NO. 12-10-00412-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

TEXAS DEPARTMENT OF TRANSPORTATION, APPELLANT	***§***	***APPEAL FROM THE 87TH***
V.		
RANDLE PETERSON AND JOYCE PETERSON, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF HANNAH PETERSON, DECEASED, KRISTOPHER STAMPLEY, TOMMY DUANE DAVIS AND WIFE, CRYSTAL NICOLE DAVIS, APPELLEES	***§***	***JUDICIAL DISTRICT COURT***
	§	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Texas Department of Transportation (TxDOT) appeals the trial court's order denying its plea to the jurisdiction. In one issue, TxDOT argues that the trial court erred in denying its plea. We reverse and render.

BACKGROUND

On a wet, cloudy day in May 2007, Virvus Green was driving a tractor-trailer on Highway 79 in Anderson County, Texas. Green lost control of the vehicle and caused a tragic accident involving three other vehicles. As a result, Hannah Peterson was killed, and Kristopher Stampley and Tommy Duane Davis were injured.

Hannah's parents, Randle and Joyce Peterson, along with Stampley, Davis, and his wife, Crystal Nicole Davis (collectively Appellees), sued TxDOT alleging the accident was caused by a dangerous roadway. TxDOT raised the affirmative defense of sovereign immunity and argued that the trial court lacked jurisdiction to consider Appellees' claims. In response, Appellees contended

that TxDOT had waived its sovereign immunity because the slippery road constituted either (1) a special defect that TxDOT knew or should have known existed or, alternatively, (2) a premises defect of which TxDOT had actual knowledge. In reply, TxDOT argued that a slippery road is not a special defect and that it had no actual knowledge of any alleged premises defect.

The trial court conducted a hearing on the matter. Thereafter, the trial court denied TxDOT's plea to the jurisdiction. TxDOT timely filed this interlocutory appeal.

SOVEREIGN IMMUNITY

In its sole issue, TxDOT argues that Appellees' claims against it are barred by sovereign immunity. Appellees first respond that TxDOT's immunity from suit is waived because the condition of the road constituted a special defect. In the alternative, they contend that TxDOT's immunity from suit is waived because the condition of the road constituted a premises defect, of which TxDOT had actual knowledge.

Standard of Review and Governing Law

The State of Texas cannot be sued in its own courts without its consent and, then, only in the manner indicated by that consent. *See* ***Wichita Falls State Hosp. v. Taylor***, 106 S.W.3d 692, 694 (Tex. 2003) (citing ***Hosner v. De Young***, 1 Tex. 764, 769 (1847)). For the legislature to waive the state's sovereign immunity, a statute or resolution must contain a clear and unambiguous expression of the legislature's waiver of immunity. ***Taylor***, 106 S.W.3d at 696. In other words, a statute that waives the state's immunity must do so beyond a doubt. *See* ***id***. at 697. When construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities in favor of the state's retaining its immunity. *See* ***id***.

Where the state has not given its consent to suit, a trial court lacks subject matter jurisdiction. *See* ***Tex. Dep't of Transp. v. Jones***, 8 S.W.3d 636, 639 (Tex. 1999). Sovereign immunity from suit is properly asserted by a plea to the jurisdiction. *See* ***id***. Subject matter jurisdiction is essential to the authority of the trial court to decide a case. ***Starkey v. Andrews Center***, 104 S.W.3d 626, 628 (Tex. App.–Tyler 2003, pet. denied). Whether a court has subject matter jurisdiction is a question of law that we review de novo. *See* ***Tex. Dep't of Parks & Wildlife v. Miranda***, 133 S.W.3d 217, 226 (Tex. 2004). The state can contest whether a plaintiff has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction or whether undisputed

evidence of jurisdictional facts establishes a trial court's jurisdiction. *See* ***id.*** However, in some cases, disputed evidence of jurisdictional facts that also implicates the merits of the case may require resolution by the fact finder. *See* ***id.***

When a plea to the jurisdiction challenges the existence of the jurisdictional facts pleaded, we consider relevant evidence submitted by the parties where necessary to resolve the jurisdictional issues raised. *See* ***id.*** at 227. In a case in which the jurisdictional challenge implicates the merits of the nonmovant's cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists. ***Id.*** If there is a fact question pertaining to the jurisdictional issue, the trial court cannot grant the plea to the jurisdiction, and the fact issue should be left for trial. *See* ***id.*** at 227-28. However, if the relevant evidence is undisputed or if there is no fact question on the jurisdictional issue, the trial court should rule on the plea to the jurisdiction as a matter of law. *See* ***id.*** at 228. When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See* ***id.***

The Texas Tort Claims Act (TTCA) waives sovereign immunity for personal injury and death caused by a condition of real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011). If the defect is a special defect, the claimant is treated as an invitee, and sovereign immunity is waived under the TTCA for injury resulting from that special defect of which the governmental entity is or should be aware. *See* ***id.*** § 101.022(b); ***Univ. of Tex. at Austin v. Hayes***, 327 S.W.3d 113, 117 (Tex. 2010); ***Denton Cnty. v. Beynon***, 283 S.W.3d 329, 331 (Tex. 2009). Absent a special defect, the claimant is treated as a licensee, and thus, the TTCA only waives sovereign immunity for injury from a premises defect of which the governmental entity had actual knowledge. TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a); ***Reyes***, 335 S.W.3d at 606.

Special Defect

The existence of a special defect is a question of law subject to de novo review. ***Denton Cnty.***, 283 S.W.3d at 331. The class of special defects is narrow. ***Hayes***, 327 S.W.3d at 116. While the TTCA does not define special defect, it likens it to "excavations or obstructions on highways, roads, or streets." TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(b); *see* ***Denton Cnty.***,

283 S.W.3d at 331. Some cases have defined a special defect as a condition that presents "an unexpected and unusual danger to ordinary users of roadways," but the Texas Supreme Court has made clear that the only test for a special defect is whether the condition is of the same class as an excavation or obstruction. ***Denton Cnty.***, 283 S.W.3d at 331 n.11. In light of the requirement that waivers of immunity be clear and unambiguous, we cannot expand the definition of a special defect to encompass a defect that is out of the ordinary, but not of the same class as an excavation or obstruction. *See* ***id.*** at 332. Thus, conditions that are not like excavations and obstructions are not special defects merely because they are unexpected or unusual. *See* ***Reyes v. City of Laredo***, 335 S.W.3d 605, 606 (Tex. 2010).

Appellees claim that the portion of Highway 79 involved in this accident constitutes a special defect because it was incredibly slick in rainy weather. Although they acknowledge that all roads are more slick when they are wet than when they are dry, Appellees argue that Green's driving a tractor-trailer on a wet Highway 79 was the equivalent of driving on an ice covered road rather than a road made wet by rain. Thus, Appellees contend the excessively slippery road posed an unexpected and unusual danger such that it became a special defect.

As evidence of the roadway's defective condition, Appellees provided an expert report from Kelley Adamson, a professional engineer and accident reconstruction specialist. Adamson conducted testing on the road that demonstrated the road was more susceptible to slippery conditions than most roadways. Adamson claimed that the road exhibited "asphalt tar bleed" that resulted in "rutting." Adamson opined that the poor maintenance of the road made the road extremely slick in wet conditions and contributed to the accident involving Green, Peterson, Stampley, and Davis.

We have reviewed the record and have found nothing to indicate that the asphalt tar bleed discovered by Adamson was akin to an excavation or obstruction. Adamson stated that the road exhibited rutting, but even rutting is different from an excavation or obstruction. *See* ***Reyes***, 335 S.W.3d at 607 (defining "excavation" as "a cavity" and "obstruction" defined as "an impediment or a hindrance"). Simply put, Appellees' claimed defect in Highway 79 is not comparable to an excavation or obstruction, and is, therefore, not a special defect. *See* ***Denton Cnty.***, 283 S.W.3d at 332.

Premises Defect

The TTCA only waives sovereign immunity for injury from a premises defect of which the governmental entity had actual knowledge of the defect. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a); ***Reyes***, 335 S.W.3d at 606. To prove actual knowledge, the claimant must show that the governmental entity actually knew of the dangerous condition at the time of the accident. ***Hayes***, 327 S.W.3d at 117. Awareness of a potential problem is not actual knowledge of an existing danger. ***Reyes***, 335 S.W.3d at 609. One factor considered in determining whether a governmental entity had actual knowledge of a dangerous condition on its premises is whether the governmental entity had received reports of prior injuries or of the potential danger represented by the condition. *See* ***id.*** at 118. Appellees argue that two factual bases provide evidence that TxDOT had actual knowledge of the slick stretch of highway: (1) TxDOT's office was nearby and (2) TxDOT had access to accident reports that showed an unusually high number of previous accidents on that portion of the highway in wet weather.

Here, the mere close proximity of TxDOT's local offices alone does not equate to actual knowledge of a premises defect. Appellees took the depositions of several TxDOT employees, none of whom was aware of a problem with this portion of the highway. Preston Massey, the maintenance supervisor for TxDOT in the Palestine Maintenance Section, was unaware of a defect in Highway 79 that would cause it to be incredibly slick in wet weather. Cheryl Lovell Tiner, the TxDOT Area Engineer for Anderson County, also testified that she was unaware of any defect in Highway 79.[1] William Willeford, a District Materials Engineer Supervisor and Pavement Engineer with TxDOT, likewise stated that he was unaware that Highway 79 had a problem with accidents in wet weather.

Further, Tiner and Willeford reviewed accident data to determine road work that needed to be performed. Carol Rawson, a Traffic Operations Division Director for TxDOT, explained that at the time of this accident, the Texas Department of Public Safety maintained the database for accident reports. Several years of accidents had not been included in the database. TxDOT took over the database in 2007, shortly after the accident at issue, and the accident report data was incorporated into the database in late 2007 and early 2008. At the time of this accident, the paper

[1] Tiner stated that she authorized a road crew to texture the pavement after this accident to improve its traction. But Tiner's action, without more, is not evidence that she knew of a defect at the time of the accident.

copies of the previous accident reports were physically available to TxDOT, but they were not in a system that TxDOT could search to determine problem areas that needed road maintenance.

Appellees argue that TxDOT should not be allowed to "hide behind its own failure to organize and analyze [the] data in a timely fashion." But the legislature's waiver of sovereign immunity requires a showing that the governmental entity actually knew of the premises defect, not merely that it reasonably should have known of the defect. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a); ***Reyes***, 335 S.W.3d at 606. As such, we cannot conclude that TxDOT's access to these accident reports is evidence that TxDOT had actual knowledge of anything in the accident reports at the time of the accident. *See* ***Tex. Dep't of Transp. v. Anderson***, No. 12-07-00268-CV, 2008 WL 186867, at *4 (Tex. App.–Tyler Jan. 23, 2008, no pet.) (mem. op.) (because of substantial number of automobile accidents occurring annually on Texas roads, governmental entity's knowledge of accident, without more, does not constitute presuit actual notice required by TTCA).

Yet, even if TxDOT's ability to access these reports could suffice to provide evidence of actual notice, the accident reports uncovered by Appellees fail to provide notice of a premises defect. Appellees provided accident reports for nine other accidents that occurred on this portion of Highway 79 in wet conditions. In these reports, the investigating officers found the factors and conditions that caused the accidents to be conduct such as failure to control speed, failure to yield while turning left, faulty evasive action, and driving at a speed unsafe for the conditions, but under the speed limit. None of these factors and conditions provided actual notice to TxDOT of a premises defect. Further, the investigating officers mentioned the slick road in only one of the narratives of the accident reports. Specifically, in the March 28, 2007 accident report, the investigating officer included the notation, "It had just rained and roads were slick." Even this notation fails to put TxDOT on actual notice of even a potential premises defect because Appellees concede that all roads are slick when they are wet.

Appellees alleged premises defect is that the portion of the highway was more slippery than other roads when wet. This allegation may be true. Indeed, Appellees presented evidence in support of this fact through Adamson's expert report. But to establish a waiver of sovereign immunity for this alleged premises defect, Appellees were required to present evidence that TxDOT actually knew of the defect at the time of the accident. There is no evidence of record that TxDOT

had the requisite knowledge. *See* ***Hayes***, 327 S.W.3d at 117. Accordingly, we hold that the trial court erred by denying TxDOT's plea to the jurisdiction.

TxDOT's sole issue is sustained.

DISPOSITION

Having sustained TxDOT's sole issue, we ***reverse*** the trial court's order denying TxDOT's plea to the jurisdiction and ***render*** judgment granting TxDOT's plea to the jurisdiction and dismissing Appellees' claims against TxDOT with prejudice.

BRIAN HOYLE
Justice

Opinion delivered October 31, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

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