COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CITY OF EL PASO,	§	No. 08-19-00262-CV
Appellant,	§	Appeal from the
v.	§	327th District Court
JOLANDE A. AGUILAR,	§	of El Paso County, Texas
Appellee.		(TC# 2017DCV3624)

O P I N I O N

The City of El Paso ("City") appeals from the denial of its plea to the jurisdiction in a lawsuit brought by Appellee Jolande Aguilar under the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1) – (2). We affirm in part and reverse in part.

BACKGROUND

In December 2016, Aguilar was assisting some students on a float involved in the City of Lights Parade in El Paso, which Aguilar alleged was conducted under the direction and supervision of the City's Parks and Recreation Department. The float, which was being pulled behind a truck driven by Charles Ortega, was directed along the parade route by volunteers wearing high-visibility vests who signaled with flashlights. Ortega testified that the vests being worn had "Parade Staff" written on them, but he did not otherwise know whether the volunteers were employed by

the City. Other evidence demonstrated, however, that the volunteers were employees of the City's Parks and Recreation Department.

At the end of the parade route, a volunteer signaled Ortega to stop and unload his float. Ortega stopped for approximately ten minutes and then he was signaled by an unidentified volunteer ("John Doe") to move forward again. Ortega's view to the rear was obstructed by decorations and he was not aware that Aguilar had stepped between the truck and the float to retrieve some belongings. Aguilar was knocked down and run over when Ortega moved the truck and float forward.

Aguilar filed suit against Ortega, the City, John Doe, and United Services Automobile Association ("USAA"). She subsequently nonsuited John Doe by omitting him as a defendant in her second amended original petition, and nonsuited Ortega by written notice of nonsuit. Aguilar alleged that the City was negligent in failing to properly oversee and control parade traffic, and in instructing Ortega to move the float when it was unsafe to do so. Invoking section 102.021 of the Texas Tort Claims Act ("TTCA"), she alleged that her injury arose from the operation or use of a motor vehicle and the use of tangible personal property. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1), (2). Aguilar additionally alleged that the City was liable for the conduct of its employee, either by vicarious liability or respondeat superior, and that it was also directly liable for negligently training and supervising that employee.

The City filed a plea to the jurisdiction in which it asserted that Aguilar failed to plead facts affirmatively demonstrating jurisdiction, and that the jurisdictional facts did not establish a claim for which governmental immunity has been waived. The City first argued that Aguilar did not state a claim for injury arising from the City's operation or use of a motor vehicle because the City

neither owned nor operated the vehicle that caused her injuries. Concerning the use of tangible property, the City argued that Aguilar failed to identify what tangible property was allegedly used, and further failed to demonstrate any nexus between the use of that property and her injury.

The trial court heard argument on the plea to the jurisdiction and took the matter under advisement to review certain deposition excerpts tendered by Aguilar during the hearing. The court subsequently denied the City's plea to the jurisdiction.[1]

ISSUES PRESENTED

The City presents two related issues broadly contending that the trial court erred in denying its plea to the jurisdiction. The City argues that Aguilar failed to plead jurisdictional facts sufficient to overcome the City's governmental immunity and, more specifically, failed to demonstrate that her negligence claims fall within any waiver of immunity contained in the TTCA. We address the issues together as a combined, single issue with sub-arguments.

STANDARD OF REVIEW

Whether a court has subject matter jurisdiction is a question of law and is, therefore, subject to *de novo* review. *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013); *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 166 (Tex. 2013). When a plea to the jurisdiction challenges the pleadings, the reviewing court determines whether the plaintiff has alleged facts affirmatively demonstrating the court's jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 446 (Tex. 1993). The court construes the pleadings liberally in favor of the plaintiff.

[1] Additionally, the court granted the plea as to John Doe, who had already been omitted as a defendant in Aguilar's live pleading.

Miranda, 133 S.W.3d at 226.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, the reviewing court considers relevant evidence submitted by the parties to resolve the jurisdictional issues. *Id.* at 227. The standard to be applied mirrors that applied in the summary judgment context, so that the court indulges every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.* at 228. A court cannot grant a plea to the jurisdiction if the evidence raises a fact issue concerning jurisdiction. *Id.* at 227-28. But if the evidence of jurisdictional facts is undisputed, the court properly rules on jurisdiction as a matter of law. *See id.* at 226, 228.

DISCUSSION

A. Waiver of immunity under the TTCA

"A municipality such as the City of El Paso is immune from liability for its governmental functions unless that immunity is specifically waived." *City of El Paso v. Hernandez*, 16 S.W.3d 409, 414 (Tex. App.—El Paso 2000, pet. denied). Aguilar contends that a waiver of immunity exists for her claims pursuant to the TTCA:

> A governmental unit in the state is liable 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.

1) Use or operation of a motor vehicle

Relying on this Court's opinion in *City of El Paso v. Hernandez*, the City first argues that the waiver of immunity for injury arising from the operation or use of a motor vehicle does not apply because Aguilar did not articulate any governmental function for which the truck and float were being used. Because the City misconstrues the significance of governmental functions, we disagree with its argument.

As stated above, we recognized in *Hernandez* that a municipality is immune from liability for its governmental functions unless that immunity is waived. 16 S.W.3d at 414. We then noted that, because the legislature designated the operation of an emergency ambulance service as a governmental function, that function was cloaked with immunity unless a claim fell within one of the waiver provisions of the TTCA. *Id.*; *see Hale v. City of Bonham*, 477 S.W.3d 452, 459 (Tex. App.—Texarkana 2015, pet. denied) ("[T]he TTCA waives immunity from suit for municipalities performing the governmental functions listed in Section 101.0215, provided that the plaintiff's lawsuit fits within the specifications of Section 101.021."). We recognized that status as a governmental function is what *affords* immunity; and a TTCA claimant's burden is to establish a *waiver* of that immunity. *Hernandez*, 16 S.W.3d at 414. Aguilar, therefore, had no burden to articulate a governmental function for which the truck and float were being used.

The City next argues that the "operation or use of a motor vehicle" waiver of immunity applies only if a government employee personally drove the vehicle. The City cites *LeLeaux v. Hamshire-Fannett Independent School Dist*rict, 835 S.W.2d 49 (Tex. 1992), as support for that proposition. The supreme court there noted that, while the TTCA "does not specify whose

operation or use is necessary—the employee's, the person who suffers injury, or some third party—we think the more plausible reading is that the required operation or use is that of the employee." *Id.* at 51. However, the focus of *LeLeaux* was not whether an employee was physically operating the vehicle, but whether the alleged injury arose from operation or use of the vehicle: "When an injury occurs on a school bus but does not arise out of the use or operation of the bus, and the bus is only the setting for the injury, immunity for liability is not waived." *Id.* at 52; *see Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 543 (Tex. 2003) (operation or use of motor vehicle does not cause injury if it only furnishes the condition making the injury possible); *Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617, 619 (Tex. 1987) (no waiver of immunity because bus only provided setting for injury); *Garza's Estate v. McAllen Indep. Sch. Dist*., 613 S.W.2d 526, 528 (Tex. App.—Beaumont 1981, writ ref'd n.r.e.) (same).

None of the cases on which the City relies supports the assertion that Aguilar was required to show that the vehicle in this case was actually being driven by a City employee at the time of Aguilar's injury. Aguilar contends that it is sufficient that the driver of the vehicle moved it forward at the express direction of a City employee. We agree.

This Court has previously recognized that *LeLeaux* does not require that a vehicle be driven by a governmental employee; rather, the *LeLeaux* court "held only that a governmental employee 'use' or 'operate' the vehicle." *City of Socorro v. Hernandez*, 508 S.W.3d 1, 10 (Tex. App.—El Paso 2015, pet. denied). We further noted that "'[o]peration' refers to a 'doing or performing of a practical work' and 'use' means 'to put or bring into action or service; to employ for or apply to a given purpose.'" *Id.* (quoting *LeLeaux*, 835 S.W.2d at 51). The plaintiff in *City of Socorro v. Hernandez* had alleged that a police officer directed him to push a stalled vehicle off the road and

that, while doing so, he was struck and injured by another vehicle. *Id*. at 3. This Court concluded that Hernandez' pleading allegation was sufficient to implicate the TTCA's waiver provision requiring the use or operation of a motor vehicle by a police officer. *Id.* at 11.

A case from one of our sister courts in Houston, *County of Galveston v. Morgan*, 882 S.W.2d 485 (Tex. App.—Houston [14th Dist.] 1994, writ denied), is also instructive. In that case, an employee of an independent contractor was injured by an electrical shock which occurred when a spotter directed a truck to move too close to a power line. *Id.* at 487-88. The driver of the truck was not a county employee; the spotters, however, were. *Id.* at 490. "The spotters told the truck driver when to move forward, how far to move, when to raise his bed, how far to raise it, when to lower his bed, and when to stop." *Id.* The court concluded that, "[a]lthough the spotters were not the drivers of the trucks, the spotters 'used or operated' the trucks by exercising complete control over their 'use or operation.'" *Id.*; *see City of El Campo v. Rubio*, 980 S.W.2d 943, 947 (Tex. App.—Corpus Christi 1998, pet. dism'd w.o.j.) (police officer who ordered unlicensed person to drive vehicle "used or operated" vehicle by exercising control over it).

We turn now to the facts of this case. Aguilar alleged that the City of Lights Parade was conducted under the direction and supervision of the Parks and Recreation Department of the City; Ortega moved his truck forward at the direction of an employee of the City, who was acting within the course and scope of his employment; and moving the truck forward caused Aguilar's injury. Aguilar also submitted excerpts from Ortega's deposition, in which he explained that he was instructed where and when to stop and unload, as well as when to move forward, by parade officials who wore high-visibility vests and signaled with flashlights.

While Ortega could not identify the parade officials as City employees, Aguilar submitted

additional deposition excerpts demonstrating that the flow of the parade floats was controlled by employees of the City's Parks and Recreation Department. Those employees were assigned per block and were instructed to inform drivers that they (the employees) would be telling them (the drivers) where to go. The employees were outfitted in fluorescent yellow vests and used flashlights to signal the drivers to move or to stop.

The City did not controvert the evidence concerning the involvement of the Parks and Recreation Department and its employees in managing the movement of the parade floats. While the City expressed some doubt about whether Ortega was directed to pull forward by a City employee, that doubt was based on Aguilar's failure to identify the specific employee, not on any contention that City employees were not engaged in directing the movement of the floats on the occasion in question. We are directed, however, to indulge every reasonable inference and resolve any doubt in Aguilar's favor. *See Miranda*, 133 S.W.3d at 228. And, to the extent that the City's skepticism concerning Aguilar's version of the accident could be construed as raising an issue of fact, that dispute itself is sufficient to warrant denial of its plea to the jurisdiction. *See id.* (trial court cannot grant plea to the jurisdiction if evidence creates fact question on jurisdictional issue).

We conclude that Aguilar sufficiently pleaded, and supported with evidence, that the City used or operated the motor vehicle that caused her injury by directing the driver of that motor vehicle to move it forward. *See Hernandez*, 508 S.W.3d at 11 (directing person to push stalled vehicle); *Morgan*, 882 S.W.2d at 490 (directing truck too close to power line); *Rubio*, 980 S.W.2d at 947 (directing unlicensed person to drive car). She therefore pleaded, and supported with evidence, jurisdictional facts supporting a waiver of immunity under TTCA section 101.021(1). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1) (use or operation of a motor vehicle). For

this reason, the trial court did not err by denying the City's plea to the jurisdiction as it relates to Aguilar's claim that the City is liable for negligently instructing Ortega to move his vehicle forward when it was unsafe to do so.

Accordingly, we overrule the City's combined issue to the extent it argues that Aguilar's claim did not articulate a claim arising from a use or operation of a motor vehicle as required to implicate the TTCA's waiver of immunity.

2) Use of tangible personal property

In addition to alleging the "operation or use of a motor-driven vehicle" waiver of immunity, Aguilar also invoked the TTCA's "condition or use of tangible personal . . . property" waiver of immunity. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A), (2). Aguilar bore the burden of alleging facts that affirmatively demonstrate the court's jurisdiction under this waiver provision. *See Miranda,* 133 S.W.3d at 226. The City argues that Aguilar did not sustain this burden, and we agree. Her pleadings relate only to the use or operation of a motor vehicle. There is no allegation, evidence, or even mention of any tangible personal property causing Aguilar's injury, other than the motor vehicle.[2] The trial court thus erred insofar as it denied the City's plea to the jurisdiction based on Aguilar's assertion of waiver under TTCA section 101.021(2). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (use of tangible personal property). We conclude that Aguilar's pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction under section 101.021(2), but they also do not affirmatively negate jurisdiction under that provision. *See Miranda,* 133 S.W.3d at 226. Aguilar should therefore be afforded an opportunity

[2] At the hearing on the plea to the jurisdiction, Aguilar discussed evidence showing that City employees used flashlights to direct parade drivers, including Ortega. She did not, however, assert any causal link between the use of flashlights and her injury.

to amend her pleadings concerning an alleged use of tangible personal property other than Ortega's motor vehicle. *See id.* at 226-27.

Accordingly, we sustain the City's combined issue to the extent it argues that Aguilar's pleadings do not articulate the use of tangible personal property as required to implicate the TTCA's waiver of immunity. Yet, we further instruct that Aguilar should be afforded an opportunity to amend her pleadings, if she so desires, to address this insufficiency in asserting a claim based on a use of tangible property that falls within a waiver of the City's governmental immunity. *See id.*

B. General negligence claims

In addition to her claim that the City is liable for negligently instructing Ortega to move his vehicle, Aguilar alleged that the City is liable for negligently failing to properly oversee and control traffic in a parade unit, and for negligently training and supervising its employee. Neither Aguilar's pleadings nor the evidence submitted to the trial court demonstrate that these allegations fall within any waiver of immunity applicable to the City, and Aguilar makes no argument on appeal that they do. The only waiver provisions Aguilar invoked in the court below are the "operation or use of a motor-driven vehicle" waiver and the "use of tangible personal . . . property" waiver discussed above. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A), (2). Nothing in the record supports application of either of these two waiver provisions of the TTCA to Aguilar's allegations of negligent control of traffic or negligent supervision of employees.

Accordingly, we sustain the City's combined issue to the extent it challenged Aguilar's claims for negligence in overseeing and controlling the parade, and in training and supervising its employee. But again, because Aguilar's pleadings do not affirmatively negate jurisdiction over

these claims, she should be afforded an opportunity to amend her pleadings to demonstrate, if possible, that her claim of general negligence falls within a waiver of the City's governmental immunity. *See Miranda*, 133 S.W.3d at 226-27.

C. Respondeat superior

Finally, the City urges that respondeat superior, as alleged by Aguilar, is not an independent basis for a waiver of immunity. Yet, the City acknowledges that the respondeat superior doctrine is properly used to connect a governmental entity to the conduct of its employee. *See DeWitt v. Harris Cty.*, 904 S.W.2d 650, 653-54 (Tex. 1995). The City concludes that "there is no purpose in citing to respondeat superior" because "there is no underlying claim that waives immunity . . . ." But we have held above that Aguilar's claim arising from a City employee's instruction to Ortega to move his vehicle falls within a waiver of immunity. Aguilar therefore properly invoked the doctrine of respondeat superior to hold the City responsible for the employee's conduct. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1) (governmental entity liable if employee would be liable); *DeWitt*, 904 S.W.2d at 653.

Accordingly, we overrule the City's combined issue to the extent it argues that Aguilar's claim required an independent basis to support allegations of respondeat superior liability.

CONCLUSION

The order of the trial court is affirmed insofar as it denies the City's plea to the jurisdiction challenging Aguilar's claim for negligence in instructing Ortega to move his vehicle when it was not safe to do so based on respondeat superior liability. The order is reversed insofar as it denies the City's plea to the jurisdiction challenging Aguilar's remaining claims. On remand, Aguilar is to be given an opportunity to replead those claims to allege sufficient jurisdictional facts, if such

facts exist, in support of those claims.

GINA M. PALAFOX, Justice

October 9, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.