



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00413-CV

BURAK SARIGOLLU

APPELLANT

V.

CITY OF ARLINGTON

APPELLEE

FROM THE 348TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 348-283880-16

MEMORANDUM OPINION¹

Appellant Burak Sarigollu appeals from the trial court's dismissal of his negligence claims against Appellee the City of Arlington. In a single issue, Sarigollu argues that the trial court erred by granting Arlington's motion for summary judgment based on sovereign immunity. We affirm.

¹See Tex. R. App. P. 47.4.

I. Background

In July 2015, sewage began seeping into Sarigollu's home in Arlington. Sarigollu called 911, and city fire department and city utilities department employees responded. The utilities crew spent an hour unsuccessfully looking for the blockage causing the sewage leak. During that time, sewage continued to flow into Sarigollu's home from every drain on the first floor. The utilities crew finally located the blockage after fire department personnel suggested that they might be searching in the wrong place.

After Arlington refused to reimburse Sarigollu for the expenses and damages to his home resulting from the sewage, he sued. In his original petition, he alleged that Arlington was negligent by (1) failing to perform proper and timely inspections of the sewer system in his neighborhood; (2) failing to keep proper maps or diagrams of the sewer system; (3) failing to properly train its employees to locate sewer problems in a timely manner; (4) failing to locate the blockage in a timely manner; (5) failing to repair the blockage in a timely manner; and (6) failing to properly maintain the sewer system. Sarigollu also sought exemplary damages for gross negligence and intentional infliction of mental distress from the "misleading 'claims' process used by" the city.

Arlington filed a motion for partial summary judgment on Sarigollu's exemplary damages claim asserting that it had immunity from claims for exemplary damages. Arlington also filed a motion for summary judgment on Sarigollu's negligence claims, alleging that the trial court did not have jurisdiction

because none of the claims as pleaded by Sarigollu fell within the waiver of governmental immunity under section 101.021 of the Texas Tort Claims Act (TTCA). Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West 2011); see *Bland ISD v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (“The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment.” (footnotes omitted)).

Citing TTCA sections 101.0215(a)(9) and 101.0215(a)(32), Arlington asserted in its summary judgment motion on the negligence claims that “sanitary and storm sewers” and “water and sewer service” are governmental functions. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(9), (32) (West Supp. 2016). And, it argued, because a city has immunity for its performance of governmental functions, and because there was no waiver of immunity in this case, the trial court had no jurisdiction over Sarigollu’s claims. Arlington further asserted that Sarigollu’s claims were incurably defective, and he therefore should not be given the opportunity to amend his pleadings. The trial court agreed and granted summary judgment for Arlington and dismissed Sarigollu’s claims without giving him the opportunity to replead. In the same order, the trial court granted summary judgment for Arlington on Sarigollu’s exemplary damages claim.

Sarigollu filed a motion for new trial, which was denied by operation of law. See Tex. R. Civ. P. 329b(c). Sarigollu now appeals the dismissal of his lawsuit.²

II. Pleas to the Jurisdiction

A plaintiff has the burden of alleging facts that affirmatively demonstrate that the trial court has subject-matter jurisdiction. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). Because a governmental unit has immunity from suit, a plaintiff asserting a claim against a governmental unit must allege facts that affirmatively demonstrate that the legislature has waived immunity for the claims brought. *Univ. of Tex. at Arlington v. Williams*, 455 S.W.3d 640, 643 (Tex. App.—Fort Worth 2013), *aff'd*, 459 S.W.3d 48 (Tex. 2015). When considering a plea to the jurisdiction challenging the plaintiff’s pleadings, the court construes the pleadings liberally, taking all factual assertions as true and looking to the plaintiff’s intent. *Heckman*, 369 S.W.3d at 150. We must grant the plea to the jurisdiction if the plaintiff’s pleadings affirmatively negate the existence of jurisdiction. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court’s jurisdiction but do not affirmatively demonstrate

²Sarigollu included the allegation of damages for “intentional infliction of mental distress” at the end of a list of his alleged damages resulting from “the above detailed negligence.” To the extent that Sarigollu pleaded “intentional infliction of mental distress” as a separate claim, he does not appear to appeal its dismissal. His brief contains no argument explaining what section of the TTCA waives Arlington’s immunity for the claim or how his pleadings asserted facts showing such a waiver. Nor does his brief contain any argument challenging the dismissal of his claim for exemplary damages for gross negligence. We will review only the trial court’s dismissal of his negligence claims.

incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004).

III. Immunity of Municipalities

A municipality is entitled to immunity for some but not all of its functions. *Tex. Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379, 388 (Tex. App.—Fort Worth 2008, no pet.). A municipality is liable for torts arising from the exercise of its proprietary functions, but it is generally immune from suit and from liability for torts arising from the exercise of its governmental functions, except for the limited waiver provided by the TTCA. *Id.* at 389. In determining whether a municipality is immune from suit, we first determine whether the governmental function at issue is governmental or proprietary. *Id.* TTCA section 101.0215 sets out a nonexclusive list of governmental functions. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215. If a function is governmental, we then determine whether the TTCA waives the municipality's immunity. *Tex. Bay Cherry Hill*, 257 S.W.3d at 388–89. The TTCA waives immunity for

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) 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 Ann. § 101.021.

IV. No Waiver of Governmental Immunity under the TTCA for Sarigollu's Claims.

Sarigollu argues that the trial court erred by granting Arlington's motion for summary judgment on his negligence claims. More specifically, he contends that TTCA section 101.0215 makes a municipality liable for damages arising from its governmental functions, including health and sanitation services and sanitary and storm sewers. Sarigollu points out that section 101.0215 states that "[a] municipality is liable *under this chapter* for damages arising from its governmental functions" and that it lists functions related to health and sanitation services, sanitary and storm sewers, and water and sewer service as governmental functions. *Id.* § 101.0215(a) (emphasis added). Arlington counters that the statute's use of the phrase "under this chapter" in section 101.0215 is not a waiver of immunity; rather, the language indicates that, before a municipality may be liable for the performance of a governmental function listed in that section, a "plaintiff must still establish a waiver of immunity under Section 101.021 of the TTCA."

Applying the plain language of the statute, we agree with Arlington that a municipality is liable for its performance of governmental functions listed in section 101.0215 only if the TTCA otherwise waives immunity. Municipalities

have long had immunity for governmental functions. *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007). The TTCA includes a limited waiver of that immunity. See *McKinney v. City of Gainesville*, 814 S.W.2d 862, 865 (Tex. App.—Fort Worth 1991, no writ). “[T]he provision in section 101.0215(a) regarding the municipality being ‘liable *under this chapter*’ requires, and was intended to require, that liability arising out of a governmental function . . . be established under one of the three areas in which the TTCA has waived sovereign immunity.” *Id.* (citation omitted). The purpose of section 101.0215 is to ensure that if the TTCA waives a municipality’s immunity for a claim, then the municipality is not entitled to immunity even if the claim arises out of governmental function; it does not provide a blanket waiver of immunity for governmental functions. See *id.* (holding that section 101.0215 does not waive governmental immunity merely because a governmental action falls within the list of governmental functions in section 101.0215).

In his petition, Sarigollu alleged that Arlington was negligent in its inspection, operation, and maintenance of the sewer system, and, on appeal, Sarigollu acknowledges that these claims involve functions related to health, sanitation, and sanitary sewers, functions that section 101.0215 explicitly classifies as governmental. See Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(2), (a)(9), (a)(32). Accordingly, there is no disagreement between the parties that Sarigollu’s claims arise out of Arlington’s performance of governmental functions. Arlington therefore may be sued and held liable for

damages it caused Sarigollu *only* if Arlington's immunity is otherwise waived under the TTCA.

Sarigollu contends that Arlington's immunity is waived because section 101.021 provides a waiver for personal injuries caused by a condition or use of real property. In support, he asserts that "[it] is undisputed that . . . the sewer system was buried in real property and its use and condition are in question."

Importantly, however, "[n]either a cause of action for negligent use of real property nor a cause of action involving a condition of real property exists separate and apart from a cause of action for a premises defect." *Nunez v. City of Sansom Park*, 197 S.W.3d 837, 842 (Tex. App.—Fort Worth 2006, no pet.). The TTCA waives immunity for a premises defect claim *only* "if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). If a claim under the TTCA arises from a premises defect, unless the claimant pays for the use of the premises, the governmental unit only owes to the claimant the duty that a private person would owe to a licensee on private property. See *id.* § 101.022 (West 2011). "The duty owed to a licensee on private property requires that a landowner not injure a licensee by willful, wanton or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 385 (Tex. 2016) (quotation marks and citation omitted). The TTCA does not waive

immunity if a condition or use of property merely furnishes a condition that makes the injury possible; rather, the condition or use must have actually caused the injury. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 726 (Tex. 2016).

None of the negligence allegations in Sarigollo's petition allege that he suffered an injury from the condition or use of real property.

First, he alleged that Arlington failed to perform proper and timely inspections of the sewer system in his neighborhood, to keep proper maps or diagrams of the sewer system so that problems could be quickly located and resolved, and to properly train its employees to locate sewer problems in a timely manner. These claims do not allege an injury from the condition or use of real property. *See id.*

Second, Sarigollu alleged that Arlington failed to maintain the sewer system, that the failure was negligence, and that such negligence caused him damages. However, a failure to maintain property is not itself a dangerous condition; at most, a failure to maintain can furnish a condition that makes injury possible. *See id.*

Finally, Sarigollu alleged that Arlington failed to locate and repair the blockage in a timely manner. Assuming from a very liberal reading of Sarigollu's pleadings that he alleged the sewage blockage constituted a dangerous condition and Arlington owes him a duty as a licensee to warn him of, or make reasonably safe, the sewage blockages of which Arlington is aware and *he is not*, Sarigollu did not allege any facts showing that Arlington caused or even had

knowledge of the sewage blockage prior to city workers being called to his house. *Heckman*, 369 S.W.3d at 150. On the contrary, based on Sarigollu's pleadings, he knew of the sewage blockage before Arlington did. Once informed of the "dangerous" condition, Arlington took steps to fix it. Therefore, Sarigollu did not plead facts showing that Arlington breached any duty to him based on a condition of real property.

Simply stated, under the long-established law of premises liability, because Sarigollu has not alleged facts showing that Arlington would be liable were it a private person, he did not meet his burden of alleging facts that affirmatively demonstrated that the trial court had subject-matter jurisdiction. *See id.*; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). And, because Sarigollu's own pleadings affirmatively demonstrate that Arlington had no duty to him that would give rise to a premises liability claim, and the facts he alleged show that his claims do not fit within the other waivers of immunity under section 101.021, the trial court correctly dismissed Sarigollu's claims without giving him a chance to replead. *Heckman*, 369 S.W.3d at 150. Because the TTCA does not waive Arlington's immunity for Sarigollu's claims, we overrule his sole issue.³

³Although Sarguillo cites several cases in support of his contention that the legislature has waived Arlington's governmental immunity, these cases are either wholly inapposite or are inapplicable to the specific circumstances of this case and are unpersuasive. *See, e.g., Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 657–58 (Tex. 2007) (determining that university's decision as to when and where irrigation water sprayed was an operational- or maintenance-level decision, not a discretionary policy-level decision); *City of Arlington v. State Farm Lloyds*, 145 S.W.3d 165, 166 (Tex. 2004) (discussing municipalities'

V. Conclusion

Having overruled Sarigollu's sole issue, we affirm the trial court's order granting Arlington's motion for summary judgment and dismissing Sarigollu's claims for lack of jurisdiction.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: MEIER, SUDDERTH, and PITTMAN, JJ.

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immunity for discretionary functions); *City of Fort Worth v. Gay*, 977 S.W.2d 814, 817 (Tex. App.—Fort Worth 1998, no pet.) (same); *City of Round Rock v. Smith*, 687 S.W.2d 300, 303 (Tex. 1985) (stating in dicta, in a decision predating the legislature's classification of acts related to sewers as governmental, that a city would be liable for the negligent construction or maintenance of a storm sewer).