REVERSE and RENDER and Opinion Filed October 1, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01540-CV

CITY OF DALLAS, Appellant
V.
JOHNNIE KAY WEST, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-03450

MEMORANDUM OPINION

Before Justices Whitehill, Pedersen, III, and Reichek
Opinion by Justice Whitehill

This is an accelerated interlocutory appeal from an order denying appellant the City of Dallas's plea to the jurisdiction based on governmental immunity from suit. The City argues that the trial court erred in denying its plea to the jurisdiction because there is no subject-matter jurisdiction for West's premises liability claim. Specifically, the City argues that (i) the alleged condition was not a special defect; (ii) West was a licensee; and (iii) the City did not have prior knowledge of the condition.

The record supports the City's arguments. Accordingly, we reverse the trial court's order denying the City's plea and render judgment dismissing West's claims against the City.

I. Background

West was injured when she tripped over a protruding metal bolt in the sidewalk along Elm Street. She sued the City and others asserting a premises liability claim.

The City filed a plea to the jurisdiction asserting immunity from West's claims because (i) the condition was not a special defect as a matter of law; (ii) West was a licensee; and (iii) the City did not have actual, prior knowledge of the condition.

West did not respond to the City's plea. But during a brief hearing at which no additional evidence was adduced, West orally alleged that the condition was a special defect.

The trial court denied the City's plea and the City now appeals from that order.

II. Analysis

A. First Issue: Did the City establish immunity from suit?

Yes. The City established that the alleged condition was not a special defect, West was a licensee, and the City did not have actual, prior knowledge of the condition. Consequently, there was no waiver of immunity under the Texas Tort Claims Act, and the trial court lacked subject-matter jurisdiction.

B. Standard of review and applicable law

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Its purpose is to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Subject matter jurisdiction is essential to the authority of the court to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Moreover, subject matter jurisdiction is never presumed and cannot be waived. *Id.* at 443–44.

Whether a court has subject matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

If a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, just as the trial court must do. *Miranda*, 133 S.W.3d at 227.

If the evidence creates a fact question on the jurisdictional issue, the trial court cannot grant the plea and the factfinder will resolve the question. *Id.* at 227–28. But if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law. *Id.* at 228.

This standard mirrors our review of summary judgments, where we take as true all evidence favorable to the non-movant, indulging every reasonable inference and resolving any doubts in the non-movant's favor. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009).

Governmental immunity protects political subdivisions of the State, including cities, from lawsuits for money damages unless immunity has been waived. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). As relevant here, the Texas Tort Claims Act provides a limited waiver of immunity for claims arising from a condition or use of real property. TEX. CIV. PRAC. & REM. CODE § 101.021(2). The Act recognizes potential liability for two types of dangerous conditions of real property, premises defects and special defects. *Id.* §101.022. Different standards of care are imposed depending on whether the condition is a premise defect or a special defect. *Id*. §101.022. If a condition is neither a special nor ordinary-premises defect, no duty is owed and there is no waiver of immunity. *See State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

C. The condition was not a special defect

The City argues that the condition was not a special defect as a matter of law. West did not file an appellate brief.

If a claim arises from a special defect, the governmental unit owes the duty that a private person owes to an invitee. *See* CIV. PRAC. & REM § 101.022(b). "With

respect to an invitee, the City owes a higher duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition of which the City is or reasonably should be aware." *City of Austin v. Rangel*, 184 S.W.3d 377, 383 (Tex. App.—Austin 2006, no pet.).

Whether a condition is a special defect is a question of law that we review de novo. *Tex. Dep't of Transp. v. Perches*, 388 S.W.3d 652, 655 (Tex. 2012) (per curiam). The Act does not define "special defect," but "likens it to conditions 'such as excavations or obstructions on highways, roads, or streets.'" *University of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010) (per curiam) (quoting Texas Tort Claims Act § 101.022(b)). "A condition must therefore be in the same class as an excavation or obstruction on a roadway to constitute a special defect." *Perches*, 388 S.W.3d at 655. In determining whether a particular condition is like an excavation or obstruction, we consider the following: (i) the size of the condition, (ii) whether the condition unexpectedly and physically impairs an ordinary user's ability to travel on the road, (iii) whether the condition presents some unusual quality apart from the ordinary course of events, and (iv) whether the condition presents an unexpected and unusual danger. *Hayes*, 327 S.W.3d at 116. Most property defects are ordinary-premises defects, not special defects. *Payne*, 838 S.W.2d at 238. The class of special defects contemplated by the statute is narrow. *Perches*, 388 S.W.3d at 655.

Here, the protrusion, which the City states is a metal post, is not an excavation or obstruction and is not so unusual or unexpected that an ordinary sidewalk user would not expect it. Pictures of the protrusion produced by West and attached to the City's plea show that it is very small and takes up only a small portion of the sidewalk. It does not appear to be elevated more than an inch.

In *Stokes v. City of San Antonio*, 945 S.W.2d 324, 325 (Tex. App.—San Antonio 1997, no writ), our sister court considered a similar situation. In that case, a pedestrian sued the city after falling over a protruding pipe coupling in the sidewalk. The court concluded that the protrusion, which was three to four inches in diameter and one-half inch above the sidewalk level, was not a special defect. *Id*. at 327. In so concluding, the court reasoned that the protrusion was very small, took up only a small portion of the sidewalk, and was more akin to a "bump in the road." *Id*.

Likewise, in *Hindman v. State Dep't of Highways & Pub. Transp*., 906 S.W.2d 43, 46 (Tex. App.—Tyler 1994, writ denied), the court concluded that a two inch high and two and a half foot long bump on the shoulder of a highway was not a special defect that a cyclist could classify as unexpected or unusual because minor flaws in the road are neither unusual or unexpected. *Id*.; *see also City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008) (two to three-inch road elevation not unexpected or unusual); *City of El Paso v. Bernal*, 986 S.W.2d 610, 611 (Tex. 1999) (Cracked and crumbled sidewalk not a special defect).

There is nothing unusually dangerous about the condition here. Special defects do not include "every pothole or bump." *City of Denton v. Paper*, 376 S.W.3d 762, 766 (Tex. 2012). West should have expected to encounter some defects and imperfections in the sidewalk, and the condition here was relatively small. This small protrusion is not of the same class or character as an excavation or obstruction on a roadway. Accordingly, we conclude that the protrusion is not a special defect as a matter of law.

D. West was a licensee and did not prove the City had actual knowledge of the condition

It is undisputed that West did not pay a fee to use the public sidewalk. Consequently, she was a licensee and was required to demonstrate that the City had actual, prior knowledge of the condition before her fall. *See Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 392 (Tex. 2016).

If a claim arises from a premise defect, "the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property." CIV. PRAC. & REM § 101.022(a).[1] That duty requires the City to not injure a licensee by willful, wanton or grossly negligent conduct; the City must use ordinary care to warn a licensee, or to make reasonably safe a dangerous condition of which the City is aware and the licensee is not. *Sampson,* 500 S.W.3d at 391. Actual knowledge

[1] At common law, a licensee is defined as a person who, for his or her own convenience, pleasure, or benefit, enters the premises with the express or implied permission of the owner. *City of El Paso v. Viel,* 523 S.W.3d 876, 892 (Tex. App.—El Paso 2017, no pet.).

of the dangerous condition is required. *Id.* at 392 (citing *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974)). Constructive knowledge of the defect is insufficient. *See id.*

"Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge, which can be established by facts or inferences that a dangerous condition could develop over time." *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414–15 (Tex. 2008); *City of Dallas v. Thompson*, 210 S.W.3d 601, 603 (Tex. 2006). Awareness of a potential problem is not actual knowledge of an existing danger. *Reyes v. City of Laredo*, 335 S.W.3d 605, 609 (Tex. 2010).

In determining whether a landowner, such as the City, has actual knowledge of a dangerous condition, "courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition." *Univ. of Tex.–Pan Am. v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008).

The affidavit attached to the City's plea established that the City did not receive any reports concerning the sidewalk or any protruding metal posts or pipes in the two years preceding West's fall. That evidence was uncontroverted. West admitted that she did not notify the City about the condition before her fall, nor was she aware of anyone else having done so. Indeed, West adduced no evidence to raise a fact issue about the City's knowledge of the condition. Thus, the evidence

establishes that the City did not have actual knowledge of the condition when West fell.

III. Conclusion

Because the protrusion is not a special defect, and West, as a licensee, failed to raise a fact issue concerning the City's knowledge of the condition, the trial court erred by denying the City's plea to the jurisdiction. We thus reverse the trial court's order and render judgment dismissing West's claims against the City.

Additionally, Sam Almasri, Hazim Mandavia, and the Almasri Marzwanian Law Group, PLLC's unopposed motion to withdraw as appellee's counsel is granted.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
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JUDGMENT

CITY OF DALLAS, Appellant	On Appeal from the 134th Judicial District Court, Dallas County, Texas
No. 05-19-01540-CV V.	Trial Court Cause No. DC-19-03450.
JOHNNIE KAY WEST, Appellee	Opinion delivered by Justice Whitehill. Justices Pedersen, III and Reichek participating.

In accordance with this Court's opinion of this date, the trial court's order is **REVERSED** and judgment is **RENDERED** that: **JOHNNIE KAY WEST'S** claims against the **CITY OF DALLAS** are dismissed.

Sam Almasri, Hazim Mandavia, and the Almasri Marzwanian Law Group, PLLC's unopposed motion to withdraw as appellee's counsel is **GRANTED**.

Judgment entered this October 1, 2020.