is prohibited under Texas law. Further, TxDOT objects to this discovery request because the discovery can be obtained from some other source that is more convenient, less burdensome, or less expensive. Tex. R. Civ. P. 192.4(a).

Subject to and without waving the foregoing objection(s) and/or assertion(s) of privilege, TxDOT responds as follows:

Fence-to-fence has been the standard method of determining the right of way. Plans were provided and areas were discussed at the pre-work meeting. Plans of the pre-work meeting are produced with TxDOT's *Response to Request for Production of Documents*. There were also phone communications between T.F.R. and TxDOT inspector.

CR 286.

Moreover, contemporaneous communications between Mike Hallum (TxDOT Area Engineer), James Gibbs (TxDOT Gainesville), and Todd Russell (TxDOT Inspector) confirm that internal confusion, budget concerns, and casual definition and alteration of work scopes contributed to the problem:



CR 299.

The above text chain confirms that *after* the Selfs' trees were removed, TxDOT altered its work scope instructions to limit *removal* of trees to twenty-eight linear feet on either side of the roadway center line, with *trimming* from fence to fence, which was evidently an update to the instructions that were in place the day the Selfs' trees were removed. Sensibly, the twenty-eight-foot requirement[2] would require the crew to use a tape measure or other technique to confirm the limits of the

[2] The full right of way width was 60 feet, or 30 feet from the centerline.

tree-removal zone, which they had evidently never done on this project. But the change came too late to benefit the Selfs.

Finally, TxDOT has confirmed in interrogatory answers that "no surveys were conducted in association with this project," and "TxDOT is not aware of any communications with Plaintiff prior to clearing or maintaining of trees or vegetation on this project." CR 287–88; 228–30.

II.
SUMMARY OF ARGUMENT

Sovereign immunity is often a tough pill to swallow for an injured plaintiff. But when a statute waives immunity in a particular situation, a plaintiff should be able to rely on the plain language of that statute.

This Petition for Review argues that the statute at issue must be construed as written, meaning that two questions control: (a) was the damage proximately caused by acts or omissions of a TxDOT employee?, and (b) did the damage arise from operation or use of motor-driven vehicles or equipment? While this inquiry involves examining foreseeability and the nexus between the employee's negligence, the machine operation, and the injury, the statute does *not* require that a government employee be physically or directly operating the machinery at issue.

In this case, the Texas Tort Claims Act waives immunity for claims involving:

> "property damage . . .

> *proximately caused* by the *wrongful act or omission or the negligence of an employee* acting within his scope of employment if . . .
>
> the property damage . . . *arises from* the operation or use of a *motor-driven vehicle or motor-driven equipment* [and] the employee would be personally liable to the claimant according to Texas law."

As set forth in more detail below, both of those elements are demonstrated by the record evidence. At the very least, fact issues as to each element required the denial of TxDOT's plea to the jurisdiction.

TxDOT's argument on appeal boils down to this—*because the individuals physically operating the motor-driven equipment and vehicles were not TxDOT employees, TxDOT remains immune*. But such a requirement simply does not exist in the plain language of the statute, and the line of cases cited by TxDOT does not create such a requirement and is otherwise distinguishable. Rather, those cases confirm that courts should not "engraft extra-statutory requirements not found in a statute's text," and that "the "statute itself—and only the statute—provides the governing rule of decision."

TxDOT interprets the Tort Claims Act to require that a TxDOT "employee" must be physically operating the vehicle/equipment for the immunity waiver to apply. The court of appeals also discussed numerous cases affirming liability where "direct control" existed, which the court of appeals defined as "both close physical

proximity to the equipment while it is in operation and direction so precise that the State tells the third party in physical control of the equipment which direction and how far to move." Op. on Reh'g at 31.

But no party has asserted that those requirements are stated *in the plain language of the statute*—the Act merely requires that a TxDOT employee's "wrongful act or omission or the negligence" be the "*proximate cause*" of the damage. And it is axiomatic that there may be more than one proximate cause of a given loss. Here, one of those causes was the acts and omissions of TxDOT employees,[3] and a direct nexus connects those acts and omissions to the machine operation and injury at issue.

III.
ARGUMENT

A. Standard of Review.

"Whether a court has subject-matter jurisdiction is a question of law, which [appellate courts] review de novo." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012).

"In reviewing a grant or denial of a plea to the jurisdiction, [appellate courts] determine whether the plaintiff's pleadings, construed in favor of the plaintiff, allege

[3] Moreover, based on TxDOT's actual control and contractual control rights, there remain fact issues as to whether TFR and Lyellco (and their respective personnel) satisfy the definition of "employee" under the Tort Claims Act.

sufficient facts affirmatively demonstrating the court's jurisdiction to hear the case." *Id.* In considering a plea to the jurisdiction, pleadings are construed in favor of the plaintiff and courts look to the pleader's intent. *Tex. Dep't of Parks & Wildlife v Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

A plea to the jurisdiction is a dilatory plea that can challenge the face of the pleadings or the existence of jurisdictional facts. *See Miranda*, 133 S.W.3d at 226–27. When a plea to the jurisdiction goes beyond the pleadings and includes evidence intended to challenge the existence of jurisdictional facts, the trial court must exercise its discretion to decide "whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case." *Id.* at 227. "If the evidence creates a *fact question* regarding the jurisdictional issue, then the trial court *cannot grant* the plea to the jurisdiction." *Id.* at 227–28 (emphasis added); *see also Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) ("[W]hen a plea to the jurisdiction challenges the existence of jurisdictional facts with supporting evidence, the standard of review mirrors that of a traditional summary judgment: all the evidence is reviewed *in the light most favorable to the plaintiff* to determine whether a genuine issue of material fact exists . . . .") (emphasis added).

B. The Texas Tort Claims Act waives immunity for Plaintiffs' tort claims.

1. Overview of Tort Claims Act.

Section 101.021 of the Texas Tort Claims Act provides:

> 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

TEX. CIV. PRAC. & REM. CODE § 101.021 (emphasis added). The Act also confirms that: "Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter." *Id.* § 101.025(a).

In addition, the Act defines "employee" as "a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control." *Id.* § 101.001(2).

2. Because acts and omissions of a TxDOT employee proximately caused the damage, and the damage arose from operation or use of motor-driven vehicles and equipment, the Act applies and TxDOT is not immune.

Section 101.021 could easily have included language requiring that the equipment be physically operated (or directly operated, or any other formulation) by an employee, but it did not. Indeed, the *LeLeaux* opinion cited by TxDOT states that (a) the statute itself simply does not say whose operation is required, and (b) what *is* required is a *nexus* between the injury proximately caused by the negligence of a government employee and the operation or use of the motor-driven vehicle:

> The phrase, "arises from", requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment. While the statute does not specify whose operation or use is necessary—the employee's, the person who suffers injury, or some third party—we think the more plausible reading is that the required operation or use is that of the employee.

LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992).

LeLeaux involved a parked school bus in which nobody was present other than the injured sixteen-year-old plaintiff. *Id*. The bus was empty, the engine was not running, and the student was attempting to enter through the rear emergency door, where she hit her head on the top of the door frame. *Id.*

The Court noted that the bus was "not in operation," was "parked, empty, with the motor off," and ultimately was "nothing more than the place where Monica happened to injure herself." *Id.* at 51. The Court therefore held that the injury did *not* "arise out of the use or operation of the bus," and therefore immunity was not waived under the Tort Claims Act. *Id.* at 52.

The court's discussion of "whose operation is necessary" under the statute (quoted above) only considered the "employee's, the person who suffers injury, or some third party." The *LeLeaux* decision had nothing to do with distinguishing *employee*-operators from *independent-contractor*-operators. Rather, the Court was considering whether an injured *plaintiff's* "operation" of the vehicle could be sufficient. The Court focused on the existence of a nexus, which it found lacking based on the specific facts presented: "The phrase, 'arises from', requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment." *Id.* But such a nexus is decidedly present in this case, where TxDOT specifically instructed TFR/Lyellco on which trees to remove to carry out TxDOT's project, directed "fence to fence" removal, and failed to follow contract requirements that TxDOT mark the trees designated for removal.

The Court did not hold anything with respect to operation of equipment by an independent contractor, and certainly not in a situation where the nexus between the "injury negligently caused by a governmental employee" and the machine-operation was so clear. Also notably, the *LeLeaux* decision was a 5-4 vote, and the dissent begins: "Once again the majority has rewritten a statute to suit its fancy." *Id.* at 54.

The above comment from the 1992 dissenting opinion was recently embraced in a unanimous decision in *PHI, Inc. v. Texas Juv. Just. Dep't*, 593 S.W.3d 296 (Tex.

2019). In *PHI*, an unoccupied government cargo van rolled backwards down an incline into a grounded helicopter. *Id.* at 299. The government-employee driver parked the van but failed to engage the emergency brake, and the van rolled into the privately owned helicopter. *Id.* The trial court denied the Department's plea to the jurisdiction, but the intermediate court reversed, holding that the Act is "is limited to cases where the vehicle was in 'active' operation or use 'at the time of the incident.'" *Id.* at 301 (*citing Ryder Integrated Logistics, Inc. v. Fayette Cty*., 453 S.W.3d 922, 927 (Tex. 2015)). The Supreme Court reversed again, and found that immunity was waived.

In explaining its decision, the *PHI* court discussed both *LeLeaux* and *Ryder*, which involved a collision between two large trucks that occurred while a deputy sheriff was attempting to pull over one of the trucks. *Id.* at 304. The *Ryder* opinion included a sentence purporting to require "active" operation at the time of the incident, but the Supreme Court in *PHI* clarified and confirmed 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; *see also Sem v. State*, 821 S.W.2d 411, 416 (Tex. App.—Fort Worth 1991, no writ):

> The striking feature about this [Section 101.021] when it is broken down into its component parts, is that it neither requires that the State own nor that it directly use the vehicle or property that causes the death. We are not permitted by statutory construction to add additional

> language to the statute unless it is necessary to give effect to clear legislative intent.

The same rule applies here and confirms that when a TxDOT employee proximately causes an injury that arises from operation of motor-driven equipment, the Act does not *also* require that the employee be physically operating (or near) the equipment. And no appellate decision does add—or could even have the authority to add—such a requirement to the Tort Claims Act. *See id.* (sentence in *Ryder* concerning "active" operation was "not intended to replace the statute or add elements to it, nor could it have done so. *The statute itself—and only the statute—provides the governing rule of decision*.") (emphasis added).

In responding to the Selfs' argument that the physical/direct-operation-by-employee requirement is not found in the Act itself, the court of appeals noted: "As the opinion reflects, neither our standard nor the holdings of the cases that we cite for its formulation are created from whole cloth. The myriad opinions that we analyzed have their genesis in the following statement in the Texas Supreme Court's opinion in *LeLeaux*." Op. on Reh'g at 32 n.6. And those opinions *do* follow *LeLeaux*'s lead. But *LeLeaux* has very little to say about the situation faced by the Selfs because *LeLeaux* did not involve an independent contractor, nor did it involve individuals who who were following instructions from a government employee when they destroyed the property at issue.

In addition, the requirement of "close physical proximity to the equipment"—part of the more "lenient" line of cases as characterized by the court of appeals—makes little sense in the digital era, when instructions and directions from people more than 20 feet away are often more consequential than those given on site. And again, such a requirement is not found in the statute.

3. TxDOT's slippery slope concerns are unfounded.

The straightforward reading of the statute for which the Selfs advocate does not create blanket government liability for *all* vehicle/equipment accidents on government jobs. Rather, a defendant must show that a TxDOT employee *proximately caused* the damage at issue, meaning the acts or omissions of TxDOT employees were the cause in fact of the damage, and that such an outcome was foreseeable. TxDOT can avoid findings of proximate cause in many situations by structuring its contracts and actual working relationships accordingly. For example, TxDOT in this case could have confirmed in the contract that TFR/Lyellco was responsible for confirming which trees were in the right of way. Instead, TxDOT retained the responsibility for designating and marking trees (but didn't mark them) and directed that the trees be removed. *See* CR 307 excerpted *supra* ("Todd did direct the contractor to cut the trees down").

As the court of appeals noted: "TxDOT is suffering the consequences of how it drafted the contract at issue and, perhaps, the instructions issued by its employees.

TxDOT could have protected itself in the contract by limiting the determinations that it took on itself to make." Op. on Reh'g, 44 n.8.

4. The record evidence confirms that TxDOT employee(s) proximately caused the injury.

The first requirement for application of the Act's waiver of immunity is that the property damage must be "proximately caused" by the "wrongful act or omission or the negligence of an employee." TEX. CIV. PRAC. & REM. CODE § 101.021. Here, the evidence establishes that (a) TxDOT did not mark the trees to be removed with an "X" as required by the contract documents and its internal procedures, (b) TxDOT performed no surveys, and failed to create a written plan identifying the trees to be removed, (c) TxDOT did not communicate with the Selfs, and (d) TxDOT specifically instructed TFR/Lyellco to remove trees "fence to fence" despite not measuring the right-of-way, and generally doing *nothing* to confirm whether the fence was located on the right-of-way line, or further into the Selfs' property. These actions and omissions by TxDOT constitute proximate causes of the damage at issue.

In addition, even assuming for argument that the Act requires an "employee" to be physically operating the equipment/vehicle at issue, fact issues remain and additional discovery is needed with respect to who exactly was operating the equipment and whether or not those individuals and entities were "employees" as defined by the Tort Claims Act. In particular, to the extent TxDOT retained the "legal right to control" the "details" of TFR/Lyellco's work, as suggested by the

emails and text messages cited above, then those individuals and entities may satisfy the definition. *See, e.g.*, CR 279; 299; 307. There is already evidence sufficient to create a fact issue on the "employee" issue—including the extremely detailed nature of the contract itself, and the numerous examples of actual control exerted by TxDOT personnel (both formally and informally) as described above and discussed in more detail in Respondents' contemporaneously filed Response to Petitioner's Petition for Review.

5. The record evidence confirms that the property damages arose from the operation or use of motor-driven vehicles and equipment.

The evidence produced by the Defendants conclusively establishes that motor driven vehicles and equipment—including a bucket truck, bobcat, and chainsaws—were used to remove the trees. These facts are undisputed. *See* TxDOT Pet. for Review at 2 ("Lyellco's employees removed trees from the Selfs' property with (1) a chainsaw and Bobcat provided by Lyellco and (2) a bucket truck provided by T.F.R.").

6. As a result, the Act applies and TxDOT's immunity is waived.

The evidence is conclusive that (a) the damage was proximately caused by acts or omissions of one or more TxDOT employees (including Todd Russell), and (b) the damage arose from operation or use of motor-driven vehicles or equipment.

At the very least, fact issues exist regarding both issues, which is sufficient to mandate denial of TxDOT's plea to the jurisdiction.

Denying TxDOT's plea to the jurisdiction is also consistent with common law and common sense. *See, e.g., Rosenthal v. Grocers Supply Co.*, 981 S.W.2d 220, 222 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("The question is: Does a company that hires an independent contractor to clear land have a duty to correctly identify the land? We hold it does."). When the State hires someone to destroy something, it should be held responsible when it designates the wrong target, whether or not such designation is made while standing in close proximity.

C. The elements of the Selfs' inverse-condemnation claim are supported by record evidence, or alternatively, fact issues exist for each element.

The court of appeals held that proof was lacking as to whether "TxDOT intended to cut down those of the Selfs' trees beyond the right-of-way or was substantially certain that any trees on their private property would be cut down," and that the Selfs failed to show TxDOT was "aware that its action [would] necessarily cause physical damage to certain private property, and yet determine[d] that the benefit to the public outweigh[ed] the harm caused to that property." Op. on Reh'g at 50.

The court of appeals cited the *Zetterlund* case as an example where the requisite intent existed, noting that in that case "employees of the City of Dallas were informed by a landowner that the City's contractors were using his property without

permission but continued that use for months after being informed and after agreeing to compensate the landowner for the use." Op. on Reh'g at 51-52 (citing *City of Dallas v. Zetterlund*, 261 S.W.3d 824, 837 (Tex. App.—Dallas 2008, no pet.)). The court of appeals continued: "*Zetterlund* held that there was evidence that damage to the landowner was substantially certain to result from the City's and their contractor's acts because they continued to use the property after being informed that they did not have permission to do so." *Id.*

In this case, TxDOT's actions and omissions made it substantially certain that the trees in questions would be destroyed in furtherance of a public project, and TxDOT failed to follow its own procedures for marking trees and confirming that all trees removed were in the right of way. To the extent TxDOT was not aware that the trees in question were privately owned, that ignorance is a result of TxDOT's acts and omissions as discussed above, its failure to communicate with property owners in advance, and its rapid removal of the trees before the owner had time to respond to the problem. These circumstances were under TxDOT's control (and not the Selfs') and should not negate the validity of the Selfs' claim. As stated above, when the State hires someone to destroy something, it should be held responsible when it designates the wrong target—even if it doesn't "intend" to destroy the wrong target.

IV.
PRAYER

FOR THESE REASONS, Respondents, Mark and Birgit Self, respectfully request that this Court grant this petition for review, affirm the trial court's order, reverse contrary portions of the decision of the court of appeals, and grant such other and further relief to which Respondents are justly entitled.

Respectfully submitted,

BARRON ADLER CLOUGH & ODDO, L.L.P.
808 Nueces Street
Austin, Texas 78701
(512) 478-4995 – Telephone
(512) 478-6022 – Facsimile

By: */s/ Andrew F. York*
Nicholas P. Laurent (SBN 24065591)
laurent@barronadler.com
Andrew F. York (SBN 24066318)
york@barronadler.com
Blaire A. Knox (SBN 24074542)
knox@barronadler.com

ATTORNEY FOR RESPONDENTS,
MARK SELF & BIRGIT SELF

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this Brief contains 4,246 words, and is in compliance with the Texas Rule of Appellate Procedure 9.4(i)(2)(B). Further, I certify that on October 13, 2022, I transmitted a copy of the foregoing to the following counsel by electronic mail:

Catherine Fuller
Assistant Attorney General
Transportation Division
P.O. Box 12548
Austin, Texas 78711-2548
O: (512) 936-1116
F: (512) 936-0888
catherine.fuller@oag.texas.gov
Counsel for Petitioner

Jennifer D. Aufricht
Sean R. Hicks
THOMPSON COE
700 N. Pearl Street, 25th Floor
Dallas, Texas 75201-8209
jaufricht@thompsoncoe.com
shicks@thompsoncoe.com
Counsel for T.F.R. Enterprises

Catherine L. Kyle
Scott G. Marcinkus
CHAMBERLAIN MCHANEY, PLLC
901 S. MoPac Expressway
Bldg. I, Suite 500
Austin, Texas 78746
ckyle@chmc-law.com
smarcinkus@chmc-law.com
Counsel for Lyellco, Inc.

/s/ Andrew F. York
Andrew F. York

No. 22-0585

IN THE SUPREME COURT OF TEXAS

TEXAS DEPARTMENT OF TRANSPORTATION,
Petitioner,

v.

MARK SELF AND BIRGIT SELF,
Respondents.

On Petition for Review from the Second Court of Appeals,
Fort Worth, Texas; Cause No. 02-21-00240-CV

APPENDIX

TAB A:
Trial Court Order

CAUSE NO. 2020-0331M-CV

MARK SELF and BIRGIT SELF, *Plaintiffs,*	§	IN THE DISTRICT COURT OF
v.	§	
TEXAS DEPARTMENT OF TRANSPORTATION, T.F.R. ENTERPRISES, INC., and LYELLCO, INC. *Defendants.*	§	MONTAGUE COUNTY
	§	97th JUDICIAL DISTRICT

ORDER DENYING DEFENDANT TEXAS DEPARTMENT OF TRANSPORTATION'S PLEA TO THE JURISDICTION

On this day, the Court considered Defendant Texas Department of Transportation's Plea to the Jurisdiction ("Plea"). After considering the Plea, and the argument, briefing, and evidence submitted by the parties, the Court finds the Plea should be and is DENIED.

SIGNED this 29th day of July, 2021.

JUDGE PRESIDING

TAB B:
Court of Appeals Opinion

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00240-CV

TEXAS DEPARTMENT OF TRANSPORTATION, Appellant

V.

MARK SELF AND BIRGIT SELF, Appellees

On Appeal from the 97th District Court
Montague County, Texas
Trial Court No. 2020-0331M-CV

Before Bassel, Wallach, and Walker, JJ.
Memorandum Opinion on Rehearing by Justice Bassel

MEMORANDUM OPINION ON REHEARING

I. Introduction

The core of the controversy is the removal of trees from Appellees Mark and Birgit Selfs' property by a contractor employed by Appellant Texas Department of Transportation (TxDOT), where the contractor cleared brush and trees from a farm-to-market road's right-of-way. The Selfs sued TxDOT and the contractor, claiming that the contractor had removed a number of trees on their property that were outside of the right-of-way. First, the Selfs alleged causes of action for trespass and negligence. To avoid the bar of governmental immunity that they recognized normally protects a State agency from a negligence suit, the Selfs claimed immunity was waived under the Texas Tort Claims Act (TTCA or the Act) because TxDOT exercised such control over the motor-driven equipment used by the contractor that, in essence, TxDOT employees were operating or using that equipment and because that use was a proximate cause of their damages. The Selfs also claimed that immunity was waived under the Act because TxDOT exercised such control over the contractor that it was no longer an independent contractor but instead was TxDOT's employee. The Selfs finally alleged that the destruction of their trees was an intentional taking of their property for a public use and thus constituted an inverse condemnation.

TxDOT responded to the Selfs' suit by filing a plea to the jurisdiction asserting that the Selfs had failed to allege or that the evidence demonstrated that TxDOT's

immunity was not waived because there was no valid waiver under the TTCA and because the Selfs did not have a viable inverse-condemnation claim. The trial court denied TxDOT's plea to the jurisdiction. TxDOT raises two issues on appeal asserting that the trial court erred because TxDOT is protected by sovereign immunity (1) from the Selfs' negligence claim and (2) from the Selfs' inverse-condemnation claim.

We resolve TxDOT's first issue by sustaining it in part and by denying it in part as follows: (1) the trial court erred to the extent that it found a fact issue existed regarding whether TxDOT was exercising such control over the motor-driven equipment used by the contractor to mean that TxDOT was operating or using that equipment, and (2) the trial court did not err by finding that a fact issue existed regarding whether the contractor was not an independent contractor but instead was TxDOT's employee. We sustain TxDOT's second issue because the act that the Selfs rely on to support their inverse-condemnation claim was not intentional in the sense required to support such a claim. We therefore affirm in part as to the denial of the plea to the jurisdiction on the independent-contractor claim and reverse and render in part solely as to the Selfs' claims for negligence and inverse condemnation.

Pending before this court are three motions: a motion for rehearing filed by the Selfs, and a motion for rehearing and motion for rehearing en banc filed by TxDOT. Although we deny both the Selfs' and TxDOT's motions for rehearing, we

withdraw our opinion and judgment dated February 10, 2022, and substitute the following opinion and judgment.

II. Factual and Procedural Background

The Selfs own an approximately 170-acre tract of land that adjoins a farm-to-market road in rural Montague County. The State holds a right-of-way easement that apparently runs a specified distance from the center line of the road. Sometime after the Selfs purchased the property, they replaced the fence fronting the farm-to-market road. The fence that the Selfs replaced sat on the boundary of the right-of-way easement and the portion of the Selfs' tract not burdened by the easement. When the Selfs replaced the fence, they placed the new fence so that it sat two to three feet further inside their property line than the original fence. In other words, the new fence created a two-to-three-foot gap between it and the boundary of the right-of-way easement. The Selfs claim that they built the new fence in this fashion to preserve trees that had grown along the original fence.

To maintain the right-of-way, TxDOT contracted in writing with T.F.R. Enterprises, Inc. (contractor) to remove brush and trees from the right-of-way. At some point, trees were removed up to the Selfs' fence line.

The Selfs sent a letter to TxDOT claiming that twenty-eight trees[1] had been removed that were wholly or partially in the area between the boundary of the right-of-way and their new fence line. The Selfs later documented the removal by

[1]The Selfs later reduced the number of removed trees to twenty-two.

having a survey performed that mapped their new fence line, the boundary of the right-of-way, and the location of the trees that they claimed had been improperly removed.

TxDOT claimed that it did not know that the Selfs had moved the fence. The Selfs do not claim that they had previously told TxDOT of the change in the fence's location but seek to shift the blame for the lack of communication to TxDOT by quoting TxDOT's interrogatory response that "TxDOT is not aware of any communications with [the Selfs] prior to clearing or maintaining of trees or vegetation on this project."

The Selfs assert that the trees should not have been removed in the gap between the boundary of their right-of-way easement and their new fence because TxDOT had no right to remove trees from an area outside the right-of-way; the Selfs claim that TxDOT and the contractor "did not acquire and neither has nor ever had any right to travel, work, cross, or otherwise engage in any activity on the [p]roperty outside the [farm-to-market road] public right-of-way."

To attribute responsibility for the trees' removal to TxDOT, the Selfs' brief highlights several provisions in various documents that they claim gave TxDOT control over the decision regarding which trees would be removed in performance of the right-of-way maintenance contract:

> •The General Notes/General Requirements for the contract provided: "[t]rees to be removed shall be marked by the State with a red, white[,] or orange 'X[,'] painted on the trunk"; quantities for tree removal "SHALL BE IDENTIFIED

> BY THE ENGINEER PRIOR TO WORK BEING PERFORMED"; and "FOR TREES MARKED FOR REMOVAL, THE DIAMETER OF TREES ARE DETERMINED BY MEASUREMENTS OF THE TRUNK CIRCUMFERENCE[.]"
>
> •A pre-construction conference agenda provided that "[t]rees to be removed shall be marked by the State with a red, white[,] or orange 'X[,'] painted on the trunk. For trimming/brush removal (channels) clear 50 feet either side of culvert center line and from right-of-way line to right-of-way line."
>
> •Standards promulgated by TxDOT that were made applicable to the project included the following: "Perform tree and brush removal and trimming from right[-]of[-]way line to right[-]of[-]way line or other widths and locations shown on the plans. . . . Remove trees of various diameters as shown on the plans[] or as directed."

The Selfs also highlight notes from the pre-construction conference, which provided the instruction to "[m]ark additional trees to be removed (not on plans) and get quantities to Chris [Peters with TxDOT] for $ approval."

Further, the Selfs cite to a text message that they claim indicates that TxDOT directed the area from which trees were to be removed:

> Talked to Mike[Hallum, a TxDOT engineer in the Gainesville area]. He only want[s] trees removed that [are] 28 lf from the CL.[2] He want[s] all tree[s] trimmed from fence to fence. Even those hanging over. That's a clarification. I had interpreted him earlier [to say] that he wanted them removed. He's concerned about [the] cost [of] removing all those trees.

Further, the Selfs reference an email containing the following communication between TxDOT employees:

> Mike[Beaver, a TxDOT district engineer] – Just to let you know, Shane [Watkins, a TxDOT supervisor in Montague County] contacted me earlier today about a property owner upset about trees cut down near his

[2]We interpret "lf" to mean linear feet and "CL" to mean center line.

> property. *Todd [Russell, a TxDOT inspector in Montague County] did direct the contractor to cut the trees down, but they were on the state highway side of the fence.* Since this complaint, they did determine that it is a 100' ROW out there[,] and after measuring with a wheel[,] one of the trees is maybe 6" on his property[,] and all others are within that 50' ROW from center[ ]line. [Emphasis added.]

Continuing, the Selfs reference an interrogatory response from TxDOT that they claim suggests TxDOT's involvement in the decision to clear the trees from fence to fence:

> **Request for Interrogatories No. 6:**
>
> Please identify any efforts TxDOT or T.F.R. took to ensure it was only clearing or maintaining trees or vegetation within the FM677 public right-of-way and not on private property.
>
> [Answer] Fence-to-fence has been the standard method of determining the right[-]of[-]way. Plans were provided and areas were discussed at the pre-work meeting. Plans of the pre-work meeting are produced with TxDOT's *Response to Request for Production of Documents*. There were also phone communications between T.F.R. and TxDOT inspector.

Finally on the question of what direction was given by TxDOT, Mr. Self filed an affidavit stating, "I was informed by TxDOT personnel that the right-of-way was not surveyed, and the contractors were simply instructed to 'clear everything between the fences.'"

Apparently to highlight that TxDOT did not make an effort to determine the dimensions of the right-of-way, the Selfs' brief states that TxDOT acknowledges that it conducted no surveys "in association with [the] project."

And the Selfs claim that if TxDOT had issued the instruction earlier to only remove trees within a measured distance of twenty-eight linear feet from the center line of the road and to perform only tree trimming from fence to fence, their trees would not have been cut down.

To compensate them for the loss of the trees, the Selfs sought $250,000 from the State. The State rejected the Selfs' claim by a letter that asserted,

> Our investigation of this matter has been completed and reviewed by the Attorney General's Office. It is their judgment that [TxDOT] committed no act of negligence.
>
> The Real Property Asset Map Survey for this area confirms the measurements for the Right[-]of[-]Way Easement for this roadway. An inspection of the Tree Trimming and Removal project was completed[,] and from the information obtained, it appears that the trees that were impacted were within the Right[-]of[-]Way Easement.

After TxDOT rejected the Selfs' claim, they filed suit against TxDOT and the contractor that performed the right-of-way maintenance.[3] The Selfs' petition asserted claims against TxDOT under the TTCA, relying on the assertion that TxDOT's actions fell under the waiver of sovereign immunity found in Section 101.021(1) of the Texas Civil Practice and Remedies Code that waives immunity for damages caused by the act of a state employee's operating or using motor-driven equipment. The petition alleged that "TxDOT's employee(s), while acting in the course and scope of their employment, were negligent and trespassed by clearing trees on the [p]roperty

[3]The Selfs later amended their petition to join the subcontractor—Lyellco, Inc.—that was hired by the contractor.

owned by [the Selfs] outside of the public right-of[-]way." The petition also asserted a claim for inverse condemnation by alleging in full that "[t]he above described intentional conduct on the part of TxDOT and its employees resulted in an unconstitutional taking of property owned by [the Selfs]—their trees—under [Article I,] [S]ection 17 of the Texas Constitution without adequate compensation."

TxDOT answered the Selfs' suit and pleaded the defenses of sovereign and official immunity. TxDOT later filed a plea to the jurisdiction, claiming that in view of the State's immunity, the trial court lacked subject-matter jurisdiction over the Selfs' claims.

TxDOT's plea to the jurisdiction challenged the Selfs' negligence claim on the ground that it did not fall within the terms of Civil Practice and Remedies Code Section 101.021's waiver of immunity because no TxDOT employee had used a motor-driven vehicle or motor-driven equipment to remove the Selfs' trees. TxDOT also asserted that no act of its employees damaged the Selfs because the party that TxDOT contracted with to remove the trees was an independent contractor and because the definition of "employee" in the TTCA specifically excludes an independent contractor. The plea to the jurisdiction next attacked the Selfs' inverse-condemnation claim, arguing that there was no evidence that TxDOT's actions were intentional or that the Selfs' property was taken for a public use. TxDOT supported its plea to the jurisdiction with the tree-removal contract, an email exchange with the

Selfs, TxDOT's answers to the Selfs' interrogatories, and the contractor's responses to the Selfs' disclosure requests.

The Selfs responded to TxDOT's plea to the jurisdiction. The response asserted that legal and factual issues existed that warranted the denial of the plea. To bring themselves within the waiver of immunity for motor-driven equipment, the Selfs pointed out that a chainsaw, a bobcat, and a bucket truck were used by the contractor to remove the trees. The Selfs argued that a fact issue existed on the question of whether TxDOT exercised such control over the acts of the contractor that the acts of TxDOT employees were a proximate cause of the Selfs' injuries. Thus, the Selfs asserted that immunity was waived under Section 101.021 because the acts of TxDOT proximately caused damages to the Selfs' property, even if no state employee physically operated the equipment. The Selfs also asserted that a fact issue existed regarding whether TxDOT exercised such control over the contractor's operation or use that the contractor was an employee of TxDOT rather than an independent contractor.

On the inverse-condemnation claim, the Selfs' response asserted that TxDOT's conduct caused damages to the Selfs' property because TxDOT acted intentionally "[b]y ordering its contractor (contrary to the written contract) to remove all trees up to the fence." Further, the Selfs claimed that removal of the trees maintained a public right-of-way and was thus a public use. The Selfs supported their response with twelve exhibits that documented (1) their title; (2) the trees removed; (3) the claim that

they made against TxDOT; (4) contracts and communications between TxDOT, the contractor, and the subcontractor; and (5) work records of the subcontractor.

In turn, TxDOT filed a reply to the Selfs' response. The reply argued that under the appropriate standard for determining independent-contractor status, the Selfs' evidence raised no fact issue that the contractor was anything other than an independent contractor. Further, because no TxDOT employee was present when the trees were removed and because the act of removal was performed by an independent contractor, TxDOT was not operating or using motor-driven equipment. On the inverse-condemnation claim, TxDOT contended that the act of ordering the removal of trees was not the type of intentional act that supported an inverse-condemnation claim and that there was no public use that could support an inverse-condemnation claim when damage resulted from an accidental act by the State.

After a non-evidentiary hearing on TxDOT's plea to the jurisdiction, the trial court sent a letter to the parties stating that

> [t]he [c]ourt finds that the [p]lea to the [j]urisdiction goes beyond the pleadings to challenge the existence of jurisdictional facts and that, accordingly, the [c]ourt must exercise discretion to determine whether the jurisdictional determination is ripe for a preliminary hearing. Reviewing all evidence now available in the light most favorable to the [Selfs], the [c]ourt finds that the evidence presented to the [c]ourt raises genuine issues of material fact regarding the jurisdictional issue.

The trial court then entered an order denying TxDOT's plea to the jurisdiction. TxDOT then perfected this interlocutory appeal.

III. Analysis

A. We set forth the standard of review and the procedural process that we utilize when addressing a plea to the jurisdiction.

"Sovereign immunity protects the State of Texas and its agencies and subdivisions from suit and from liability." *Matzen v. McLane*, No. 20-0523, 2021 WL 5977218, at *3 (Tex. Dec. 17, 2021). "Because the assertion of sovereign immunity implicates the courts' jurisdiction, immunity is properly raised in a plea to the jurisdiction." *Id.*

"Where a government entity challenges jurisdiction on the basis of immunity, 'the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity.'" *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015) (quoting *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003)). "Whether sovereign immunity defeats a trial court's subject-matter jurisdiction is a question of law . . . ." *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 904–05 (Tex. 2021). "We review orders on pleas to the jurisdiction *de novo*." *Matzen*, 2021 WL 5977218, at *3.

Resolution of a plea to the jurisdiction may be on the pleadings or an evidentiary record; "[a] plea to the jurisdiction 'may challenge the pleadings, the existence of jurisdictional facts, or both.'" *Tex. Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018)).

When a plea to the jurisdiction attacks the pleadings, the following principles apply:

- "If a plea 'challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause.'" *Id.*
- "In determining whether the plaintiff has met that burden, 'we liberally construe the pleadings, taking all factual assertions as true and looking to [the plaintiff's] intent.'" *Id.* (quoting *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015)).
- "If the pleadings do not contain 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 plaintiffs should be afforded the opportunity to amend." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004).
- "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Id.* at 227.

The following principles apply to a plea to the jurisdiction that goes beyond a facial challenge to the pleadings:

- When "the plea challenges the existence of jurisdictional facts, we must move beyond the pleadings and consider evidence when necessary to resolve the jurisdictional issues, even if the evidence implicates both subject-matter jurisdiction and the merits of a claim." *Clark*, 544 S.W.3d at 770–71.
- When a plea to the jurisdiction requires the consideration of evidence, we utilize a process that mirrors a traditional motion for summary judgment. *Id.* at 771. Thus, the following shifting burdens apply:
    - "Initially, the defendant carries the burden to meet the summary[-]judgment[-]proof standard for its assertion that the trial court lacks jurisdiction." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012).
    - "If [the defendant carries that burden], the plaintiff is then required to show that a disputed material fact exists regarding the jurisdictional issue." *Id.*
    - "If a fact issue exists, the trial court should deny the plea." *Id.*
    - "But if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law." *Id.*

- "In determining whether a material fact issue exists, we must take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in the plaintiff's favor." *Clark*, 544 S.W.3d at 771.
- Finally, a trial court may defer the decision on a plea to the jurisdiction: "[w]hether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

We address the question of whether there is jurisdiction on a claim-by-claim basis. *Amador v. City of Irving*, No. 05-19-00278-CV, 2020 WL 1316921, at *7–8 (Tex. App.—Dallas Mar. 20, 2020, no pet.) (mem. op.) ("[T]he Supreme Court has made clear that 'a plaintiff must demonstrate that the court has jurisdiction over . . . each of his claims; the court must dismiss those claims (and only those claims) over which it lacks jurisdiction.'" (quoting *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 152–53 (Tex. 2012))).

B. We conclude that TxDOT did not operate or use the motor-driven equipment that was used to remove the Selfs' trees; for this reason, TxDOT's governmental immunity is not waived under Section 101.021 of the Civil Practice and Remedies Code.

We turn initially to the portion of TxDOT's first issue challenging the trial court's determination that a fact issue existed on the question of whether TxDOT's immunity was waived under Section 101.021 of the Civil Practice and Remedies Code because state employees were a proximate cause of the Selfs' damages by the operation or use of motor-driven equipment. TxDOT's argument is straightforward: no TxDOT employee physically operated the equipment; therefore, Section 101.021 cannot apply. The Selfs respond that Section 101.021 does not require the physical operation of motor-driven equipment by a state employee and that no appellate decision adds or could legitimately add that requirement to the statutory provision. Their position is that the waiver provision "merely requires that the damage '*arise from* the operation or use of a motor-driven vehicle or motor-driven equipment'—not that a TxDOT employee be *physically operating* the vehicle/equipment." In essence, their argument is that so long as an act of a state employee proximately caused an injury and the injury arises from the operation or use of a motor-driven vehicle, then immunity is waived.

Both parties overlook more than twenty years of precedents that addresses the question of what type of control over a motor-driven vehicle or equipment is required to trigger Section 101.021's waiver. These precedents diverge. One line of cases does

not require a state employee to be operating the equipment but does require a state employee to be giving precise direction to a third-party operator to invoke the waiver provision. The other line of cases supports TxDOT's position that waiver requires physical operation by a state employee.

We need not decide which line of cases we will follow. Even if we adopt the line of cases accepting that a state employee may operate or use equipment though not in physical control, the evidence fails to raise a fact issue that TxDOT operated or used the contractor's equipment. The generalized instructions that TxDOT allegedly gave the contractor do not rise to the necessary level of control required even by the cases holding that the State can exercise control to such a degree that the State may be considered to be operating or using equipment without physical operation by a state employee.

1. We set forth the provision of the TTCA that is at issue and the parties' conflicting interpretations of it.

The TTCA provides that the State is shielded by governmental immunity unless a provision of the Act waives that immunity. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.025 (stating that "[s]overeign immunity to suit is waived and abolished to the extent of liability created by this chapter" and that "[a] person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter"). TxDOT and the Selfs clash over whether TxDOT's governmental immunity is waived

by Section 101.021, which is titled "Governmental Liability" and which reads as follows:

> 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.

Id. § 101.021.

In the trial court, the Selfs argued that a plain-language interpretation of Section 101.021 demonstrates waiver:

> [T]he evidence confirms that acts, omissions, and/or negligence of TxDOT employee(s)—including Mr. Todd Russell—*proximately caused* the property damage suffered by the Selfs. Such proximate-causation-by-an-employee is sufficient to trigger the [TTCA's] waiver of immunity, whether or not the same "employee" is physically operating the equipment when the damage takes place.

The act that the Selfs apparently claim was the proximate cause of the injury was a direction from Mr. Russell "to clear [trees from] 'fence to fence'" or his designating which trees to remove.

TxDOT supports its argument—that without physical operation by a state employee, there is no waiver—by citing the Texas Supreme Court's opinion of *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49 (Tex. 1992). *LeLeaux* involved a high-school student who injured herself by jumping through the rear emergency exit of a school bus that was parked with its engine turned off while the driver was not in the bus. *Id.* at 50–51. To support its contention that Section 101.021 requires a state employee to be physically operating the vehicle or equipment, TxDOT quotes *LeLeaux* and emphasizes portions of that quote as follows:

> This waiver of immunity [under Texas Civil Practice and Remedies Code Section 101.021] is a limited one. A school district is not liable for a personal injury proximately caused by a negligent employee unless the injury "arises from the operation or use of a motor-driven vehicle or motor-driven equipment." *Id.* The phrase, "arises from[,"] requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment. **While the statute does not specify whose operation or use is necessary**—the employee['s], the person who suffers injury, or some third party—**we think the more plausible reading is that the required operation or use is that of the employee. This requirement is consistent with the clear intent of the Act that the waiver of sovereign immunity be limited.**

Id. at 51 (emphasis added). Thus, TxDOT argues that Section 101.021 creates the bright line that without a state employee at the controls, there is no waiver, i.e., no nexus exists "between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment." *Id.*

2. We set forth the divergent authorities on the question of whether a state employee must physically operate motor-driven equipment for a waiver of immunity to occur under Section 101.021.

Two opinions followed on the heels of *LeLeaux* holding that the State can exercise such control over motor-driven equipment that, even though a non-State-employed third party is at the equipment's controls, the State is operating or using the equipment. The two opinions are *County of Galveston v. Morgan*, 882 S.W.2d 485 (Tex. App.—Houston [14th Dist.] 1994, writ denied), and *City of El Campo v. Rubio*, 980 S.W.2d 943 (Tex. App.—Corpus Christi–Edinburg 1998, pet. dism'd w.o.j.). These cases' principles have guided the courts that agree that the State can operate or use equipment physically controlled by a third party and have been the target of criticism for those courts that do not agree that operation or use can occur under those circumstances.

Morgan involved a claim that arose from an incident in which a truck dumping gypsum allegedly came into contact with an electrical line, causing an injury to a rider on the truck. 882 S.W.2d at 487–88. The truck's driver was an employee of a third-party contractor, but county employees acted as spotters who told the driver when to move forward and when to stop. *Id.* at 488. *Morgan* interpreted the language of Section 101.021 and *LeLeaux*'s definition of the section's terms to hold that the county was operating or using the truck under such facts even though the truck was driven by a non-county-employed third party:

> There is no requirement [in Section 101.021] that the vehicle in question be a county vehicle, only that a county employee "used" or "operated" the vehicle. *LeLeaux*[, . . .] 835 S.W.2d [at] 51 . . . . "Operation" refers to "a 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." [*Id.*] at 51. The spotters in question were county employees. They were a necessary part of the job. The spotters told the truck driver when to move forward, how far to move, when to raise his bed, how far to raise it, when to lower his bed, and when to stop. The movement of the truck and the laying of the gypsum was within the spotters' sole discretion. If a driver moved his truck contrary to the spotters' direction, he could be fired. *Although the spotters were not the drivers of the trucks, the spotters "used or operated" the trucks by exercising complete control over their "use or operation."*

Id. at 490 (emphasis added).

The next opinion, *Rubio*, involved a police officer who arrested a driver for driving with a suspended license. 980 S.W.2d at 944. The driver's family was in the vehicle when the officer arrested him. *Id.* After arresting the driver, the officer instructed the driver's wife, who was not a licensed driver, to follow him in the family's vehicle to the police station. *Id.* The officer allegedly showed the wife how to operate the vehicle by demonstrating the use of the gas and brake pedals. *Id.* While the wife was following the officer, she pulled out in front of another vehicle and was struck by that vehicle. *Id.* When sued, the city that employed the police officer argued that Section 101.021 did not apply because a governmental employee must actually be driving the motor-driven vehicle involved in the accident. *Id.* at 945. As had *Morgan*, *Rubio* did not read *LeLeaux* to mean that a governmental vehicle "had to be driven by a governmental employee, only that a governmental employee 'use' or

'operate' the vehicle." *Id.* (citing *LeLeaux*, 835 S.W.2d at 51). *Rubio* quoted the same language that we quoted above from *Morgan* to guide it in deciding whether the officer's directions constituted operation or use of the family's vehicle by the officer's instructing the driver's wife to follow him, explaining how to operate the vehicle, and leaving her with the choice of either following or being abandoned by the side of the road at midnight until other help arrived. *Id.* at 946. *Rubio* concluded that the officer exercised such control over the family's vehicle that he was in operation or use of it. *Id.* at 947.

In the more than twenty years since *Morgan* and *Rubio* were decided, they have been repeatedly cited by the courts of appeals. As noted, some agree with their holdings that precise direction from a governmental employee may constitute operation or use of motor-driven equipment even if the governmental employee is not at the controls. Other courts have found that holding too broad.

One of the first opinions analyzing *Morgan* and *Rubio* involved a claim that a sheriff's deputy had directed a property owner to build a berm on a road adjoining the business in order to cut off an avenue of escape for drag racers being pursued by the police. *Sepulveda v. Cnty. of El Paso*, 170 S.W.3d 605, 609 (Tex. App.—El Paso 2005, pet. denied). After the berm was installed, a driver claimed that he was injured when he hit the berm. *Id.* The driver claimed that the deputy had directed the construction of the berm by the property owner and thus had operated or used the property owner's front-end loader that was used in the berm's construction. *Id.* at 611. After

analyzing the holdings of *Morgan*, *Rubio*, and other cases, *Sepulveda* extracted the rule that there may be operation or use by a governmental entity of a third-party's motor-driven equipment if the governmental entity directly controlled the equipment's operation and concluded that *LeLeaux* did not hold otherwise. *Id.* at 613–14. *Sepulveda* concluded that, under its facts, there was no waiver under Section 101.021. *Id.* at 614.

Many of the cases that have followed *Morgan* and *Rubio* have examined whether directions given by law enforcement to a driver constitute operation or use by the State. The Fourteenth Court of Appeals recently performed a thorough analysis of these opinions in a case that involved an officer's telling an unlicensed driver to move the vehicle in which she was a passenger, resulting in an accident after the driver attempted to follow the officer's instructions. *Galveston Cnty. v. Leach*, 639 S.W.3d 268, 273–76 (Tex. App.—Houston [14th Dist.] Dec. 9, 2021, pet. filed). In addition to the prior *Morgan* and *Rubio* opinions, *Leach* inventoried a host of cases that date back to the 1970s and include the following:

- *Jackson v. City of Corpus Christi*, 484 S.W.2d 806, 809 (Tex. App.—Corpus Christi–Edinburg 1972, writ ref'd n.r.e.), involved a claim of negligent traffic control, which the court found not to constitute the operation or use of a motor vehicle.

- *Townsend v. City of Alvin*, No. 14-05-00915-CV, 2006 WL 2345922, at *3 (Tex. App.—Houston [14th Dist.] Aug. 15, 2006, no pet.) (mem. op.), involved a police officer's telling an unlicensed driver to go home, and the driver was subsequently involved in an accident. The court held that there was no operation or use because the officer "retained no control over [the driver's] vehicle, and [the driver] suffer[ed] no consequence for disobeying" the officer. *Id.*
- *City of Sugar Land v. Gaytan*, No. 01-18-01083-CV, 2020 WL 2026374, at *6 (Tex. App.—Houston [1st Dist.] Apr. 28, 2020, no pet.) (mem. op.), involved an accident that occurred while police officers were directing traffic during a bike race. The court concluded that the appellee had not alleged facts demonstrating that the "officers' direction or control of traffic constituted 'operation' or 'use' of a motor-driven vehicle" and held that the officers did not operate or use a motor vehicle involved in an accident. *Id.*
- *City of Socorro v. Hernandez*, 508 S.W.3d 1, 10 (Tex. App.—El Paso 2015, pet. denied), involved a police officer's activating his overhead lights and ordering the occupants of a disabled vehicle to push the vehicle out of the road. The court held that there were facts raising a waiver of immunity because "there were allegations and evidence that a

> governmental employee 'used' or 'operated' a vehicle by directly controlling the actions of the actual operator." *Id.*

Noting that the courts had engaged in fact-specific inquiries, the Fourteenth Court of Appeals distilled that "[t]he differing outcomes seem to have turned on whether the drivers in each case had complied with, or were in the act of complying with, the directions of a governmental employee who was present when the accident occurred." *Leach*, 2021 WL 5831123, at *6.

Other cases applying *Morgan* and *Rubio* do not involve following the directions of law enforcement but apply the principle that the terms "operation" or "use" under Section 101.021 require immediate, direct control:

- *City of Houston v. Ranjel*, 407 S.W.3d 880, 885–86 (Tex. App.—Houston [14th Dist.] 2013, no pet.), involved a suit against a city when a contractor's employees were injured while working on an airport's automated people-mover system, which was owned by the city but was operated and maintained by an independent contractor. After discussing *Morgan* and *Rubio*, *Ranjel* concluded that the city did not operate or use the people-mover system because

  > the undisputed evidence . . . show[ed] that [the city] contracted with [the independent contractor] to operate and maintain the [people-mover] system, that no [city] employees were present in the [people-mover] [s]ystem [c]ontrol [r]oom or at the actual scene of the train strike on the day it occurred, and that [the city] had no ability or

> contractual authority to control directly the operation or use of the [people-mover] trains.

Id. at 889–90.

- *Mt. Pleasant Indep. Sch. Dist. v. Elliott*, No. 06-13-00115-CV, 2014 WL 1513291, at *5 (Tex. App.—Texarkana Apr. 17, 2014, pet. denied) (mem. op.), involved injuries to a student when the brakes failed on a district-owned school bus that was operated and maintained by a third party. After discussing *Morgan*, *Rubio*, and other cases in the direct-control line of cases, *Elliot* concluded that "[t]he control theory of 'use or operation' of a motor vehicle appears to require direct control of the actions of the actual operator of the motor vehicle. Short of that, 'use or operation' under this theory must fail." *Id.*
- *El Paso Cmty. Coll. Dist. v. Duran*, 510 S.W.3d 539, 543 (Tex. App.—El Paso July 22, 2015, pet. denied), involved a student who was injured while riding a college-owned motorcycle provided for a motorcycle-safety class. Again, looking to *Morgan* and *Rubio*, *Duran* concluded that the rule to be derived from those cases was that in *Morgan* and *Rubio*, there was operation and use of a motor-driven vehicle because "the drivers operated the vehicles at the behest of government employees in positions of formal authority because they had no choice in the matter. They felt compelled to obey the employees' orders for fear of losing

something significant: in *Morgan*, loss of employment; in *Rubio*, loss of personal safety." *Id.*

- *Rodriguez v. City of Fort Worth*, No. 07-16-00037-CV, 2017 WL 6459532, at *5 (Tex. App.—Amarillo Dec. 8, 2017, no pet.) (mem. op.), involved a claim by a property owner that the city's independent contractor had erroneously demolished his property. The court rejected the claim that the city had operated or used motor-driven equipment because of its instructions to the independent contractor:

> Here, however, there is nothing in the record to show that City employees were involved with the demolition by "operating" or "using" motor-driven vehicles or equipment or by exercising any control over the independent contractor or its employees. No City-owned motor-driven vehicles or equipment were used in the demolition of [appellant's] property[,] and there is nothing in the record to support [appellant's] bare assertion that City employees were instructing the independent contractor or its employees or exercising any degree of control over the demolition. His pleadings do not establish that any City employee "used" or "operated" any motor-driven vehicle or equipment in carrying out the demolition. Consequently, [appellant] did not show that the City waived its governmental immunity.

Id.

- *City of El Paso v. Aguilar*, 610 S.W.3d 600, 602 (Tex. App.—El Paso 2020, no pet.), involved a claim by a pedestrian who was run over by a parade float that was pulled by a truck driven by a third party while the truck's

movements were being specifically directed by city employees. After analyzing the cases that we have discussed, the court concluded that the pedestrian had sufficiently pleaded and supported by evidence a waiver of governmental immunity "that the City used or operated the motor vehicle that caused her injury by directing the driver of that motor vehicle to move it forward." *Id.* at 605.

The deviation from the line of cases outlining the direct-control test for operation or use includes cases that advocate for a strict reading of *LeLeaux* and that disagree with the holdings of *Morgan* and *Rubio* and their progeny—that a governmental employee's direct control of a third party can satisfy the operation or use language of Section 101.021. The initial case in this line is *Tarkington Independent School District v. Aiken*, 67 S.W.3d 319 (Tex. App.—Beaumont 2002, no pet.). In *Tarkington*, a school employee told participants in a summer program to move furniture. *Id.* at 321–22. One of the participants used his personal vehicle in the task and injured another participant who was riding on the back of the truck. *Id.* at 322. *Tarkington* held that the trial court erred by denying the school district's plea to the jurisdiction. *Id.* at 326. To reach this holding, the court surveyed a number of authorities and cited the language from *LeLeaux* construing "employee" in Section 101.021 to mean a government employee. *Tarkington* rejected the holdings of *Morgan* and *Rubio* and held that "given the holding in *LeLeaux*[,] we do not accept the proposition, as espoused by these cases, that a school district necessarily engages in

'use' or 'operation' of a motor-driven vehicle when it negligently exercises control over non-employees." *Id.* at 325. In essence, *Tarkington* viewed the school district's actions as implicating a failure to supervise the program participant rather than the operation or use of a motor-driven vehicle. *Id.* In *Tarkington*'s view, the appellees were trying to read language into Section 101.021 that it did not have and that violated the construction placed on it by *LeLeaux*:

> Appellees would have us read the statute more expansively than *LeLeaux* stated it should be read. We decline to do so until directed otherwise by the Texas legislature or by the Texas Supreme Court. The record before us establishes that Tarkington I.S.D. did not own the vehicle and [that] its employee did not operate or use the vehicle. There is no nexus between [the injured appellee's] injuries and an employee's negligent operation or use of the vehicle.

Id. at 326.

The Waco Court of Appeals followed *Tarkington* in *McLennan County v. Veazey*, 314 S.W.3d 456 (Tex. App.—Waco 2010, pet. denied). *Veazey* dealt with claims against a county and a county commissioner that arose when the commissioner directed a wrecker operator regarding how to extricate a house that was being moved on a trailer from trees in which it had become ensnared. *Id.* at 458. The appellees in *Veazey* cited *Morgan* and *Rubio* to support their claim that the commissioner's direct supervision of the efforts to extricate the house constituted operation or use under Section 101.021. *Id.* at 459–60. The Waco Court of Appeals rejected the appellee's premise and relied on the more restricted holding of *Tarkington*, which it summarized as follows:

> The Beaumont Court did not accept [its appellees'] argument or the propositions advocated by *Morgan* and *Rubio*. Instead, and relying on the Texas Supreme Court decision in *LeLeaux*, the Beaumont Court held that [its appellees'] complaint did not fall within the scope of the waiver of immunity under the [TTCA].

Id. at 462. Because the commissioner had not operated or used the wrecker, immunity was not waived. *Id.* The Amarillo Court of Appeals has followed the holdings of *Tarkington* and *Veazey*. *See Tavira v. Tex. Dep't of Crim. Just.*, No. 07-14-00046-CV, 2016 WL 736062, at *3 (Tex. App.—Amarillo Feb. 24, 2016, pet. denied) (mem. op.) (holding that supervision by corrections officer of inmate's use of lift machine "did not have the legal effect of 'operation or use' of the telehandler by an employee of the [Corrections] Department").[4]

---

[4]The El Paso Court of Appeals has noted the divergence of *Veazey* and *Tarkington* from the line of cases that permit operation or use under Section 101.021 based on direct control by a governmental employee of a third party:

> On appeal, however, [the governmental entity] raises the argument that the reasoning of *Morgan* and *Rubio* is faulty and conflicts with *LeLeaux*'s pronouncement that the TTCA does not apply to situations in which a government employee was not operating the vehicle responsible for the plaintiff's injuries. We recognize that some Texas intermediate appellate courts have refused to adopt the reasoning of *Morgan* and *Rubio*. *See*[,] *e.g.*, . . . *Veazey*, 314 S.W.3d [at] 462 . . . ; *Elgin Indep. Sch. Dist. v. R.N.*, 191 S.W.3d 263, 268 (Tex. App.—Austin 2006, no pet.); *Tarkington* . . . , 67 S.W.3d [at] 326 . . . . But we have previously concluded that *Morgan* and *Rubio* do not conflict with *LeLeaux*. *See Sepulveda* . . . , 170 S.W.3d [at] 614 . . . .

Duran, 510 S.W.3d at 542 n.3.

3. The State did not operate or use the motor-driven equipment that was used to remove the Selfs' trees.

To resolve the question of whether the State operated or used the motor-driven equipment to remove the Selfs' trees, it is not necessary for us to decide which line of cases applying *LeLeaux* is correct. The more lenient line, which permits a third party's motor-driven equipment to be operated or used by the State, still requires direct control of that equipment. And direct control appears to mean both close physical proximity to the equipment while it is in operation and direction so precise that the State tells the third party in physical control of the equipment which direction and how far to move. At that point, according to the more lenient line of cases, the nexus envisioned by *LeLeaux* between the State's actions and the operation or use of the equipment exists. Here, that nexus is absent. The direction that the Selfs rely on to establish the operation or use of the contractor's equipment is a generalized direction to remove trees from fence line to fence line.[5] That allegation and its proof

[5]The Selfs' argument that TxDOT operated or used motor-driven equipment or vehicles in this case relies heavily on the Texas Supreme Court's recent opinion in *PHI, Inc. v. Texas Juvenile Justice Department*, 593 S.W.3d 296, 304–05 (Tex. 2019). The Selfs cite *PHI* for the proposition that the words in the phrase "operation or use" in Section 101.021 should be given their everyday meaning. *Id.* at 303. *PHI* used that holding to disagree with our court's holding that the term "operation" required "active" operation and rejected the suggestion in *Ryder Integrated Logistics* that active operation is required because the statutory language did not support that reading. 593 S.W.3d at 301, 305–06. *PHI* provides guidance on when operation or use by a state employee ends but little on the question of whether a state employee's control over a third party's physically operating the equipment constitutes operation or use. Thus, we turn to the decades-long litany of cases dealing with that issue for guidance rather

does not place a state employee in close proximity to the equipment while it was being used, nor does it create a fact question that the State was guiding the hand on the tiller with such precision that it constituted direct control. Thus, we conclude that the trial court erred by denying the aspect of the State's plea to the jurisdiction predicated on its assertion that there is not a waiver of immunity because the State was not operating or using equipment as those terms are used in Section 101.021 of the Civil Practice and Remedies Code.[6]

---

than trying to glean a guiding principle on the question from the apparently inapposite holding of *PHI*.

[6]In their motion for rehearing, the Selfs argue that we have read a requirement into Section 101.021 that is not found in its language, which is that a measure of control must be exercised by a State employee before there is operation or use of motor-driven equipment by that employee sufficient to invoke the waiver of Section 101.021. As the opinion reflects, neither our standard nor the holdings of the cases that we cite for its formulation are created from whole cloth. The myriad opinions that we analyzed have their genesis in the following statement in the Texas Supreme Court's opinion in *LeLeaux*:

> The phrase, "arises from[,"] requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment. While the statute does not specify whose operation or use is necessary—the employee['s], the person who suffers injury, or some third party—we think the more plausible reading is that the required operation or use is that of the employee. This requirement is consistent with the clear intent of the Act that the waiver of sovereign immunity be limited.

835 S.W.2d at 51. The Selfs' argument appears to be predicated on an interpretation of Section 101.021 that the motor-driven equipment can be used or operated by anyone so long as a governmental employee had some role that proximately caused property damage, personal injury, or death. Neither the Selfs' brief nor their motion for rehearing explain why such a broad reading is reasonable or why the supreme

C. We conclude that there is a fact question regarding whether the contractor who removed the Selfs' trees was TxDOT's employee and not an independent contractor. The trial court did not err by denying TxDOT's plea to the jurisdiction directed at the Selfs' claim that a TxDOT employee—the contractor—caused their damages by operating or using motor-driven equipment.

We turn now to the remainder of TxDOT's first issue that addresses the Selfs' other avenue to avoid TxDOT's sovereign immunity by arguing that fact issues exist regarding whether the contractor was an "employee" of TxDOT, thus making its operation or use of motor-driven equipment attributable to the State. By this means, the Selfs apparently seek to avoid the obstacle created by having to prove that TxDOT exercised such control over the contractor that the contractor's operation or use of the motor-driven equipment was then attributable to TxDOT, even though no TxDOT employee was at the equipment's controls. TxDOT counters with the argument that the contractor and thus its subcontractor were independent contractors whose acts are not attributable to TxDOT. Because there is evidence that TxDOT controlled the details of the contractor's work in determining the area from which trees were to be removed—both in its contract and through instructions given by TxDOT employees—we conclude that the trial court did not err by denying TxDOT's plea to the jurisdiction on this ground. TxDOT's direction over which trees the contractor was to clear created a fact question regarding whether the

---

court's differing interpretation is flawed. If the Selfs feel that *LeLeaux*'s interpretation is in error, they will have the opportunity to make that argument to the court with the power to change it.

contractor was an independent contractor or TxDOT's employee.

The TTCA's definition of "employee" is the starting point for the analysis of this issue. Under the statutory definition, an employee "means 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). But the definition then goes on to describe categories of those who do not qualify as an employee by stating that the term "does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control." *Id.* To qualify as an employee, the State must pay the person and exercise control over him. *Ranjel*, 407 S.W.3d at 890.

The overarching question in determining whether a person is an employee or an independent contractor turns on who "has the right to control the progress, details, and methods of operations of the work." *See Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002). We look to two sources to resolve the control question; it can be determined "by evidence of a contractual agreement that explicitly assigns a right to control; and second, in the absence of such contractual agreement, by evidence of actual control over the manner in which the work was performed." *Olivares v. Brown & Gay Eng'g, Inc.*, 401 S.W.3d 363, 368–69 (Tex. App.—Houston [14th Dist.] 2013), *aff'd*, 461 S.W.3d 117 (Tex. 2015). And

> [a] written contract expressly providing for an independent-contract relationship is determinative of the parties' relationship in the absence of extrinsic evidence indicating the contract was subterfuge, the hiring party exercised actual control in a manner inconsistent with the contract, or if the written contract has been modified by a subsequent agreement.

Id. at 369.

Usually, the question of whether a person is an employee is a question of fact. *Id.* When, however, the facts are undisputed, the question becomes one of law. *Id.* And the interpretation question regarding what level of control is provided by a contract is one of law. *Id.*

In deciding whether the allocation of control impacts the independent-contractor determination, "[a]n independent contractor is one who, in pursuit of an independent business, undertakes specific work for another using his own means and methods without submitting to the control of the other person as to the details of the work." *Id.* at 368. The intensity of control required to conclude that someone is an employee requires control "not merely [of] the end sought to be accomplished, but also the means and details of its accomplishment." *Id.* (quoting *McNamara*, 71 S.W.3d at 312).

Courts generally look to the following factors in deciding whether a contractor is an independent contractor:

> (1) the independent nature of the person's business; (2) the person's obligation to furnish necessary tools, supplies, and material to perform the job; (3) the right to control progress of the work, except as to final results; (4) the time for which the person is employed; and (5) the method of payment, whether by time or by the job.

Id. at 369.

But the independent-contractor determination under the TTCA is tinctured by the fact that the Act's "definition of 'employee' does not require that a governmental unit control *every* detail of a person's work." *Fryday v. Michaelski*, 541 S.W.3d 345, 350 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (quoting *Mark v. Scheele*, 120 S.W.3d 865, 867 (Tex. 2003)).

And in a case outside the TTCA, the supreme court focused the independent-contractor determination on who controlled the act that caused the injury at issue. *See JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860, 864–65 (Tex. 2021). In dealing with a personal-injury claim, the Texas Supreme Court recently provided an overview of the process of determining the independent-contractor question and how that inquiry focuses on who controls the details of the injury-causing event:

> As a general rule, one who employs an independent contractor has no duty to ensure that the contractor safely performs its work. *AEP Tex. Cent. Co. v. Arredondo*, 612 S.W.3d 289, 295 (Tex. 2020). However, an exception to this rule arises when "the employer retains some control over the manner in which the contractor performs the work that causes the damage." *Id.* (quoting *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 791 (Tex. 2006)); *see also Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) (adopting Restatement (Second) of Torts § 414 (1977)). A plaintiff can prove the requisite control by establishing that the general contractor either actually controlled the manner in which the subcontractor performed its work or had a contractual right to do so. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002) (citing *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999)). In either case, the "control must relate to the condition or activity that caused the injury." *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 528 (Tex. 1997). Further, the control retained or exercised by the general contractor must "extend[] to 'the means, methods, or details of the independent

> contractor's work.'" *Arredondo*, 612 S.W.3d at 295 (quoting *Bright*, 89 S.W.3d at 606); *see also Chapa*, 11 S.W.3d at 156 (noting that a general contractor "must have some latitude to tell its independent contractors what to do, in general terms, . . . without becoming subject to liability").

Id. (footnotes omitted).

An opinion that predates *JLB* noted the supreme court's prior application of the Restatement section that it had cited—Section 414 of Restatement (Second) of Torts—and that section's application to a situation analogous to the one before us. *See Rosenthal v. Grocers Supply Co.*, 981 S.W.2d 220, 222 (Tex. App.—Houston [1st Dist.] 1998, no pet.). *Rosenthal* held that directing a contractor to clear a particular tract of land is sufficient control of the details of a contractor's work to obviate the independent-contractor defense. *Id.* Because the general contractor had given the contractor direction to clear a particular tract, *Rosenthal* reversed a summary judgment in the general contractor's favor with the following holding:

> [General contractor] asserted it owed no duty to [appellant] because [contractor] was an independent contractor. "The general rule is that an owner or occupier [of land] does not have a duty to see that an independent contractor performs its work in a safe manner." *Redinger* . . ., 689 S.W.2d [at] 418 . . . . It is the independent contractor's duty to perform its work in a safe manner. *Id.*

Redinger adopted the following rule:

> > One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

> *Id.* (citing Restatement (Second) of Torts § 414 (1965)). To create liability, the control must be more than a general right to order the work to stop or start, to inspect progress, or to receive reports. *Id.* It was.
>
> [General contractor] admits it directed [contractor] to clear the wrong property. Though [general contractor] did not control *how* [contractor] cleared the land, it completely controlled one vital "detail": *what* land was to be cleared. That creates a fact issue on liability, both as to [general contractor's] responsibility for the contractor's acts and also as to [general contractor's] responsibility for its own error.

Id.

In *Communities Helping Communities, Inc., v. City of Lancaster*, a federal court applied the holding of *Rosenthal* to conclude that a fact issue existed regarding whether a general contractor was liable for instructing a contractor to demolish a house, even though the general contractor did not control the specific details of the demolition. No. 3:06-CV-1436-P, 2007 WL 9711683, at *5 (N.D. Tex. July 18, 2007) (order). *Lancaster* saw a distinction between the rule that applies to injury cases, which holds that merely telling a contractor when to stop and start work does not create a duty on the part of the general contractor, and the situation before it:

> Because of the focus on physical safety, it is logical that a general contractor who retains control over only the stopping, starting, and progression of the work would not be held responsible for injury to others occurring at the hand of the subcontractor. However, in this case, the injury complained of by [appellant] is not a physical injury[] but rather the alleged improper demolition of property. Accordingly, the Court finds that the City, even if it only retained the right to order or stop a demolition, may have a duty of control over [the contractor] that would make the City liable for an improper demolition at the hands of [the contractor]. Here, both the City and [the contractor] assert that the other had the ultimate responsibility to confirm *what* properties to demolish and *when* the demolition should occur. From the evidence

> presented, it is unclear whether the City should have contacted [the contractor] to prevent demolition, or vice versa, prior to its occurrence.

Id.; *see also Schievink v. Wendylou Ranch, Inc.*, 227 S.W.3d 862, 867 (Tex. App.—Eastland 2007, pet. denied) ("Assuming that [property owner] had a duty to ascertain the correct boundary line and to instruct [fence-building contractor] in that respect and that [property owner] retained control over the location on which [fence-building contractor] was to build the fence, [property owner] had a duty to use reasonable care in the exercise of that control.").

Guided by the precedents suggesting that telling a contractor which land to clear is a sufficient act of control to pierce the shield of independent-contractor status, we hold that the trial court did not err by apparently deciding that there was a fact question at the point it decided to deny TxDOT's plea. We have outlined the provisions of the contract between TxDOT and the contractor and the guidelines setting out TxDOT's supervisory role that appear to give TxDOT control over the central details of which trees were to be removed or the area from which to remove trees. Further, there is an email stating that a TxDOT employee "did direct the contractor to cut the trees down, but they were on the state highway side of the fence." And Mr. Self's affidavit stated, "I was informed by TxDOT personnel that the right-of-way was not surveyed, and the contractors were simply instructed to 'clear everything between the fences.'" The Selfs' brief focuses on this very aspect of

TxDOT's control in arguing that fact issues were raised on the independent-contractor question:

> In addition, even assuming for argument that the Act requires an "employee" to be physically operating the equipment/vehicle at issue, fact issues remain and additional discovery is needed with respect to who exactly was operating the equipment and whether or not those individuals and entities were "employees" as defined by the [TTCA]. *In particular, to the extent TxDOT retained the "legal right to control" the "details" of TFR/Lyellco's work, as suggested by the emails and text messages cited above, then those individuals and entities may satisfy the definition. There is already evidence sufficient to create a fact issue on the "employee" issue—including the extremely detailed nature of the contract itself, and the numerous examples of actual control exerted by TxDOT personnel (both formally and informally) as described above—and additional discovery (including depositions) will be necessary to fully develop that issue.* [Emphasis added.] [Record references omitted.]

We agree that the facts highlighted by the Selfs are sufficient to create a fact question regarding whether the contractor's doing right-of-way maintenance was as an employee or as an independent contractor.

TxDOT does little to join issue with the Selfs' argument. In its opening brief, TxDOT argues as follows:

> TxDOT held a standard pre-construction conference on January 24, 2020, in order for "TxDOT, Contractor, Utility Companies, Law Enforcement Agencies, etc. to discuss the schedule and methods of operation. To acquaint all concerned with the lines of authority and communication and [to] determine the responsibilities and duties of the contract and department personnel." However, after this meeting, T.F.R. had broad discretion on how to complete the project, so long as the job was performed in "accordance with the applicable environmental laws, rules, regulations[,] and requirements" and [the] terms of the contract. T.F.R.'s broad discretion is also demonstrated by TxDOT's simple direction to perform the brush and tree removal from fence line to fence line. This broad discretion is further demonstrated by TxDOT['s] not being present on the ground and only providing

> direction through a few phone conversations. [Record references omitted.]

We interpret TxDOT's argument to be that instruction on what area to clear is not sufficient control to create a question on independent-contractor status and that sufficient control exists only if TxDOT actually told the contractor how to cut down the trees. For the reasons outlined, we conclude that focusing on that level of direction or control is too narrow in this case.[7]

---

[7]TxDOT argues in its motions for rehearing that it cannot be liable for a negligence claim because no person who was an employee of TxDOT removed the Selfs' trees. In the motions, TxDOT raises the issue that the trees were removed by a subcontractor of the company contracted with by TxDOT for maintenance of the right of way. TxDOT's rehearing argument now proceeds that the subcontractor could not be an employee who falls within the definition of "employee" found in Section 101.001(2) of the Civil Practice and Remedies Code. The basis for the new argument is that the subcontractor was paid by TxDOT's contractor and not the State and thus was not "in the paid service of a governmental unit" as required by Section 101.001(2)'s definition. This argument is a different one from the one that TxDOT raised previously when it argued that both the original contractor and subcontractor were independent contractors of TxDOT because TxDOT did not exercise sufficient control over either for them to be employees. The cases that TxDOT now cites to support the proposition in the motions for rehearing were not in its prior briefs in this court (nor were they presented to the trial court). An appellate court "generally do[es] not address issues raised for the first time on rehearing." *Segundo Navarro Drilling, Ltd. v. San Roman Ranch Min. Partners, Ltd.*, 612 S.W.3d 489, 496 (Tex. App.—San Antonio 2020, pet. denied) (op. on reh'g); *OAIC Com. Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 747 (Tex. App.—Dallas 2007, pet. denied) (op. on reh'g) ("The sole purpose of a motion for rehearing is to provide the court an opportunity to correct any errors on issues already presented."); *ICM Mortg. Corp. v. Jacob*, 902 S.W.2d 527, 535 (Tex. App.—El Paso 1994, writ denied) (op. on reh'g) ("Rehearing is not an opportunity to test alternative arguments after finding other arguments unsuccessful."). Further, in the trial court, though TxDOT referenced the relationship of the contractor and the subcontractor, TxDOT did not argue that the subcontractor could not be an employee because it was not paid by TxDOT. We will not address TxDOT's eleventh-hour issue.

With respect to the remainder of TxDOT's rehearing arguments, we overrule them for the following reasons:

- In an argument that is not completely clear to us, TxDOT argues that "the TTCA does not waive sovereign immunity for negligence in exercising some control over an independent contractor." If TxDOT is arguing that the State is liable for the acts of its employees only if they are using motor-driven equipment, the Selfs' argument is that the degree of control exercised by TxDOT over the right-of-way maintenance contractor and subcontractor created a fact question regarding whether a person categorized as an employee under the definition in Section 101.001(2) used the equipment that caused the Selfs' damages. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.001(2); *see also Ranjel*, 407 S.W.3d at 889–92 (conducting of an analysis of both whether city employees used or operated equipment and whether contractor was employee of the city).

- TxDOT challenges our holding by asserting that "the Court's reliance is misplaced because evidence that some control may have been maintained over an independent contractor does not convert an independent contractor into an employee." Again, this argument leaves us at a bit of a loss to understand. The definition in Section 101.001(2) states in part,

  > "Employee" means a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

  Tex. Civ. Prac. & Rem. Code Ann. § 101.001(2). Our opinion specifies that there is a fact question regarding TxDOT's control of the detail regarding what area was to be cleared in performance of the maintenance contract. It appears that TxDOT's argument offers an all-or-nothing proposition that even though it retained control over the injury-causing event, if the entity it contracted with to do that work remains an independent contractor for other aspects of its

And even after being confronted by the Selfs' specific arguments, TxDOT does not join issue with them. TxDOT argues that *Rosenthal* is distinguishable because that opinion involved negligence under the common law instead of the TTCA, but TxDOT does not tell us how that distinction matters. TxDOT then tells us that it "did not send its independent contractors specifically onto [the Selfs'] land to remove trees" without telling us why that distinction is pivotal. TxDOT also argues that the contract at issue characterizes the contractor as an independent contractor—an argument that begs the question of whether the control given in the contract's terms and by TxDOT's employees creates a fact question.

TxDOT's reply brief concludes by attempting to distinguish *Rosenthal* because the property owner in that case did not create confusion about the location of its property line as the Selfs did by moving their fence off the boundary of the right-of-way. TxDOT does not explain how the Selfs' possible contributory negligence or

---

work, that entity can never be an employee. That proposition appears contrary to logic and precedent.

- Finally, TxDOT argues that in some way our duty analysis violates Civil Practice and Remedies Code Section 5.001, which specifies that "[i]n any action governed by the laws of this state concerning rights and obligations under the law, the American Law Institute's Restatements of the Law are not controlling." *Id.* § 5.001(b). Apparently, this argument turns on the contention that we improperly relied on Section 414 of Restatement (Second) of Torts and that such section is contrary to Texas law. A cursory reading of our opinion shows that we are citing Texas cases—including two Texas Supreme Court opinions—that adopt and apply Section 414. Thus, we are following Texas precedent.

proportionate responsibility obviates the control that TxDOT exercised or how those issues should guide our resolution at this preliminary stage of the case. None of TxDOT's arguments convince us that the trial court erred by denying the plea to the jurisdiction based on the apparent findings that a fact issue existed on the question of whether the contractor was an independent contractor.[8]

---

[8]TxDOT also argues that it would be against public policy to hold it liable:

> The [Selfs] further argue that TxDOT should have surveyed or measured the right[-]of[-]way or contacted and coordinated with the Selfs prior to the tree removal. However, [the Selfs] cannot point to any authority requiring TxDOT to do such prior to executing the tree and brush removal contract.
>
> The tree and brush removal contract was for the maintenance of highways in three counties: Montague, Clay, and Cooke. It is not financially possible or feasible for TxDOT to survey every tract of property along the right[-]of[-]way in the three counties and to coordinate with every property owner to perform its tree and brush removal. To interpret the TTCA to require TxDOT to do so would be clearly outside the legislature's intent in order to avoid liability in every tree and brush removal contract. [Record references omitted.]

What this argument ignores is that TxDOT is suffering the consequences of how it drafted the contract at issue and, perhaps, the instructions issued by its employees. TxDOT could have protected itself in the contract by limiting the determinations that it took on itself to make. Further, even if we were inclined to consider TxDOT's argument, our record contains no evidence on the issue. To the contrary, the record appears to undermine TxDOT's argument by suggesting that TxDOT took remedial action after the Selfs made their claim when it began measuring 28 linear feet from the center line of the road to establish the zone from which it would remove trees.

For the reasons outlined, we sustain in part and overrule in part TxDOT's first issue.[9]

D. We conclude that the trial court erred by denying the portion of TxDOT's plea to the jurisdiction directed to the Selfs' inverse-condemnation claim.

The Selfs also pleaded a claim for inverse condemnation. In its second issue, TxDOT challenges the trial court's denial of the portion of its plea directed to that claim. We conclude that the trial court erred by denying TxDOT's plea to the jurisdiction on the inverse-condemnation claim. The record does not contain

---

[9]In its briefs, TxDOT argues that there can be no showing that its acts were a proximate cause of the Selfs' damages. As articulated in TxDOT's reply brief,

> First, [the Selfs] were aware when they purchased their property that the fence separated TxDOT's right[-]of[-]way and [their] property. Next, it is common knowledge that TxDOT maintains its right[-]of[-]way. [The Selfs'] act of moving the fence from the right[-]of[-]way line to placing the fence at least two feet onto their property was a substantial factor in bringing about their own injury. Therefore, [the Selfs] are the cause in fact of their own damages. Further, it was not foreseeable to TxDOT that [the Selfs] would move the fence from the right[-]of[-]way line onto their own property. Therefore, it was not foreseeable that [the Selfs'] trees would be removed from their property through the brush and tree removal project. [Record references omitted.]

We pass no judgment on whether this act was negligent on the Selfs' part, but the argument ignores that there can be more than one proximate cause of an injury and that the Selfs have alleged acts that they contend were negligent—removing trees without marking the trees as required by the contract or taking the step of at least measuring to the fence line to determine if it coincided with the boundary of the right-of-way. *See Gregory v. Chohan*, 615 S.W.3d 277, 295 (Tex. App.—Dallas 2020, pet. pending) (en banc) ("Moreover, there can be more than one proximate cause of an accident." (citing *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992))). In our view, the facts raise a question on the issue of proximate cause.

evidence of and the Selfs do not identify a potential issue that supports a claim that TxDOT acted with the requisite intent to support an inverse-condemnation claim.

Article I, Section 17 of the Texas Constitution provides a right to compensation when property is taken for a public use: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ." Tex. Const. art. I, § 17. The doctrine of sovereign immunity "does not shield the State from an action for compensation under the takings clause." *Gen. Servs. Comm'n v. Little–Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). "When the government takes private property without first paying for it, the owner may recover damages for inverse condemnation." *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004).

But as we have noted, to withstand a plea to the jurisdiction, a plaintiff must allege a valid inverse-condemnation claim:

> But because the plaintiff in a suit against a governmental entity must allege a valid waiver of immunity to show jurisdiction, a plaintiff in a taking suit must allege a valid taking claim. That is, when the basis for jurisdiction is the assertion of a taking claim, the taking claim alleged must be a valid one. A trial court should therefore grant a plea to the jurisdiction when a government defendant produces evidence to show as a matter of law that the plaintiff cannot establish a viable taking claim.

City of Keller v. Hall, 433 S.W.3d 708, 714–15 (Tex. App.—Fort Worth 2014, pet. denied) (footnote omitted); *see also Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 491 (Tex. 2012) ("The jurisdictional question at the heart of this case is whether, considering [the plaintiff's] pleadings and the evidence submitted in the plea to the

jurisdiction proceeding, there are sufficient facts to support an inverse condemnation.").

The elements of an inverse-condemnation claim are "(1) a governmental entity intentionally performed certain acts (2) that resulted in a taking or damaging of property (3) for public use." *City of Dallas v. Zetterlund*, 261 S.W.3d 824, 828 (Tex. App.—Dallas 2008, no pet.).

Though the elements of an inverse-condemnation claim are short and straightforward in their formulation, they have presented a vexing question of how to balance a person's right to be compensated for property taken for public use with the sovereign's immunity from negligence claims that could consume the fisc. *Gragg*, 151 S.W.3d at 554. The Texas Supreme Court has described its quest to balance these concerns and formulate a standard as follows:

> For one, we strive to avoid what would be an anomalous result if the State, an entity otherwise generally entitled to immunity for negligence, were subject to liability for something less than intentional behavior. More importantly, though, we seek to ensure that the public does not bear the burden of paying for property damage for which it received no benefit. As we have noted, our Constitution provides for compensation only if property is damaged or appropriated "'for or applied to public use.'" "That is the factor which distinguishes a negligence action from one under the constitution for destruction." Accordingly, we have sought objective indicia of intent in particular contexts to determine whether property has been taken or damaged in furtherance of the public interest.

Id. at 554–55 (citations omitted). The formulation of the intent standard adopted to reach a balance is whether the governmental entity "(1) knows that a specific act is

causing identifiable harm[] or (2) knows that the specific property damage is substantially certain to result from an authorized government action — that is, that the damage is 'necessarily an incident to[] or necessarily a consequential result of' the government's action." *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004). The supreme court has described this standard as focusing on "mens rea" to make "clear that a taking cannot be established by proof of mere negligent conduct by the government." *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016) (op. on reh'g). An act of omission by the government is not enough to establish liability for a taking: "We [the supreme court] have not recognized a takings claim for nonfeasance." *Id.* at 800. Also, intent for an inverse-condemnation claim must be tested at the time the governmental entity acted and not with hindsight. *Id.* at 806 (quoting *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009)).

The supreme court also described how its formulation of the intent standard addressed the failures of a standard that would make the State liable for a taking resulting from any intentional act. *See Jennings*, 142 S.W.3d at 313. So broad a standard would make a government entity subject to higher liability than a private individual. *Id.* It would also "ignore the predicate of Article I, Section 17: that the damage be 'for or applied to public use.'" *Id.* "When damage is merely the accidental result of the government's act, there is no public benefit[,] and the property cannot be said to be 'taken or damaged *for public use*.'" *Id.*

The supreme court also felt that the standard it formulated counterbalanced the concern that would arise if the standard required proof of a targeted effort to take property, i.e., one that would require proof that the government intended to cause damage. *Id.* To address this concern, the supreme court's formulation ensures that "if the government knows that specific damage is substantially certain to result from its conduct, then takings liability may arise even when the government did not particularly desire the property to be damaged." *Id.* at 314. Continuing, the supreme court stated that

> [t]here may well be times when a governmental entity is aware that its action will necessarily cause physical damage to certain private property[] and yet determines that the benefit to the public outweighs the harm caused to that property. In such a situation, the property may be "damaged for public use."

Id.

In the trial court, the Selfs were clear what intentional act they predicated their inverse-condemnation claim on:

> By ordering its contractor (contrary to the written contract) to remove all trees up to the fence, [i.e.], on [the Selfs'] property, the State acted with sufficient intent. . . . ("Todd [TxDOT employee] did direct the contractor to cut the trees down . . .") . . . . In other words, *TxDOT knew with substantial certainty that trees up to the fence line would be removed.* Thus, the State knew that "specific property damage [was] substantially certain to result from an authorized government action," [i.e.], maintaining the State's right-of-way. [Record references omitted.]

The Selfs simply copied this argument into their appellate brief and added that the intent standard that applies to inverse-condemnation claims has been met because "in

the instant case, TxDOT specifically and intentionally directed and instructed that the particular trees at issue be removed."

The Selfs indisputably identify an intentional act, but their argument begs the question at the core of the intent standard: what was the impetus of the intentional act of removing the trees? The answer seems apparent from the underpinning of their claim: TxDOT failed to measure the right-of-way and assumed trees on the road side of the fence were in the right-of-way. That certainly looks like an act of nonfeasance—i.e., an act of negligence—for which TxDOT is not liable for a taking. Though cutting down a tree is an intentional act, the proof is lacking that TxDOT intended to cut down those of the Selfs' trees beyond the right-of-way or was substantially certain that any trees on their private property would be cut down. Again, the formulation of the intent standard in an inverse-condemnation case is designed not to impose a higher standard of liability than would be imposed on an individual by simply making TxDOT liable for any intentional act leading to harm; the Selfs appear to seek to impose exactly that standard of liability. Further, the Selfs do not explain how TxDOT acted in a way that it was "aware that its action [would] necessarily cause physical damage to certain private property, and yet determine[d] that the benefit to the public outweigh[ed] the harm caused to that property." *See id.* The State and the public would surely have preferred that the Selfs' trees had remained standing because the act of removing trees from outside the right-of-way

accomplished nothing of benefit for the public; indeed, that act's only result was the creation of the Selfs' claim against the fisc.

Though one of the cases predates the supreme court's pronouncements, the cases that we have found analyzing facts analogous to the underlying facts of the Selfs' inverse-condemnation claim support our holding. *State v. Gafford* involved an inverse-condemnation claim from TxDOT's destroying a landowner's tree while clearing brush and trees from a right-of-way. No. 04-03-00168-CV, 2003 WL 22011302, at *1 (Tex. App.—San Antonio Aug. 27, 2003, no pet.) (mem. op.). On the question of the State's intent, *Gafford* noted that

> [i]t is undisputed that TxDOT was engaged in the construction of U.S. Highway 281. At the hearing on the State's plea to the jurisdiction, the trial court was informed that when TxDOT employees were told to stop clearing the brush and trees on [appellee's] property, they stopped. In his deposition, [appellee] testified that based upon what TxDOT [had] told him, he did not think "they intended to take [his] property." *The evidence reflects that the State did not intend, authorize, or even know that it was removing trees from [appellee's] property until it was so informed. Under these circumstances, the removal of brush and trees on [appellee's] property was not authorized or intended by the State.*

Id. at *3 (footnotes and citations omitted) (emphasis added). Here, there is no evidence that TxDOT knew that trees were being removed outside the right-of-way until Mr. Self informed TxDOT of that fact.

The Dallas Court of Appeals distinguished *Gafford* because employees of the City of Dallas were informed by a landowner that the City's contractors were using his property without permission but continued that use for months after being informed

and after agreeing to compensate the landowner for the use. *See Zetterlund*, 261 S.W.3d at 831–32. *Zetterlund* held that there was evidence that damage to the landowner was substantially certain to result from the City's and their contractor's acts because they continued to use the property after being informed that they did not have permission to do so. *Id.* Again, our record contains no evidence that TxDOT had any inkling that it was damaging the Selfs' trees when the area up to their fence was cleared.

The Selfs do not claim that anything else should occur in this case that will allow them to identify an intentional act on the part of TxDOT upon which to base their inverse-condemnation claim. The act that the Selfs identify—removing trees from the roadside to their fence—as the intentional act supporting their inverse-condemnation claim is the result of the negligent act of allegedly failing to take steps to identify the extent of the right-of-way. We hold that such an act is not evidence that raises a fact question regarding whether TxDOT acted with the type of intent necessary to support an inverse-condemnation claim. Thus, we conclude that the trial court erred by denying TxDOT's plea to the jurisdiction directed to the Selfs' inverse-condemnation claim.

We sustain TxDOT's second issue.

IV. Conclusion

Having sustained the portion of TxDOT's first issue arguing that the trial court erred by denying TxDOT's plea to the jurisdiction on the Selfs' negligence claim that

TxDOT operated or used motor-driven equipment and having also sustained TxDOT's second issue that the trial court erred by denying TxDOT's plea to the jurisdiction on the Selfs' inverse-condemnation claim, we reverse the portions of the trial court's order denying TxDOT's plea to the jurisdiction as to those claims and render judgment dismissing those claims. Having overruled the portion of TxDOT's first issue directed at the Selfs' claim that the contractor was TxDOT's employee, we affirm the remainder of the trial court's order denying TxDOT's plea to the jurisdiction on that claim.

/s/ Dabney Bassel

Dabney Bassel
Justice

Delivered: April 28, 2022

TAB C:
Court of Appeals Judgment

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00240-CV

TEXAS DEPARTMENT OF TRANSPORTATION, Appellant	§	On Appeal from the 97th District Court
	§	of Montague County (2020-0331M-CV)
V.	§	April 28, 2022
MARK SELF AND BIRGIT SELF, Appellees	§	Memorandum Opinion by Justice Bassel

JUDGMENT ON REHEARING

After reviewing Appellees Mark Self and Birgit Self's motion for rehearing and Appellant Texas Department of Transportation's motion for rehearing and motion for rehearing en banc, we deny the motions; withdraw our opinion and judgment dated February 10, 2022; and substitute the following.

This court has considered the record on appeal in this case and holds that there was error in part of the trial court's order. It is ordered that the order of the trial court is affirmed in part and reversed in part. We reverse the portions of the trial court's order denying TxDOT's plea to the jurisdiction as to the Selfs' negligence

claim and inverse-condemnation claim, and we render judgment dismissing those claims. We affirm the remainder of the trial court's order that denies the plea to the jurisdiction on the Selfs' independent-contractor claim.

It is further ordered that each party shall bear their own costs of this appeal, for which let execution issue.

SECOND DISTRICT COURT OF APPEALS

By /s/ Dabney Bassel
Justice Dabney Bassel

TAB D:
Tex. Civ. Prac. & Rem. Code § 101.001

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 5. Governmental Liability
Chapter 101. Tort Claims (Refs & Annos)
Subchapter A. General Provisions

V.T.C.A., Civil Practice & Remedies Code § 101.001

§ 101.001. Definitions

Effective: June 17, 2011
Currentness

In this chapter:

(1) "Emergency service organization" means:

(A) a volunteer fire department, rescue squad, or an emergency medical services provider that is:

(i) operated by its members; and

(ii) exempt from state taxes by being listed as an exempt organization under Section 151.310 or 171.083, Tax Code; or

(B) a local emergency management or homeland security organization that is:

(i) formed and operated as a state resource in accordance with the statewide homeland security strategy developed by the governor under Section 421.002, Government Code; and

(ii) responsive to the Texas Division of Emergency Management in carrying out an all-hazards emergency management program under Section 418.112, Government Code.

(2) "Employee" means a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

(3) "Governmental unit" means:

(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;

(B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;

(C) an emergency service organization; and

(D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

(4) "Motor-driven equipment" does not include:

(A) equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state; or

(B) medical equipment, such as iron lungs, located in hospitals.

(5) "Scope of employment" means the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.

(6) "State government" means an agency, board, commission, department, or office, other than a district or authority created under Article XVI, Section 59, of the Texas Constitution, that:

(A) was created by the constitution or a statute of this state; and

(B) has statewide jurisdiction.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 693, § 1, eff. June 19, 1987; Acts 1991, 72nd Leg., ch. 476, § 1, eff. Aug. 26, 1991; Acts 1995, 74th Leg., ch. 827, § 1, eff. Aug. 28, 1995; Acts 1997, 75th Leg., ch. 968, § 1, eff. Sept. 1, 1997; Acts 2011, 82nd Leg., ch. 1101 (S.B. 1560), § 1, eff. June 17, 2011.

O'CONNOR'S CROSS REFERENCES

See also ***O'Connor's Texas COA***, "Suits Against the Government," ch. 24, § 1 et seq.; *O'Connor's Texas COA,* "General Concepts," ch. 25-A, § 1 et seq.

O'CONNOR'S ANNOTATIONS

Employee

Brown & Gay Eng'g v. Olivares, 461 S.W.3d 117, 122 (Tex.2015). "[A] private company that performed allegedly negligent acts in carrying out a contract with a governmental unit seeks to invoke the same immunity that the government itself enjoys. [¶] [Private company argues] that sovereign immunity extends to private entities contracting to perform government functions, unless otherwise provided by statute. We disagree. The fact that a statute recognizes that private contractors are not entitled to sovereign immunity under certain circumstances does not imply that such entities are entitled to immunity in all other situations. *At 124:* We have never directly addressed the extension of immunity to private government contractors…. *At 126:* [Private company cites] appellate court decisions … addressing the extension of immunity to private agents of the government. [¶] Regardless of whether these cases were correctly decided, the government's right to control that led these courts to extend immunity to a private government contractor is utterly absent here. … We need not establish today whether some degree of control by the government would extend its immunity protection to a private party; we hold only that no control is determinative. *At 127:* [W]e cannot adopt [D's] contention that it is entitled to share in [governmental unit's] sovereign immunity solely because [governmental unit] was statutorily authorized to engage [D's] services and would have been immune had it performed those services itself. [Ps'] suit does not threaten allocated government funds and does not seek to hold [D] liable merely for following the government's directions. [D] is responsible for its own negligence as a cost of doing business and may (and did) insure against that risk, just as it would had it contracted with a private owner. *At 129:* We decline to extend sovereign immunity to private contractors based solely on the nature of the contractors' work when the very rationale for the doctrine provides no support for doing so." *See also* ***Nettles v. GTECH Corp.***, 606 S.W.3d 726, 733, 736-37 (Tex.2020) (as in ***Brown & Gay***, Court did not decide whether it should recognize doctrine of derivative sovereign immunity for private contractors or what standard would apply to determine scope of that immunity; in dicta, Court applied control-based immunity standard to examine extent to which governmental unit had control over private contractor's actions, stating that "where a contractor has been granted discretion to perform a task and the government approves those discretionary plans, the government has not specified the manner in which the task is to be performed"); ***Fort Worth Transp. Auth. v. Rodriguez***, 547 S.W.3d 830, 842 (Tex.2018) (Tex. Transp. Code §452.056 does not amount to legislative grant or extension of immunity to private contractors, but it does limit liability of private contractors performing function of regional authority under Tex. Transp. Code ch. 452).

Texas A&M Univ. v. Bishop, 156 S.W.3d 580, 584-85 (Tex.2005). "There are several factors to consider in determining whether or not a worker is an independent contractor: (1) The independent nature of his business; (2) his obligation to furnish necessary tools, supplies, and material to perform the job; (3) his right to control the progress of the work, except as to final results; (4) the time for which he is employed; and (5) the method of payment, whether by time or by the job." *See also* ***Harris Cty. Flood Control Dist. v. Halstead***, __ S.W.3d __, 2022 WL 678277 (Tex.App.--Houston [14th Dist.] 2022, no pet.) (No. 14-20-00457-CV; 3-8-22); ***EPGT Tex. Pipeline, L.P. v. Harris Cty. Flood Control Dist.***, 176 S.W.3d 330, 336 (Tex.App.--Houston [1st Dist.] 2004, pet. dism'd).

Murk v. Scheele, 120 S.W.3d 865, 866 (Tex.2003). "The principal question in this case is whether a physician who exercises independent judgment in treating patients can be an employee of a governmental unit within the meaning of the Act. We answer in the affirmative…." *See also* ***Harris Cty. Appr. Dist. v. Texas Workforce Comm'n***, 519 S.W.3d 113, 119-20 (Tex.2017).

Harris Cty. v. Dillard, 883 S.W.2d 166, 167 (Tex.1994). Deputy sheriff "was not in the paid service of Harris County at the time of the accident. He was a volunteer reserve deputy subject to being called into service. [Deputy] was therefore not an 'employee,' within the meaning of the [TTCA], for whose conduct Harris County was liable."

Roades v. Henderson, __ S.W.3d __, 2022 WL 802983 (Tex.App.--Corpus Christi 2022, pet. filed 4-29-22) (No. 13-20-00315-CV; 3-17-22). See annotation under CPRC §78.103.

Powell v. Knipp, 479 S.W.3d 394, 401 (Tex.App.--Dallas 2015, pet. denied). "Only if the governmental entity's control of its employee is negated would a borrowed employee come within the exception clause in §101.001(2). [¶] There is a presumption

that an employee remains in his general employment as long as the employee is performing the work entrusted to him by the general employer, absent evidence to the contrary."

Texas Bay Cherry Hill, L.P. v. City of Fort Worth, 257 S.W.3d 379, 399 (Tex.App.--Fort Worth 2008, no pet.). "[D], in her capacity as a City council member, was a City employee as defined by the [TTCA]."

TDFPS v. Atwood, 176 S.W.3d 522, 529 (Tex.App.--Houston [1st Dist.] 2004, pet. denied). "[F]oster parents … do not meet the definition of government employees under the Act. Unlike employees, foster parents … are not paid a salary, nor are they otherwise 'in the paid service of a governmental unit.' Instead, foster parents are only reimbursed for expenditures made on behalf of the child."

Dillard v. Austin ISD, 806 S.W.2d 589, 592 (Tex.App.--Austin 1991, writ denied). "[T]he state is generally not liable for the acts of public servants. *E.g.*, ***Lowe v. Texas Tech Univ.***, 540 S.W.2d 297, 298 (Tex.1976); ***Whitfield v. City of Paris***, … 19 S.W. 566, 567 (1892) (doctrine of respondeat superior does not apply against the state); ***City of Galveston v. Posnainsky***, 62 Tex. 118, 125 (1884)…."

Hein v. Harris Cty., 557 S.W.2d 366, 368 (Tex.App.--Houston [1st Dist.] 1977, writ ref'd n.r.e.). "The rule is that when a servant turns aside, no matter how short the time, from the prosecution of the master's work to engage in an affair wholly his own, he ceases to act for the master, and the responsibility for his actions in pursuing his own business or pleasure is upon him alone. The action of [government employee] in attempting to remove the clip from the pistol for the purpose of showing it to a friend was something wholly disconnected from his employment and not for the benefit of his employer. When he turned aside from the prosecution of his duties for the county, although for only a short time, he ceased to act for the county and the responsibility of any act done by him during that time rested upon him alone."

Governmental Unit

El Paso Educ. Initiative, Inc. v. Amex Props., LLC, 602 S.W.3d 521, 524 (Tex.2020). "Although the legislature has directed that open-enrollment charter schools have governmental immunity, we have not expressly held that they do. We hold today that open-enrollment charter schools and their charter-holders have governmental immunity from suit and liability to the same extent as public schools." *See also* ***KIPP Tex., Inc. v. Doe #1***, __ S.W.3d __, 2022 WL 2347906 (Tex. App.--Houston [1st Dist.] 2022, n.p.h.) (No. 01-21-00368-CV; 6-30-22) (D, open-enrollment charter school, was immune from Ps' claims for assault and negligence based on sexual abuse of their children by school counselor employed by D).

University of the Incarnate Word v. Redus, 602 S.W.3d 398, 402 (Tex.2020) (***Redus II***). "[T]he legislation authorizing private university police departments [does not] reflect an intent that private universities possess sovereign immunity. *At 407:* Because the University is private, the extent to which the government exercises control over the activities the University characterizes as governmental is relevant--sovereign immunity potentially extends to the University if the complained-of conduct was not the University's 'independent action,' but rather 'action taken by the government.' *At 408:* That control is absent here. Though the University obtained State approval to form its police department, the University's governing board is in charge. That board is not accountable to the taxpayers or to public officials. Sovereign immunity 'prohibits suits against the government without the state's consent.' Because the University's police department is not accountable to the government, we conclude that the University is not an arm of the State government. *At 413:* We conclude that private universities do not operate as an arm of the State government through their police departments."

University of the Incarnate Word v. Redus, 518 S.W.3d 905, 906 (Tex.2017) (***Redus I***). See annotation under CPRC §51.014, *§51.014(a)(8)--Governmental Unit's Plea to Jurisdiction*.

LTTS Charter Sch., Inc. v. C2 Constr., Inc., 342 S.W.3d 73, 76 (Tex.2011). See annotation under CPRC §51.014, *§51.014(a)(8)--Governmental Unit's Plea to Jurisdiction*.

San Antonio ISD v. McKinney, 936 S.W.2d 279, 283 (Tex.1996). "[T]he Legislature has defined school districts as political subdivisions of the State … for purposes of sovereign immunity. … The fact that a school district enjoys sovereign immunity does not mean that it is in effect the State for purposes of the 11th Amendment."

Electric Reliability Council of Tex. v. Panda Power Generation Infrastructure Fund, LLC, 552 S.W.3d 297, 306 (Tex.App.--Dallas 2018), *pet. dism'd*, 619 S.W.3d 628 (Tex.2021). See annotation under CPRC §51.014, *§51.014(a)(8)--Governmental Unit's Plea to Jurisdiction*.

City of New Braunfels v. Carowest Land, Ltd., 578 S.W.3d 668, 675 (Tex.App.--Austin 2019, no pet.). "To qualify as a governmental unit under §101.001, [D] must be an 'organ of government,' and it also must derive its status and authority from the Constitution of Texas or from laws passed by the legislature under the constitution. ... The Court has explained that an 'organ of government' is an entity that operates as part of a larger governmental system. *At 676:* [D] argues that it should be considered an 'organ of government' essentially because [D's] actions relevant to this lawsuit have been on the City's behalf, [D] is being sued for merely following the City's directives, and [D's] position is aligned with the City. However, the delay claim at issue in this appeal is a claim that [D] had, if at all, *against* the City. In submitting the delay claim to the City and maintaining the claim even after the City opined that the claim had been released, it does not appear that [D] was carrying out the City's directives with no independent discretion. … Nor are we persuaded that the existence of statutes authorizing the City to enter into contracts with private entities satisfies §101.001's requirement that an entity's status and authority be derived from the Constitution of Texas or from laws passed by the legislature under the constitution." (Internal quotes omitted.)

Orion Real Estate v. Sarro, 559 S.W.3d 599, 603 (Tex.App.--San Antonio 2018, no pet.). "[D] is a public facility corporation that is owned and operated by [Housing Authority], which is a governmental unit. [¶] Thus, [D] is an 'institution, agency, or organ' of government whose 'status and authority' are derived from laws passed by the legislature. Accordingly, [D] is a 'governmental unit' under [§101.001(3)(D)]." *See also* ***152 Lakewest Cmty., LP v. Ameristar Apt. Servs.***, No. 05-20-00483-CV, 2021 WL 5710553 (Tex.App.--Dallas 2021, no pet.) (memo op.; 12-2-21).

San Antonio Water Sys. v. Smith, 451 S.W.3d 442, 449 (Tex.App.--San Antonio 2014, no pet.). The San Antonio Water System (SAWS) "is a municipally-owned utility. Although SAWS is not an entity independent from the City of San Antonio, management and control of the utility has been delegated by the City to the SAWS board of trustees. In exercising such management and control, the SAWS board acts as an agent of the City. *At 450-51:* SAWS argues that its status and authority are ultimately derived from the Texas Constitution because the constitution grants home-rule municipalities the full powers of state government unless restricted by the constitution or legislature and because the City passed [an ordinance] in exercise of those powers. We do not believe that is what the legislature intended by its definition of 'governmental unit' in §101.001(3)(D)…. The Texas Constitution and statutes authorize home-rule *municipalities* to own their water systems. The statutes authorize home-rule *municipalities* to encumber the system assets and create dedicated funds for operating the system, and authorize *municipalities* to place management of the system in the hands of a board of trustees. However, neither the Texas Constitution nor any statute purports to confer any status or authority on such boards or systems. Instead, the legislature has expressly provided that the proceedings of the *municipality* are to specify the powers and duties of the board of trustees and the manner of exercising those powers and duties. [¶] The actual status and authority of SAWS and its board derives exclusively from the city ordinance and the encumbrance documents. We therefore conclude that SAWS is not an agency of the City…. Therefore, SAWS is not a 'governmental unit' within the meaning of §101.001(3)…."

Teague v. City of Dallas, 344 S.W.3d 434, 438 (Tex.App.--Dallas 2011, pet. denied). "When the governmental unit is a municipality, the waiver of immunity analysis begins with the determination of whether the governmental unit was engaged in a governmental function [under CPRC §101.0215] at the time of the action giving rise to the claim. When the governmental unit is a county, however, this step of the inquiry is unnecessary because all of the functions of a county are governmental."

City of Texarkana v. City of New Boston, 141 S.W.3d 778, 783 (Tex.App.--Texarkana 2004), *pet. denied*, 228 S.W.3d 648 (Tex.2007). "[S]overeign immunity principles are to be applied horizontally between governmental entities. That is, political

subdivisions of government cannot assert immunity against the sovereign from which its immunity is derived, but can assert immunity against other governmental entities deriving their rights and privileges from the same source."

Alamo Workforce Dev. Inc. v. Vann, 21 S.W.3d 428, 433 (Tex.App.--San Antonio 2000, no pet.). "The tier-like structure of the Texas workforce boards derives directly from the State and therefore we hold they fall within the protective umbrella of sovereign immunity. We are careful not to extend the blanket of sovereign immunity to every entity which at first blush exhibits the characteristics of a governmental unity. However, [P] established through the affidavits of credible witnesses its status as a recognized workforce board under statutory authority." *See also* ***Arbor E&T, LLC v. Lower Rio Grande Valley Workforce Dev. Bd., Inc.***, 476 S.W.3d 25, 33 (Tex.App.--Corpus Christi 2013, no pet.).

University of Houston v. Elthon, 9 S.W.3d 351, 354 (Tex.App.--Houston [14th Dist.] 1999, pet. dism'd), *disapproved on other grounds*, ***Texas Dept. of Parks & Wildlife v. Miranda***, 133 S.W.3d 217 (Tex.2004). The definition of governmental unit "does not include employees or officials of governmental units."

TRST Corpus, Inc. v. Financial Ctr., Inc., 9 S.W.3d 316, 321 (Tex.App.--Houston [14th Dist.] 1999, pet. denied). "We hold that [D] is entitled to assert sovereign immunity. Its articles of incorporation show that [D] is owned and entirely controlled by the [Teacher Retirement System of Texas]. [D's] sole purpose is to hold title to a multi-million-dollar asset for the benefit of [retirement-system] members. Under these circumstances, a lawsuit that may implicate [D's] assets necessarily implicates [retirement system's] assets. Consequently, a lawsuit against [D] is also a lawsuit against [retirement system], a state agency."

Sharpe v. Memorial Hosp., 743 S.W.2d 717, 718 (Tex.App.--Houston [1st Dist.] 1987, no writ). "[W]e need not decide whether [D] is a governmental unit under [CPRC §101.001(3)(B)], because [§101.001(3)(D)] clearly includes a county hospital within the meaning of 'governmental unit.' Section [101.001(3)(D)] is a broad, 'catch-all' definition of 'governmental unit,' which includes, 'any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.' [H&SC chs. 263-265] provide for the creation and operation of county hospitals. Therefore, [D], a county hospital, is a governmental unit." *See also* ***Gracia v. Brownsville Hous.***, 105 F.3d 1053, 1056 (5th Cir.1997).

V. T. C. A., Civil Practice & Remedies Code § 101.001, TX CIV PRAC & REM § 101.001
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

TAB E:
Tex. Civ. Prac. & Rem. Code § 101.021

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 5. Governmental Liability
Chapter 101. Tort Claims (Refs & Annos)
Subchapter B. Tort Liability of Governmental Units (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 101.021

§ 101.021. Governmental Liability

Currentness

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.

Credits
Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

O'CONNOR'S NOTES
Editor's note: The word "and" at the end of §101.021(1)(B) should probably be "or." *See* ***Bryant v. MTA***, 722 S.W.2d 738, 740 (Tex.App.--Houston [14th Dist.] 1986, no writ), *overruled on other grounds,* ***Fleming Foods, Inc. v. Rylander***, 6 S.W.3d 278 (Tex.1999).

O'CONNOR'S CROSS REFERENCES
See also ***O'Connor's Texas COA***, "Suits Against the Government," ch. 24, § 1 et seq.; ***O'Connor's Texas COA,*** "Texas Tort Claims Act--Negligence," ch. 25, § 1 et seq.; ***O'Connor's Texas COA,*** "Texas Tort Claims Act--Premises Liability," ch. 26, § 1 et seq.

O'CONNOR'S CHARTS REFERENCES
See Chart 6, "Waivers of Governmental Immunity Chart."

O'CONNOR'S ANNOTATIONS

Generally--Liability for Employee's Negligence

City of San Antonio v. Riojas, 640 S.W.3d 534, 535 (Tex.2022). "This case … involve[s] a city's immunity from suit under the [TTCA] for injuries arising from the use of law-enforcement vehicles. Here, the court of appeals held that the City is not immune, applying a need-risk balancing analysis that we have expressly refused to apply outside the context of a high-speed chase or other emergency law-enforcement response that carries an inherent risk of harm to the public. In this case involving routine traffic management, the City need show only that its officer acted in good faith--that is, that a reasonably prudent officer, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred. The City made that showing. Accordingly, we reverse the judgment of the court of appeals and dismiss [P's] claims against the City for lack of jurisdiction. *At 538:* The need-risk analysis that the court of appeals employed originates in … ***City of Lancaster v. Chambers***[, 883 S.W.2d 650 (Tex.1994)]. [¶] [There,w]e held that an officer acts in good faith in a pursuit case if: a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit. *At 539-40:* Three years later we decided … ***Wadewitz v. Montgomery***, [591 S.W.2d 464 (Tex.1997)], on which the court of appeals relied here. [¶] We explained that under ***Chambers***, good faith depends on how a reasonably prudent officer could have assessed both the *need* to which an officer responds and the *risks* of the officer's course of action, based on the officer's perception of the facts at the time of the event. The 'need' aspect of the test refers to the urgency of the circumstances requiring police intervention. In the context of an emergency response, need is determined by factors such as the seriousness of the crime or accident to which the officer responds, whether the officer's immediate presence is necessary to prevent injury or loss of life or to apprehend a suspect, and what alternative courses of action, if any, are available to achieve a comparable result. The 'risk' aspect of good faith, on the other hand, refers to the countervailing public safety concerns: the nature and severity of harm that the officer's actions could cause (including injuries to bystanders as well as the possibility that an accident would prevent the officer from reaching the scene of the emergency), the likelihood that any harm would occur, and whether any risk of harm would be clear to a reasonably prudent officer. [¶] In subsequent cases, we clarified that the ***Chambers-Wadewitz*** need-risk assessment does not place an onerous burden on law enforcement. In ***University of Houston v. Clark***, [38 S.W.3d 578 (Tex.2000)], we characterized the assessment as analogous to the abuse of discretion standard. [I]n ***Texas*** [***DPS v. Bonilla***, 481 S.W.3d 640 (Tex.2015)], we repeated that characterization as well as ***Chambers***' statement that official immunity protects all but the plainly incompetent or those who knowingly violate the law. In ***Bonilla***, we recognized that magic words are not required to establish that a law-enforcement officer considered the need/risk balancing factors. And in ***Clark***, we noted that depending on the circumstances, an officer may not be able to thoroughly analyze each need or risk factor, and that this alone should not prevent the officer from establishing good faith. [¶] We have also declined to expand the need-risk balancing requirement beyond the pursuit and emergency-response contexts. In ***Telthorster v. Tennell***, [92 S.W.3d 457 (Tex.2002)], we held that a particularized need-risk assessment is not required to establish good faith when a suspect sues for injuries sustained during an arrest. *At 541:* [W]e held that a particularized need-risk assessment is not required when an arrest results in an injury to a suspect, and we disapproved of court of appeals' decisions requiring the assessment in that context. We then determined that ***Chambers***' good-faith test, absent its need/risk component, strikes the appropriate balance between official immunity's purpose of encouraging energetic law enforcement and any risk to the public associated with street-level police work. [¶] Thus, to establish good faith, [the officer in ***Telthorster***] was required to show that a reasonably prudent officer, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred. [Officer] need not prove that it would have been unreasonable not to engage in the conduct, or that all reasonably prudent officers would have engaged in the same conduct. Rather, he must prove only that a reasonably prudent officer, under similar circumstances, *might* have reached the same decision. [T]his test of good faith does not inquire into what a reasonable person *would have done*, but into what a reasonable officer *could have believed*. [¶] If the defendant officer meets this burden, the plaintiff must do more than show that a reasonably prudent officer could have reached a different decision. Rather, the plaintiff must offer evidence that no reasonable officer in the defendant's position *could* have believed that the facts were such that they justified his conduct. *At 542:* The facts of this case are even further removed from the pursuit and emergency-response contexts than the arrest was in ***Telthorster***. There was no suspect, no arrest, and no inherent danger to the public. [Police officer] merely turned on his emergency lights to warn approaching motorists of a traffic slowdown ahead. *At 543:* We have said that magic words are not required for evidence

to satisfy the ***Chambers-Wadewitz*** standard, and we reiterate today that they are not required for an affidavit to satisfy the lower ***Telthorster*** standard either. We conclude that [police officer's] affidavit is sufficient to demonstrate that a reasonably prudent officer in his shoes could have believed that activating his emergency lights was warranted. [¶] The burden then shifted to [P] to present conflicting evidence…. [P] did not present any evidence at all. Accordingly, [police officer's] affidavit conclusively establishes that he acted in good faith." (Internal quote omitted.)

VIA Metro. Transit v. Meck, 620 S.W.3d 356, 365 (Tex.2020). "[B]ecause [D] only performs governmental functions, governmental immunity protects [D] unless the legislature has waived that immunity…. [¶] Because [D's] primary function is the business of providing transportation to the general public for a fee, we hold that [D] is a common carrier that owes its passengers the duty to exercise a high degree of care, regardless of whether it is a governmental entity that provides that service as a governmental function. *At 369:* Just as the [TTCA] incorporates, but does not define, well-established common-law concepts like 'proximate cause' and 'tangible personal property,' it also incorporates the common-law concept of 'negligence.' *At 370:* [T]he common law has long used the term 'negligence' to refer to 'three degrees or grades of negligence,' including gross negligence, ordinary negligence, and slight negligence. [W]e conclude that the [TTCA's] reference to 'negligence' includes 'slight negligence' when the common law imposes on the defendant a duty to exercise a high degree of care. [¶] [D] concedes that, if [employee] had been driving for a privately operated common carrier, his personal liability would have been determined under the higher duty. [D] argues that [employee] cannot be personally liable for breaching that duty here, however, because as a … driver [for D], he was necessarily performing a governmental function. But as we have explained, the fact that [D] (and [employee], when acting within the scope of his … employment) only performs governmental functions simply means that governmental immunity applies, thus requiring us to look to the [TTCA] to determine whether it has waived that immunity. [¶] We hold that the [TTCA] waives governmental immunity for the negligence of common carriers under the high-degree-of-care duty when that duty applies to them."

Texas DOT v. Able, 35 S.W.3d 608, 616 (Tex.2000). "[T]he Legislature intended that a governmental unit enjoying the benefits and advantages of a joint enterprise would also be subject to the same obligations and liabilities that a private person would be if he or she were engaged in a joint enterprise."

DeWitt v. Harris Cty., 904 S.W.2d 650, 654 (Tex.1995). "Consistent with [§101.021(1)], we construe [§101.021(2)] to predicate the governmental unit's respondeat superior liability upon the liability of its employee. [¶] When … the governmental unit's liability under §101.021(2) is based on respondeat superior for an employee's negligence arising from the misuse of tangible personal property, the liability is derivative or indirect. [¶] [O]fficial immunity … becomes relevant to the governmental entity's liability. [W]ere [county] a private person, the county would be entitled to assert any affirmative defenses its employee has to liability." *See also* ***Driskill v. State***, 787 S.W.2d 369, 370-71 (Tex.1990).

K.D.F. v. Rex, 878 S.W.2d 589, 596-97 (Tex.1994). "In Texas, a governmental entity's limited liability is derivative of the employee's official immunity. The [TTCA] leaves an employee's common law official immunity intact, and [CPRC] chs. 104 and 108 … provide for indemnification of the employee only for 'actual damages, court costs, and attorney's fees adjudged against' the employee. Official immunity in Texas is an affirmative defense to negligence claims against state employees that applies when employees exercise discretion in good faith while acting within the scope of their official authority. Thus, Texas is vicariously liable for the acts of its employees only to the extent its employees are not entitled to official immunity." *See also* ***City of La Joya v. Herr***, 41 S.W.3d 755, 759 (Tex.App.--Corpus Christi 2001, no pet.).

City of Houston v. Jenkins, 363 S.W.3d 808, 814 (Tex.App.--Houston [14th Dist.] 2012, pet. denied). "A governmental employee is entitled to official immunity for the good-faith performance of discretionary duties within the scope of the employee's authority. A discretionary act is one involving 'personal deliberation, decision and judgment'; in contrast, actions requiring obedience to orders 'or the performance of a duty to which the actor has no choice' are ministerial. Thus, if the duty is imposed by law, then the performance of the duty is a ministerial act, and there is no official immunity for the failure to perform it. *At 817:* A duty is 'a legally enforceable obligation to conform to a particular standard of conduct.' Thus, a question as to whether a governmental employee was performing a ministerial or a discretionary duty is a question about the employee's

conduct. *At 818:* The Texas Supreme Court has offered guidance in determining whether the conduct at issue is discretionary or ministerial. Factors that courts consider include the following: (1) the nature and importance of the function that the employee is performing, (2) the extent to which passing judgment on the exercise of discretion by the employee will amount to passing judgment on the conduct of a coordinate branch of government or an agency thereof, (3) the extent to which the imposition of liability would impair the employee's free exercise of discretion, (4) the extent to which financial responsibility will fall on the employee, (5) the likelihood that harm will result to the public if the employee acts, (6) the nature and seriousness of the type of harm that may be produced, and (7) the availability to the injured party of other remedies and forms of relief."

Norrell v. Gardendale Volunteer Fire Dept., 115 S.W.3d 114, 117 (Tex.App.--San Antonio 2003, no pet.). "Under the [TTCA], an emergency service organization, such as [D volunteer fire department], is a 'governmental unit.' The Act defines employee as a person 'who is in the paid service of a governmental unit.' In its plea to the jurisdiction, [D] alleged that because it was composed entirely of unpaid volunteers, and not employees, §101.021 did not apply to waive its immunity. We agree."

City of San Antonio v. Johnson, 103 S.W.3d 639, 642 (Tex.App.--San Antonio 2003), *pet. denied*, 140 S.W.3d 350 (Tex.2004). "A defendant's claim of contribution is derivative of the plaintiff's right to recover from the joint defendant against whom contribution is sought. Thus, whether the City is immune from the contribution claim depends upon whether the City would be immune from a claim asserted by [P]."

City of Baytown v. Peoples, 9 S.W.3d 391, 395-96 (Tex.App.--Houston [14th Dist.] 1999, no pet.). "Although governmental immunity and official immunity are distinct concepts, through [CPRC] §101.021 … they become intertwined in certain circumstances. For example, in §101.021(1), the government is not liable if its employee is entitled to official immunity. This same result can occur in §101.021(2) if the governmental unit's liability is based on respondeat superior. However, … §101.021(2) is broader than §101.021(1); §101.021(2) encompasses not only liability based on respondeat superior, but also liability based on premise and special defects. If the liability is based on a premise defect, the governmental unit is not shielded by its employee's official immunity. 'With premise defects, liability is predicated not upon the actions of the governmental unit's employees but by reference to the duty of care owed by the governmental unit to a claimant for premise and special defects as specified in [CPRC] §101.022….'"

§101.021(1)--"Arises from" Motor-Driven Equipment & Vehicles

PHI, Inc. v. Texas Juvenile Justice Dept., 593 S.W.3d 296, 302 (Tex.2019). "By requiring that the damage 'arises from' the operation or use of the vehicle, the statute 'requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle.' We have, perhaps unhelpfully, described this standard as 'something more than actual cause but less than proximate cause.' In any event, '[t]his nexus requires more than mere involvement of property.' Instead, the use or operation 'must have actually caused the injury.' *At 303:* With respect to [P's] emergency-brake allegations, the 'arises from' causation element requires that [employee's] negligent failure to engage the emergency brake 'actually caused' the collision between [parked] van [that rolled down incline] and [crashed into grounded] helicopter. ... We conclude that a fact issue remains as to whether the accident 'arose from' the failure to set the emergency brake. At this stage of the proceedings, no more is required to satisfy §101.021(1)(A)'s 'arises from' requirement." *See also* ***DART v. Whitley***, 104 S.W.3d 540, 543 (Tex.2003); ***Texas Nat. Res. Conserv. Comm'n v. White***, 46 S.W.3d 864, 869-70 (Tex.2001).

Ryder Integrated Logistics, Inc. v. Fayette Cty., 453 S.W.3d 922, 927 (Tex.2015). "Given the Legislature's preference for a limited immunity waiver, we strictly construe §101.021's vehicle-use requirement. *At 928-29:* [Third-party-P] contends [deputy sheriff] breached a legal duty when he 'failed to follow proper … protocols and procedures in moving his motor vehicle,' and then 'blinded and distracted [third-party-P's employee with his headlights], causing [employee] to strike the rear of the … 18-wheeler [driven by P in underlying suit].' [¶] The question, then, is whether the alleged harm arose from [deputy sheriff's] arguably negligent use of the [police] cruiser. The statute itself does not define 'arises from.' We have defined this standard as a 'nexus between the operation or use of the motor-driven vehicle or equipment and a plaintiff's injuries.' We have also described the threshold as something more than actual cause but less than proximate cause. Accordingly, a plaintiff can satisfy the 'arising from' standard by demonstrating proximate cause. This is particularly appropriate in the context of the TTCA,

which only reaches injuries 'proximately caused by the wrongful act or omission or the negligence of an employee.' *At 931:* [W]e conclude [third-party-P] has alleged an injury arising from the use of a vehicle for the purpose of §101.021…." *See also* ***DART v. Whitley***, 104 S.W.3d 540, 543 (Tex.2003); ***LeLeaux v. Hamshire-Fannett ISD***, 835 S.W.2d 49, 51 (Tex.1992).

Williams v. City of Baytown, 467 S.W.3d 566, 574 (Tex.App.--Houston [1st Dist.] 2015, no pet.). Ps sued city, alleging that its police "officers were negligent while using their vehicles in [a] foiled attempt to box-in the suspects' truck [in a parking lot], and this use was a proximate cause of the [subsequent car accident involving suspects and Ps' teenage children]. *At 576:* Applying the reasoning in ***Ryder*** [***Integrated Logistics, Inc. v. Fayette Cty.***, 453 S.W.3d 922 (Tex.2015)], we conclude that [Ps] here have failed to show a waiver of immunity through the operation of a police vehicle. [¶] To establish a [TTCA] waiver, … it is not sufficient that the officers used their patrol cars to execute an unsuccessful box-in maneuver; rather, their use of the vehicles must be an actual cause of the injury. We hold that the officers' failure to control [suspect's] actions in the … parking lot does not furnish a sufficient nexus between a government employee's operation of a motor vehicle and the injuries that occurred." *Compare* ***City of Dallas v. Hillis***, 308 S.W.3d 526, 534-35 (Tex.App.--Dallas 2010, pet. denied) (court did not find sufficient nexus between suspect's accident and officer's use of police car; only actual cause of suspect's accident was his own decision to exit highway at reckless speed and officer's use of police car only furnished condition that made suspect's accident possible), *with* ***City of El Paso v. Cangialosi***, 632 S.W.3d 611, 625-26 (Tex.App.--El Paso 2020, no pet.) (key is to identify causative factor of accident and determine if it related to police's use of motor vehicle; court found Ps raised sufficient facts to show some nexus between police use of vehicle and accident between suspects and Ps), *and* ***Maspero v. City of San Antonio***, No. 04-18-00286-CV, 2019 WL 4044036 (Tex.App.--San Antonio 2019) (memo op.; 8-28-19) (court found sufficient nexus between officer's use of vehicle and collision between suspect and P), *rev'd on other grounds*, 640 S.W.3d 523 (Tex.2022) (Court did not reach or express any opinion on issue of whether P's injuries arose from officer's operation or use of vehicle).

Motor-Driven Vehicle or Equipment

Texas Nat. Res. Conserv. Comm'n v. White, 46 S.W.3d 864, 868 (Tex.2001). "The [TTCA] does not define 'motor-driven equipment.' [¶] We hold that the pump [used to dissipate gas fumes] is 'motor-driven equipment' for two reasons. First, the pump falls within the generally accepted meaning of 'motor-driven equipment.' 'Equipment,' which is not … defined … by the [TTCA], generally means '[t]he articles or implements used for a specific purpose or activity.' 'Motor-driven' means … driven by a motor. The pump in this case was an implement used for the purpose of dissipating fumes. It was driven--or made to perform its task--by a motor. It therefore fits the general definition of 'motor-driven equipment.'" *See also* ***4 DG's Corp. v. City of Lockney***, 853 S.W.2d 855, 857 (Tex.App.--Amarillo 1993, no writ).

Slaughter v. Abilene State Sch., 561 S.W.2d 789, 792 (Tex.1977). "Common usage has made the phrase 'motor vehicle' a generic term for all classes of self-propelled vehicles not operating on stationary rails or tracks, and therefore, as a result all automobiles are motor vehicles, but the contrary proposition is not true. The term 'motor vehicle' is much broader than the word 'automobile' and includes various vehicles which cannot be classified as automobiles. [¶] [T]he tractor involved in this accident is a motor vehicle within the meaning of [the TTCA]."

Ozolins v. North Lake Cmty. Coll., 805 S.W.2d 614, 615 (Tex.App.--Fort Worth 1991, no writ). "We hold that a sailboat is not a motor vehicle…."

Bryant v. Metropolitan Transit Auth., 722 S.W.2d 738, 740 (Tex.App.--Houston [14th Dist.] 1986, no writ), *disapproved on other grounds*, ***Fleming Foods, Inc. v. Rylander***, 6 S.W.3d 278 (Tex.1999). "[A] bus qualifies as a motor vehicle." *See also* ***DART v. Whitley***, 104 S.W.3d 540, 542-43 (Tex.2003).

Brookshire v. Houston ISD, 508 S.W.2d 675, 679 (Tex.App.--Houston [14th Dist.] 1974, no writ). "A forklift … is a piece of equipment as that term is ordinarily and popularly defined."

Operation or Use

PHI, Inc. v. Texas Juvenile Justice Dept., 593 S.W.3d 296, 303-05 (Tex.2019). Issue was whether D's employee's "failure to engage the emergency brake qualifies as 'operation or use' of the vehicle. [¶] We have previously defined 'use' as 'to put or bring into action or service; to employ for or apply to a given purpose.' We have defined 'operation' as referring to 'a doing or performing of a practical work.' These definitions are undoubtedly correct but not particularly enlightening here, other than to reinforce that these words should be given their everyday meaning. [¶] [W]e 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. It seems no less a part of driving than any other act by which the driver controls the vehicle. [Ps] allegation that [employee] negligently performed this 'essential' and 'final' aspect of driving the van fits squarely within the textual parameters of §101.021(1)(A). [¶] If we were writing on a clean slate, there would be little more to say. But ... we must examine prior cases interpreting the 'operation or use' requirement. Our application of the statute to these peculiar facts is consistent with this precedent, although some explanation is required. [¶] In ***LeLeaux***, [a] school bus was 'parked [and] empty, with the motor off.' A student jumped onto the rear of the bus and hit her head. We held that the injury did not arise out of the operation or use of the bus because the bus 'was nothing more than the place where [student] happened to injure herself' and was 'only the setting for the injury.' Here, by contrast, [D's] van was not simply the venue of the injury. The van itself rolled away and collided with the helicopter [parked on a landing pad nearby]. The bus driver in ***LeLeaux*** had nothing to do with the accident.... [¶] [H]ere, the manner in which [employee] operated his vehicle led directly to the damages [P] sustained, provided that [P] can ultimately establish, as alleged, that the failure to use the emergency brake actually caused the accident. [¶] Our application of the [TTCA] today is also consistent with ***Ryder***, though one passage from that case merits explanation. ... In [***Ryder***], we stated that 'a government employee must have been actively operating the vehicle at the time of the incident.' Relying on this statement, [D] argues that because [employee] had exited the van and was not '*actively* operating the vehicle *at the time of the incident*,' ***Ryder*** bars [P's] claims. The court of appeals agreed.... [¶] The statute does not explicitly require that the operation or use be 'active' or that it be ongoing 'at the time of the incident.' Nevertheless, [D] contends that ***Ryder*** effectively added these two additional requirements to the requirements already found in the statutory text. [¶] [D's] error--and that of the court of appeals--lies not in treating the disputed sentence from ***Ryder*** as an important part of the analysis but in treating it like statutory text. In context, ***Ryder***'s emphasis on active operation of the vehicle served primarily to distinguish that case from our earlier decision in ***LeLeaux***, where the bus was not only empty but was nothing more than the physical place where the accident occurred. The sentence was not intended to replace the statute or add elements to it, nor could it have done so. The statute itself--and only the statute--provides the governing rule of decision. *At 306:* Under the unusual facts presented in this case, [P] has alleged injury arising from operation or use of the vehicle even though the driver was not behind the wheel at the moment the accident happened. While [employee] had turned off and exited the van before it collided with the helicopter, the statute does not require in every case that the driver be in the vehicle at the precise time of the collision. The statute ... covers the allegations in question because 'operation' of a vehicle includes making sure it does not roll away after it is parked. [¶] [D] also contends that while the Act waives immunity for 'use' of a vehicle, there is no waiver for failures to use. ... True, '[t]his Court has never held that mere non-use of property can support a claim under the [TTCA].' But we cannot agree ... that failing to engage the appropriate brake on a vehicle is a non-actionable failure to use the vehicle. ... Correctly using the parking brake is just as much a part of 'using' or 'operating' the vehicle as any other function by which a driver controls the vehicle." *See also* ***Ryder Integrated Logistics, Inc. v. Fayette Cty.***, 453 S.W.3d 922, 927-28 (Tex.2015); ***LeLeaux v. Hamshire-Fannett ISD***, 835 S.W.2d 49, 51 (Tex.1992); ***Mount Pleasant ISD v. Estate of Lindburg***, 766 S.W.2d 208, 211 (Tex.1989).

San Antonio State Hosp. v. Cowan, 128 S.W.3d 244, 246 (Tex.2004). "A governmental unit does not 'use' personal property merely by allowing someone else to use it and nothing more. If all 'use' meant were 'to make available,' the statutory restriction would have very little force." (Internal quotes omitted.)

Texas Nat. Res. Conserv. Comm'n v. White, 46 S.W.3d 864, 869-70 (Tex.2001). "[T]o invoke the [TTCA]'s waiver of immunity, [P's] injury must have been caused by [D's] actual use of the [motor-driven] pump, not [D's] failure to use it. This Court has never held that non-use of property can support a claim under the [TTCA]. We have refused to broaden §101.021's waiver provision to include both use and non-use because doing so 'would be tantamount to abolishing governmental immunity….'"

Hopkins v. Spring ISD, 736 S.W.2d 617, 619 (Tex.1987). "[P] argues the school district and the bus supervisor cannot claim this immunity because (1) the child's injuries were aggravated when she had seizures on the bus and (2) [Ds] were negligent in failing to provide adequate medical care. … Applying the common and ordinary meaning of the words 'operation' and 'use,' [P's] injury could not have arisen from the use of a motor vehicle as contemplated by the statute." *See also* ***Austin ISD v. Gutierrez***, 54 S.W.3d 860, 863 (Tex.App.--Austin 2001, pet. denied).

Galveston Cty. v. Leach, 639 S.W.3d 268, 276 n.7 (Tex.App.--Houston [14th Dist.] 2021, pet. filed 1-20-22). "There is a split of authority among Texas appellate courts about whether a governmental employee can constructively 'operate' or 'use' a vehicle if the employee is not the vehicle's actual driver. *At 276-77:* In ***Townsend***, ***Gaytan***, ***Morgan***, and ***Hernandez***, each authoring court engaged in a fact-specific inquiry to determine whether the claimed indirect control amounted to the operation or use of the motor vehicle by a governmental employee. [¶] The differing outcomes seem to have turned on whether the drivers in each case had complied with, or were in the act of complying with, the directions of a governmental employee who was present when the accident occurred. In ***Townsend***, there is no indication whether the unlicensed driver complied with the officer's instruction to drive straight home, but we do know that the officer was not present at the accident. In ***Gaytan***, the officers who directed the driver were present when the accident occurred, but the driver acted independently in pausing the vehicle rather than proceeding to turn as the officers directed. But in both ***Morgan*** and ***Hernandez***, governmental employees were present when the accident occurred, and under the facts alleged, compliance with the governmental actor's directives at the scene allegedly was a proximate cause of the plaintiffs' injuries. [¶] We see the same principle in ***City of El Campo v. Rubio***, 980 S.W.2d 943 (Tex.App.--Corpus Christi 1998, pet. dism'd w.o.j.)…. In that case, [t]he officer allegedly ordered [unlicensed P] to follow the patrol car to the police station…. [As unlicensed P] pulled the family's van onto the highway to follow, an oncoming vehicle struck the van. The Thirteenth Court of Appeals held that, given the allegations that [unlicensed P] was acting under direct orders from the officer, the trial court did not err in denying the municipal defendant's plea to the jurisdiction. [¶] Here, [Ps] pleaded and offered evidence that, as in ***Rubio***, a law-enforcement officer ordered an unlicensed driver to drive a motor vehicle she was not qualified to operate safely, and that the accident was the result of her attempt to comply with the officer's directions. [T]here is at least a question of fact as to whether [officer] exercised such control as to be considered the operator or user of the motor vehicle." (Internal quotes omitted.) *Compare* ***City of El Paso v. Aguilar***, 610 S.W.3d 600, 605 (Tex.App.--El Paso 2020, no pet.) (City employee's act of directing driver of truck pulling parade float to move truck forward, which caused P's injury, was "operation or use"), ***City of El Campo v. Rubio***, 980 S.W.2d 943, 946-47 (Tex.App.--Corpus Christi 1998, pet. dism'd) (officer's act of instructing unlicensed P on how to drive and then ordering her to follow him back to police station was "operation or use"), *and* ***County of Galveston v. Morgan***, 882 S.W.2d 485, 490 (Tex.App.--Houston [14th Dist.] 1994, writ denied) (county employee's act of directing truck to move too close to power line, which caused P's injury by electrical shock, was "operation or use"), *with* ***City of Sugar Land v. Gaytan***, No. 01-18-01083-CV, 2020 WL 2026374 (Tex.App.--Houston [1st Dist.] 2020, no pet.) (memo op.; 4-28-20) (police officers' act of directing traffic at intersection was not "operation or use"), ***McLennan Cty. v. Veazey***, 314 S.W.3d 456, 462 (Tex.App.--Waco 2010, pet. denied) (declining to follow ***Rubio*** and holding that County Commissioner's act of instructing wrecker driver was not "operation or use"), ***Townsend v. City of Alvin***, No. 14-05-00915-CV, 2006 WL 2345922 (Tex.App.--Houston [14th Dist.] 2006, no pet.) (memo op.; 8-15-06) (police officer's act of instructing unlicensed and untrained driver to "drive straight home" did not amount to "operation or use"), *and* ***Pierce v. Hearne ISD***, No. 14-50788, 2015 WL 81995 (5th Cir.2015) (slip op.; 1-7-15) (declining to follow ***Rubio*** and holding that teacher's act of ordering student to drive ATV was not "operation or use"). *See also* ***Texas DOT v. Self***, No. 02-21-00240-CV, 2022 WL 1259094 (Tex.App.--Fort Worth 2022, n.p.h.) (memo op.; 4-28-22) (Court determined it was not necessary to decide which line of cases is correct because even the more lenient line of cases, which permits third party's motor-driven equipment to be operated or used by State, still requires direct control of that equipment, i.e., "both close physical proximity to equipment while it is in operation and direction so precise that State tells third party in physical control of the equipment which direction and how far to move"; Court held that nexus was absent in this case).

Arlington ISD v. T.P., No. 02-16-00249-CV, 2017 WL 526311 (Tex.App.--Fort Worth 2017, no pet.) (memo op.; 2-9-17). "[P] claims that [her minor daughter] was thrown into the windshield and injured because the bus driver was not looking where she was driving and had to suddenly apply the brakes to avoid colliding with another bus. Thus, according to [P's] allegations and the jurisdictional evidence, the school bus did not simply furnish the condition that made [minor's] alleged injuries possible, nor

did it merely play some irrelevant tangential role in her alleged injuries; rather, [P] alleged that [the school district's] operation or use of the school bus *actually caused* [minor's] injuries. This is sufficient to state a claim within the TTCA's limited waiver of immunity for claims involving the use or operation of a motor vehicle."

Mt. Pleasant ISD v. Elliott, No. 06-13-00115-CV, 2014 WL 1513291 (Tex.App.--Texarkana 2014, pet. denied) (memo op.; 4-17-14). "We reject the assertion that maintenance falls within the scope of the terms 'operation' and 'use' as used in §101.021(1)(A)."

Freeman v. Harris Cty., 183 S.W.3d 885, 889 (Tex.App.--Houston [1st Dist.] 2006, pet. denied). Section 101.021 "does not require that, for the County's immunity to be waived, the motor-driven equipment must be used for something other than its intended purpose."

Tarrant Cty. v. English, 989 S.W.2d 368, 375 (Tex.App.--Fort Worth 1998, pet. denied). "The record in this case shows that county employees spilled diesel fuel on the ground while preparing dump trucks to haul asphalt for use in the maintenance of county roads. The record also contains evidence that some of the diesel migrated from the County's property to [P's] property. We hold that this evidence is sufficient to support the jury's finding that the negligent operation or use of a motor-driven vehicle damaged [P's] property. The fact that the trucks were not pouring asphalt on county roads when [P's] property was injured does not defeat this finding. The trucks were in use because they were being prepared to transport and release asphalt onto county roads."

§101.021(2)--Tangible Personal or Real Property

Sampson v. University of Tex., 500 S.W.3d 380, 385-86 (Tex.2016). "In ***Texas*** [***Dept.***] ***of Parks & Wildlife v. Miranda***, [133 S.W.3d 217 (Tex.2004),] this Court considered whether a claim can be both a premises defect claim and a claim relating to a condition or use of tangible property, and held that it cannot. … ***Miranda*** made clear that a claim for a condition or use of real property is a premises defect claim under the [TTCA], and therefore the [TTCA] waives immunity for two distinct tort causes of action: one arising from tangible personal property and one arising from a premises defect. [¶] Additionally, in ***Miranda***, this Court recognized the different standards of care attached to the two causes of action and explained that a plaintiff cannot plead around the heightened standard for premises defects, which requires proof of additional elements such as actual knowledge, by casting his claim instead as one for a condition or use of tangible personal property…. Therefore, if a claim is one for a premises defect, it must be analyzed under §101.022 and not as a claim for a condition or use of tangible property under [CPRC] §101.021(2). [¶] The [TTCA] does not define 'premises defect' or 'tangible personal property.' Nor have we defined those terms within the context of the [TTCA]. [H]owever, … this Court … has consistently treated slip/trip-and-fall cases as presenting claims for premises defects. *At 387:* [W]ith 'premise[s] defects, liability is predicated not upon the actions of the governmental unit's employees but by reference to the duty of care owed by the governmental unit to the claimant for premise and special defects as specified in §101.022….' Under the [TTCA], the duty owed for a premises defect is that owed to a licensee. Rather than expressly imposing a particular duty, … the Legislature linked the applicable duty under §101.022(a)--for premises defects--to the common law. 'That duty requires that a landowner not injure a licensee by willful, wanton or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not.' … We therefore look to the common law premises defect cause of action for guidance in interpreting 'premises defect' under the [TTCA]. *At 388-89:* The definition of 'premises defect' has been developed at common law through case law distinguishing between two subspecies of negligence: causes of action for premises liability and negligent activity. … When distinguishing between a negligent activity and a premises defect, this Court has focused on whether the injury occurred by or as a contemporaneous result of the activity itself--a negligent activity--or rather by a condition created by the activity--a premises defect. … We seek to clarify this distinction. [¶] Within the [TTCA's] context, we have defined 'condition' as 'either an intentional or an inadvertent state of being.' To state a 'condition' claim under the [TTCA], there must be an allegation of 'defective or inadequate property.' Furthermore, we have defined 'use' to mean 'to put or bring into action or service; to employ for or apply to a given purpose.' [T]o state a 'use' of tangible personal property claim under the [TTCA], the injury must be *contemporaneous* with the use of the tangible personal property--'[u]sing that property must have actually caused the injury.' Allegations of mere non-use of property cannot support a 'use' claim under the [TTCA].

At 390-91: The distinction between a use or condition of tangible personal property claim as opposed to a premises defect claim, however, is whether it was the contemporaneous, affirmative action or service (use) or the state of being (condition) of the tangible property itself that allegedly caused the injury, or whether it was a condition created on the real property by the tangible personal property (a premises defect). … Here, the electrical extension cord was strung across the pedestrian walkway hours [before P tripped over it] by either a [university] or [rental-company] employee. The dangerous condition was the way the extension cord was positioned over the concrete retaining wall, resulting in a gap between the ground and the cord. The injury did not result from the use of tangible personal property because a [university] employee was not putting or bringing the cord into action or service *at the time* of the injury. … Nor was the gap between the ground and the cord a condition of tangible personal property because it was not the defective state of the actual cord that resulted in the injury. … Instead it was the static placement of the extension cord on the real property … that created the dangerous condition--a tripping hazard. The extension cord thus created a condition on the real property--a premises defect. [U]nder the [TTCA], when an item of tangible personal property creates a condition of real property that results in a slip/trip-and-fall injury, it is properly characterized as a premises defect cause of action."

Texas Dept. of MHMR v. Petty, 848 S.W.2d 680, 687 n.7 (Tex.1992) (Cornyn, J., dissenting). The 1985 codification of the TTCA "inexplicably changed the conjunction between the motor-driven vehicle portion of the statute and the tangible real and personal property portion of the statute from an 'or' to an 'and.' One court has properly construed the 'and' to mean 'or.' ***Bryant v. Metropolitan Transit Auth.***, 722 S.W.2d 738, 740 (Tex.App.--Houston [14th Dist.] 1986, no writ)."

Harris Cty. v. Shook, 634 S.W.3d 942, 950 (Tex.App.--Houston [1st Dist.] 2021, pet. denied). "[D] argues that because the toll gate arm is permanently affixed to the concrete tollway and the loop-detection system is embedded under the concrete, [P's] claim relates to the condition of real property, the tollway, and 'not tangible, movable personal property.' [P] argues that the tollway gate arm is not disqualified from the category of tangible personal property because the tollway gate arm is motorized and is designed to move up and down. *At 951:* Given it is undisputed that the gate is attached to the pavement and operates as part of an inductive loop system embedded into the pavement that generates a magnetic field on the tollway, we conclude that [P's] claim involves a premises defect. That the gate arm lifts and lowers--and thus is moveable in a sense--does not mandate a different conclusion or create a fact issue as to the nature of the property. *At 952:* Moreover, [P's] allegation is that the defective condition of the tollway gate caused an obstruction on the tollway, which made the tollway unsafe for vehicles to pass. Thus, even if the tollway gate arm were tangible personal property, the nature of the claim would still be properly characterized under a premises defect theory because the use or condition of the tangible personal property created a dangerous condition of real property."

Hardin Cty. Sheriff's Dept. v. Smith, 290 S.W.3d 550, 553 (Tex.App.--Beaumont 2009, no pet.). "[T]he use of tangible personal property must be by the government employee. Merely supplying nondefective property to be used by others and nothing more is not use of tangible personal property by a state employee. Likewise, the non-use of tangible personal property is not use for purposes of §101.021."

Caused By

University of Tex. M.D. Anderson Cancer Ctr. v. McKenzie, 578 S.W.3d 506, 518 (Tex.2019). "[D] does not dispute that the [carrier agent] was a cause in fact of [decedent's] death, arguing only that proximate cause is lacking because [decedent's] death was not a foreseeable result of using the [carrier agent]. [D] advances two arguments that it claims foreclose foreseeability: (1) [decedent's] death was a 'possibility' but was not 'predictable' and (2) the precautions taken to prevent [decedent] from developing hyponatremia rendered any risk of death unforeseeable. Essentially, [D] contends that [decedent's] death was unforeseeable because it was unlikely. We disagree. *At 519:* Foreseeability does not necessarily equate to predictability. Rather, 'foreseeability' means that the actor should have reasonably anticipated the dangers that his negligent conduct created for others. It 'does not require that a person anticipate the precise manner in which injury will occur once he has created a dangerous situation through his negligence.' It requires only that 'the general danger, not the exact sequence of events that produced the harm, be foreseeable.' Accordingly, the plaintiff need not always show that his particular injury has occurred before in order to create a fact question on foreseeability. *At 520:* It is ... clear that, at a minimum, the general dangers associated with the use

of the [carrier agent] were known to [decedent's] doctors. This evidence is sufficient to raise a fact issue on foreseeability. [¶] And the precautionary measures taken to prevent hyponatremia do not negate foreseeability. [R]educing risk is not the same as eliminating it."

City of Dallas v. Sanchez, 494 S.W.3d 722, 725 (Tex.2016). City "9-1-1 dispatchers received two 9-1-1 calls within approximately ten minutes of one another. Both calls originated from the same apartment complex and both requested assistance for a drug-overdose victim; however, the calls were placed from different phone numbers and concerned different residents. After emergency responders arrived at the apartment complex to assist the subject of the first 9-1-1 call, they erroneously concluded that the two 9-1-1 calls were redundant and that a single individual was the subject of both calls. Consequently, the emergency responders never went to [decedent's] apartment to provide aid. [¶] [Ps] sued the City … alleging: (1) the City's 9-1-1 dispatcher misused the phone system by hanging up before emergency responders arrived to assist [decedent], or in the alternative, the 9-1-1 phone system malfunctioned, causing the call to disconnect prematurely; (2) the 9-1-1 dispatcher failed to follow proper procedure and violated various … laws and regulations by either disconnecting the call or failing to redial after the call disconnected; and (3) if the emergency responders had located [decedent] before leaving the premises, they would have most likely saved his life. *At 726-27:* For immunity to be waived under §101.021(2), personal injury or death must be proximately caused by a condition or use of tangible personal or real property. To establish a waiver of the City's immunity under §101.021(2), we must therefore determine whether the phone's condition was a proximate cause of [decedent's] death. [¶] Proximate cause requires both cause in fact and foreseeability. For a condition of property to be a cause in fact, the condition must serve as a substantial factor in causing the injury and without which the injury would not have occurred. When a condition or use of property merely furnishes a circumstance that makes the injury possible, the condition or use is not a substantial factor in causing the injury. To be a substantial factor, the condition or use of the property must actually have caused the injury. Thus, the use of property that simply hinders or delays treatment does not actually cause the injury and does not constitute a proximate cause of an injury. [¶] [T]he alleged telephone-system malfunction was not a proximate cause of [decedent's] death. … Although disconnection of the telephone call may have contributed to circumstances that delayed potentially life-saving assistance, the malfunction was too attenuated from the cause of [decedent's] death--a drug overdose--to be a proximate cause. The alleged defect did not actually cause [decedent's] death nor was his death hastened or exacerbated by a telephone malfunction. The malfunction was merely one of a series of factors that contributed to [decedent] not receiving timely medical assistance. [Decedent's] death was caused by drugs, the passage of time, and misinterpretation of information. Accordingly, the pleadings do not establish a defect in the 9-1-1 telephone system was a proximate cause of [decedent's] death as required to establish a waiver of governmental immunity under the [TTCA]." (Internal quotes omitted.) *See also* ***TDCJ v. Miller***, 51 S.W.3d 583, 588 (Tex.2001) (although medications given to decedent might have furnished condition that made his injury possible by suppressing symptoms that would otherwise have been recognized as meningitis, treatment did not actually cause his death: meningitis did); ***Dallas Cty. MHMR v. Bossley***, 968 S.W.2d 339, 343 (Tex.1998) (although combination of a condition of property--unlocked inner door--and a use of property--mental-health-facility employee unlocking outer door without looking for patient--might have furnished condition that made patient's suicide possible, they did not actually cause patient's suicide).

City of Austin v. Anam, 623 S.W.3d 15, 19 (Tex.App.--Austin 2020, no pet.). "[Ps] do not allege any facts demonstrating foreseeability--i.e., that a person of ordinary intelligence should have anticipated that the failure to refasten the seatbelt of a handcuffed occupant of the vehicle would create the danger of suicide by gunshot. Instead, [Ps'] pleadings assert in a conclusory manner only that 'it was foreseeable that failing to use the seatbelt properly would cause injury to [decedent].' Nor could [Ps] allege any such facts in this case because the reasonably anticipated danger or harm created from an unfastened seatbelt is not suicide by gunshot wound to the head, but rather is the likelihood of injury or death should the vehicle be involved in a collision or otherwise stop abruptly."

Condition of Property

Texas DOT v. Garza, 70 S.W.3d 802, 803 (Tex.2002). "[W]e must decide whether a sign that accurately reflects the legal speed limit, even though [P] believes that limit was too high considering the sign's proximity to a school zone, falls within [§101.021(2)]. … We hold that [Ps'] allegations do not come within the [TTCA's] waiver of sovereign immunity for a 'condition' of a traffic sign."

Texas DOT v. Pate, 170 S.W.3d 840, 844-45 (Tex.App.--Texarkana 2005, pet. denied). Held: D's failure to maintain clear sight lines for roads by removing vegetation waives sovereign immunity under §101.021(2) because the obscuring vegetation is a condition of the property.

Webb Cty. v. Sandoval, 88 S.W.3d 290, 295 (Tex.App.--San Antonio 2002, no pet.). "[T]he claim regarding the negligent condition of the food served to [decedent] meets the requirements for a waiver of immunity. The size of the chicken nuggets and their hard nature due to being overcooked constitute the 'condition' of the nuggets or their particular mode or state of being. Since [Ps] contend that [decedent] choked on the chicken nuggets due to their condition, this claim survives the immunity challenge under §101.021…."

City of Fort Worth v. Gay, 977 S.W.2d 814, 817 (Tex.App.--Fort Worth 1998, no pet.). "To properly state a claim involving the 'condition' of property, it is sufficient to allege that defective or inadequate property contributed to the injury. [P] alleged such a claim by questioning the City's negligence in maintaining the street and sewer system, which proximately caused her fall. Accordingly, the City was not entitled to sovereign immunity."

McBride v. TDCJ-ID, 964 S.W.2d 18, 22 (Tex.App.--Tyler 1997, no writ). "[P] alleged in his petition that a TDCJ-ID employee directed him to carry a 50 gallon handleless barrel up the stairs, and that the barrel slipped from his grasp, causing him to fall backwards down the stairs. He further alleged that TDCJ-ID was negligent in furnishing him with a barrel which did not have handles, such defect causing him to lose his balance, proximately causing his injuries. We therefore hold that [P's] claim under the [TTCA] has a basis in law."

Tangible Personal Property

Texas DPS v. Petta, 44 S.W.3d 575, 580-81 (Tex.2001). "[P's] claim that the [Police] Department negligently failed to furnish the proper training, instruction, training manuals, and documents to [D-police officer] fails. … We have long held that information is not tangible personal property, since it is an abstract concept that lacks corporeal, physical, or palpable qualities. [S]imply reducing information to writing on paper does not make the information 'tangible personal property.' [I]n ***Kassen v. Hatley***, [887 S.W.2d 4 (Tex.1994), *overruled on other grounds*, ***Franka v. Velasquez***, 332 S.W.3d 367 (Tex.2011),] we specifically held that the information in an emergency room procedures manual is not tangible personal property. Thus, while instructional manuals can be seen and touched, the Legislature has not waived immunity for negligence involving the use, misuse, or non-use of the information they contain." *See also* ***UTMB v. York***, 871 S.W.2d 175, 178-79 (Tex.1994) (information that may or may not be recorded in patient's medical records does not constitute tangible personal property under §101.021(2)).

University of Tex. M.D. Anderson Cancer Ctr. v. King, 329 S.W.3d 876, 880-81 (Tex.App.--Houston [14th Dist.] 2010, pet. denied). "There is no waiver of immunity under the 'tangible personal property' provision of the [TTCA] for injuries proximately caused by the negligent (1) exercise of medical judgment, (2) use or misuse of information, (3) failure to act or to use property, (4) failure to supervise, (5) failure to investigate, (6) failure to monitor, or (7) failure to recognize or address the risk of falling." *See also* ***Strode v. TDCJ***, 261 S.W.3d 387, 391 (Tex.App.--Texarkana 2008, no pet.) (no waiver under theory of negligent implementation of written policy).

Sipes v. City of Grapevine, 146 S.W.3d 273, 281 (Tex.App.--Fort Worth 2004), *rev'd in part on other grounds*, 195 S.W.3d 689 (Tex.2006). "There is no requirement under the Act that the City own the tangible property that causes the injury. The City may be liable in circumstances in which it assumes control over tangible personal property and the negligent exercise of that control results in personal injury."

State v. San Miguel, 981 S.W.2d 342, 347 (Tex.App.--Houston [14th Dist.] 1998), *rev'd on other grounds*, 2 S.W.3d 249 (Tex.1999). "[B]arrel signs were individual items of tangible personal property because they were moveable, portable, temporary, and were not intended to be a permanent part of the highway…. Because [the] claims arise from the negligent use of tangible personal property, the trial court did not err in submitting the case under a general negligence charge."

Use of Property

TDCJ v. Rangel, 595 S.W.3d 198, 206 (Tex.2020). "In examining what constitutes 'use' of tangible personal property for purposes of the [TTCA's] waiver, we have held that a governmental unit does not 'use' personal property merely by allowing someone else to use it and nothing more. Instead, ... we have held that a governmental unit 'uses' tangible personal property if it puts or brings the property into action or service, or employs the property for or applies it to a given purpose. Further, the government's use of the property must have actually caused the injury. [¶] [Here,] the Department 'used' the tear-gas gun and skat shell when [prison warden] authorized and instructed [security officer] to use them to address the incident in the prison dormitory. … [T]he Department did not simply make available the tear-gas gun and skat shell to [security officer]; rather, the Department put the tear-gas gun and skat shell into action or service and employed them for the given purpose of addressing the incident with the inmates. Where, as here, a governmental unit authorizes or orders an employee to use tangible personal property for a specific purpose, that governmental unit has 'used' the tangible personal property for purposes of the Act's waiver. [¶] [W]e have interpreted 'use' to include employing tangible personal property for a given purpose or putting it into service or action. *At 207:* Further, holding that the Department's actions constitute 'use' of tangible personal property comports with the plain language of the statute. We have interpreted 'use' under §101.021 as a common, everyday word. [T]he ordinary meaning of 'use' includes to 'employ,' which means to make use of or to use or engage the services of. Thus, the plain meaning of 'use' does not necessarily require physical manipulation of an object. [¶] The [TTCA's] distinction between 'use' and 'operation' further supports this understanding of 'use.' While we have interpreted 'operation' to mean a doing or performing of a practical work, we have understood 'use' as having a broader definition.... [B]ecause the Department employed the tear-gas gun and skat shell for a given purpose, it has 'used' the property under §101.021(2)." (Internal quotes omitted.)

University of Tex. M.D. Anderson Cancer Ctr. v. McKenzie, 578 S.W.3d 506, 513-14 (Tex.2019). "[T]he issue presented in this case is whether actual use of non-defective property is sufficient to establish waiver where the complaint is not that the property was administered incorrectly, but that it should not have been used in the first place. [¶] The [TTCA] does not narrow the definition of use to encompass only the manner of administration, nor does it limit the scope of the waiver to 'use' that is not preceded by medical judgment. The suggestion that 'use' of property transforms into medical judgment so long as the property is administered correctly simply is not supported either by the statute's plain language or ... by our precedent. [¶] [Ps] complain about [D's] use of property under circumstances where it (1) should not have been used at all and (2) caused harm. This is as much a claim for negligent use of property as a claim that the [carrier agent] was improperly administered would have been. That the subsequent administration followed protocol does not somehow negate any negligence in using the property in the first place. [¶] While we have never addressed the issue directly, we have indicated that the use of medication that is improper under the circumstances and causes harm constitutes negligent 'use' under the [TTCA]. *At 515:* [Further, w]hile we agree that a complaint about medical judgment, without more, is insufficient to waive immunity, the negligence alleged here does not involve only medical judgment. *At 516:* [D] insists that because [Ps] do not complain about how the [carrier agent] was administered--only that is was used at all--this is a case of 'mere involvement' of tangible personal property that is insufficient to waive immunity. However, in the cases from which [D] extracts this language we were explaining that the 'requirement of causation is more than mere involvement.' In other words, a plaintiff cannot invoke waiver merely by alleging use of tangible personal property; the use of the property must also cause his injury. However, this well-settled proposition does not affect our analysis here. *At 517:* [T]he dissent would hold that causing harm by improperly administering the right property does not involve medical judgment and thus constitutes negligent or wrongful use of property under the [TTCA's] use waiver, while causing harm by properly administering the wrong property does involve medical judgment and thus cannot be negligent use under the [TTCA]. We fail to see the textual basis [anywhere in §101.021] for that distinction." *See also* ***University of Tex. Sw. Med. Ctr. v. Rhoades***, 605 S.W.3d 853, 860-61, 865 (Tex.App.--Dallas 2020, pet. denied) (although P did not contend that D used sponge or x-ray machine in manner for which they were not designed or intended, P's claims that D negligently failed to remove sponge from surgical field and use x-ray machine for its intended purpose--to scan entire surgical field for foreign objects--were claims arising from D's allegedly negligently use of tangible personal property and, thus, waived immunity under TTCA).

Harris Cty. v. Annab, 547 S.W.3d 609, 614 (Tex.2018). "[T]he county's failure to take action based on information it knew or should have known about its employee is not the 'use of tangible personal property.' We have long held that information is not

tangible personal property, since it is an abstract concept that lacks corporeal, physical, or palpable qualities. [C]omplaints about employment decisions allege the use or non-use of information, not the use of tangible personal property. We reject [P's] claim that the county's use or non-use of information regarding [officer's] fitness to serve as a constable or to possess his personal firearm establishes a waiver of immunity under the [TTCA]. [¶] Further, non-use is by definition not use. It is well settled that mere nonuse of property does not suffice to invoke §101.021(2)'s waiver. If it did, governmental immunity would be rendered a nullity, because it is difficult to imagine a tort case which does not involve the use, or nonuse, of some item of real or personal property. The county's failure to use information when it hired [officer], retained [officer] as an employee, and declined to revoke the authorization for his on-duty possession of a firearm, cannot be the 'use of tangible personal property.'" (Internal quotes omitted.) *See also* ***TDCJ v. Campos***, 384 S.W.3d 810, 815 (Tex.2012); ***City of North Richland Hills v. Friend***, 370 S.W.3d 369, 372 (Tex.2012).

City of North Richland Hills v. Friend, 370 S.W.3d 369, 372 (Tex.2012). "[I]n some cases we have held that, when a plaintiff alleges that property used by the state lacks an integral safety component, immunity is waived under §101.021(2). [¶] But our recent holdings have limited the precedential value of [this theory]. '[The theory] 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.' [W]e further limited the integral safety component doctrine to cases where a safety component is completely lacking, as opposed to merely inadequate." *See also* ***White v. City of Houston***, under this code section; ***City of Houston v. Gutkowski***, 532 S.W.3d 855, 859-60 (Tex.App.--Houston [14th Dist.] 2017, no pet.); ***University of Tex. Sys. v. Palomino***, 498 S.W.3d 711, 715-16 (Tex.App.--El Paso 2016, pet. denied).

Texas A&M Univ. v. Bishop, 156 S.W.3d 580, 583 (Tex.2005). "[N]egligent supervision, without more, does not constitute a 'use' of personal property that would waive [D's] immunity under §101.021(2), else the failure to prevent any accident that involves tangible personal property would come within the statute's purview. 'Such a result would be tantamount to abolishing governmental immunity, contrary to the limited waiver the Legislature clearly intended.'" *See also* ***University of Tex. Health Sci. Ctr. v. Schroeder***, 190 S.W.3d 102, 106-07 (Tex.App.--Houston [1st Dist.] 2005, no pet.); ***TDFPS v. Atwood***, 176 S.W.3d 522, 528 (Tex.App.--Houston [1st Dist.] 2004, pet. denied).

San Antonio State Hosp. v. Cowan, 128 S.W.3d 244, 245-46 (Tex.2004). "The issue here is whether merely providing someone with personal property that is not itself inherently unsafe is a 'use' within the meaning of the Act. We hold that it is not…. [¶] [Ps] concede that §101.021(2) waives immunity for a use of personal property only when the governmental unit is itself the user. This limitation is not expressly stated in §101.021, but we have read it into §101.021(1), which waives immunity for the use of motor-driven vehicles and equipment, and there is no reason to construe 'use' differently in §101.021(2)." *See also* ***Texas A&M Univ. v. Bishop***, 156 S.W.3d 580, 583 (Tex.2005); ***University of Tex. Health Sci. Ctr. v. Schroeder***, 190 S.W.3d 102, 105-06 (Tex.App.--Houston [1st Dist.] 2005, no pet.).

Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 584 (Tex.1996). "[Ps] claim that [D] should have administered an injectionable drug because [D] knew that [P's child] had not been taking his oral Thorazine and that he became violent when not medicated. Thus, the issue is whether [D's] administration of an oral form of Thorazine, rather than an injectionable drug, constitutes use or misuse of tangible personal property under the terms of the [TTCA]. We hold that [D's] failure to administer an injectionable drug is non-use of tangible personal property and therefore does not fall under the waiver provisions of the [TTCA]." *See also* ***Bansal v. University of Tex. M.D. Anderson Cancer Ctr.***, 502 S.W.3d 347, 358 (Tex.App.--Houston [14th Dist.] 2016, pet. denied); ***Webb Cty. v. Sandoval***, 126 S.W.3d 264, 267 (Tex.App.--San Antonio 2003, no pet.).

White v. City of Houston, 624 S.W.3d 28, 33 (Tex.App.--Houston [1st Dist.] 2021, no pet.). "An allegation that a governmental unit failed to use property with a more effective safety feature than the property it did use is … insufficient to invoke the waiver of immunity for the use of property. [¶] However, a narrow exception applies when a plaintiff alleges that property used by a governmental unit lacked an integral safety component altogether and this component's complete absence caused the plaintiff's injuries. *At 34-35:* [P] does not assert that [fire department] should have used a different type of hose or a firetruck with a differently designed storage compartment. Rather, [P] alleges that the hose, or the compartment in which it was stowed, lacked

an integral safety component to secure the hose in place while in transit. This allegation, and the undisputed evidence that such components exist and are used, suffice to invoke the statutory waiver for a condition or use of tangible personal property. [¶] When the accident happened, firefighters were not using the hose to extinguish or contain a fire. They were not handling the hose at all. But the plain meaning of 'use' does not necessarily require physical manipulation of an object. The hose need only have been put or brought into action or service to qualify as being used. By being stowed and transported on the truck, the hose was put or brought into service to extinguish fires as needed. When the hose became dislodged, it was being transported in a firetruck en route to a fire. Thus, the hose was in use when it caused the accident in which [P] was injured. Transporting a firehose to a location where it is to be employed to extinguish a fire is as much a part of its intended and ordinary use as extinguishing a fire. [P's] injuries therefore were contemporaneous with the alleged use of the hose." (Internal quotes omitted.)

University of Tex. Health Sci. Ctr. v. DeSoto, 401 S.W.3d 319, 325 (Tex.App.--Houston [14th Dist.] 2013, pet. denied). "[Ps] assert that the following language in subsection (1) is an express negligence requirement: 'property damage, personal injury, and death *proximately caused by the wrongful action or omission or the negligence* of an employee.' According to [Ps], the absence of such language from subsection (2) means that the 'use of tangible personal … property' need not be negligent for the subsection to apply, even when the property is not defective. We disagree. *At 327:* [T]he Legislature did not intend for sovereign immunity to be waived for a state employee's non-negligent use of non-defective personal property."

Redden v. Denton Cty., 335 S.W.3d 743, 751 (Tex.App.--Fort Worth 2011, no pet.). "We are persuaded by the reasoning of our sister courts in holding that the 'use' of tangible property must involve the use of a medical machine, not the 'use' of information from the medical machine." *See also* ***Cherry v. TDCJ***, 978 S.W.2d 240, 242-43 (Tex.App.--Texarkana 1998, no pet.) (use of computers, telephones, or records to collect and communicate information is not use of tangible personal property).

Retzlaff v. TDCJ, 135 S.W.3d 731, 742 (Tex.App.--Houston [1st Dist.] 2003, no pet.). "We are not willing to impose a duty on prison officials to make safe those barriers and deterrents whose very purpose require them to be dangerous. Likewise, we will not impose a duty on prison officials to warn inmates of every possible hazard which these barriers and deterrents might create. It is enough that TDCJ and other prison operators warn inmates of those areas of the prison from which inmates are prohibited and to identify the consequences of failing to heed these warnings."

Were It a Private Person

Sipes v. City of Grapevine, 146 S.W.3d 273, 283 (Tex.App.--Fort Worth 2004), *rev'd in part on other grounds*, 195 S.W.3d 689 (Tex.2006). The TTCA's "waiver [of immunity] encompasses joint enterprise liability, which makes each party the agent of the other and holds each responsible for the negligent act of the other."

V. T. C. A., Civil Practice & Remedies Code § 101.021, TX CIV PRAC & REM § 101.021
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

TAB F:
Tex. Civ. Prac. & Rem. Code § 101.025

V.T.C.A., Civil Practice & Remedies Code § 101.025

§ 101.025. Waiver of Governmental Immunity; Permission to Sue

Currentness

(a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.

(b) A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

Credits
Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

O'CONNOR'S CROSS REFERENCES
See also Tex. Const. art. 1, §17;***O'Connor's Texas COA***, "Suits Against the Government," ch. 24, §1 et seq.; ***O'Connor's Texas COA,*** "Texas Tort Claims Act--Negligence," ch. 25, §1 et seq.; ***O'Connor's Texas COA,*** "Texas Tort Claims Act--Premises Liability," ch. 26, §1 et seq.; ***O'Connor's Texas COA,*** "Government-Employee Immunities," ch. 46, §1 et seq.

O'CONNOR'S ANNOTATIONS
Texas DOT v. Jones, 8 S.W.3d 636, 638 (Tex.1999). "[I]mmunity from suit bars an action against the state unless the state expressly consents to the suit. The party suing the governmental entity must establish the state's consent, which may be alleged either by reference to a statute or to express legislative permission. [A]bsent the state's consent to suit, a trial court lacks subject matter jurisdiction. A party may contest a trial court's subject matter jurisdiction by filing a plea to the jurisdiction. [¶] [I]mmunity from suit raises a jurisdictional bar." *See also* ***Federal Sign v. Texas S. Univ.***, 951 S.W.2d 401, 405 (Tex.1997) (legislative consent for suit must be by clear and unambiguous language).

Snelling v. Mims, 97 S.W.3d 646, 653 (Tex.App.--Waco 2002, no pet.). "We conclude that the operation of the nursing home by [governmental entity] in violation of statute does not remove [governmental entity] from the protection afforded by sovereign immunity."

Austin ISD v. Gutierrez, 54 S.W.3d 860, 862 n.3 (Tex.App.--Austin 2001, pet. denied). "A governmental entity may claim immunity from *suit* or immunity from *liability*. Immunity from suit completely bars an action against the state unless the state waives its immunity and consents to suit. This is a jurisdictional issue because, without the state's consent, a trial court lacks jurisdiction to hear the case. Immunity from liability protects a government entity from judgment, but does not prevent the case from going to trial. This is an affirmative defense that must be pleaded, rather than an issue to be raised in a plea to the jurisdiction."

V. T. C. A., Civil Practice & Remedies Code § 101.025, TX CIV PRAC & REM § 101.025

Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Amanda Glasscock on behalf of Nicholas Laurent
Bar No. 24065591
aglasscock@barronadler.com
Envelope ID: 69207310
Status as of 10/13/2022 4:24 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Catherine L. Kyle	11778600	ckyle@chmc-law.com	10/13/2022 4:14:37 PM	SENT
Sean Hicks	24072479	shicks@thompsoncoe.com	10/13/2022 4:14:37 PM	SENT
Andrew York	24066318	york@barronadler.com	10/13/2022 4:14:37 PM	SENT
Blaire Knox	24074542	knox@barronadler.com	10/13/2022 4:14:37 PM	SENT
Nicholas Laurent	24065591	laurent@barronadler.com	10/13/2022 4:14:37 PM	SENT
Scott Marcinkus	24099703	smarcinkus@chmc-law.com	10/13/2022 4:14:37 PM	SENT
Jennifer Dechamplain Aufricht	1429050	jaufricht@thompsoncoe.com	10/13/2022 4:14:37 PM	SENT
Amanda Glasscock		aglasscock@barronadler.com	10/13/2022 4:14:37 PM	SENT
Catherine Fuller		Catherine.Fuller@oag.texas.gov	10/13/2022 4:14:37 PM	SENT