Affirm and Opinion Filed June 30, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00445-CV

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, Appellant
V.
PAMELA RHOADES, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-11649

OPINION

Before Justices Bridges, Molberg, and Partida-Kipness
Opinion by Justice Partida-Kipness

In one issue, appellant University of Texas Southwestern Medical Center (UTSW) challenges the trial court's denial of its plea to the jurisdiction in this medical negligence action that is subject to the Texas Tort Claims Act (TTCA), TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109. We affirm the trial court's order.

BACKGROUND

Surgeons at UTSW conducted breast reconstruction surgery on appellee Pamela Rhoades following Rhoades's bilateral mastectomy. Dr. Sumeet Teotia and Dr. Nicholas Haddock performed a Deep Inferior Epigastric Perforator (DIEP)

micro-surgical procedure in which Rhoades's breasts were reconstructed from her own tissue and blood vessels harvested from Rhoades's lower abdomen. To harvest the tissue, surgeons make two horizontal incisions in the lower abdomen and pelvic area: a horizontal longitudinal suprapubic and a horizontal supraumbilical incision. These incisions are joined to form an ellipse, which is bisected into two triangles of tissue that are used to form the reconstructed breasts. Dr. Haddock testified that surgeons typically make these incisions as low on the patient's body as possible to access the "dominant blood supply" and avoid leaving visible scars.

The surgery typically lasts six hours and involves four separate sites in the chest and lower abdomen. To facilitate closing the lower abdominal incisions, from which the patient's tissue is harvested, the patient is placed into a v-shaped position in the latter stages of the surgery by flexing the hinged surgical bed on which the surgery is conducted.

Sometime after the surgical bed had been flexed to facilitate closing of Rhoades's incisions, the surgical staff informed the surgeons that one sponge was unaccounted for. Surgical staff account for the sponges used during surgery by comparing counts taken before and after surgery. Drs. Teotia and Haddock had used Ray-tec surgical sponges to blot and absorb blood during the surgery. These sponges have a blue, radiopaque strip that can be visualized on an x-ray. This allows surgical staff to locate sponges inside the patient's body using a mobile x-ray machine.

At the time, the surgeons had closed internal fascia incisions in Rhoades's lower abdomen, but all other incisions, including external abdominal incisions, remained open. The surgical staff searched the room while the surgeons continued with the surgery and searched with a lighted retractor inside of Rhoades's body for the missing sponge.

When the visual search did not locate the missing sponge, the surgical staff ordered x-rays taken of the surgical field. To take an x-ray, the technician must place a plate underneath the patient. When the surgical bed is in a flexed position, as it is in the latter stages of the DIEP procedure, the plate cannot be inserted low enough to capture an image of the patient's pelvic area. Despite the physical inability to x-ray Rhoades's pelvis while she was in the flexed position, Dr. Teotia ruled out the possibility that the sponge was located in Rhoades's pelvic area and focused the x-ray search to Rhoades's chest and abdomen.

Several x-rays were taken of Rhoades's chest and abdomen, but no x-rays were taken of her pelvic area. The missing Ray-tec sponge did not appear in any x-ray images taken of Rhoades.

After spending several hours searching for the missing sponge to no avail, all while Rhoades was under anesthesia, Dr. Teotia determined that the sponge was not missing and the count must have been incorrect. The surgeons closed Rhoades's incisions. In all, Rhoades's surgery lasted approximately eleven hours.

Despite the extensive search, Dr. Teotia had a "nagging" feeling regarding the sponge miscount. According to Dr. Teotia, "It was just nagging on me. I've never had a sponge count that's incorrect." He "just had a horrible feeling about it." Thus, he ordered an x-ray of Rhoades's pelvic area while she was recovering in the intensive-care unit. The Ray-tec sponge appeared in the x-ray, "deep in the [left side of the] pelvis." Dr. Teotia immediately performed a second surgery and successfully retrieved the missing sponge.

Rhoades later developed a hematoma, "wound separation," and a wound dehiscence in her abdomen. Dr. Teotia conducted four additional surgeries to resolve these issues.

Rhoades sued UTSW for medical negligence, alleging that the surgery to retrieve the missing sponge caused her post-operative complications that required four additional surgeries to alleviate. In her second amended original petition, Rhoades specifically alleges:

- Nurses and the surgeons failed to remove all of the sponges used during the procedure.
- The surgeons, radiologist and radiology technicians failed to utilize the radiology equipment to x-ray the entire surgical field.
- Postoperatively an additional film was taken which clearly demonstrated the sponge in the pelvis. [Rhoades] was subsequently taken back to the operating room for re-opening the abdominal and fascial closures and removing the retained sponge. Postoperatively [Rhoades] developed a subcutaneous hematoma. This ultimately lead [sic] to a breakdown of the wound and an organized hematoma. . . . The abdominal wound was non-healing and she was then readmitted to

UTSW on October 7, 2015 and underwent four operative debridements and VAC changes to ultimately close the wound.

- The minimum standard of care that reasonable, prudent plastic surgeons, radiologists and radiology technicians should have provided under similar circumstances included obtaining an appropriate intraoperative x-ray was taken delineating the entire surgical field. Dr. Teotia, Dr. Haddock, the radiology technician and the radiologists involved in . . . Rhoades [sic] surgery failed to do this. The minimum standard of care that a reasonable, prudent plastic surgeon and radiologist should have provided under similar circumstances also included reviewing the x-rays, affirming that there was no sponge present and confirming that the film adequately included the entire surgical field.
- As a result of the inadequate X-rays, misuse of the X-ray equipment, delay in the procedure as a result of the use and misuse of equipment, failure to use the appropriate sponge type and retained sponge, [Rhoades] required an additional opening of both the skin and fascial incisions to remove the foreign body. This caused [Rhoades] to undergo an additional, unplanned, surgical procedure and caused postoperative wound healing complications including wound dehiscence, hematoma, and seroma formation. [Rhoades] underwent four additional operative interventions to achieve a stable, closed wound.

Rhoades contends that UTSW waived immunity under the TTCA in two ways: through the alleged misuse of the sponge by failing to remove it before closing and the misuse of the x-ray machine by failing to search the entire surgical field to locate the missing sponge.

UTSW filed a plea to the jurisdiction, arguing that the sponge and x-ray machine were not misused but were used for their respective intended purposes. Thus, UTSW argues that Rhoades has alleged errors in medical judgment, not misuse of tangible personal property, as required to waive immunity under the

TTCA. Errors in medical judgment do not waive immunity. The trial court denied UTSW's plea to the jurisdiction, and this appeal followed.

STANDARD OF REVIEW

"Governmental immunity generally protects municipalities and other state subdivisions from suit unless the immunity has been waived by the constitution or state law." *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 512 (Tex. 2019) (quoting *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014)). The purpose of a plea to the jurisdiction is to "defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Governmental immunity defeats a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004); *Arnold v. Univ. of Tex. Sw. Med. Ctr. at Dallas*, 279 S.W.3d 464, 467 (Tex. App.—Dallas 2009, no pet.). The existence of subject matter jurisdiction is a question of law we review de novo. *Arnold*, 279 S.W.3d at 467; *see also State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007).

The TTCA waives governmental immunity for certain negligent acts by governmental employees. *See* TEX. CIV. PRAC. & REM. CODE § 101.021. A party suing a governmental unit bears the burden to affirmatively show waiver of immunity. *McKenzie*, 578 S.W.3d at 512; *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). When determining whether the party has met this

burden, we may consider the facts alleged by the plaintiff and the evidence submitted by the parties. *See McKenzie*, 578 S.W.3d at 512; *Tex. Nat. Res. & Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001). We liberally construe the plaintiff's pleadings, taking all factual assertions as true, and look to the plaintiff's intent. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012); *Tex. Dep't of Criminal Justice v. Hawkins*, 169 S.W.3d 529, 532 (Tex. App.—Dallas 2005, no pet.).

We must also consider the evidence submitted when necessary to resolve the jurisdictional issue. *Heckman*, 369 S.W.3d at 150. The review of such evidence is similar to a summary-judgment review. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 554 (indulging every reasonable inference and resolving all doubts in favor of non-movant). "If the evidence raises a fact question on jurisdiction," we cannot grant the plea, "and the issue must be resolved by the trier of fact." *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010). However, "if the evidence is undisputed or fails to raise a fact question, the plea must be granted." *Id*.

ANALYSIS

In one issue, UTSW contends the trial court erred in denying its plea to the jurisdiction because there was no negligent use of any tangible personal property that caused Rhoades's injuries, as required to waive UTSW's immunity. Construing the pleadings in Rhoades's favor and looking to her intent, we must determine

whether Rhoades has pleaded sufficient facts to bring her claim under the TTCA's waiver of immunity.

The TTCA provides a limited waiver of governmental immunity when the "use" of property is involved. TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109. The "use" provision states:

> 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.

Id. § 101.021(2). Thus, immunity is waived if injury or death is caused by a "condition or use of tangible personal or real property." *Id.* Mere involvement of the property is not enough. *Miller*, 51 S.W.3d at 588; *Arnold*, 279 S.W.3d at 467. Likewise, a use that merely furnishes the condition that makes the injury possible is not sufficient to waive immunity. *Miller*, 51 S.W.3d at 588; *Arnold*, 279 S.W.3d at 467–68. A claim of non-use is also insufficient to waive immunity; actual use is required. *McKenzie*, 578 S.W.3d at 513. And the use of the property must have actually caused the injury. *Id.* at 517; *Arnold*, 279 S.W.3d at 468.

UTSW does not dispute that it actually used tangible personal property. Rather, UTSW contends that Rhoades has pleaded claims arising from Dr. Teotia's medical judgment, not the negligent use of personal property. We look to the true nature of the dispute to determine whether a plaintiff has stated a claim for use of

tangible personal property. *McKenzie*, 578 S.W.3d at 513; *Dallas Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998).

Rhoades claims that UTSW's actual use of the surgical sponge and x-ray machine caused harm. UTSW contends, however, that both the sponge and x-ray machine were properly used for their intended purposes, and that the x-ray machine was not defective, did not malfunction, and did not produce inaccurate images, as would be required to support Rhoades's claims. Accordingly, UTSW argues that the gravamen of Rhoades's complaint is that her injury was caused by the surgeons' negligent exercise of medical judgment in searching for the missing sponge, not any negligent use of personal property. Essentially, UTSW argues that Dr. Teotia's medical judgment in calling off the search rendered the use of the sponge and x-ray machine inconsequential to Rhoades's claims. Waiver of immunity under the TTCA, however, is not limited to only those "uses" that do not follow or involve a medical judgment. *See McKenzie*, 578 S.W.3d at 513–14 ("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."). Thus, we disagree with UTSW's characterization of Rhoades's claims.

Although Rhoades does not contend that UTSW used the sponge or x-ray machine in a manner for which they were not designed or intended, Rhoades does allege that UTSW negligently failed to remove the sponge at the end of the surgery and ensure "an appropriate intraoperative x-ray was taken delineating the entire

surgical field." In other words, Rhoades complains that UTSW negligently used tangible personal property in such a way that it failed to prevent retention of the sponge in her body and caused harm.

A. UTSW's use of the surgical sponge.

UTSW argues that because the sponge was used as designed, was not defective, and did not malfunction, there was no negligent use to waive immunity. Thus, according to UTSW, Rhoades's claims actually arise from the surgeons' allegedly negligent medical judgment, for which immunity is not waived. In so arguing, UTSW relies on a number of cases involving the non-use of property, the use of intangible information, or medical decisions that preceded and prompted non-negligent use of property. These cases are inapplicable to the facts at issue here.

For the proposition that a failure to act (i.e., the non-use of property) does not waive immunity, UTSW cites *Miller*, 51 S.W.3d 583, and *Somervell County Healthcare Authority v. Sanders*, 169 S.W.3d 724, 727 (Tex. App.—Waco 2005, no pet.). UTSW also cites *University of Texas Medical Branch at Galveston v. Tatum*, 389 S.W.3d 457, 462 (Tex. App.—Houston [1st Dist.] 2012, no pet.), but provides no explanation. *Tatum* involved a claim that the defendant failed to develop adequate procedures for tissue storage, which resulted in the loss of a bone flap taken from the plaintiff's skull. *Id*. at 460. The "true nature of this allegation is actually one of failure to use or non-use." *Id*. at 463. Rhoades has not alleged, however, that

UTSW failed to use tangible personal property but that it used the property at issue negligently.

For the proposition that misuse of information produced by tangible personal property does not waive immunity, UTSW cites *Redden v. Denton County*, 335 S.W.3d 743, 751 (Tex. App.—Fort Worth 2011, no pet.), and *Kelso v. Gonzales Healthcare Systems*, 136 S.W.3d 377, 383–84 (Tex. App.—Corpus Christi 2004, no pet.). Similarly, UTSW cites *University of Texas Medical Branch at Galveston v. Kai Hui Qi*, 402 S.W.3d 374, 388 (Tex. App.—Houston [14th Dist.] 2013, no pet.), and *Kidd v. Brenham State School Texas Department of Mental Health & Mental Retardation*, 93 S.W.3d 204, 206 (Tex. App.—Houston [14th Dist.] 2002, pet. denied), for the proposition that misdiagnosis does not waive immunity. However, Rhoades has not alleged that UTSW misinterpreted information generated by the x-ray machine—the only property at issue capable of producing information—or misdiagnosed her condition. Rather, Rhoades has alleged that UTSW misused the x-ray machine by failing to scan the entire surgical field, thus creating the condition that harmed her. No similar allegation was made in *Redden*, *Kelso*, *Kai Hui Qi*, or *Kidd*.

For the proposition that erroneous judgments made after the non-negligent use of property does not waive immunity, UTSW cites *University of Texas Health Science Center at Houston v. DeSoto*, 401 S.W.3d 319, 326 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). The question in *DeSoto*, however, was whether the

plaintiff could rely solely on the "but for" relationship between the non-negligent use of the property and her injuries. *Id*. at 324. The *DeSoto* plaintiffs attempted to tease out a difference between "use or misuse" of tangible personal property, as that phrase was used in case precedent. *Id*. at 324–25. Rhoades makes no such argument, but alleges UTSW negligently used (i.e., misused) the property at issue.

Closer to the mark, UTSW cites *Kamel v. University of Texas Health Science Center at Houston*, 333 S.W.3d 676, 686 (Tex. App.—Houston [1st Dist.] 2010, pet. denied), *Miers v. Texas A & M University System Health Science Center*, 311 S.W.3d 577, 579–80 (Tex. App.—Waco 2009, no pet.), and *Arnold*, 279 S.W.3d at 468–69, for the proposition that immunity is not waived for negligent medical decisions. In each of these cases, the decision at issue preceded and prompted the use of property. *See Kamel*, 333 S.W.3d at 670 (while performing unrelated procedure, surgeon wrongly determined plaintiff's testicle was cancerous and removed it); *Miers*, 311 S.W.3d at 579–80 (surgeon decided to remove additional teeth from plaintiff); *Arnold*, 279 S.W.3d at 466 (surgeon improperly calculated size of replacement breast implants). Additionally, none of the plaintiffs alleged the property at issue was defective or used negligently. *See Kamel*, 333 S.W.3d at 686 ("Kamel has made no claim that the surgical instruments themselves were defective in any way or that they were used in a negligent manner."); *Miers*, 311 S.W.3d at 511 ("[T]here is evidence that Phillips correctly used the equipment and dental instruments when he removed the teeth."); *Arnold*, 279 S.W.3d at 470 ("Arnolds

have made no allegations that the implants themselves were defective in any way or used in a negligent manner."). Thus, the court in each case held that the plaintiff's claims were not derived from alleged negligent use of property but from negligent medical decisions that prompted non-negligent use of property.

In contrast, Rhoades has alleged that UTSW's negligent use of the property at issue preceded and prompted Dr. Teotia's flawed medical determination that the sponge count was incorrect. In other words, the true nature of Rhoades's allegations is that her injury was proximately caused by UTSW's negligent use of the sponge and x-ray machine, which prompted Dr. Teotia's flawed determination and resulted in the second surgery.

In support of her allegation that UTSW misused the sponge, Rhoades cites *University Medical Center v. Harris*, 302 S.W.3d 456, 458 (Tex. App.—Amarillo 2009, pet. denied), which dealt with an immunity claim on facts similar to those at issue here. Surgeons at University Medical Center (UMC) conducted a hysterectomy on Mary Beth Harris. *Id*. During the surgery, the primary surgeon packed Harris's intestines with a surgical towel. *Id*. Surgical staff—UMC employees—handled and tracked items used in the surgery by keeping count on a dry erase board. *Id*. at 459–60. As the incisions were closed, the staff conducted a physical count to verify that all items brought into the surgical field were accounted for. *Id*. at 460. Apparently, the staff failed to determine the towel was not returned from the surgical field. *Id*. Harris began experiencing pain and swelling after the

surgery, resulting in a trip to the emergency room. *Id*. at 458. One month after the hysterectomy, she underwent surgery, and the towel was removed. *Id*.

Harris and her husband sued UMC, alleging that it failed to inventory and count all towels used, failed to double-check all counts for accuracy, and failed to confirm all towels were removed from the surgical field. *Id*. at 459. On appeal from the trial court's denial of its plea to the jurisdiction, UMC argued that the failure to properly account for the towels used was a non-use of tangible property or misuse of information, which does not waive immunity. *Id*. at 460. The court disagreed, holding that handling the towel and sharing responsibility with the surgeons for ensuring it was removed constituted use of the towel such that immunity was waived. *Id*. at 461. We find *Harris* persuasive.

As in *Harris*, the record here reflects that Drs. Teotia and Haddock and the surgical staff were responsible for ensuring that all items used in Rhoades's surgery were accounted for and removed from the surgical field. Evidence in the record reflecting that UTSW's surgeons and staff conducted an extensive search for the missing sponge demonstrates this fact.

UTSW argues that the search distinguishes this case from *Harris*, which makes no mention of a search for the missing towel. However, the question before this Court as to the sponge is the same as that before the *Harris* court as to the towel: did the actions of the hospital's employees, which included the failure to remove the item from the surgical field, constitute the use of tangible personal property for

purposes of the TTCA? The fact of the search does not affect the answer to this question. At most, the search would serve only to mitigate negligence liability by showing efforts taken to locate the sponge. That is a fact question for the trier of fact. *See, e.g.*, *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 366 (Tex. 1987). At this stage of the litigation, the only question is whether Rhoades has pleaded and the jurisdictional evidence demonstrates that UTSW has waived immunity to Rhoades's claims.

UTSW essentially argues that the search transforms any misuse of the sponge, by failing to remove it from the surgical field, into an issue of medical judgment, in calling off the search and deciding the count must have been incorrect. In so arguing, UTSW inadvertently distinguishes this case from *Kamel*, *Miers*, and *Arnold*, in which the erroneous medical judgment *preceded and prompted* the non-negligent use of tangible personal property, thus rendering the use of property in those cases immune to suit. *See Kamel*, 333 S.W.3d at 670; *Miers*, 311 S.W.3d at 579–80; *Arnold*, 279 S.W.3d at 466.

Rhoades has pleaded, and the jurisdictional evidence demonstrates, that Dr. Teotia's erroneous decision to call off the search and close the remaining incisions *followed* the allegedly negligent use of the sponge. We are aware of no case in which a medical decision based on a prior negligent use of tangible personal property insulated that prior use from suit. Consequently, we affirm the trial court's denial of the plea to the jurisdiction as to UTSW's use of the sponge.

B. UTSW's use of the x-ray machine.

UTSW argues that Rhoades's claim regarding use of the x-ray machine is actually about the use of intangible information and not any defect, malfunction, or negligent use of the machine. According to UTSW, the jurisdictional evidence shows the machine functioned correctly and produced accurate images of the areas x-rayed. Consequently, Rhoades's claim actually arises from Dr. Teotia's interpretation of the x-ray films, for which immunity is not waived. *See Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 178–79 (Tex. 1994). Although we agree with the legal premise that use of intangible property does not waive immunity, we disagree with UTSW's interpretation of Rhoades's allegations.

It is true that Rhoades does not contend the x-ray machine was defective, malfunctioned, or produced incorrect information. However, she need not make such an allegation to support her claim that the machine was used in a negligent manner. *See Arnold*, 279 S.W.3d at 469–70. Rhoades contends that it was proper to use the x-ray machine to locate the radiopaque sponge, but that UTSW used the machine negligently by failing to x-ray the entire surgical field.

UTSW argues that waiver under the TTCA for use of medical diagnostic equipment is limited to circumstances in which the equipment malfunctions or is not used as designed. The decisions UTSW cites in support of this contention, however, address claims for non-use of property or pre-use medical judgments, which do not

waive immunity.[1] More importantly, they do not hold that any use must be inconsistent with the property's design to waive immunity under the TTCA, as UTSW proposes. Rather, these decisions hold merely that the property must be "used in a negligent manner," *Arnold*, 279 S.W.3d at 470;[2] *Kamel*, 333 S.W.3d at 686, and that the use must proximately cause an injury. *See Tatum*, 389 S.W.3d at 463; *Redden*, 335 S.W.3d at 751; *Ward*, 280 S.W.3d at 355; *Bossley*, 968 S.W.2d at 342–43.

To support her claim that misuse of the x-ray machine can support waiver even if the machine did not malfunction or produce incorrect information, Rhoades relies on the decisions in *Salcedo v. El Paso Hospital District*, 659 S.W.2d 30 (Tex. 1983), *University of Texas Medical Branch Hospital at Galveston v. Hardy*, 2 S.W.3d 607 (Tex. App.—Houston [14th Dist.] 1999, pet. denied), and *Green v. City of Dallas*, 665 S.W.2d 567, 568-70 (Tex. App.—El Paso 1984, no writ). UTSW attempts to distinguish these cases by arguing that they addressed the prior version of the TTCA, under which immunity was waived for a defendant's negligent use of

[1] UTSW cites *Bossley*, 968 S.W.2d at 343, *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994), *Tatum*, 389 S.W.3d at 462, *Redden*, 335 S.W.3d at 751, *Kamel*, 333 S.W.3d at 686, *Texas Tech University Health Sciences Center v. Ward*, 280 S.W.3d 345, 356 (Tex. App.—Amarillo 2008, pet. denied), *Arnold*, 279 S.W.3d at 468–69, *Mullins v. University of Texas Medical Branch at Galveston*, 57 S.W.3d 653, 657 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

[2] The dissent incorrectly claims that we distinguish *Arnold* as to the use of the x-ray machine by citing our observation in section A above that immunity is not waived for an erroneous medical judgment that preceded and prompted the non-negligent use of tangible personal property. We made this distinction only as to UTSW's use of the sponge. We cite *Arnold* here for the proposition that waiver requires only that the property at issue be "used in a negligent manner" to address UTSW's citing the same for the proposition that the x-ray machine must have malfunctioned or been used contrary to its design to find waiver.

information generated by medical equipment or mere involvement of personal property. However, as noted, Rhoades has not alleged that UTSW misused information or that the x-ray machine was merely involved, but that UTSW misused the x-ray machine itself by failing to scan the entire surgical field. The jurisdictional evidence supports Rhoades's allegation.

Specifically, the record reflects that Dr. Teotia did not solely interpret or rely on the x-ray machine's results to conclude that the sponge count was incorrect. Dr. Teotia testified that the surgeons, including himself, directed the x-ray technician as to the areas of Rhoades's body to x-ray, but that he did not think that a sponge was in Rhoades's pelvic area. Dr. Teotia testified that he "never thought [the sponge] was in the . . . pelvis," despite the fact that he used sponges there, and that he "thought [they] had adequate films." He also testified that the x-ray could not reach Rhoades's pelvic area due to the flexed surgical table, but that he did not know of this physical limitation until after the surgery. Although he expressed concern about complications that could arise from reopening the partially closed incisions and flattening the surgical table to allow the x-ray machine to scan Rhoades's pelvic area, the evidence shows this was an option. Consequently, *Salcedo* and *Green* are distinguishable, not because they address a prior version of the TTCA, but because they address waiver for use of information, *see Salcedo*, 659 S.W.2d at 33 (holding alleged "improper 'reading and interpreting' of the electrocardiogram graphs" waived immunity), and the failure to use proper equipment, *see Green*, 665 S.W.2d

at 569–70 (relying on *Salcedo* and holding alleged failure to use proper equipment waived immunity for misdiagnosing a heart condition). Neither of these claims is at issue here.

According to the dissent, our treatment of *Salcedo* and *Green* constitutes reliance on the same. To the contrary, we have distinguished these cases as addressing facts not at issue here, which is consistent with the supreme court's guidance. *See Bossley*, 968 S.W.2d at 342 ("The decision in *Salcedo* is limited to its facts.").

Hardy, however, does not rely on the prior version of the TTCA, as UTSW contends, and is helpful to our analysis. *See Hardy*, 2 S.W.3d at 607. The dissent contends that our reliance on *Hardy* is misplaced because the Fourteenth Court of Appeals has subsequently rejected it. The Fourteenth Court's subsequent precedent shows, however, that *Hardy*, like *Salcedo*, is merely limited to its facts. *See Kai Hui Qi*, 402 S.W.3d at 389 (noting that *Salcedo* is limited to its facts, there is no waiver for use of information, and *Hardy*'s cardiac monitor alarm required "no other reading, interpretation, or action" to diagnose the patient's condition, in contrast to "the blood pressure equipment and urine test strips" at issue that required interpretation and analysis); *Univ. of Tex. Med. Branch of Galveston v. Crawford*, No. 14-18-00758-CV, 2019 WL 7372163 (Tex. App.—Houston [14th Dist.] Dec. 31, 2019, no pet.) (mem. op.) ("[T]he [supreme] court removed the foundation on which *Hardy* was based, and we have repeatedly refused to apply *Salcedo* or *Hardy*

to cases with different facts."). As discussed below, the facts in *Hardy* are analogous to those at issue here. Thus, *Hardy* is still helpful to our analysis.

Hardy concerned a suit against The University of Texas Medical Branch Hospital in Galveston (Hospital) for a patient's death arising from the Hospital's delayed response to a cardiac monitor alert. *Id*. at 608–09. Hardy alleged the patient was connected to a cardiac monitor while in the Hospital's cardiothoracic care unit after coronary artery bypass surgery. *Id*. at 608. The monitor sounded an alarm due to a complete heart block and heart stoppage. *Id*. At least five minutes passed before Hospital staff attempted to resuscitate the patient. *Id*. Although resuscitation efforts were successful, lack of oxygen caused severe brain damage. *Id*. at 609. The patient never regained consciousness and was taken off life support. *Id*.

On appeal from the trial court's denial of the Hospital's plea to the jurisdiction, the Fourteenth Court of Appeals held that the failure to monitor the cardiac monitor was "a use or misuse of tangible personal property" under the TTCA. *Id*. at 610. Relevant to our analysis here, the *Hardy* court noted that "[t]he cardiac monitor could only be effective . . . if it was properly monitored at all times." *Id*. The failure to monitor the cardiac monitor resulted in the decedent's death "from the very condition that the proper use of the cardiac monitor was intended to avoid." *Id*. Thus, the court affirmed denial of the Hospital's plea to the jurisdiction. *Id*.

UTSW argues that *Hardy* has a "fatal flaw" in its reliance on a prior version of the TTCA. Admittedly, the *Hardy* court relies on the Texas Supreme Court's

opinion in *Salcedo* that analyzes the prior version of the TTCA, which, unlike the current version of the TTCA, mandated a liberal interpretation and required only "some condition or some use of tangible property" to waive immunity. *See id*. at 609–10; *Salcedo*, 659 S.W.2d at 31–32. Although the *Hardy* court relied on the supreme court's analysis of analogous facts in *Salcedo*, it interpreted and applied the current version of the TTCA, which applies here. *See Hardy*, 2 S.W.3d at 609. Moreover, the *Hardy* court did not conclude that misreading or misinterpreting results or information generated from the monitor constituted use of tangible property. *See id*. at 610; *see also Kai Hui Qi*, 402 S.W.3d at 389 (analyzing the *Hardy* decision). Rather, "the cardiac monitor sounded an alarm due to heart stoppage, and no other reading, interpretation, or action was necessary for the patient's diagnosis." *Kai Hui Qi*, 402 S.W.3d at 389 (distinguishing *Hardy* on evidence showing that physicians had to further analyze information at issue to obtain a diagnosis and determine proper treatment).

Dr. Haddock testified that the x-ray machine at issue here is mobile, stored near the operating room, and brought in when surgeons need to scan the patient for foreign objects. When asked whether it is important to x-ray the entire surgical field, Dr. Haddock testified, "If we think something is missing, we want to see the entire area." Addressing the post-operative x-ray of Rhoades's pelvic area, Dr. Teotia testified that he knew with certainty as soon as he saw the x-ray film that the object displayed in the film was the missing sponge. Rhoades testified that Dr. Teotia told

her while she was recovering in ICU that he needed to take an additional x-ray. She stated that hospital staff lifted her up and placed "something under [her]," in apparent reference to the x-ray "slab." The x-ray was taken, and Dr. Teotia declared, "[T]here it is," referring to the missing sponge located "deep in the groin or even lower." Thus, the record reflects that the x-ray machine, just as the cardiac monitor in *Hardy*, was designed for the very purpose to which it was employed. Likewise, just as the cardiac monitor in *Hardy* was effective only if monitored by medical staff, the x-ray machine was effective to locate foreign objects only if used on the entire surgical field. Finally, just as the cardiac monitor alert required no interpretation or action for diagnosis, the missing sponge was immediately apparent in the x-ray film.

The dissent promotes a narrow rule under which immunity is waived only when the property at issue malfunctions or is used contrary to its design, regardless of whether its use was inadequate or negligent under the circumstances. Thus, the dissent would hold that immunity is not waived because UTSW used the x-ray machine to produce films, as it was designed to do. This view disregards precedent, including our own, holding that immunity may be waived even though the property at issue did not malfunction and was used as designed. *See Dallas Cty. Hosp. Dist. v. Moon*, No. 05-17-00538-CV, 2017 WL 4546121, at *4 (Tex. App.—Dallas Oct. 12, 2017, no pet.) (mem. op.); *see also Univ. of Tex. M.D. Anderson Cancer Ctr. v. Jones*, 485 S.W.3d 145, 152 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)

(holding immunity waived on allegation of negligent medication prescription with no indication the medication failed to perform as expected).

In *Moon*, we held that negligent use of a wheelchair waived immunity. *Id.* at *4. Moon sued for injuries sustained by a patient while Parkland Hospital staff were removing her from a wheelchair. *Id.* at *1. Moon pleaded that the hospital staff removed the arms from the wheelchair before attempting to remove the patient, and the removal of the arms caused staff to drop the patient, resulting in a fractured ankle. *Id.* Relying on *Bossley*, the hospital argued that the gravamen of Moon's complaint was a failure of medical judgment, and the wheelchair was merely "involved," just as the unlocked doors in *Bossley* merely provided the condition that made injury possible. *Id.*; *see Bossley*, 968 S.W.2d at 343 ("Property does not cause injury if it does no more than furnish the condition that makes the injury possible."). The dissent posits the same view here. We held in *Moon*, however, that Moon had pleaded that the manner in which the wheelchair was used, not its mere existence, caused the injury. *Id.* Likewise, Rhoades has pleaded that the "misuse of the X-ray equipment," not its mere existence, prevented removal of the sponge, thus causing post-operative complications from the second surgery.

Contrary to the dissent's view, the record reflects that *this* x-ray machine was not only intended to produce films but to scan the entire surgical field for foreign objects. Rhoades alleges and the jurisdictional evidence establishes that it was not used for this purpose, even though it did produce accurate films. Specifically, the

record reflects that the surgeons knew the surgical field extended below the fold in the surgical table, but that Dr. Teotia did not think the sponge would be there. Thus, Rhoades has pleaded, and the jurisdictional evidence supports, an allegation that UTSW negligently failed to use the x-ray machine for its intended purpose. Accordingly, we overrule UTSW's issue as to the use of the x-ray machine.

C. Non-use of radio-frequency sponges

Rhoades alleged in her second amended original petition that her injuries could have been avoided if UTSW had used sponges containing radio-frequency identification tags. UTSW argues on appeal that this is an allegation of non-use of tangible personal property for which immunity is not waived. We do not address this argument because Rhoades withdrew this allegation in her response to UTSW's plea to the jurisdiction, and our resolution of this argument would not change the disposition of this appeal. *See* Tex. R. App. P. 47.1.

CONCLUSION

Based on the record before the Court, we conclude that Rhoades has pleaded, and the jurisdictional evidence supports, claims arising from UTSW's allegedly negligent use of tangible personal property, thus waiving immunity under the TTCA.

Accordingly, we affirm the trial court's denial of UTSW's plea to the jurisdiction.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

Bridges, J., dissenting in part

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER, Appellant	On Appeal from the 134th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-17-11649. Opinion delivered by Justice Partida-Kipness. Justices Bridges and Molberg participating.
No. 05-19-00445-CV V.	
PAMELA RHOADES, Appellee	

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee recover her costs of this appeal from appellant.

Judgment entered this 30th day of June 2020.