Opinion filed December 4, 2008

In The

Eleventh Court of Appeals

No. 11-08-00053-CV

CITY OF MIDLAND, Appellant

V.

JUD WALTON, Appellee

On Appeal from the 238th District Court

Midland County, Texas

Trial Court Cause No. 41,309

M E M O R A N D U M O P I N I O N

The City of Midland appeals from the trial court's order denying its plea to the jurisdiction. We affirm.

Factual and Procedural Background

In 1982, the City acquired land for the treatment of municipal waste water effluents discharged from the City's sewage disposal plant. The City began discharging effluent water in1984. In 1996, Jud Walton sued the City for damages allegedly incurred from this discharge. Walton amended and supplemented his original petition to include various other defendants and to allege

a continuing course of conduct resulting in actionable claims in negligence, "nuisance and/or trespass," strict liability, and conversion as well as violations of the Texas Water Code, of 42 U.S.C. § 1983, of TEX. CONST. art. I, § 17, of 33 U.S.C. ch. 26, of 42 U.S.C. ch. 103, and of U.S. CONST. amends. V, XIV by the taking of his private property for public use without just compensation. Walton sought both actual and punitive damages as well as injunctive relief.

The defendants filed various motions for summary judgment. These motions were granted, and the El Paso Court of Appeals affirmed in part and reversed in part in *Walton v. City of Midland*, 24 S.W.3d 853 (Tex. App.—El Paso 2000, no pet.). The El Paso court remanded the "temporary damages, injunctive relief, and continuing tort" claims against several of the defendants, including the City. *Id.* at 862.

The City next moved for summary judgment on the grounds that the El Paso court's *Walton* decision was dispositive, that the statute of limitations barred Walton's suit, and that Walton had not established intent on the City's part. When it granted the City's motion for summary judgment, the trial court did not have the benefit of the Texas Supreme Court's holding in *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004), concerning the element of intent in taking claims. This court sustained Walton's complaints as to the City's failure to affirmatively plead issue preclusion and as to the standard for assessing the element of intent as clarified in *Jennings* and reversed and remanded for further proceedings. *Walton v. City of Midland*, No. 11-03-00381-CV, 2005 WL 2090655 (Tex. App.—Eastland Aug. 31, 2005, no pet).[1]

The City then filed a plea to the jurisdiction raising sovereign immunity.[2] The City contended that the only live pleadings were Walton's inverse condemnation claim under the Texas Constitution and his Section 1983 takings claim; that the trial court lacked subject-matter jurisdiction on the grounds of sovereign immunity; and that, without the requisite intent on its part, no taking had occurred. After a hearing, the trial court denied the City's plea.

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[1]Effective September 1, 2003, TEX. GOV'T CODE ANN. § 22.201(*l*) (Vernon Supp. 2008) was amended to transfer Midland County from the Eighth Court of Appeals District to the Eleventh Court of Appeals District.

[2]The City also filed a motion for summary judgment on the grounds that the statute of limitations had run, that there were no temporary damages, and that there was no takings claim because the City had no intent to divest Walton of his property. The trial court denied the motion.

Issue on Appeal

In its sole issue, the City argues that the trial court committed reversible error when it denied the plea to the jurisdiction. The City contends that Walton's claims of inverse condemnation under the Texas Constitution are barred by the doctrine of sovereign immunity. Specifically, the City argues that it presented uncontroverted evidence that it lacked the requisite intent under *Jennings* to be liable.

Standard of Review

A. Pleas to the Jurisdiction.

Whether the trial court has jurisdiction is a question of law. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The defendant may properly challenge the trial court's jurisdiction in a dilatory plea to the jurisdiction and thereby defeat the plaintiff's cause of action before the merits of the plaintiff's claims are determined. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). As the court stated in *Blue*, the purpose of this dilatory plea to the jurisdiction is to establish a reason why the merits of the plaintiff's case "should never be reached." *Id*.

While the plaintiff is not required to prove the merits of the case at this preliminary stage of the proceedings, the plaintiff must either through the pleadings or through both pleadings and relevant evidence raise facts sufficient to invoke the trial court's jurisdiction. *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414 (Tex. 2008); *Holland*, 221 S.W.3d at 642-43; *Miranda*, 133 S.W.3d at 226; *Blue*, 34 S.W.3d at 554. In some cases, jurisdictional facts and facts as to the merits of the plaintiff's claims overlap. Where jurisdictional facts implicate the facts on the merits, the Texas Supreme Court has held that the plaintiff's right to present these facts on the merits for consideration must be preserved. *Miranda*, 133 S.W.3d at 228. In such a situation, the trial court should deny the plea to the jurisdiction to allow the factfinder to resolve the fact issue. *Stewart*, 249 S.W.3d at 414; *Miranda*, 133 S.W.3d at 226. The appellate court makes a de novo review of the trial court's determination. *Holland*, 221 S.W.3d at 642; *Miranda*, 133 S.W.3d at 226.

B. Intent Under Jennings.

In *Jennings*, the Texas Supreme Court stated:

> We therefore hold that when a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under

> Article I, Section 17 if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action -- that is, that the damage is "necessarily an incident to, or necessarily a consequential result of" the government's action.

Jennings, 142 S.W.3d at 314. This language was the basis for our remand in *Walton*, 2005 WL 2090655 at *3-4.

De Novo Review

In his live pleadings, Walton alleges continuing tort, trespass/nuisance, takings, and statutory claims resulting in temporary damage to his land. Walton pleaded facts, including the following, to support his claims: that continual disposal by the City of sewage water detrimentally affected the storageability of his soil and caused a significant rise in the water table, that sporadic rainfalls magnified the problems causing an accumulation of contaminants on his land, and that the continual movement of the sewage water polluted his groundwater. Walton submitted affidavits, business records and reports, and excerpts from oral depositions to support his jurisdictional allegations that the City's alleged activities intentionally caused his alleged damages. These documents included the 2000 affidavit of Technical Environmental Projects Manager Paul L. Downing that the pollution of Walton's wells was due in part to the City's "poor effluent management practices" and the 1999 affidavit of Environmental Chemist Gayle Potter that the sample of the City's effluent water was "very consistent" with the sample of water from Walton's wells.

At the hearing, the City introduced testimony and exhibits to support its position that there was insufficient or inconclusive evidence of any damage to Walton's land and that it lacked (1) the intent to take or harm Walton's land and (2) the knowledge that its actions could result in any taking or harming of Walton's land. Walton introduced the 1994 Railroad Commission of Texas's memorandum stating that the contamination of Walton's wells was due to a source affecting the surface water.

Analysis and Application

The trial court did not err in denying the City's plea to the jurisdiction. Walton was not required to prove the merits of his claims in response to the City's dilatory plea. Our de novo review reflects that Walton affirmatively pleaded and presented sufficient facts to invoke the trial court's subject matter jurisdiction to consider his claims. The issue of the City's intent under *Jennings*

involves jurisdictional facts that implicate facts on the merits of Walton's claims – such as the sufficiency of Walton's evidence, intent on the part of the City, the depth of knowledge on the City's part, and conflicting reports and views concerning the flow and impact of the effluent water. By denying the plea, the trial court properly allowed Walton's claims to proceed to the factfinder for the ultimate determination on the merits of his claims. *Stewart*, 249 S.W.3d at 414; *Miranda*, 133 S.W.3d at 226.

The City argues that it presented uncontroverted proof that it had no intent to harm Walton's land or knowledge that Walton's land would be harmed at the time it acquired the adjacent land and established its wastewater program. This argument does not address Walton's live pleadings concerning the ongoing damage to his land and his request for temporary damages. As noted above, Walton was not required to prove the merits of his claims in response to the City's dilatory plea but was only required to plead (or plead and submit evidence) of facts sufficient to invoke the trial court's subject-matter jurisdiction. *Stewart*, 249 S.W.3d at 414; *Holland*, 221 S.W.3d at 642-43; *Miranda*, 133 S.W.3d at 226; *Blue*, 34 S.W.3d at 554. The City's challenges as to the competency of Walton's claims is best addressed by the factfinder and not at a hearing on its dilatory plea. The trial court properly denied the plea. *Stewart*, 249 S.W.3d at 414; *Miranda*, 133 S.W.3d at 226.

The City focused only on its intent at the time the City approved the sewer treatment facility at issue.[3] The City did not address all of Walton's claims in his live pleadings. Those claims involve the City's continued intentional discharge of effluent wastewater, not the City's initial decision to acquire the land and discharge effluent wastewater. *See Tarrant Reg'l Water Dist. v.* Gragg, 151 S.W.3d 546 (Tex. 2004) (flood damage to landowner due to repeated water releases from reservoir by water district); *Robinson v. City of Ashdown*, 783 S.W.2d 53, 56 (Ark. 1990) (cited in *Jennings*) (holding that repeated sewage flooding could give rise to a takings claim). Therefore, the dismissal of all of Walton's claims would not have been proper. The trial court did not err in denying the plea. The issue is overruled.

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[3]Walton states that "sewer treatment facility" is a misnomer; the City simply uses the land as a place to dispose of effluent wastewater.

Holding

The order of the trial court is affirmed.

TERRY McCALL
JUSTICE

December 4, 2008

Panel consists of: Wright, C.J.,
McCall, J., and Boyd, J.[4]

[4]John T. Boyd, Retired Chief Justice, Court of Appeals, 7th District of Texas at Amarillo sitting by assignment.