AFFIRM; and Opinion Filed August 15, 2017.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00554-CV

LOUIS MORGAN, Appellant
V.
THE CITY OF TERRELL, Appellee

On Appeal from the County Court at Law
Kaufman County, Texas
Trial Court Cause No. 92356-CC

MEMORANDUM OPINION

Before Justices Bridges, Myers, and Brown
Opinion by Justice Brown

Louis Morgan appeals an order granting the City of Terrell's plea to the jurisdiction. In two issues, Morgan generally contends the trial court erred in granting the City's plea and dismissing her suit for want of jurisdiction. For the following reasons, we affirm.

BACKGROUND

Morgan sued the City of Terrell ("the City") for premises liability after she fell on an unmarked ledge on a sidewalk. Morgan alleged the sidewalk was owned and maintained by the City and the unmarked ledge constituted a dangerous condition. She asserted that the City had a duty to warn her of that condition or make the premises safe for her use. Morgan also alleged the City's immunity from suit was waived under the provisions of the Texas Tort Claims Act ("the TTCA").

The City filed a plea to the jurisdiction based on sovereign immunity. Specifically, it asserted the TTCA did not waive immunity for Morgan's premises liability claim because the allegedly dangerous condition was the design of the sidewalk and its lack of safety features, both of which are discretionary functions. Thus, the City claimed it retained its immunity from suit under the TTCA's discretionary powers exception. The trial court granted the City's plea and dismissed Morgan's suit.

APPLICABLE LAW

Immunity from suit defeats a trial court's subject-matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). Whether a trial court has subject-matter jurisdiction and whether a plaintiff has alleged facts that affirmatively demonstrate a trial court's subject-matter jurisdiction are questions of law. *Id*. at 226; *Kaufman Cnty. v. Leggett*, 396 S.W.3d 24, 28 (Tex. App.—Dallas 2012, pet. denied).

We therefore review de novo a trial court's ruling on a jurisdictional plea. *Miranda*, 133 S.W.3d at 226; *Leggett*, 396 S.W.3d at 28. When a plea challenges the existence of jurisdictional facts, we must consider relevant evidence submitted by the parties to resolve the jurisdictional issues. *Id*. at 227. In reviewing such a plea, we take as true all evidence favorable to the non-movant, indulging every reasonable inference and resolving all doubts in the non-movant's favor. *Id*. at 227–28. Once the movant asserts and provides evidentiary support for its plea, the plaintiff is then required to show only that a disputed fact issue exists. *Id.; City of Dallas v. Heard*, 252 S.W.3d 98, 102 (Tex. App.—Dallas 2008, pet. denied).

The TTCA generally waives governmental immunity from suit for torts involving premises defects. *See Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 657 (Tex. 2007). However, the TTCA preserves immunity for discretionary decisions under the "discretionary

powers" exception to the waiver. TEX. CIV. PRAC. & REM. CODE § 101.056; *Stephen F. Austin State Univ.*, 228 S.W.3d at 657. A city's immunity is preserved not only for the state's policy decisions, but also for the state's failure to act, when no particular action is required by law. *See* TEX. CIV. PRAC. & REM. CODE § 101.056; *see also State v. Miguel*, 2 S.W.3d 249, 250–51 (Tex. 1999).

Whether a governmental activity is discretionary is a question of law. *Miguel*, 2 S.W.3d at 250–51. It is well settled that the design of a public work, such as a roadway, involves many policy decisions, and is a discretionary function. *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002); *Miguel*, 2 S.W.3d at 250–51. Likewise, a governmental entity's decision about what type of safety features to install on a public work is a discretionary function. *Flynn*, 228 S.W.3d at 657. However, while a governmental entity is immune from liability for injuries resulting from the formation of policy, a governmental entity is not immune for injuries caused by the negligent implementation of that policy. *Id*; *City of Wylie v. Taylor*, 362 S.W.3d 855, 862 (Tex. App.—Dallas 2012, no pet.)

APPLICATION

In her first issue, Morgan contends the trial court erred in granting the City's plea to the jurisdiction because her pleadings allege a premises defect claim and the trial court was not permitted to look beyond the face of her pleadings to determine whether that claim was based on the City's exercise of a discretionary function. The only authority Morgan cites to support this issue is directly contrary her position. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). It is well settled that a trial court may consider relevant evidence when deciding a plea to the jurisdiction and it must do when necessary to resolve the jurisdictional issue presented. *See Miranda*, 133 S.W.3d at 225–26. We resolve the first issue against Morgan.

In her second issue, Morgan asserts the trial court erred in granting the City's plea to the jurisdiction because her injuries were caused by the City's negligent implementation of policies contained in its Code of Ordinances. Specifically, she asserts the ordinance created a nondiscretionary duty on the part of the City to make the sidewalk safe.

Morgan did not attach the ordinance to her response to the plea to the jurisdiction or request the trial court to take judicial notice of the ordinance. *See* TEX. R. EVID. 204; *City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 469 (Tex. App.—Dallas 2007, no pet.) ("[a] court, upon the motion of a party, shall take judicial notice of a municipal ordinance, provided the party requesting the notice furnishes the court with sufficient information to comply with the request and the court gives the opposing party an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed."). Nor has she asked this Court to take judicial notice of the ordinance. *See Ramos*, 235 S.W.2d at 469. As a result, the ordinance is not properly before us. *See City v. Glen Heights v. Sheffield Dev. Co. Inc.*, 158 S.W.3d 55, (Tex. App.—Dallas 2001, pet. denied).

Morgan has included in her brief only the language of portions of provisions she has plucked from the Ordinance. *Unified Dev. Code. Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004) (in reviewing an ordinance, we consider ordinance as a whole and in context). But even if we considered those provisions, they do support her contentions.

Morgan first directs us to a provision in the City's building code that contains specifications for sidewalk slopes and curbs. It states sidewalks shall be set at a grade to provide for a certain slope range *or as directed by the city engineer*. If anything, that provision establishes the City made a policy decision to retain discretion to alter the specifications of sidewalks.

Morgan also asserts provisions of the City's "Neighborhood Integrity Code" created a mandatory duty on behalf of the City to remedy unsafe conditions on sidewalks. Under the Neighborhood Integrity Code, whenever a sidewalk *becomes* dangerous, it is a public nuisance. The code also provides that whenever a public nuisance is found to exist, the City's Chief Building Official may order the property owner to repair or replace the sidewalk or, with the approval of the City manager, may enter into a private contract to cause the sidewalk to be repaired or replaced. These provisions, on their face, state that the building official "may" take action. But even then, if it involves City resources, the building official must obtain the approval of the City manager. *Cf. City of Corsicana v. Stewart*, 249 S.W.3d 412, 416 (Tex. 2008) (City immune from liability for discretionary decisions concerning the expenditure of limited resources for the safety of its citizens). Finally, we also note the provisions applies when a sidewalk becomes dangerous. It is thus apparent the provisions are directed to dangers arising after construction. We do not agree those provisions suggest the City adopted a policy to limit its decisions over design choices.

Morgan does not dispute the allegedly dangerous condition was created at the time the sidewalk was constructed or that it was the result of the sidewalk's design. We conclude the City retained it immunity from suit. *See Ramirez*, 74 S.W.3d at 867. We therefore affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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Fifth District of Texas at Dallas

JUDGMENT

LOIS MORGAN, Appellant	On Appeal from the County Court At Law No. 1, Kaufman County, Texas
No. 05-16-00554-CV V.	Trial Court Cause No. 92356-CC.
	Opinion delivered by Justice Brown. Justices
CITY OF TERRELL, TEXAS, Appellee	Bridges and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee the CITY OF TERRELL, TEXAS recover its costs of this appeal from appellant LOIS MORGAN.

Judgment entered this 15th day of August, 2017.