Reverse and Render and Opinion Filed March 22, 2016

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01152-CV

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, Appellant
V.
JOHNNY FELIPE MUNOZ, Appellee

On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-10-00309-E

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill

Johnny Munoz was injured by heavy equipment he was working near on property UTSW owned. The pivotal question is whether his injury was caused by a premises condition or the use of tangible personal property, as that difference determines whether sovereign immunity defeats his claim. The answer to that question turns on whether the equipment at issue was (i) a fixture attached to real property (and thus treated as real property) or (ii) personal property.

This is the second time the case has been before us regarding UTSW's sovereign immunity. In the first appeal, UTSW challenged the trial court's order denying its plea to the jurisdiction. *See Univ. of Texas Southwest Med. Ctr. v. Munoz*, No. 05-11-01220-CV, 2012 WL 2890366, at *1 (Tex. App.—Dallas July 13, 2012, pet. denied) (mem. op.) (*Munoz I*). There, we concluded that sovereign immunity was not waived for his premises defect claim because Munoz conceded that he knew about the danger. *Id*. But we said—in the context of that plea—that the

act of requiring the equipment to be running while Munoz worked near it constituted a use of tangible personal property and his pleadings and proof were sufficient to establish the trial court's jurisdiction over the suit. *Id*. at *3. We thus affirmed the trial court's denial of the plea to the jurisdiction.

The case was subsequently tried and submitted to a jury on a negligence theory. The jury found that UTSW was 51% negligent in causing Munoz's injuries and awarded him $2,410,000 in damages. The trial court reduced the damages to $250,000 by operation of the Texas Tort Claims Act (TTCA) and entered judgment accordingly. *See* TEX. CIV. PRAC. & REM. CODE ANN. §101.023.

UTSW now appeals that judgment, again arguing that it is immune from suit. Specifically, UTSW asserts that (i) the evidence is insufficient to support the verdict because there is no evidence that UTSW negligently used tangible personal property in a manner that injured Munoz; (ii) the trial court erred by admitting medical billing records that did not include the amounts paid or incurred on Munoz's behalf; and (iii) the trial court erred by admitting expert testimony on future medical expenses that lacked foundation.

For the following reasons, we agree that the evidence conclusively shows that the air handling unit is not personalty because it is affixed to the building and cannot be moved without cutting it apart and rendering the floors it services uninhabitable. It is instead a real property fixture and the absence of a safety cover created a dangerous premises condition. As a result, sovereign immunity was not waived because Munoz's prior knowledge of the dangerous condition precludes a premises defect claim. We thus reverse the trial court's judgment and render judgment dismissing the case for lack of subject matter jurisdiction.

I. Background

UTSW owns and maintains the Bass Towers complex, which includes two high rise office buildings with a mall in between them.

Munoz, an electrician, was employed by Universal Controls, Inc. (UCI).

UCI subcontracted with Siemans Industries Inc. to retrofit the control system for the air handling units for Towers I and 2. An air handling unit is an industrial air conditioning unit used to regulate the temperatures of occupied spaces in office buildings.

The system retrofit involved installing new computer panels and sensors to control the air handling units, and UCI was to run conduit and electrical control wiring for the system. UCI was also responsible for determining where the wire would go, and its employees were responsible for doing the work. UTSW did not supply to UCI wire, conduit, or any materials for the retrofit.

Bass Tower 2 is a fourteen-story building with nine air handling units numbered 21-29. Air handling unit 26 (AHU 26) is at issue here.

AHU 26 has a pulley driven motor system with a series of pulley belts that spin about 26 revolutions per second. A safety cover is supposed to cover the spinning wheel and the belts that drive the fan. But AHU 26's safety cover was missing.

Munoz began working on AHU 26 around October 1, and worked on and around the unit for seven or eight days without incident. The day that Munoz was injured was not the first time he noticed AHU 26's missing safety cover.

Munoz was injured on October 9, 2009 while installing conduit for AHU 26's controls. When Munoz arrived in the machine room that day, he saw that UCI employees Wesley Henry and Danny Williams, were present, but no UTSW employees were there. He also saw that another UCI employee had left a long, unwound length of wire in the walkway around AHU 26.

The distance between the exposed motor and pulley system and the adjacent wall for AHU 26 was 18-24 inches.

When Munoz saw the wire near the uncovered spinning wheel on AHU 26, he immediately recognized that it created a dangerous condition. Munoz, however, continued walking around the loose wire instead of tying it up.

"Quite a few times" that day, he passed through the space where the loose wire was near the spinning wheel. His leg, however, became caught in the wire when he moved past the spinning wheel while making a measurement for the next section of conduit. The wire then became entangled in the spinning wheel, and Munoz "felt a jerk" as the wire pulled by the spinning wheel lifted up his leg and twisted his knee. Munoz's left knee and lower back were injured, and he later had two unsuccessful knee surgeries. He has been in chronic pain since the injury.

Munoz testified that the incident "probably wouldn't have happened" had the wire not been present.

Before the case was submitted to the jury, UTSW moved for a directed verdict, arguing that AHU 26 is an appurtenance to a building, not tangible personal property, thereby relegating Munoz to an unsustainable premises defect claim due to his prior knowledge of the dangerous condition. UTSW also argued that there was no evidence of a contemporaneous use of property by a UTSW employee. The trial court denied the motion.

The jury was asked to apportion the negligence among Munoz, UTSW, Siemens, and UCI, and the jury found UTSW 51% negligent. The jury awarded $2,410,000 in damages that were subsequently reduced to $250,000 by operation of the TTCA. *See* TEX. CIV. PRAC. & REM. CODE ANN. §101.023. UTSW moved for a new trial and a judgment notwithstanding the verdict, both of which were denied. This appeal followed.

II. Analysis

A. Issue One: Did operating AHU 26 while Munoz worked nearby involve the use of tangible personal property and thereby waive UTSW's sovereign immunity?[1]

1. Standard of review and Sovereign Immunity law

Sovereign immunity protects the State and its various divisions from lawsuits for money damages.[2] *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 853 (Tex. 2002). If the Legislature has not expressly waived immunity from suit, the State retains that immunity even if its liability is not otherwise disputed. *Id*. Thus, a plaintiff must establish the State's consent to suit. *See Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Otherwise, sovereign immunity from suit defeats a trial court's subject-matter jurisdiction. *See Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004).

The TTCA, however, expressly waives immunity for "personal injury and death caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2). The question here is whether Munoz met his burden to prove that UTSW waived its immunity under this statute.

2. Does law of the case establish AHU 26's character as a matter of law ?

According to Munoz, *Munoz I* held that he proved a waiver of immunity by UTSW's negligent use of tangible personal property and this holding is now the law of the case. UTSW responds that the law of the case here consists only of *Munoz I's* legal conclusions that (i) the facts of this case preclude a premises defect claim and (ii) Munoz is only recasting his premises

[1] As phrased, UTSW's first issue argues that thre is insufficient evidence that any UTSW employee negligently used tangible personal property in a manner that contemporaneously harmed Munoz. But, because the sub-issue of whether AHU 26 is personal property effectively resolves this case, we focus on that question first.

[2] The existence of subject matter jurisdiction is a question of law that may be raised at any time by any party or by the trial court. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 91 (Tex. 2012); *Mayhew v. Towns of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

defect claim as a negligent condition claim to the extent he claims that the lack of a safety cover on AHU 26 caused his injury. Our first task is therefore to determine to what extent *Munoz I* controls the present case.

Law of the case concerns uniformity and judicial economy, dictating that "questions of law decided on appeal to a court of last resort . . . govern the case throughout its subsequent stages." *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003). The doctrine's application is flexible and must be left to the court's discretion and determined according to the case's circumstances. *Heggy v. Am. Trading Employee Retirement Account Plan*, 123 S.W.3d 770, 778 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The doctrine, however, does not apply if pertinent facts are not substantially the same in the two cases. *Brewer & Pritchard, P.C. v. Johnson*, 167 S.W.3d 460, 466 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

If the record in one appeal on a plea to the jurisdiction differs from the record on a second appeal following a trial, we review the evidence challenging the existence of jurisdictional facts. *See City of Houston v. Harris*, 192 S.W.3d 167, 171 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (prior opinion concluding that pleadings were sufficient to state claim that statue was personal property was not law of the case in second appeal); *see also Miranda*, 133 S.W.3d at 227.

In *Munoz I*, we concluded that sovereign immunity was not waived for Munoz's premises defect claim because he knew about the danger. *Munoz I*, 2012 WL 2890366, at *1.[3] We also said that, "to the extent Munoz's amended pleading raised a claim of a negligent condition, specifically that the lack of a safety cover on AHU 26 caused his injuries, this is

[3] To establish UTSW's liability for an ordinary premises defect, Munoz would have been required to prove that UTSW had actual knowledge of the dangerous condition and that he did not. *See State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

simply recasting Munoz's premises defect claim as a negligent condition claim and sovereign immunity has not been waived." *Id*. at *4.

We reached a different conclusion, however, regarding Munoz's use of tangible property allegation:

> Munoz asserted UT Southwestern required the units, including AHU 26, to be running while Munoz and his coworkers worked on the retrofit. The record contains proof that UT Southwestern personnel required AHU 26 and other units to be running and operational while Munoz and the other Universal Controls employees worked on and around the units and wires. Although Munoz tried to step around the wires, his leg got caught and the wires got tangled in the pulley system of the AHU, his leg and back were injured. The pulley system was operational because the AHU was running. Under these facts and circumstances, the act of requiring the AHU to be running and operational constitutes a use of tangible personal property and is separate and distinct from a condition of property. We conclude Munoz pleaded, and provided proof, the trial court had jurisdiction over this suit.

Id.

Regarding Munoz's use of personal property claim, although he generally asserts that the "testimony at trial did not differ substantially from the deposition testimony" he referenced in the first appeal, he provides no further insight into the specific facts developed at the pleading stage as compared to trial. Moreover, he also seems to concede that characterizing AHU 26 as personal or real property remained a fact question after the first appeal. Specifically, he says that, "despite the law of the case this court is free to decide" that "the use of AHU 26 was a use of tangible real property for which immunity was waived."

Comparing the facts developed at the pleadings stage with the facts developed at trial, it is logical to infer that the evidence adduced at the jury trial on the merits was more developed. Specifically, *Munoz I* involved a plea to the jurisdiction at the pleading phase. When a plea to the jurisdiction challenges the existence of jurisdictional facts, the court considers the relevant evidence to determine if a fact issue exists. *Miranda*, 133 S.W.3d at 227. Thus, while *Munoz I* concluded that the case could proceed on a use of tangible personal property theory, but not a

premises defect theory, it was only a conclusion that, based on the evidence then in the record, there was a fact issue as to the negligence theory of recovery but not the premises liability theory. Indeed, during the charge conference, the trial judge noted that the question of whether AHU 26 is personal property was "at least a fact issue."

Under these circumstances, the law of the case doctrine does not establish whether AHU 26 is personal or real property for the purposes of a TTCA negligence claim and thus does not foreclose our considering whether the evidence supports the judgment on the negligence claim. *See*, *e.g.*, *Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602, 609 (Tex. App.—Fort Worth 2004, pet. denied) (law of case doctrine does not apply when evidence differs "at two different stages of litigation and may involve more fully developed facts at either stage").

3. Is running AHU 26 a use of tangible personal property?

Having determined that *Munoz I* did not conclusively resolve AHU 26's characterization issue, we next consider whether running the unit without the safety cover was a use of tangible personal property.

UTSW says that the evidence conclusively establishes that AHU 26 is a fixture and thus real property. Munoz responds that the distinction is immaterial because regardless of its character (i) UTSW "used" AHU 26 by keeping it on to deliver air conditioning into occupied tenant spaces, (ii) the equipment was defective; and (iii) the equipment caused the injury. That is, Munoz argues that UTSW's negligent use of AHU 26, regardless of its character, waived UTSW's sovereign immunity. But Munoz's problem is that §101.021(2)'s use of real property prong would not help him because he previously knew that the missing wheel cover presented an unreasonably dangerous condition. *See Payne*, 838 S.W.2d at 237. Consequently, under

premises liability law, he could win only if he proved that AHU 26 was tangible personal property instead of real property.[4]

"Real property" in this context means "land, and generally whatever is erected or growing upon or fixed to land." *Miranda*, 133 S.W.3d at 229–30. Courts have defined "premises" as a building or part thereof with its grounds and appurtenances, and "defect" as a shortcoming, imperfection, or "the want of something necessary for completeness." *Renteria v. Housing Auth.*, 96 S.W.3d 454, 458 (Tex. App.—El Paso 2002, pet. denied).

On the other hand, while "tangible" and "personal property" are not defined in the statute, "tangible personal property" means something that has a corporeal, concrete, and palpable existence." *Univ. Of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 178 (Tex. 1994). And, by definition, it must not be real property.

Regarding AHU 26's character, the undisputed trial evidence established that the unit weighs more than one thousand pounds. Furthermore, it is connected to Tower 2 by a series of ducts and it is permanently connected by electrical wiring. And the unit is so large that it could not be removed without disassembling it by cutting it apart. Finally, removing AHU 26 from Tower 2 would make the floors it services uninhabitable. Those facts, and existing precedents, conclusively establish that AHU 26 was a fixture and thus treated as part of realty. *See Eun Bok Lee v. Ho Chang Lee*, 411 S.W.3d 95, 110 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

For example, the court in *City of Houston v. Harris*, 192 S.W.3d 167, 172 (Tex. App.—Houston [14th Dist.] 2006, no pet.) had to decide whether an elephant statue at the zoo was real property subject to a premises liability claim. Although the statue had been moved in the past, it was affixed to the ground when the injury happened. *Id* at 173-74. As a result, the court held as

[4] And even if a claim alleges a condition or use of tangible personal property, the plaintiff must allege that the property did more than merely furnish the condition that makes the injury possible; the plaintiff must allege that the property was a direct factor in causing the injuries. *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998).

a matter of law that the statue was real property, and therefore subject to the heightened standard for a premises liability claim. *See id*. at 174.[5] In reaching that result, the court held that courts view a case as involving a premises defect when allegedly defective property is affixed to land or other real property. *Id.* at 173 (*citing Billstrom v. Mem'l Med. Center*, 598 S.W.2d 642, 644 (Tex. Civ. App.—Corpus Christi 1980, no writ)).

Similarly, the court in *Univ. of Texas Med. Branch at Galveston v. Davidson*, 882 S.W.2d 83, 100 (Tex. App.—Houston [14th Dist.] 1994, no pet.) rejected a claim that an elevator was personal property. *Id.* In so holding, the court observed that, although the elevator was a separate piece of equipment, it was attached to and an integral part of the building and was therefore an appurtenance. *Id.*

Here, that AHU 26 sits on vibration control devices that are not connected to the building does not alter our analysis because "[T]he removability or temporary nature of a piece of property on a premises does not convert a premises-defect claim into a viable negligence claim." *Tex. Health & Human Svcs. v. McRae*, No. 05-14-00894-CV, 2015 WL 4546927, at *3 (Tex. App.—Dallas July 28, 2015, no pet.) (mem. op.). And, although the vibration devices may not be attached to the building, AHU 26 itself is affixed to the property through vents and electrical wiring, making the unit an integral part of the building. Accordingly, the above evidence and authorities conclusively establish that AHU 26 is a real property fixture.

As discussed above and in *Munoz I*, classifying AHU 26 as realty means that Munoz has only a premises defect claim on which he cannot prevail due to his prior knowledge of AHU 26's unreasonably dangerous condition. *See Payne*, 838 S.W.2d at 237. Accordingly, we reject

[5] When the case involves a premises defect claim, the governmental unit owes only the duty that a private person owes a licensee on private property unless the claimant pays for the use of the premises. TEX. CIV. PRAC. & REM. CODE ANN. §101.022; *Pitts v. Winkler Cty*., 351 S.W.3d 564, 571 (Tex. App.—El Paso 2011, no pet.).

Munoz's argument that UTSW's sovereign immunity does not apply because AHU 26 was allegedly tangible personal property.

4. Does the exception for providing personal property that lacks an integral safety component apply here?

Munoz further assserts that characterizing AHU 26 as real or personal property is immaterial because UTSW's use of the unit falls within the "integral safety component" exception. We disagree.

Although the general rule is that a government's act of furnishing personal property to an individual *to use* is not *a "use"* of that property, the supreme court recognizes a narrow exception to the rule for "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 safety component led to the plaintiff's injuries." *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 585 (Tex. 1996).

This exception derives from an earlier line of cases in which the supreme court held that a governmental unit's negligent provision of defective or deficient protective equipment was a "condition or use" of personal property that waived immunity under § 101.021(2). *See Robinson v. Central Tex. MHMR Ctr.*, 780 S.W.2d 169, 169, 171 (Tex. 1989) (providing swim attire lacking life preserver to epileptic child prone to seizures constituted a "condition or use"); *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298-300 (Tex. 1976) (providing protective gear to football player without protection for his injured knee constituted a "condition or use"); *Overton Mem'l Hosp. v. McGuire*, 518 S.W.2d 528, 528-29 (Tex. 1975) (per curiam) (providing bed for patient that was not equipped with side rails was a "condition or use").

These cases, however, represent the "outer bounds" of what constitutes using tangible personal property:

> These cases [*Robinson, Overton, and Lowe*] represent perhaps the outer bounds of what we have defined as use of tangible personal property. We did not intend, in deciding these cases, to allow both use and non-use of property to result in waiver of immunity under the Act. Such a result would be tantamount to abolishing governmental immunity, contrary to the limited waiver the Legislature clearly intended. The precedential value of these cases is therefore 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.

Clark, 923 S.W.2d at 585 (emphasis added).

Further refining this narrow exception, the supreme court distinguishes between a governmental unit's affirmatively furnishing or providing personal property that is missing integral safety features, which waives immunity, from (i) failing to provide personal property at all or (ii) failing to provide better, safer, alternative personal property, which does not. *See Texas A &M Univ. v. Bisho*p, 156 S.W.3d 580, 583–84 (Tex. 2005) (providing students with knife that lacked adequate "stab pad" was not a use or absence of a safety component, but a "non-use" by failure to provide a more effective safety feature).

In urging that UTSW "used" AHU 26 in a way relevant to waiver under § 101.021(2), Munoz relies on *Texas State Technical College v. Beavers*, 218 S.W.3d 258, 265–67 (Tex. App.—Texarkana 2007, no pet.). In *Beavers*, a student in a diesel engine testing and repair course was injured while using a hydraulic hoist as part of his course instruction. He sued the college for negligence and sought to establish waiver of the college's sovereign immunity by alleging that the college's "use" of the hoist proximately caused his injuries. While holding that the student's claims did not fall within the complete absence of an "integral safety component" exception for personal property furnished to an individual to use, the Texarkana court nonetheless concluded that the college had "used" the hoist because it was utilized as part of the student's course instruction. *See id.* at 263-67.

We decline to apply these cases here because, as we have said, AHU 26's status as a fixture renders this a premises condition case barred by Munoz's prior knowledge of the dangerous condition.

B. Issues Two and Three: Was it error to admit billing records and medical expert testimony that lacked foundation?

UTSW's second and third issues assert that the trial court erred by admitting medical billing records that did not include the amounts paid or incurred on Munoz's behalf and by admitting expert testimony on future medical expenses that lacked foundation. Because we have concluded that the evidence is insufficient to establish that UTSW waived its immunity, we need not consider these remaining issues. *See* TEX. R. APP. P. 47.1.

III. Conclusion

We conclude that Munoz failed to prove a condition or use of tangible personal property separate from a premises defect claim. As a result, the evidence is legally insufficient to show that UTSW waived its sovereign immunity. Our resolution of UTSW's first issue obviates the need to consider its remaining issues. *See* TEX. R. APP. P. 47.1.

We reverse the trial court's judgment and render judgment dismissing the case for lack of subject matter jurisdiction.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, Appellant

No. 05-14-01152-CV V.

JOHNNY FELIPE MUNOZ, Appellee

On Appeal from the County Court at Law No. 5, Dallas County, Texas
Trial Court Cause No. CC-10-00309-E.
Opinion delivered by Justice Whitehill.
Justices Lang and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that:

the case is dismissed for lack of subject matter jurisdiction..

It is **ORDERED** that appellant THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER recover its costs of this appeal from appellee JOHNNY FELIPE MUNOZ.

Judgment entered March 22, 2016.