

Second, the Court misapplies *Dallas County Mental Health & Mental Retardation v. Bossley*.² *Bossley* stands for the proposition that the use or condition of property that was not causally linked to the patient's injury did not invoke the Tort Claims Act's waiver of sovereign immunity.³ As in *Bossley*, it is undisputable that there was a use of property in this case, contrary to the majority's contention that the allegation here was "only of negligence, not of 'use' of tangible personal property that 'caused' injury." But unlike *Bossley*, the plaintiff here presents a distinct causal link, which the majority sidesteps, between the "use" of the property and the injury suffered.

For these two reasons, I respectfully dissent.

As the Court acknowledges, Miller "alleg[ed] that misuse of various medications and medical equipment masked the diagnosable symptoms of" her husband's meningitis.⁴ And as a result, the doctors failed to diagnose the meningitis. Consequently, she argues, her claim falls within the narrow waiver of sovereign immunity for claims of death or personal injury "caused by . . . use of tangible . . . property . . ." ⁵ Yet the Court rejects Miller's argument asserting that the causal connection between the medication and her husband's death is too attenuated.⁶ The Court's reasoning is not only unpersuasive, it's not credible.

² 968 S.W.2d 339 (Tex. 1998).

³ TEX. CIV. PRAC. & REM. CODE § 101.021(2).

⁴ ___ S.W.3d ___, ___.

⁵ TEX. CIV. PRAC. & REM. CODE § 101.021(2).

⁶ ___ S.W.3d at ___.

This Court has, on a number of occasions, pleaded with the Legislature to reconsider the waiver section at issue not only because its application is difficult but because its concept seems almost irrational.⁷ Justice Hecht’s concurrence emphasizes again how unworkable the requirement of the statute is. But that reality does not give the Court license to make the application of the law more ridiculous than it already is.

TDCJ gave Miller’s husband medicine – tangible personal property. A fact the Court concedes. And that medicine caused a change in the condition of the patient. A fact the Court cannot avoid. But the Court claims that this use of medicine did not cause Mr. Miller’s death as *Bossley* requires: “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. Using that property must have actually caused the injury. The property ‘used’ on Miller did not.”⁸ Really?

Bossley’s charge is that “[p]roperty does not cause injury if it does no more than furnish the condition that makes the injury possible.”⁹ There is neither doubt nor dispute that Miller claims that the medication that TDCJ gave her husband did more than merely furnish the condition that killed Mr. Miller. She alleges that the medicine caused his doctors to misdiagnose the real problem – the meningitis – by hiding its symptoms. With proper candor, the majority acknowledges that the medicine “might have

⁷ See *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 301 (Tex. 1976) (Greenhill, C.J., concurring); *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 32 (Tex. 1983); *Robinson v. Central Texas MHMR Ctr.*, 780 S.W.2d 169, 170-71 (Tex. 1989); *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996).

⁸ ___ S.W.3d at ___ (citations omitted).

⁹ 968 S.W.2d at 343.

furnished the condition that made the injury possible *by suppressing symptoms that TDCJ staff otherwise could have recognized as meningitis . . .*”¹⁰ How this is not an allegation of causation under anyone’s definition escapes me. But the Court appears to be caught up in its misapplication of *Bossley*. *Bossley* dealt with a situation where an employee left a door unlocked – a condition of property conducive to escape by a mental patient.¹¹ Here, though, the property wasn’t just in a particular state of existence, the property was medicine with active ingredients actually ingested by the patient, given by the state to the patient, and intended by the state to alter the patient’s condition. And Miller’s complaint is that the medicine affected the doctor’s ability to properly diagnose her husband’s illness. *Bossley*’s causation discussion dealt with the lack of a causal link between the use or condition of the property and the patient’s death¹² – not with a situation where there actually existed a causal link between the use of the property and the patient’s death.

Bossley’s legitimacy depends on the fact that the unlocked door was too far removed from the patient’s death – the patient was run over when he ran into traffic,¹³ he didn’t kill himself because the door was unlocked. But had the allegation been that *Bossley* killed himself because of an irrational fear of unlocked doors, the door would still have done “no more than furnish the condition that makes the injury

¹⁰ ___ S.W.3d at ___ (emphasis added).

¹¹ 968 S.W.2d at 341-42.

¹² *Id.* at 343.

¹³ *Id.*

possible.” Yet in that case the door would have been causally linked to the patient’s death. I suggest the outcome in *Bossley* might have been different.

This Court’s opinion in *Salcedo v. El Paso Hospital District*¹⁴ aptly demonstrates the same distinction. This Court has, in recent years, been critical of that opinion because the case dealt with a doctor misreading information from an electrocardiogram machine. Our criticism of *Salcedo* is that the case actually dealt with the misuse of information and not any misuse of the machine – for the evidence showed that the machine was properly used, the doctor just misread the information it produced. We limited *Salcedo* to its facts in *University of Texas Medical Branch at Galveston v. York*, explaining that where the allegation is that the doctor misread the information, the fact that the information is in tangible form does not make it the “use” of tangible personal property.¹⁵ But what of our criticism of *Salcedo* if we change one fact – suppose the doctor actually misused the EKG machine, creating a misreading, which allowed the patient’s heart attack to go undiagnosed. Would *Salcedo* have been so troubling?

And what would the result in *York* have been if the allegations were that a nurse misused, not misread, a thermometer resulting in incorrect information being recorded, which in turn resulted in the doctor misdiagnosing the patient’s condition. Is there any doubt that a causal link between the misuse of a thermometer and the patient’s injury would have been alleged?

¹⁴ 659 S.W.2d 30.

¹⁵ 871 S.W.2d 175, 178-79 (Tex. 1994).

And how should the Court deal with *Overton Memorial Hospital v. McGuire*?¹⁶ In *McGuire*, a patient fell out of a hospital bed and was injured.¹⁷ The Court held that negligently providing a bed without rails when the bed was being used to protect a patient that could not protect himself was “use” of tangible personal property that “caused” the plaintiff’s injury.¹⁸ But the bed didn’t *do* anything. It didn’t expel the patient, nor did it permit someone to push the patient out of bed. Rather, the patient simply fell out of bed because there were no rails to hold him in bed.¹⁹ In truth, the rail-less bed did no more than furnish a condition that made the patient’s injuries possible – the *Bossley* standard the Court uses in this case. So shouldn’t *McGuire* be overruled? It’s telling that the Court doesn’t do so.

The point is that although it is the doctor’s misdiagnosis that is the direct cause of a patient’s injury, to reach that diagnosis, the doctor relies on information that comes from a number of sources, which includes machines, medicines and patient complaints. If any one of those sources fails to provide accurate information, leading to the misdiagnosis, a causal link to the injury is established. And when the source of that information is improperly used tangible personal property, the Tort Claims Act waives sovereign immunity.

The allegation in this case is that by giving Mr. Miller medicine, his symptoms were “masked.” And it was this masking that generated inaccurate information that, by being relied upon by the doctor, resulted

¹⁶ 518 S.W.2d 528 (Tex. 1975) (per curiam).

¹⁷ *Id.* at 528.

¹⁸ *Id.* at 529.

¹⁹ *Id.* at 528.

in the doctor making an inaccurate diagnosis. Unlike *Bossley*, there are allegations here that the use of tangible personal property, by altering the patient's symptoms, caused the doctor to misdiagnose the patient's illness.

In sum, the real *Bossley* causation problem is that the unlocked door and the patient's running into traffic couldn't be causally linked. In the *Bossley* context, the "furnish a condition that makes the injury possible" language is correct. But here, the majority has used that same language to create a causation standard so burdensome that the medicine would have to have literally killed the patient to have "caused" the injury. I respectfully remind the Court that the standard for causation in Tort Claims Act cases is "proximate cause,"²⁰ and not anything heavier. Assuming, as the Court protests, its application of *Bossley* in this case is not changing the proximate cause standard, I challenge the Court to explain how the decision in *McGuire* remains viable. I agree with the Court's reading of *Kerrville State Hospital*²¹ that "[d]octors in state medical facilities use some form of tangible personal property nearly every time they treat a patient.' If there is waiver in all of those cases, the waiver of immunity is virtually unrestricted, which is not what the Legislature intended."²² But it isn't enough to simply "use" property. The property must also be the proximate cause of the injury. The misuse of tangible personal property that causes a patient, by way of his symptoms, to give a doctor incorrect information upon which the doctor bases an incorrect diagnosis is the proximate cause of the resulting injury.

²⁰ *Bossley*, 968 S.W.2d at 343.

²¹ 923 S.W.2d 582.

²² ___ S.W.3d at ___ (quoting *Kerrville State Hosp.*, 923 S.W.2d at 585-86).

I don't assert that Miller can prove causation – that medicine that merely relieves patient's symptoms can cause doctors to mis-diagnose serious illnesses – that remains for expert proof and a decision on the merits. But as a matter of law, alleging that medicine masked symptoms, leading to an error in diagnosis, meets the threshold allegation of use of personal property under the Tort Claims Act.

The trial court has jurisdiction to entertain the merits of Miller's complaint. Consequently, the court of appeals judgment should be affirmed. I respectfully dissent.

Craig T. Enoch
Justice

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