COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE CITY OF EL PASO TEXAS,	§	08-22-00058-CV
Appellant,	§	Appeal from the
v.	§	171st Judicial District Court
MARIA H. TORRES,	§	of El Paso County, Texas
Appellee.	§	(TC# 2017DCV0738)

O P I N I O N

This is an accelerated interlocutory appeal in which Appellant, the City of El Paso (the City), appeals the trial court's denial of its plea to the jurisdiction. We affirm in part and reverse in part.

BACKGROUND

Factual Background

Appellee owned 7895 La Senda Drive, the subject property located in El Paso, Texas. The property is at the corner of La Senda Drive and Milton Road. In 2007, Milton Road was resurfaced as part of the City's street resurfacing program. The intent and purpose of the work conducted on Milton was to provide maintenance to this historic roadway in this on-site ponding subdivision.

Before construction, Milton Road had a raised center crown which was designed to divert rainwater on the roadway equally to each side of the road—i.e., the center of the road was higher than the sides. The resurfacing design changed this and utilized an inverted crown instead. Storm drainage was supposed to have been collected on the roadway and transported by the centralized channel invert on the roadway gutter to a storm drainage inlet located on the north end of Milton connecting to a drainage system on San Jose Road.

The resurfacing of Milton was completed in Spring of 2008 and all storm water that fell upon Milton roadway was supposed to have been drained by the resurfaced inverted roadway within the roadway structure from the higher elevation at the intersection of Milton and La Senda, to the lower elevation located near the intersection of Milton and San Jose Road. However, resurfacing of Milton led to rainwater being diverted to 7895 La Senda, the subject property.

After the resurfacing project, but prior to the January 1, 2016, flood, Appellee claims her property flooded during heavy and moderate rainfall; however, she was able to remove the excess water with pumps. On or about January 1, 2016, Appellee claims her property was taken, damaged or destroyed for public use, when it was flooded by water flowing down Milton Road. Appellee claims a water main broke on the intersection of Milton and La Senda sometime between the late hours of December 31st and the early hours of January 1st, and water from the main break was diverted to her home. Appellee learned of the flooding of her home the morning of January 1st when she walked out of her bedroom and slipped and fell on the water and mud that had made its way inside. She fractured her right humerus as a result of the fall, which required surgery to repair and physical therapy thereafter. It was after the January 2016 flood that Appellee realized the extent of damage to the concrete slabs and foundation of her home as a cumulative effect of all of the floods.

After the January 2016 flood, a property inspection was completed on April 5, 2016. The home inspection included evaluation of the property's grading and drainage to determine the flow of rainwater and damage thereof. The inspector determined that "both streets that border on the property are sloped in a manner that rainwater is funneled into the property with no way of flowing out."

Appellee initiated suit against the City on March 6, 2017. During pendency of the suit, Appellee's home flooded again on January 25, 2019.

Procedural Background

Appellee initiated suit and filed her original petition on March 6, 2017, against the City.[1] On April 13, 2017, the City filed its original answer and plea to the jurisdiction. The City filed its sixth amended plea to the jurisdiction on March 21, 2022. On March 25, 2022, the trial court denied the City's plea to the jurisdiction. This accelerated appeal followed.

DISCUSSION

In two issues, the City challenges the denial of its plea to the jurisdiction by arguing Appellee failed to articulate a viable takings claim, and by claiming the City retains governmental immunity. We affirm the trial court's decision to deny the plea to the jurisdiction as to the takings claim and reverse as to Appellee's remaining claims.

Standard of Review

The purpose of a plea to the jurisdiction is to dismiss a cause of action without considering whether the claim has merit. *City of El Paso v. Caples Land Co., LLC*, 408 S.W.3d 26, 30 (Tex.App.—El Paso 2013, pet. denied). A plea to the jurisdiction is a dilatory plea that challenges

[1] El Paso Water Utilities was initially included as a named defendant, but was later nonsuited.

the court's power to adjudicate the subject matter of the controversy. *Id*. at 31. Whether a party has alleged facts that affirmatively establish a trial court's subject matter jurisdiction, and whether undisputed evidence of jurisdictional facts establishes a trial court's jurisdiction, are questions of law we review *de novo*. *Id*.

When, as here, a plea to the jurisdiction challenges the existence of jurisdictional facts, we look beyond the pleadings and consider evidence submitted by the parties—which may implicate the merits of a plaintiff's cause of action—when necessary to resolve the jurisdictional issues raised. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). Evidentiary review is confined to evidence relevant to the jurisdictional issue, and our task is to determine whether a fact issue exists. *Id*.; *see Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). If the plaintiff's factual allegations are challenged with supporting evidence, in order to avoid dismissal, plaintiffs must raise a genuine issue of material fact to overcome the challenge of the trial court's subject matter jurisdiction. *Miranda*, 133 S.W.3d at 221. If the evidence creates a fact issue as to the jurisdictional issue, the trial court must deny the plea to the jurisdiction and the fact issue is left for the fact finder to resolve. *Id*. at 227–28. However, if the relevant evidence fails to raise a fact issue on the jurisdictional issue, the trial court grants the plea to the jurisdiction and rules on jurisdiction as a matter of law. *Id*. at 228

Applicable Law

Article I, Section 17 of the Texas Constitution provides, "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ." TEX. CONST. art. I § 17. "Taking," "damaging," and "destruction" of one's property are three distinct claims that arise under Article I, Section 17. *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 n.2 (Tex. 2004)(citing *Steele v. City of Houston*,

603 S.W.2d 786, 789–91 (Tex. 1980)). However, courts use the term "taking" as a shorthand to refer to all three types of claims. *Id.* This case concerns the damage to 7895 La Senda, the subject property.

A municipality such as the City of El Paso is immune from liability for its governmental functions unless immunity is explicitly waived. *City of El Paso v. Hernandez*, 16 S.W.3d 409, 414 (Tex.App.—El Paso 2000, pet. denied). Governmental immunity protects political subdivisions of the State, such as cities, from suit for damages. *City of El Paso v. Mazie's L.P.*, 408 S.W.3d 13, 18 (Tex.App.—El Paso 2012, pet. denied). If a plaintiff fails to allege a valid takings claim, a city retains its immunity. *Id.* at 19. However, when a valid takings claim is asserted, a city does not retain its immunity. *Id.* at 18.

Takings Claim

In its first issue, the City maintains the trial court erred in denying its plea to the jurisdiction because Appellee failed to articulate a viable takings claim.

To plead a viable takings claim under Article I, Section 17 of the Texas Constitution, Appellant must allege (1) an intentional act by the governmental entity under its lawful authority, (2) resulting in a taking or damaging of property, (3) for public use. *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016). Requisite intent is sufficient "when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." *Id*.

Analysis

Appellee alleges the property damage was caused by the reconstruction of Milton Road. Specifically, in Appellee's fourth amended petition, Appellee pleaded:

- Prior to January 1, 2016, Defendant, through its agents or servants, rebuilt and graded Milton Road with an inverted crown.

. . . .

- Defendant was aware of the importance of diverting the flow of water over surface streets into a drainage system.

- Defendant knew that water flows downhill and that the changes to the grading of Milton Road changed the flow of water along Milton Road.

- Defendant had actual knowledge [] its construction and grading work was changing the flow of water in a way that adversely affected the properties in the neighborhood, because residents of the neighborhood complained to Defendant that the construction it was performing was diverting water to their homes and causing flooding.

- Despite knowing that its construction was redirecting the flow of water in a way that adversely affected the properties in the neighborhood, Defendant constructed Milton Road in such a way as to divert water towards Plaintiff's property and into Plaintiff's home.

- Prior to the date of Defendant's actions described herein, excess surface water did not flow to Plaintiff's property. As a result of Defendant's action, however, excess surface water had nowhere to go except towards Plaintiff's home. Defendant effectively turned Plaintiff's property into a retention pond for excess surface water.

- Defendant was warned and knew prior to completing its construction project on Milton Street that the construction it was performing would negatively impact water drainage in the neighborhood, including based on complaints from residents of the neighborhood.

- Defendant knew that its decision to construct the street in a manner that directed the flow of water down Milton Road would cause flooding of downstream properties, including Plaintiff's home, or at least, that the flooding of downstream properties, including Plaintiff's home, was substantially certain to result.

- Defendant nonetheless constructed the roadway in a manner which directed the flow of water into Plaintiff's property and home, thus taking Plaintiff's home for public use.

. . . .

- On or about January 1, 2016, Plaintiff's property was taken, damaged or destroyed for public use, when her home was flooded by water flowing down Milton Road.

- Furthermore, regular flooding of her property when rainfall occurs has caused substantial damage to the slabs and foundation due to rain water flooding the exterior perimeter of the house.

- This taking was caused by Defendant's intentional action in rebuilding Milton Road in such a way that it directed the flow of water towards Plaintiff's property. Attached hereto as Exhibit "A" is the report of Michael Huerta, Ph.D., P.E., which describes the cause of the flooding of Plaintiff's property.

  . . . .

- On or about January 25, 2019, Plaintiff's home again flooded, again because of Defendant's conduct described herein.

- Because of Defendant's decision to turn Plaintiff's home into a water retention area, it has become unmarketable and worthless.

As to damages, Appellee pleaded:

- Plaintiff's residence sustained serious damage, including damage to the foundation and walls. The damage to Plaintiff's home is so severe it is estimated repairing the damage will cost in excess of $60,000.

  . . . .

- As a result of Defendant's actions, Plaintiff's home has become unmarketable and worthless. Plaintiff sues to recover the full value of her real . . . property that has been taken, damaged, and destroyed.

The City claims Appellee focuses on the water main bursts as the basis for her takings claim. We disagree. According to the City, because the water pipes did not burst until 2016, there is no suggestion the City "knew, thought, or even worried that its resurfacing project would affect the water lines, and the project certainly did not appear to have affected them at the time the resurfacing was taking place." However, Appellee pleaded the City was warned and was aware the construction would negatively impact water drainage in the neighborhood based on complaints from residents of the neighborhood. Appellee maintains it did not allege the floods resulted from rain, or simply from a water main burst, but rather, the City's intentional alteration of the structure

of Milton Road knowing the damage to Appellee's property was substantially certain to reoccur from this authorized government action.

Appellee relies on the Texas Supreme Court's holding in *Jennings* to support its contentions. In *Jennings*, the Court discussed the element of intent, and clarified:

> 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.

142 S.W.3d at 314 (citing *Tex. Highway Dep't v. Weber*, 219 S.W.2d 70, 71 (1949)). Again, Appellee pleaded the City "was warned and knew prior to completing its construction project on Milton Street that the construction it was performing would negatively impact water drainage in the neighborhood . . . based on complaints from residents of the neighborhood." Appellee also attached to her live pleading, as Exhibit A, the report of Michael Huerta, Ph.D., P.E., which describes the cause of the flooding of the subject property. Dr. Huerta, a mechanical engineer, offered the following opinions and conclusions:

- The water-line break which occurred on or about January 1, 2016, led to severe flooding of the interior and exterior of the subject property.
- The responsible entity for flooding and damaging the interior of the house is the El Paso Water Utilities.
- The responsible entity for the injuries sustained by Ms. Torres is the El Paso Water Utilities.
- Street construction and modifications by the City of El Paso has caused rain water that falls on city streets near the subject lot to be diverted into the subject lot.
- The subject lot is receiving more water than the rain water that falls on its surface area and the corresponding street area directly in front of the subject lot.
- The extra water that has been diverted into the lot has caused serious damage to the

existing house structure.

. . . .

- The City of El Paso bears responsibility for diverting extra water on to the property and causing structural damage to the property.

- A possible solution to this problem is to build a 1-foot-high reinforced concrete barrier in front of the subject lot. The house foundation and slab will need to be repaired.

The report included extensive diagrams, photographs, elevation readings, a discussion regarding water flow into the subject property, and the qualifications of Dr. Huerta. Also attached to Appellee's live pleading was a report from Timothy A. Sank, a professional home inspector, in which he concluded:

> In the case of this home at 7895 La Senda I found that both streets that border on the property are sloped in a manner that rain water is funneled into the property with no way of flowing out. There are no gutters or drainage lines along the streets to channel or control the run off.

As to damages, the City maintains all Appellee has done is point to "two unfortunate water main bursts" and has failed to articulate how her property was damaged or taken for public use, or that any damage she suffered was in relation to or because of the City's activities in 2008, 2016 or 2019.[2] According to the City, Appellee has "not raised a single fact or pleading" establishing the City caused her injury. We disagree.

[2] As a sub-issue, the City argues even if Appellee asserted a viable takings claim, "any claim related to [the] 2008 construction would be barred by the two year statute of limitations applicable to 'damage' takings cases." However, the City is misguided and inaccurately relies on caselaw and Section 16.003(a) of the Texas Civil Practice and Remedies Code. TEX.CIV.PRAC. & REM. CODE ANN. § 16.003(a). In *Hues v. Warren Petroleum Co.*, 814 S.W.2d 526 (Tex.App.—Houston [14th Dist.] 1991, writ denied), the court inquired whether the discovery rule applied in the context of tort liability for damage to property. *Id.* at 528–29. The court stated that as a general rule, a cause of action sounding in tort accrues at the time the tort is completed. *Id.* at 529. The court also cited Section 16.003(a), which states "a person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the *personal* property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues." TEX.CIV.PRAC. & REM. CODE ANN. § 16.003(a)(emphasis added). Thus, the two-year statute of limitations the City refers to is applicable to tort liability for damage to *personal* property. *See id*. In *Levatte v. City of Wichita Falls*, 144 S.W.3d 218 (Tex.App.—Fort Worth 2004, no pet.), the court clarified, "It appears that a state-law takings claim under article I, section 17 of the Texas

As articulated above, Appellee made allegations concerning the relationship between the resurfacing of Milton Road and the reoccurring damage to her property. In cases of flood-water impacts, recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur. *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004). Additionally, the Court in *Gragg* found causation was sufficiently established because the record contained more than a scintilla of evidence to support that the reservoir's construction and operation "intensified flooding" and "caused quicker and more forceful flooding[.]" *Id.* at 552.

Here, Appellee made similar allegations of increased and intensified water flow onto her property. Appellee alleged that prior to construction, excess surface water did not flow to her property. According to Appellee's live pleading, the City was aware it had changed the flow of water along Milton Road. Appellee pleaded that only after the resurfacing was water directed to her property at an increased, intensified rate, resulting in flooding and extensive damage to the concrete slabs and foundation. Appellee argues the City remains free to dispute these allegations

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Constitution is governed by the ten-year statute of limitations[.]" *Id.* at 225; *see also Tucker v. City of Corpus Christi*, 622 S.W.3d 404, 408 (Tex.App.—Corpus Christi-Edinburg 2020, pet. denied)("The limitation period for a takings claim depends on the nature of the property at issue and the damages alleged. A takings claim premised on a governmental entity's taking of *real* property is governed by the ten-year limitations period [in §16.026] to acquire land by adverse possession. However, claims premised on a governmental entity damaging real or personal property or taking *personal* property are governed by the two-year statute of limitations found in §16.003 . . . . [Plaintiff's] takings claim concerns automobiles, which is personal property. Therefore, it is governed by a two-year statute of limitations." (emphasis added)(citations omitted)); *Carr v. City of Cisco*, 161 S.W.3d 522, 524 (Tex.App.—Eastland 2004, pet. denied)(appellant argued the City was not entitled to assert limitations because the result would be an unconstitutional taking of private property without just compensation in violation of the Takings clause of the Texas Constitution, but the court disagreed, finding "[t]he ten-year statute of limitations has been applied in similar situations involving municipalities.").

Here, construction began in 2007 and was completed in 2008. The first flood occurred in January 2016. Appellee filed suit in March 2017 for the taking of her real property. The second flood occurred in January 2019. Appellee maintains the taking occurred and Appellee's claim accrued when Appellee's property was taken, damaged, and destroyed, which occurred on or about January 1, 2016. We agree. Accordingly, Appellee filed suit within the applicable limitations period. This sub-issue is overruled.

at trial, but at this stage, the allegations sufficiently allege causation and support denial of the plea. We agree. Moreover, Appellee attached photographs of the damage to her property.[3]

The foregoing evidence establishes that by Appellee's live pleading, a fact issue exists as to the takings claim—i.e., whether the City knew flooding was substantially certain to occur as a result of the intentional diversion of surface waters by the resurfacing of Milton Road, which was constructed, operated, and maintained by the City. Whether Appellee will *actually* succeed on this claim is not for us to determine; that fact issue is left for the fact finder to resolve. *Miranda*, 133 S.W.3d at 227–28. We are merely tasked with evidentiary review and determining whether a fact issue exists. *Id.* Issue One is overruled.

Waiver of Governmental Immunity

In its second issue, the City maintains because Appellee failed to articulate a viable takings claim, the City retains its governmental immunity from suit. A plaintiff must plead facts establishing a valid takings claims to invoke waiver of governmental immunity. *City of Socorro v. Campos*, 510 S.W.3d 121, 127 (Tex.App.—El Paso 2016, pet. denied). Because we have found Appellee's factual pleadings sufficiently created a fact issue as to the takings claim, it follows the City has not retained governmental immunity as to the takings claim. *See Tex. Parks & Wildlife*

[3] The City alleges that on January 1, 2016, and February 25, 2019 (the dates of the floods of the subject property), the National Oceanic and Atmospheric Administration recorded zero inches of rainfall in the area. The City also alleges there was also a video of water being dumped on Milton Road and flowing away from the subject property. The City attempted to admit this evidence through the affidavits of City employees, Kareem Dallo and Harold Kutz, which the City argues, when considered, clearly shows that no specific damage occurring to Appellee happened in incidents related to rainwater. However, this evidence was excluded by the trial court because it was rendered expert evidence and the City failed to provide fair notice of the substance of the evidence in violation of Texas Rule of Civil Procedure 195. *See* TEX.R.CIV.P. 195. The City complains the trial court incorrectly excluded the evidence. Appellee alleges the City provided this evidence thirty-five days prior to the hearing on the plea to the jurisdiction, and forty-two days after the discovery deadline, and thus, its inability to conduct discovery related to the expert testimony renders exclusion proper. The expert affidavits were attached, for the first time, to the City's sixth amended plea, filed on March 21, 2022. The hearing on the plea to the jurisdiction was held three days later, on March 25, 2022. Exclusion was proper. In any case, we opine the evidence does not clearly disprove the existence of jurisdiction facts as the City asserts; to the contrary, the evidence bolsters the existence of a fact issue as to Appellee's takings claim. This sub-issue is overruled.

Dep't v. Sawyer Trust, 354 S.W.3d 384, 388 (Tex. 2011)("[W]hen the State or a state agency has taken a person's property for public use, the State's consent to suit is not required; the Constitution grants the person consent to a suit for compensation."); *Mazie's L.P.*, 408 S.W.3d at 18–19.

Within this issue, the City also contends the trial court erred in denying its plea to the jurisdiction challenging Appellee's remaining state law claims based on its governmental immunity. The City argues the remainder of Appellee's live pleading suggests, but does not develop, claims for premises liability and general negligence.[4] In Appellee's live pleading, Appellee alleged:

> [the City], through its agents and employees, acting in the course and scope of their employment, reconstructed Milton Street in a way that diverted the water to Plaintiff's property and home. In the exercise of reasonable care, a municipality constructing a road would not construct it to divert water flows towards an individual resident's property and home. Defendant, and its agents and employees, failed to exercise reasonable care in their construction and grading of Milton Road. Defendant's actions created an unreasonably dangerous condition of real property, specifically, a wet, muddy floor inside a residence. Defendant knew of the dangerous condition because Defendant knew that it constructed the roadway in such a manner as to direct the flow of water towards Plaintiff's property and home. Defendant's actions were the proximate cause of Plaintiff's injuries.
>
> Under the Texas Tort Claims Act, the Defendant is liable for personal injury caused by a condition of real property if it would, were it private person, be liable to the claimant. [] If Defendant were a private person, it would be liable to Plaintiff for personal injuries caused by its action in creating an unreasonably dangerous condition of real property, irrespective of whether it owned, occupied, or controlled that property. Plaintiff sues to recover her damages caused by Defendant's action in creating an unreasonably dangerous condition of real property, in an amount within the jurisdictional limits of this Court.

[4] The City argues Appellee's premises liability claim particularly fails because Appellee cannot demonstrate that her own home belongs to the City. However, a party who does not own, occupy, or control the premises may nevertheless be liable if it undertakes to make the premises safe for others. *Wilson v. Tex. Parks & Wildlife Dep't*, 8 S.W.3d 634, 635 (Tex. 1999)(per curiam)(citing RESTATEMENT (SECOND) OF TORTS § 323 ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance on the undertaking.")).

When one is injured on the property in the control of another, two theories of liability can apply—negligent activity (negligence) and premises liability. *See United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 470–71 (Tex. 2017). The Texas Supreme Court has outlined the applicable theories of recovery as follows:

> [A] person injured on another's property may have either a negligence claim or a premises-liability claim against the property owner. When the injury is the result of a contemporaneous, negligent activity on the property, ordinary negligence principles apply. When the injury is the result of the property's condition rather than an activity, premises-liability principles apply.

Id. at 471 (quoting *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 640, 644 (Tex. 2016)). Negligence and premises liability claims are separate, distinct theories of recovery, and are not interchangeable. *Id*. In a negligent activity case, a property owner or occupier must do what a person of ordinary prudence in the same or similar circumstances would have done, whereas a property owner or occupier in a premises liability case must use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition the owner or occupier knows of or should have known of. *Id*. The distinction between these claims is based on the principle that "negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe." *Id*. (citing *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010)).

On appeal, Appellee maintains "the manner in which the City actually constructed the roadway was negligent and created a dangerous condition causing Appellee's injuries." In her live pleading, Appellee alleged:

- Plaintiff learned of the flooding of her home on or about January 1, 2016, when she walked out of her bedroom, which had a step down, and as she did so slipped on water and fell to the floor.

- There was water and mud all over the floor of Plaintiffs home. The flooding was a result of Defendant's conduct described herein.

- Plaintiff had no notice of these dangerous conditions before she slipped and fell.

- As a result, Plaintiff sustained severe personal injuries that required surgery.

- Plaintiff suffered a fractured right humerus that required surgery to repair and substantial physical therapy to recover from said injury.

- Plaintiff sustained pain and suffering; impairment; disfigurement; and mental anguish.

As to damages, Appellee alleged:

> Plaintiff's medical bills and records will be filed and exchanged during discovery. Plaintiff had surgery and metal in the body to repair the break. Plaintiff has sustained pain and suffering in the past and to date because of the broken lim[b]s surgery and repairs. Plaintiff has sustained impairment in the past and to date because of the broken bones, surgery, and repair. Plaintiff needs additional surgery. Plaintiff sues to recover for her physical pain and suffering, in the past and future; her mental anguish, in the past and future; her medical bills, in the past and future; impairment, in the past and future; and disfigurement, in the past and future.

In any case, we are not tasked with classifying the claim, and for the reasons that follow, we do not reach the distinction.[5]

Appellee alleges the Tort Claims Act establishes that a municipality's actions in "street construction and design" are governmental functions within the Act and the City cannot avoid this section of the statute by claiming its actions are "discretionary." *See* TEX.CIV.PRAC. & REM. CODE ANN. § 101.0215(a)(3). A discretionary act is exempt from the Tort Claims Act's limited waiver

[5] Additionally, in response to Appellee's request to replead should we find the factual allegations insufficient to support jurisdiction, we find Appellee is not entitled to replead. *See State v. Navarrette*, No. 08-18-00017-CV, 2022 WL 17082096, at *11 (Tex.App.—El Paso Nov. 18, 2022, no pet. h.)(finding the opportunity to replead is "not available [when as here,] the jurisdictional challenge contests the existence of jurisdictional facts, and the undisputed facts establish a lack of jurisdiction.").

of governmental immunity. *Id.* § 101.056.[6] Appellee states she is aware the City argues it cannot be liable under the Torts Claims Act for its discretionary activity in designing the roadway, but nevertheless maintains her remaining claims are *not* based on the City's design decisions. We disagree. By her very live pleading, Appellee asserts:

> Plaintiff alleges Defendant failed to exercise reasonable care in its construction of the roadway in a manner that failed to provide water drainage, and knew that it constructed the roadway in a manner that did not provide adequate slope for drainage of water, and that its construction would cause water to flow to Plaintiffs property and home.

We find Appellee's complaint is a challenge to the City's design of resurfacing the roadway. The mere fact that Appellee characterizes her complaint as "the manner in which the City actually constructed the roadway," rather than the design itself, does not make it so. The Texas Supreme Court has explicitly held design of any public work is a discretionary function protected by Section 101.056. *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999)(per curiam), *abrogated on other grounds by Denton Cty. v. Beynon*, 283 S.W.3d 329 (Tex. 2009)("Design of any public work, such as a roadway, is a discretionary function involving many policy decisions, and the governmental entity responsible may not be sued for such decisions.").

Accordingly, Appellee's remaining state law claims[7] are barred by governmental immunity, and we find the trial court erred in its denial of Appellant's plea to jurisdiction as to these claims. We reverse the trial court's denial of the City's plea to the jurisdiction as to Appellee's premises liability/general negligence claims. Issue Two is sustained.

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[6] Section 101.056 provides: "This chapter does not apply to a claim based on: (1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or (2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit."

[7] Whether it be premises liability or general negligence.

CONCLUSION

For these reasons, we affirm the trial court's denial of the plea to the jurisdiction as to Appellee's takings claim, and reverse the trial court's denial of the plea to the jurisdiction as to Appellee's remaining claims.

YVONNE T. RODRIGUEZ, Chief Justice

December 29, 2022

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