AFFIRMED and Opinion Filed November 19, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00099-CV

CITY OF IRVING, TEXAS, Appellant
V.
EDWIN MUNIZ, Appellee

On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-18-07034-E

MEMORANDUM OPINION

Before Justices Schenck, Smith, and Garcia
Opinion by Justice Smith

Appellee, Edwin Muniz, brought suit against appellant, the City of Irving, and Thalle Construction Company, Inc.[1] alleging that the City's and Thalle's negligence, negligence per se, and gross negligence proximately caused his personal injuries when his vehicle slid into a large excavation on West Oakdale Road in Irving. Specifically, Muniz alleged that the City's immunity was waived under the Texas Tort Claims Act because the excavation was either a special defect or a premise defect and the City failed to adequately warn him of the defect causing his injuries.

[1] Thalle is not a party to this appeal.

The City appeals from the trial court's denial of its first amended plea to the jurisdiction and argues that the trial court erred by denying its plea claiming the excavation was not on the roadway, the City's design of the detour road around the excavation was discretionary, and the City did not have actual knowledge that the excavation or detour was a dangerous condition. Because we conclude that the excavation was a special defect of which the City had a duty to adequately warn, we affirm.

Background and Contested Facts

On February 16, 2018, at approximately 9 p.m., Muniz drove westbound on Oakdale Road in Irving. It was dark and there was a downpour of rain making it difficult for Muniz to see even using his windshield wipers. When Muniz reached the intersection of Senter and Oakdale, he observed construction signs indicating a detour. A detour sign directed him to merge slightly to the left. Muniz looked for another sign to guide him, but never saw one. Suddenly, he saw a mesh fence in front of him and tried to brake, but it was too late. He traveled through the mesh fence and down an excavation that was approximately thirty-foot deep by twenty-five-foot wide. The Irving Fire Department had to extricate him.

The excavation existed as part of a project to replace underground sewer pipes. The City had contracted with Thalle on the project, and Thalle designed the traffic control plan for the project and submitted it to the City for approval. The excavation was in the westbound lane of the road, and a detour was designed to shift

traffic away from the excavation. Thalle removed the curb from the eastbound lane and converted it into a roadway so that the eastbound lane shifted to the shoulder and curb area; the westbound lane shifted to the eastbound lane.

Although both parties argued that the detour was a lane shift and accommodated two-way traffic, the evidence submitted to the trial court confused the issue. The police report from the night of the accident and various photographs indicate that the road was closed to westbound traffic. It is not clear when the photographs were taken.

The evidence was also not well established as to what safety features and warning signs were in place on the night of the accident. The photographs show numerous cones and at least one barricade on each side of the excavation outside of a chain link fence around the excavation, but Muniz testified he did not see the barricades or cones depicted in the photographs on the night of his accident. Muniz acknowledges that he drove through a mesh fence and a chain link fence in front of the excavation but disputes that there were any warnings or other barriers blocking the excavation. The City maintains that Muniz drove through multiple barricades, a chain link fence, and a welded rail. The City admits that the barricades did not have flashers on them at the time of the accident and that there were no flares or lights. Muniz did not see the mesh fence until it was about eight feet in front of him.

The parties also dispute whether Muniz was speeding at the time of the accident. The City claims that the posted speed limit was fifteen miles per hour;

however, Muniz testified in his deposition that he never saw such a speed limit sign, and he was traveling twenty to twenty-five miles per hour, which was slower than the normal speed limit of thirty miles per hour. When asked whether he thought it was safe to drive twenty to twenty-five miles per hour through a construction zone at night when it was pouring rain, he answered no.

Procedural History

Muniz filed his original petition on December 20, 2018, and his first amended petition on November 6, 2019. Specifically, Muniz alleged that the City's immunity was waived under the Texas Tort Claims Act because the excavation existed on the roadway, making it a special defect, and the City failed to adequately warn him of the special defect. The City filed a plea to the jurisdiction and motion for summary judgment seeking dismissal of Muniz's claims. The trial court denied the City's plea and motion on June 22, 2020.

Muniz filed a supplemental petition in which he added a premises liability claim against the City alleging that it knew the excavation was dangerous and failed to exercise ordinary care to protect Muniz from the danger by failing to adequately warn of the condition and make it reasonably safe. The City filed a second plea to the jurisdiction and, subsequently, a first amended plea to the jurisdiction, which was denied on January 22, 2021. The trial court did not specify as to which claim or claims it based its denial. This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8).

Pleas to the Jurisdiction and Governmental Immunity

To invoke the trial court's subject-matter jurisdiction, the plaintiff must allege facts that affirmatively demonstrate the court has jurisdiction to hear the case. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). A plea to the jurisdiction is an appropriate procedural vehicle by which a party may challenge a trial court's subject-matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 639 (Tex. 1999). When a plea to the jurisdiction challenges the existence of jurisdictional facts, the court considers the evidence submitted when resolving the jurisdictional issue. *Miranda*, 133 S.W.3d at 227. "If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder." *Id.* at 227–28. However, if the evidence related to the jurisdictional issue is undisputed or fails to raise a fact question as to jurisdiction, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

We review a trial court's ruling on a plea to the jurisdiction *de novo*. *Id.* As with the summary judgment standard of review, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovants favor. *Id.*

Sovereign immunity deprives a trial court of subject-matter jurisdiction over suits against the State and certain governmental units, such as cities, unless the

governmental unit has consented to suit or immunity has been waived, such as under the Texas Tort Claims Act (TTCA). *Id.* at 224; *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–.109. The TTCA waives immunity for "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(2). A claim based on a condition of real property is a premises defect claim, either ordinary or special, under the TTCA. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 385–87 (Tex. 2016). Whether a condition of real property is an ordinary premise defect or a special defect is a question of law for the court to decide. *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 238 (Tex. 1992) (op. on reh'g).

When there is an ordinary premise defect, a governmental unit owes the duty that a private person owes to a licensee: not to injure the licensee by willful, wanton, or gross negligent conduct and to use ordinary care in warning a licensee of a dangerous condition, or making the condition safe, that is actually known to the owner but not to the licensee. *Id.* at 237; *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.022(a), (c) (setting out duty owed for premise defects). As for a special defect, a governmental unit has the same duty to warn as a private landowner owes to an invitee: "to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition of which the owner is or reasonably should be aware." *Payne*, 838 S.W.2d at 237.

A. Special Defect

We first turn to whether the excavation in this case is a special defect. The City argues in its first issue that an excavation in a roadway with a detour around it does not constitute a special defect under the TTCA because the detour directed traffic around the excavation, removing the excavation from being a part of the regular roadway. Thus, according to the City, an ordinary user of the roadway would not encounter the excavation; an ordinary user would go around the excavation on the detour road.

Although the TTCA does not define "special defect," it provides that special defects include "excavations or obstructions on highways, roads, or streets." TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(b). The supreme court "has never squarely confronted whether a hazard located off the road can (or can never) constitute a special defect," but it has recognized that some intermediate courts of appeals have held that certain conditions located off the road were special defects. *Denton Cty. v. Beynon*, 283 S.W.3d 329, 331 (Tex. 2009) (citing *Payne*, 838 S.W.2d at 238–39 n.3).

For example, in *Morse v. State*, the Beaumont court held that a six to twelve inch drop off on the side of the road was a special defect. 905 S.W.2d 470, 475 (Tex. App.—Beaumont 1995, writ denied). The court explained that a condition does not have to exist upon the surface of the roadway itself but must pose a threat to the ordinary user of the roadway. *Id.* And, in *Texas Department of Transportation v. Dorman*, this court held that a four-inch drop-off on the edge of the roadway

constituted a special defect. No. 05-97-00531-CV, 1999 WL 374167, at *3 (Tex. App.—Dallas June 10, 1999, pet. denied) (not designated for publication). "A condition may be a special defect without actually being on the roadway if it is close enough to present a threat to the normal users of the road." *Id.*

"[A]s *Payne* clarified, '[w]hether on a road or near one,' conditions can be special defects like excavations or obstructions 'only if they pose a threat to the ordinary users of a particular roadway.'" *Beynon*, 283 S.W.3d at 331 (quoting *Payne*, 838 S.W.2d at 238 n.3). To determine whether a condition is a special defect, we look to the following characteristics: (1) the size of the condition; (2) whether the condition unexpectedly and physically impairs a vehicle's ability to travel on the road; (3) whether the condition presents some unusual quality apart from the ordinary course of events; and (4) whether the condition presents an unexpected and unusual danger to the ordinary users of the roadway. *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010).

It is undisputed that Muniz drove into a large excavation—a hole in the road that was at least thirty feet deep. And, had the City failed to warn at all of the excavation, there is no doubt the excavation would be a special defect and the City's immunity would be waived. The question in this case turns on whether such an excavation remains a special defect when the City attempts to warn of the excavation by erecting a detour to route drivers around the excavation but the warning allegedly fails.

In *State v. Rodriguez*, the supreme court held that the detour was not a special defect and that the State retained its immunity for its detour design and sign placement under sections 101.056 and 101.060, as a discretionary act, because the detour was a temporary roadway that involved the same discretionary judgment in designing a roadway in general. 985 S.W.2d 83, 86 (Tex. 1999). The detour directed traffic onto a separate frontage road, around an excavation on the highway. *Id.* at 85. The court explained that the excavation's status as a special defect did not extend to the detour, nor did the excavation cause the accident. *Id.* at 86. The accident also did not occur at the site of the excavation. *Id.* at 85–86. The accident occurred when Rodriguez failed to successfully make a sharp, ninety-degree turn in the detour, hit a bridge abutment, and rolled his tractor-trailer rig. *Id.* at 85. Thus, the defect at issue in *Rodriguez* was the sharp turn in the detour and whether the warning signs for the sharp turn were adequate. *Id.* at 85–86. The supreme court noted that, while the detour was around a large excavation, the excavation itself was a mile away from the accident. *Id.*

Muniz's accident occurred when he drove into the excavation. Although he was following a detour sign, the detour was not a separate roadway apart from the excavation as in *Rodriguez*. The detour here was next to the excavation on the same street as the excavation; it was a lane shift away from the excavation.

The City argues that Muniz failed to properly negotiate the detour and that there were multiple safety devices that warned of the excavation. But Muniz

disputes that such warnings were present on the night of his accident, and the City has not presented conclusive evidence that they were. In fact, the evidence shows that the fire department had to move the warning devices that were present in order to extricate Muniz from the excavation and, thus, when the City and Thalle inspected the accident scene, the warning devices were not set according to the traffic control plan. There is no evidence from the fire department as to what warning devices were moved and from what location. And, as discussed earlier, it is not clear from the evidence presented what traffic control plan or safety features were in use at the time of the accident.

We are unpersuaded by the City's reliance on *The University of Texas at Austin v. Hayes*, *Denton County v. Beynon*, and the *City of Dallas v. Giraldo* for the proposition that the excavation here is not a special defect because an ordinary user of the road would not have encountered it. *See Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113 (Tex. 2010); *Denton Cty. v. Beynon*, 283 S.W.3d 329 (Tex. 2009); *City of Dallas v. Giraldo*, 262 S.W.3d 864 (Tex. App.—Dallas 2008, no pet.). Each are easily distinguishable.

In *Hayes*, a bicyclist rode around a barricade, into a metal chain, and suffered injuries. 327 S.W.3d at 115. The court explained that the bicyclist did not take the normal course of travel: "Road users in the normal course of travel should turn back or take an alternate route when a barricade is erected to alert them of a closed roadway"; "an ordinary user would not have traveled beyond the barricade." *Id.* at

116–17. But the bicyclist saw the barricade and, "without braking, without slowing down significantly," chose to go around it. *Id.* at 115. Muniz did not choose to go around a barricade. According to Muniz, he did not see the mesh fence until it was too late. He tried to brake and pushed the brake pedal as hard as he could, but he went through the mesh fence and into the excavation. The City has offered no evidence that conclusively shows that Muniz saw the barricade and chose to drive around it like the bicyclist in *Hayes*.

There is also no evidence that some other condition caused Muniz to drive into the excavation such as a blowout or another vehicle that Muniz had to swerve around. In *Beynon*, the supreme court held that a seventeen-foot floodgate arm located approximately three feet off a two-lane rural roadway was not a special defect because an ordinary driver would not encounter it on the roadway. 283 S.W.3d at 330, 332. "[T]he arm was neither the condition that forced [the driver's] car off the road initially nor the condition that caused the car to skid sideways and crash into the floodgate arm." *Id.* at 332. The driver lost control of the vehicle when he moved to the far right of the road to avoid an oncoming car drifting into his lane and his tire hit a steep drop off. *Id.* at 330, 332. There is no evidence that such an incident here caused Muniz to go off the road.

Additionally, there is no evidence that Muniz was intoxicated like the driver in the *City of Dallas v. Giraldo*, where this court held that a bulldozer was not a special defect because it would not have been encountered by an ordinary driver.

262 S.W.3d 864, 871–72 (Tex. App.—Dallas 2008, no pet.). The driver was legally intoxicated and had lost control of his vehicle, which skidded of the road and collided with a bulldozer. *Id.* at 867. He was later charged and convicted of intoxication manslaughter. *Id.* Muniz admitted that he had one beer at 12:30 p.m., and the police report indicated that he had been drinking but was not legally intoxicated. He neither lost control of his vehicle nor swerved off the road. He simply drove into the excavation because he did not know it was there.

Furthermore, Muniz testified that he was not on his phone, he was paying attention to the roadway, and he was wearing his glasses. The City has not shown otherwise. Additionally, although Muniz agreed that it was unsafe to drive twenty to twenty-five miles per hour through a construction zone in the pouring rain at night, the City did not show that the accident was caused by the rain or Muniz's driving speed. Therefore, the City has not presented conclusive evidence to show that the accident was caused by some other reason than the excavation in the roadway.

Here, Muniz was using the roadway like an ordinary driver would be expected to use the roadway if unaware of the excavation or the route to take around the excavation. Muniz claims he drove into the excavation because the warning signs and detour around the excavation were inadequate; he did not see the warning signs that the City claims were present and did not see the fence and netting until it was too late. He also had no knowledge that a thirty to forty-foot excavation existed in the roadway in front of him. Muniz did know that there was a detour but explained

that once he encountered the detour there were no other signs directing him along the route of the detour.

Muniz alleged sufficient facts to state a claim against the City under the TTCA, and the City failed to show that such jurisdictional facts did not exist. The City insists that there were warning signs and a detour that properly directed traffic around the excavation but, as discussed above, the evidence presented does not conclusively show what warning devices were present on the night of Muniz's accident. Therefore, at this stage, a fact question remains as to what warnings were present and whether those warnings were adequate to warn of the special defect. As such, the trial court did not err in denying the City's first amended plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 227–28 (a trial court cannot grant a plea to the jurisdiction where the evidence submitted by the parties raises a fact question regarding the jurisdictional issue; the fact issue must be resolved by the fact finder). We overrule the City's first issue.

B. Premise Defect

In its second issue, the City argues that an excavation with a roadway detour around it is also not a premise defect under the TTCA. Even if it were a premise defect, the City claims that it discharged any duty it owed to Muniz by detouring traffic around the excavation and warning of the detour and excavation with warning signs, fencing, and barricades.

Because we have concluded that the excavation was a special defect as a matter of law, it is unnecessary for us to reach the City's second issue. *See* TEX. R. APP. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."); *Tex. Dep't of Transp. v. Canales*, No. 04-19-00121-CV, 2020 WL 86219, at *10 (Tex. App.—San Antonio Jan. 8, 2020, pet. denied) (mem. op.) ("Because we have already concluded that the pothole in this case was a special defect, we need not address TxDOT's argument that no fact question was raised as to its actual knowledge of the condition" under an ordinary premise defect claim.); *City of Weston v. Gaudette*, 287 S.W.3d 832, 839 (Tex. App.—Dallas 2009, no pet.) (determination that pleadings and proof established a special defect as a matter of law was dispositive of City's challenge to jurisdictional evidence of either a premise defect or a special defect).

C. Discretionary Act

The City also contends that it retained its immunity because designing the detour and warning signs was a discretionary act. Section 101.056 provides that the TTCA does not apply to a claim based on the failure of a governmental unit to perform an act that is discretionary and not required to be performed by law. TEX. CIV. PRAC. & REM. CODE ANN. § 101.056. Section 101.060 further provides that the TTCA does not apply to "the failure of a governmental unit initially to place a traffic or road sign, signal, or warning device if the failure is a result of discretionary action

of the governmental unit." *Id.* at § 101.060(a)(1). These two sections are found in a subchapter entitled "Exclusions and Exceptions" of the TTCA, which provides for circumstances in which the TTCA's general waiver provisions do not apply. *Id.* at §§ 101.051–.067 (Subchapter C); *City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 (Tex. 2006).

The City claims that, although it was required to warn of the excavation, how it chose to warn and how it designed the detour road around the excavation were discretionary acts for which its immunity was not waived. But the exclusion for discretionary acts does not apply when there is a special defect. TEX. CIV. PRAC. & REM. CODE ANN. § 101.060(c) (section 101.060 "does not apply to the duty to warn of special defects such as excavation or roadway obstructions"); *Canales*, 2020 WL 86219, at *10 ("Because we have determined that the condition in question was a special defect, we conclude that TxDOT did not retain immunity under section 101.056 of the Texas Civil Practice and Remedies Code."); *Maxwell v. Tex. Dep't of Transp.*, 880 S.W.2d 461, 464 (Tex. App.—Austin 1994, writ denied) ("if the injury is caused by a special defect, the mandatory duty to warn of the special defect abrogates governmental immunity") (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.060(c)); *Wenzel v. City of New Braunfels*, 852 S.W.2d 97, 100 (Tex. App.—Austin 1993, no writ) ("The Act thus makes the City's duty to warn the public of special defects mandatory, not discretionary."); *Villarreal v. State*, 810 S.W.2d 419, 421 (Tex. App.—Dallas 1991, writ denied) ("[The] duty to warn of special defects

is expressly removed from the exemption created for discretionary signage under section 101.060.") (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.060(c)). If the exclusion applied, the City could warn by placing an 8 ½ by 11 inch paper with the words "Caution. Go Around" written in pencil on a post in front of a thirty- to forty-foot hole and claim it retained its immunity because the design of the warning sign was within its discretion.

We have found no cases, and the City has cited to none, in which a court holds that a mandatory duty to warn transforms into a discretionary act once a governmental unit attempts to warn of a special defect but the plaintiff is ultimately injured by the special defect of which the governmental unit was required to warn. The cases in which the supreme court has held that the governmental unit's detour around, or warning design for, a defect was discretionary involved premise defect claims that did not rise to the level of a special defect or in which no special defect was alleged. *See Rodriguez*, 985 S.W.2d at 85–86 (holding the State retained its immunity where the driver was injured on a detour road a mile away from the excavation because the design of the detour around the excavation was discretionary and because the sharp turn of the detour was not a special defect); *see also State v. Miguel*, 2 S.W.3d 249, 250–51 (Tex. 1999) (holding the State retained its immunity under the discretionary acts exception to the TTCA where the driver alleged negligent use of tangible personal property and a premise defect based on an accident in which he lost control of his van, struck barrels that had been placed to warn of a

missing guardrail, went over the concrete wall, and fell about sixty feet to the ground).

Thus, under the specific facts of this case and our holding that this excavation was a special defect, we do not agree that the City's design of the detour and warning signs for the excavation was discretionary. We overrule the City's third issue.

D. Official Immunity

In its final issue, the City argues that it is exempt from liability based on the official immunity of its employees because they were performing discretionary duties in good faith when they participated in the design of the roadway detour and determined what safety features to use around the excavation and detour. Because we have concluded that the City had a duty to warn of the excavation as a special defect and its act of warning was mandatory and not discretionary, the City is not exempt from liability based on the official immunity of its employees. *See DeWitt v. Harris Cty.*, 904 S.W.2d 650, 653 (Tex. 1995) (explaining that liability for a premises defect claim is "predicated not upon the actions of the governmental unit's employees but by reference to the duty of care owed by the governmental unit to the claimant for premise and special defects"). The City's fourth issue is overruled.

Conclusion

The trial court did not err when it denied the City's first amended plea to the jurisdiction. Muniz alleged facts that affirmatively showed a waiver of immunity under the TTCA for a premises liability claim based on a special defect. The City

failed to meet its burden of proof to conclusively negate those facts. At a minimum, a fact question remains as to what warnings were present and whether those warnings adequately warned Muniz of the special defect. *See Miranda*, 133 S.W.3d at 227–28. We affirm the trial court's order. !

/Craig Smith/
CRAIG SMITH
JUSTICE

Schenck, J., dissenting.

200099F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CITY OF IRVING, TEXAS, Appellant No. 05-21-00099-CV V. EDWIN MUNIZ, Appellee	On Appeal from the County Court at Law No. 5, Dallas County, Texas Trial Court Cause No. CC-18-07034-E. Opinion delivered by Justice Smith. Justices Schenck and Garcia participating.

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

It is **ORDERED** that appellee EDWIN MUNIZ recover his costs of this appeal from appellant CITY OF IRVING, TEXAS.

Judgment entered November 19, 2021