Affirmed in Part, Reversed and Remanded in Part, and Majority and Dissenting Opinions filed March 14, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00348-CV

LORI ANNAB, Appellant

V.

HARRIS COUNTY, TEXAS, Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2015-58707

D I S S E N T I N G O P I N I O N

Because I would affirm the trial court's order on the basis that Annab's pleadings demonstrate incurable defects in jurisdiction, I respectfully dissent.

The Texas Tort Claims Act (TTCA) waives immunity for injuries caused by the negligent use of tangible property but this limited waiver does not apply to intentional torts. Tex. Civ. Prac. & Rem. Code §§ 101.021(2) and 101.057. In order

to be viable, the claim cannot arise out of an intentional tort. *City of Watauga v. Gordon*, 434 S.W.3d 586, 587 (Tex. 2014). Annab's pleadings state that Caplan shot and severely injured her, clearly an intentional tort. Thus, to maintain a negligence claim against Harris County, Annab's pleadings must allege facts that, taken as true, reflect her claim does not "arise out of" being intentionally shot by Caplan.

The tangible property identified in Annab's pleadings is Caplan's personal gun that he used to shoot her.[1] Annab alleges Harris County had control over Caplan's personal gun because it authorized Caplan to use it. Annab alleges that Harris County's negligence regarding that authorization was a proximate cause of her injuries. These allegations are reflected in the following statement from her petition:

> Specifically, [Caplan] using the Glock gun which the County had repeatedly approved and qualified and thus, had allowed Deputy Constable Caplan to retain possession of such Glock gun, Deputy Constable Caplan, acting under his indicia of authority as a Deputy Constable; used the approved and qualified Glock gun and shot and severely injured the Plaintiff.

The majority cites three cases in support of its determination that Annab's allegations state a claim that her injuries were caused by negligent use of tangible property, rather than an intentional tort. *See Delaney v. Univ. of Houston*, 835 S.W.2d 56, 60 (Tex. 1992); *Young v. City of Dimmitt*, 787 S.W.2d 50, 51 (Tex. 1990); and *Texas Youth Comm'n v. Ryan*, 889 S.W.2d 340, 343 (Tex. App.—Houston [14th Dist.] 1994, no pet.).

In *Delaney*, a university failed to fix the lock on a door that provided access to a campus dormitory despite complaints. 835 S.W.2d at 57. An intruder entered

[1] Annab conceded at oral argument the gun was owned by Caplan and he was not on duty.

through that door, found the plaintiff in her room, and raped her. *Id.* The plaintiff sued the university for failing to repair the lock and breach of contract to provide a secure residence. *Id.* at 60. The court expressly did not decide whether the plaintiff's negligence claims fell within the waiver of immunity contained in the TTCA or whether they were barred by immunity for other reasons. *Id.* at 60-61. The court only concluded that it was error for the lower courts to apply section 101.057(2) to the plaintiff's claims. The court gave two reasons: (1) intentional conduct intervening between a negligent act and the result does not always vitiate liability for the negligence; and (2) "arising out of," as used in section 101.057(2), "requires a certain nexus" between the claim and an intentional tort for the provision to apply. *Id.* 59-60. Thus *Delaney* stands for the proposition that an intentional tort precludes a negligence claim when there is a nexus between the two.

The Texas Supreme Court in *Young* disapproved the lower court's conclusion that regardless of the claims for negligent employment, entrustment, and supervision, the officer's intentional tort precluded application of the TTCA.[2] *Young,* 787 S.W.2d at 51. The court then found no error requiring reversal of the trial court's dismissal of the petitioners' claims. *Id.* Thus the court did not overturn the Court of Appeal's determination that the officer's intentional tort — driving his car into oncoming traffic in an attempted suicide — precluded application of the TTCA. *See Young v. City of Dimmitt*, 776 S.W.2d 671, 673 (Tex. App.—Amarillo 1989), *writ denied per curiam*, 787 S.W.2d 50 (Tex. 1990). Thus while *Young* stands for the proposition that negligence claims *may* arise from acts other than the intentional tort, it does not support a finding that such is the case here. 787 S.W.2d at 51.

[2] As the majority notes, none of these claims are at issue in this case.

Ryan involved multiple intentional torts. 889 S.W.2d at 341. This court recognized that an intervening intentional tort does not automatically bar the negligence claim "simply because [the intentional tort] played a role." *Id.* at 343. We then determined the tangible personal property alleged to have been used, diagnostic tests and evaluation forms to determine the youth's placement, was not property under the TTCA. We further held the causal nexus required under section 101.021(2) was absent because the tests and forms were not the "direct devices" which proximately caused the plaintiff's injuries. *Id.* at 344-45; Tex. Civ. Prac. & Rem. Code § 101.021(2). Like *Young*, *Ryan* acknowledges an intervening intentional tort does not *necessarily* preclude a negligence claim. But unlike *Ryan,* the nexus we are concerned with is whether the claim arises from an intentional tort. *See Delaney,* 835 S.W.2d at 59; Tex. Civ. Prac. & Rem. Code § 101.057.

As this court recognized in *Holder v. Mellon Mortgage Co*,, 954 S.W.2d 786, 806-807 (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other grounds*, 5 S.W.3d 654 (Tex. 1999), the nexus between the use of the property and the alleged negligent conduct causing the injury is the critical inquiry. In that case, the plaintiff was raped by a police officer in the City's police car. *Id.* at 789. The plaintiff alleged the City was negligent in hiring the officer, retaining him, entrusting him with a badge and a police car, and in monitoring his activities and failing to discover his personal and emotional problems. *Id.* at 804. The plaintiff argued her claim did not arise from the officer's intentional tort, but from the City's negligent supervision and monitoring of the officer and his use of its police car, which was the tangible personal property in that case. *Id.* at 805. We determined the patrol car was not the direct device that caused the plaintiff's injury and the required causal nexus for liability was absent, stating the cause of the plaintiff's injury was the officer's intentional assault. *Id.* at 807.

Annab's injuries were caused by Caplan's gun and there are no allegations of a causal connection between the alleged negligent conduct and Caplan's use of that gun. *See McCord v. Mem'l Med. Ctr. Hosp.*, 750 S.W.2d 362 (Tex. App.—Corpus Christi 1988, no writ) (the use of the nightstick against the plaintiff was committed by the security guard in the course of an intentional tort, precluding plaintiff's claim); *Townsend v. Mem'l Med. Ctr.*, 529 S.W.2d 264 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (the essence of the plaintiff's complaint was the rape, an intentional tort excluded by the TTCA). There are no factual allegations in Annab's pleadings as to how Harris County used or misused the gun. *See Tex. Dep't of Criminal Justice v. Miller,* 51 S.W.3d 583, 587-88 (2001) (recognizing that non-use of property does not waive immunity under the TTCA but misuse is within the waiver). It is not alleged that Harris County had any right to take Caplan's gun or that if Harris County had never authorized, or withdrawn its authorization, for Caplan to use the gun he would not have been in lawful possession of his own gun in his own personal car.[3] Because Annab's pleadings, if taken as true, establish her claims arise from an intentional tort, I would find her claims against Harris County for negligence are precluded by the TTCA and affirm the trial court's order.

/s/ John Donovan
Justice

Panel consists of Justices Busby, Donovan, and Brown (Brown, J., majority).

[3] Harris County's assertion in its plea to the jurisdiction that Caplan was driving his own car has never been disputed.