



the claim is not within the statutory waiver, we reverse the judgment of the court of appeals, \_\_\_ S.W.3d \_\_\_, and render judgment dismissing the case for lack of subject matter jurisdiction.

## I.

In August 1994, while imprisoned at the TDCJ facility in Huntsville, Clyde Edwin Miller III began suffering from nausea and severe headaches. Dr. Martin Chaney and the on-site clinic staff administered pain medications, intravenous fluids, electrolytes, anti-nausea medications, and ice-packs to alleviate Miller's symptoms. After fifteen days of this regimen, on September 8, Miller was hospitalized in the University of Texas Medical Branch (UTMB) at Galveston. There he was diagnosed with cryptococcal meningitis, which caused his death on September 28, 1994.

Miller's surviving spouse, Jeannie Miller, individually and on behalf of his estate and their children, brought a negligence claim against the State, TDCJ, UTMB, and Dr. Chaney (now deceased). Jeannie Miller alleged that Dr. Chaney's failure to timely or adequately evaluate her husband made a serious condition deteriorate into a fatal one. Specifically, she alleged that her husband's personal injury and death were proximately caused by the defendants' misuse of tangible property by (1) improperly administering pain medication and intravenous fluids which masked the symptoms of meningitis, (2) improperly reading and interpreting fever-detecting equipment, and (3) improperly using clinic facilities and equipment in diagnosing and treating Miller. The plaintiff further alleged that Dr. Chaney and the clinic staff were negligent "in failing to practice medicine in an acceptable manner consistent with public health and welfare," failing to evaluate Miller in a timely manner, failing to make a proper diagnosis, failing to order appropriate laboratory tests, and failing to treat Miller's true condition.

TDCJ filed a plea to the jurisdiction, and alternatively a motion for summary judgment, asserting that Jeannie Miller failed to bring her claim within the Tort Claims Act's limited waiver of sovereign immunity.<sup>1</sup> In response, the plaintiff asserted various technical defects in TDCJ's plea and motion and brought forth summary judgment evidence, including deposition testimony of a nurse at the TDCJ facility and an infectious disease specialist. The nurse testified that she administered various drugs, including Darvocet, a prescription pain medication, to Miller, and that the medications reduced his headaches and vomiting. The specialist described the progressive nature and symptoms of meningitis, explaining that Darvocet would have reduced the headaches, allowing the disease to progress undiagnosed to its fatal stage.

The trial court denied both TDCJ's plea to the jurisdiction and its alternative motion for summary judgment. TDCJ filed an interlocutory appeal from the denial of the plea to the jurisdiction, and the court of appeals affirmed the trial court's judgment.<sup>2</sup> TDCJ then petitioned this Court for review, contending that *Texas Department of Transportation v. Jones*, 8 S.W.3d 636, 639 (Tex. 1999) (per curiam), requires a court to examine the pleadings to determine whether a plaintiff alleged waiver under the terms of the Tort Claims Act, which the court of appeals here did not do.

## II.

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<sup>1</sup> TDCJ asserted that the plaintiff failed to (1) give adequate notice of the claim, as required by section 101.101(a), (2) demonstrate that Chaney was an "employee" of TDCJ, as defined in section 101.001(1), and (3) plead an injury proximately caused by use of tangible personal property, under section 101.021(2). Only the third issue is before this Court.

<sup>2</sup> As in the court of appeals, TDCJ appeals only the trial court's denying the plea to the jurisdiction, not its denying the motion for summary judgment. The Legislature authorized interlocutory appeals by governmental units from the former but not the latter. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

We first consider whether this Court has jurisdiction to consider TDCJ's appeal. TDCJ asserts jurisdiction based on a conflict between the decision below and our recent decision in *Jones*. TEXAS GOV'T CODE § 22.225(c) (this court has jurisdiction to review interlocutory appeals when "one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court"). This Court has conflicts jurisdiction if it appears that "the rulings in the two cases are 'so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other.'" *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998). In *Jones*, we concluded: "Because governmental immunity defeats a trial court's subject matter jurisdiction, the court of appeals erred in affirming the denial of the Department's plea *without first determining whether Jones' pleadings state a claim* under the Texas Tort Claims Act." 8 S.W.3d at 639 (emphasis added). By contrast, the court of appeals below held: "Because [Jeannie Miller's] claim is made pursuant to the Texas Tort Claims Act, it is a claim for which the legislature has granted consent to sue the State." \_\_ S.W.3d at \_\_. But the court of appeals did not determine whether Jeannie Miller stated a claim under the Tort Claims Act, as required by *Jones*. This conflict is sufficient to confer jurisdiction on this Court.

### III.

The court of appeals' holding that a plaintiff can establish waiver of sovereign immunity simply by making a claim "pursuant to the Texas Tort Claims Act" is erroneous under both *Jones* and our more recent decision in *Bland Independent School District v. Blue*, 34 S.W.3d 547 (Tex. 2000). Mere reference to the Tort Claims Act does not establish the state's consent to be sued and thus is not enough to confer jurisdiction on the trial court. The Tort Claims Act provides a limited waiver of sovereign

immunity, allowing suits to be brought against governmental units only in certain, narrowly defined circumstances. See *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998) (“the Legislature intended the waiver in the Act to be limited”). Therefore, “we must look to the terms of the Act to determine the scope of its waiver,” *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996), and then must consider the particular facts of the case before us to determine whether it comes within that scope.

The specific Tort Claims Act provision under which Jeannie Miller alleges waiver provides that “[a] governmental unit in the state is liable for . . . personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.” TEX. CIV. PRAC. & REM. CODE § 101.021(2). Although this provision speaks in terms of waiver of immunity from *liability*, the Act also waives immunity from suit to the same extent. TEX. CIV. PRAC. & REM. CODE § 101.025(a) (“Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.”). Under *Jones*, we must examine the plaintiff’s pleadings to decide whether sovereign immunity has been waived. 8 S.W.3d at 639. We must also look to the summary judgment evidence the plaintiff offered to support her jurisdictional argument. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555 (“[A] court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised.”). Therefore, to decide whether Jeannie Miller has “affirmatively demonstrate[d] the court’s jurisdiction to hear the cause,” *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993), “we consider the facts alleged by the plaintiff, and to the extent it is relevant to the

jurisdictional issue, the evidence submitted by the parties.” *Texas Natural Resource & Conservation Comm’n v. White*, \_\_ S.W.3d \_\_, \_\_ (Tex. 2001).

#### IV.

We turn now to an examination of Jeannie Miller’s pleadings and pertinent jurisdictional evidence. Her petition alleged generally that TDCJ was negligent in its treatment of her husband by failing to diagnose meningitis. But the Tort Claims Act does not waive sovereign immunity for all negligence claims against governmental units. Accordingly, Jeannie Miller sought to bring her claim within the “personal injury or death so caused by a condition or use of tangible . . . property,” TEX. CIV. PRAC. & REM. CODE § 101.021(2), waiver provision by also alleging that misuse of various medications and medical equipment masked the diagnosable symptoms of the fatal disease and by offering deposition testimony to support that theory.

The Tort Claims Act and our cases have distinguished claims involving the failure to use, or the non-use of property, which do not waive sovereign immunity, from claims involving a “condition or use” of tangible personal property that causes injury, which do effect a waiver. *Id.*; compare *Kerrville State Hosp.*, 923 S.W.2d at 584-86 (failure to prescribe medications which allegedly could have prevented the injury is non-use thus not within the waiver), with *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 300 (Tex. 1976) (furnishing football uniform lacking proper protective device for player’s knee injury is misuse thus within the waiver). Here, TDCJ contends that Jeannie Miller, in essence, alleged only the non-use of tangible personal property and an error in medical judgment, neither of which are within the statutory waiver.

Jeannie Miller responds that she alleges not only TDCJ's failure to use tangible property which could have prevented her husband's death, but also its simultaneous misuse of pain-reducing and anti-nausea medications, intravenous fluids, and diagnostic equipment. That misuse, she claims, "mask[ed] the symptoms of the severity of the progression of the life threatening nature of meningitis."

While this is an attractive attempt to distinguish our non-use cases, we are not persuaded. As we have previously observed: "There cannot be waiver of sovereign immunity in every case in which medical treatment is provided by a public facility. Doctors in state medical facilities use some form of tangible personal property nearly every time they treat a patient." *Kerrville*, 923 S.W.2d at 585-86. If there is waiver in all of those cases, the waiver of immunity is virtually unrestricted, which is not what the Legislature intended. *Id.* at 586; *see Lowe*, 540 S.W.2d at 302 (Greenhill, C.J., concurring).

"Use" means "to put or bring into action or service; to employ for or apply to a given purpose." *White*, \_\_\_ S.W.3d at \_\_\_; *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989). TDCJ did "bring into . . . service" and "employ" various drugs and medical equipment while treating Miller, but that some property is merely involved is not enough. *Bossley*, 968 S.W.2d at 342. Using that property must have actually caused the injury. *White*, \_\_\_ S.W.3d at \_\_\_. The property "used" on Miller did not.

In *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339 (Tex. 1998), a mentally ill patient escaped through unlocked hospital doors and later committed suicide by leaping in front of a truck. 968 S.W.2d at 340-41. We concluded that neither the use of tangible property — unlocking the hospital doors — nor their condition — being unlocked — caused the patient's death. *Id.*

at 343. The doors may have “furnish[ed] the condition that made the injury possible” by permitting the patient to escape into the community where he committed suicide, but “the use and condition of the doors were too attenuated from [the patient’s] death to be said to have caused it.” *Id.*

Likewise, Miller’s treatment might have furnished the condition that made the injury possible by suppressing symptoms that TDCJ staff otherwise could have recognized as meningitis, but the treatment did not actually cause his death. Neither the drugs nor the treatment afforded to Miller hurt him or made him worse, in and of themselves. His meningitis became progressively worse due to the passage of time and an alleged error in medical judgment; there is no evidence that any defendant’s acts hastened or exacerbated his decline. That time might not have passed and that the symptoms of meningitis might have been recognized if the TDCJ staff had not treated Miller’s complaints in an improper manner is in essence an allegation only of negligence, not of “use” of tangible personal property that “caused” injury.

V.

We recognize that the distinction we draw is problematic. But we believe that the Legislature drew that line in the Tort Claims Act. For many years, this Court and its justices have expressed their frustration in trying to draw principled boundaries between “use” and “non-use.” *See Kerrville*, 923 S.W.2d at 584; *University of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *Robinson v. Central Tex. MHMR Ctr.*, 780 S.W.2d 169, 170-71 (Tex. 1989); *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 32 (Tex. 1983); *Lowe*, 540 S.W.2d at 301-03 (Greenhill, C.J., concurring). Despite these writings, the Legislature has made no change in this language. Under our precedents, we conclude that Jeannie Miller has not demonstrated waiver of sovereign immunity under the Tort Claims Act. Therefore, we reverse the

judgment of the court of appeals and render judgment dismissing the case for lack of subject matter jurisdiction.

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Thomas R. Phillips  
Chief Justice

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