Opinion issued January 14, 2010

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-01005-CV

THE CITY OF HOUSTON, Appellant

V.

SHERIF CHEMAM AND DIANN CHEMAM, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2008-13762

MEMORANDUM OPINION

Appellant, the City of Houston ("the City"), appeals the denial of its plea to the jurisdiction in the suit seeking a determination of rights under the Declaratory

Judgment Act, monetary damages, and attorney's fees under claims for detrimental reliance, estoppel, negligence, and violation of the takings clause brought against it by appellees, Sherif and Diann Chemam. In seven issues, the City argues that the trial court erred in denying its plea to the jurisdiction because: (1) it is immune from suit for damages waived under equitable theories of recovery; (2) the trial court does not have jurisdiction to award damages against the City for violations of state constitutional rights; (3) the uncontroverted evidence showed that there was no estoppel claim, and, therefore, the Chemams' pleadings failed to establish the trial court's subject matter jurisdiction over the cause; (4) the City is immune from suit for intentional torts that do not arise from the use of a motor vehicle; (5) the trial court did not have jurisdiction over the takings claim against the City; (6) the Chemams' pleading failed to establish the trial court's jurisdiction under the Uniform Declaratory Judgments Act (UDJA) because the allegations underlying their current claims duplicate already pending claims, their claims fail to arise under a deed, will, or written contract, and damages are sought; and (7) the trial court does not have jurisdiction to award attorney's fees under the UDJA when no UDJA cause is properly alleged.

We reverse and render judgment dismissing the Chemams' claims for lack of subject matter jurisdiction.

Background

The Chemams own real property (the "property") located at 8 Rollingwood, Houston, Texas. The property is on the corner of Rollingwood and Long Point Road in the City of Houston. The Chemams have owned the property since 1992. The property is bordered along Long Point Road and Rollingwood by a cinder block wall.

In 1999, the Chemams learned from a City engineer that improvements were planned along Long Point Road. The Chemams' cinder block wall began to show signs of disrepair; however, believing that Long Point Road would be widened, the Chemams decided to wait to improve the condition of their wall because they believed that the wall might have to be moved.

In late 2005, the Chemams learned that the City had joined with the Memorial TIRZ[1] and decided to widen Bunker Hill and improve the intersection of Bunker Hill, Long Point Road, and Rollingwood.

Due to the disrepair of their cinder block wall, on October 10, 2006, the Chemams received a Violation Notice from the City's Neighborhood Protection Corps of the Houston Police Department for violations of the City's Code of Ordinances requiring them to either tear down or improve the condition of the wall.[2]

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[1] Memorial Area Tax Incremental Reinvestment Zone

[2] The Chemams were cited for violating sections 10-343(b)(1) and 10-343(c)(11) of the City's Code of Ordinances. Section 10-343(b)(1) is a citation for "[f]ailure to eliminate any unprotected hole, upon excavation, sharp protrusion from the ground or walls and any other object or condition that exists on the land that is reasonable

The Chemams began construction on a new wall in the same location and on the same foundation as the original wall without seeking a building permit.

When the construction of the new wall was near completion, the City received a report that the fence construction was taking place without a permit. In response to a visit by a City inspector, the Chemams submitted a Residential Building Permit Application (the "Application") to the City on November 16, 2006 containing Diann Chemam's sworn representation that the rebuilt fence did not violate any of the deed restrictions. The affidavit signed by Diann Chemam also stated:

> I understand, acknowledge and agree that (1) if any statement made herein is false or misleading, then any permit issued hereunder shall be void with the same force and effect as if it had never been issued, and (2) I may be required by the City Building Official to remove any improvements erected pursuant to the void permit at my sole cost and expense.

The City initially rejected the Application because it did not include plans and a property site plan and survey. The Chemams' engineer then sent the plans and survey to the City showing the location of the cinder block fence to be on the Property's southern property line and not in the City's right-of-way. The City approved the Chemams' permit application and construction was completed on the new cinder block fence.

(sic) capable of causing injury to a person." Section 10-343(c)(11) is a citation for "[f]ailure to repair or remove fences and accessory structures, including detached garages and sheds, in a structurally unsound condition and not in good repair."

In February of 2007, the project consultant for Memorial TIRZ informed the Chemams that their newly-built wall extended 2.6 feet beyond the boundary of the Chemams' property and it would have to be removed at their expense. The Chemams filed a claim with the City arguing that they should not be held responsible for the cost of removing the wall. The City denied their claim, so the Chemams filed suit in the 113th District Court of Harris County.

On April 9, 2008, the City filed special exceptions arguing that the Chemams' claim for detrimental reliance is an element of promissory estoppel and that the Chemams failed to state a claim for promissory estoppel. The City also argued that it was immune from suit on the equitable estoppel claim because it was engaged in a governmental function. On May 13, 2009, the trial court signed an order sustaining the City's special exceptions that the Chemams failed to state a detrimental reliance claim or promissory estoppel claim and that the City was immune from suit for equitable and promissory estoppel. The Chemams filed their First Amended Petition on June 25, 2008 repleading their causes of action for detrimental reliance and estoppel, including an argument that the City was estopped from asserting immunity against those claims.

On August 1, 2008, the City filed its plea to the jurisdiction arguing that it was immune from suit for damages in detrimental reliance, promissory estoppel, and equitable estoppel claims and that the Chemams failed to plead a selective

enforcement claim. On August 11, 2008, the Chemams responded that the City should be estopped from invoking sovereign immunity and that they had stated a cause of action under the takings clause of the United States and Texas Constitutions, and they alternatively requested the opportunity to amend their pleadings to cure any jurisdiction defects. The trial court held a hearing on the City's plea to the jurisdiction on August 11, 2008.

On August 14, 2008, the Chemams filed their Second Amended Petition in the trial court. The Chemams pleaded a cause of action for detrimental reliance on the City's representations that there was no firm information with regard to the location of the right-of-way and that the Chemams were required to repair their fence. They also argue that they relied on the permits and inspections allowing them to rebuild the fence on the existing foundation. Within the detrimental reliance cause, the petition stated, "On information and belief, [the Chemams] allege a selective enforcement action against them in which they have been intentionally and knowingly treated differently than similarly situated citizens which additionally confirms their justified detrimental reliance upon the actions of the [City]."

The Chemams' estoppel cause of action alleged that they "made repeated requests to the City to determine the alignment of the right-of-way and to communicate with them with regard to the necessity for removing or rebuilding the wall in its existing location," that the City "refused to give them any information

whatsoever," and that it eventually issued a permit allowing the Chemams to rebuild their wall. They argue that these actions constituted an "implied and contractual promise by the City (the building permit) that they would undertake no action that would harm, impact or damage" the Chemams and that the City "should be estopped from requiring [them] to remove the wall at their expense."

In their second amended petition the Chemams also alleged for the first time a negligence cause of action, claiming that "The City's actions in deliberately misleading and or refusing to disclose the details of the right of way alignment while at the same time insisting that [the Chemams] replace the fence and approving the replacement in a position that the City knew would necessitate its subsequent and imminent removal breaches the City's duty to deal fairly with its citizens' . . . valuable property rights." They also alleged that the City breached its duty "to coordinate actions between its various departments so as to serve and benefit all its citizens and to not take advantage of its powers of law enforcement and superior knowledge of its plans."

The Chemams also alleged that the actions of the City "constitute an unconstitutional taking by the City . . . in violation of the rights guaranteed to them under the United States and Texas Constitutions." Finally, the Chemams added a cause of action under the Texas Declaratory Judgment Act for a determination of the parties' rights and an interpretation of the effect of the Texas Constitution and "and

any other applicable statutes as to the City's right to remove the wall under these circumstances without just compensation."

The Chemams sought damages in the amount of $17,000 based on detrimental reliance for the cost they have already incurred from rebuilding the wall and $25,000 based on detrimental reliance and estoppel for the cost that they will incur if they have to remove and rebuild the foundation and the wall. In the alternative, they sought damages of $41,000 based on the City's negligent conduct. In addition, the Chemams sought attorney's fees in the amount of $10,000 under the Texas Declaratory Judgment Act.

On August 27, 2008, the City supplemented its plea to the jurisdiction to address the Chemams' claim for negligence, unconstitutional taking, and plea for declaratory relief. On November 21, 2008, the trial court denied the City's plea to the jurisdiction. This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (Vernon 2008).

Standard of Review

A plea to the jurisdiction challenges the trial court's subject matter jurisdiction to hear the case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Subject matter jurisdiction is essential to the authority of a court to decide a case and is never presumed. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). The plaintiff has the burden to allege facts affirmatively

demonstrating that the trial court has subject matter jurisdiction. *Id.* at 446.

The existence of subject matter jurisdiction is a question of law. *State Dep't of Hwys. & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). Therefore, we review the trial court's ruling on a plea to the jurisdiction de novo. *Id.* When a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). If the evidence creates a fact question regarding jurisdiction, the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact-finder; however, 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 227–28.

In deciding a plea to the jurisdiction, a court may not consider the merits of the case, but only the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). In conducting our review, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Miranda*, 133 S.W.3d at 228. If the pleadings do not affirmatively demonstrate the trial court's jurisdiction but, likewise, do not demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Miranda*, 133 S.W.3d at 226–27. However, if the

pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.* at 227.

Equitable Claims

In its first issue, the City argues that is immune from suit for damages under the Chemams' equitable claims for detrimental reliance and estoppel. In its third issue, the City argues that the Chemams failed to invoke the trial court's jurisdiction because they failed to allege any fact supporting an equitable estoppel cause.[3]

Governmental immunity has two components—immunity from liability and immunity from suit. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). A unit of state government is immune from suit and liability unless the State consents. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Immunity from suit defeats a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Id.* at 639. Immunity from liability protects the State from money judgments even if the Legislature has expressly given consent to sue. *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). The Texas Supreme Court has long recognized that it is the Legislature's sole province to waive

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[3] Detrimental reliance is a "doctrinal sibling" to the contractual doctrine of promissory estoppel. *Roberts v. Geosource Drilling Servs., Inc.*, 757 S.W.2d 48, 50 (Tex. App.—Houston [1st Dist.] 1988, no writ). The Chemams do not make any additional arguments regarding the City's immunity under these claims, so we consider them together as "equitable claims."

or abrogate sovereign immunity. *Tooke*, 197 S.W.3d at 332. A plaintiff who sues the State must establish the State's consent to suit; otherwise, sovereign immunity from suit defeats a trial court's subject matter jurisdiction. *IT-Davy*, 74 S.W.3d at 855.

Generally, a city is immune from suit for its governmental actions. *Tooke*, 197 S.W.3d at 343. Street construction and design is classified as a governmental function for which a municipality is immune from suit except where immunity has been waived under the Texas Tort Claims Act. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(3) (Vernon 2005); *see also id.* § 101.021 (Vernon 2005). The issuance and denial of permits is likewise classified as a governmental function. *Maguire Oil Co. v. City of Houston*, 69 S.W.3d 350, 364 (Tex. App.—Texarkana 2002, pet. denied); *see City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex.1978); *Trevino & Gonzalez Co. v. R.F. Muller Co.*, 949 S.W.2d 39, 42 (Tex. App.—San Antonio 1997, no writ). Furthermore, Texas courts have held that a municipality is immune from suit for equitable estoppel. *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589, 594–96 (Tex. App.—Austin 1991, writ denied); *Univ. of Tex. Sys. v. Courtney*, 946 S.W.2d 464, 468 (Tex. App.—Fort Worth 1997, writ denied).

The Chemams, citing *Maguire Oil*, argue that the City is estopped from invoking sovereign immunity. However, *Maguire Oil* is distinguishable from the present case. It was not an appeal from a plea to the jurisdiction; rather, the appeal dealt with a granted summary judgment in favor of the city on Maguire Oil's

negligent misrepresentation and promissory estoppel claims under the doctrine of sovereign immunity. *Maguire Oil*, 69 S.W.3d at 364. The Texarkana Court of Appeals cited cases in which cities were estopped from taking some action, such as enforcing zoning ordinances, to support its holding that summary judgment based on sovereign immunity was inappropriate on Maguire Oil's negligent misrepresentation and promissory estoppel claims.[4] *Maguire Oil* did not address whether a governmental entity could be estopped from asserting immunity to suit in a plea to the jurisdiction.

Furthermore, a governmental entity cannot be estopped from asserting a lack of jurisdiction. *Tourneau Houston, Inc. v. Harris County Appraisal Dist.*, 24 S.W.3d

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[4] The *Maguire* court held that, generally, a municipality exercising its governmental powers is not subject to estoppel. *Maguire Oil Co. v. City of Houston*, 69 S.W.3d 350, 365 (Tex. App.—Texarkana 2002, pet. denied) (citing *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970)). It further held that "in order to apply estoppel the trial court must determine . . . (1) whether the landowner is relying on an authorized act of a city official or employee; (2) whether this is the kind of case in which justice requires the application of estoppel; and (3) whether the application of estoppel would interfere with the exercise of the city's governmental functions." *Id.* at 366 (citing cases that set out elements of estoppel against the city generally, not in relation to a plea to the jurisdiction).

Maguire also held that "a party seeking to invoke estoppel against a city must demonstrate he or she qualifies under each element of equitable estoppel. *Id.* To establish a claim for equitable estoppel, the Chemams would have to prove that: (1) there was a false representation or concealment of material facts; (2) made with actual or constructive knowledge of those facts; (3) to a party without knowledge, or the means of knowledge, of those facts; (4) with the intention that it be acted upon; and (5) the party to whom it was made must have relied on the misrepresentation to his prejudice. *See Stamper v. Knox*, 254 S.W.3d 537, 543 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

907, 910 (Tex. App.—Houston [1st Dist.] 2000, no pet.) ("No one is ever estopped from asserting lack of subject-matter jurisdiction."); *see also Jonah Water Special Util. Dist. v. White*, No. 03-06-00626-CV, 2009 WL 2837649, at *4 (Tex. App.—Austin 2009, no pet.) (mem. op.) (citing *Tooke*, 197 S.W.3d at 332 (noting that courts "defer to the Legislature to waive immunity from contract claims")).

However, we can construe the Chemams' arguments as a claim that the City's conduct constituted an equitable waiver of immunity.[5] This Court has held that a governmental entity may waive immunity by its conduct. *Texas Southern University v. State St. Bank & Trust Co.*, 212 S.W.3d 893 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). There, TSU, a governmental entity, contracted with a company to lease heavy equipment. *Id.* at 897. TSU's general counsel assured the leasing company in writing that the contract was binding against the University and that the company could collect on a judgment against the University if the need arose. *Id.* at 898. After the company provided approximately $13 million in equipment and services, TSU refused to make the payments due and declared that the agreements in question were not valid obligations. *Id.* We held that TSU waived immunity by its conduct, citing

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[5] The supreme court has not specifically approved waiver by conduct. *See Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 862 (Tex. 2002) (Hecht, J., concurring) ("I cannot absolutely foreclose the possibility that the State may waive immunity in some circumstances other than by statute."); *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003) (stating that State may waive its immunity by conduct but "the equitable basis for such waiver simply does not exist under this set of facts").

the leasing company's argument that TSU "lured" the company into the lease "with false promises that the contract would be valid and enforceable, then disclaimed any obligation on the contract by taking the position that the contract was not valid after all." *Id.* at 908.

Here, however, the City's conduct does not constitute equitable waiver by conduct. The City did not enter into a contract with the Chemams. *See Tex. A. & M. Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007) (holding that contracting with private party and accepting benefits of contract are not enough to waive immunity by conduct). The City did not require them to rebuild the fence—the Chemams could have torn the old one down and waited—and the Chemams began building the new fence before they sought a building permit from the City. The City granted the permit after the Chemams provided plans and surveys and made representations that their fence was located entirely on their own property. The affidavit signed by Diann Chemam acknowledged that any false or misleading statements would void the permit and they might be required to remove any improvements erected pursuant to the void permit at their sole cost and expense. *See Tara Partners, Ltd. v. City of S. Houston*, 282 S.W.3d 564, 580 & n.19 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (holding that city did not waive immunity when city's attorney made handwritten and signed agreement with plaintiffs because agreement was not binding on city until it was approved by city

counsel, plaintiffs were "charged with notice of the limits of the authority of the City's counsel," and plaintiffs did not allege that they were "'lured' or misled in relation to the handwritten resolution").

The Chemams have not pled any statute that waives the City's immunity to suit. Therefore, we conclude that the trial court erred in denying the City's plea to the jurisdiction on the Chemams' detrimental reliance and equitable estoppel claims.

We sustain the City's first and third issues.

Tort Claims

In its fourth issue, the City argues that it is immune from liability for the Chemams' tort claims.[6] The City argues that it is immune from liability for any of the Chemams' negligence claims because they did not plead that their injuries arose from the use of a motor vehicle or motorized equipment.

In the tort context, cases involving claims against a city begin by considering whether the city was acting in a proprietary or governmental function. *City of Houston v. Petroleum Traders Corp.*, 261 S.W.3d 350, 355 (Tex. App.—Houston

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[6] The City contends that the Chemams pled an intentional tort by alleging in its pleadings that "The City's actions in deliberately misleading and or refusing to disclose the details of the right of way alignment while at the same time insisting that [the Chemams] replace the fence and approving the replacement in a position that the City knew would necessitate its subsequent and imminent removal breaches the City's duty to deal fairly with its citizens . . . valuable property rights." However, we consider this statement as an allegation supporting the negligence cause of action rather than a separate cause of action, and the Chemams do not treat it as a separate cause of action.

[14th Dist.] 2008, no pet.); *see also Tooke*, 197 S.W.3d at 343 ("The proprietary-governmental dichotomy has been used to determine a municipality's immunity from suit for tortious conduct."). Governmental entities are not immune from suits for acts taken in their proprietary capacity; however, they are immune from suit for torts committed in the performance of their governmental functions, unless immunity is waived by the Tort Claims Act. *Tooke*, 197 S.W.3d at 343 (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 501 (Tex. 1997) and *Dilley v. City of Houston*, 222 S.W.2d 992, 993–94 (Tex. 1949)). Street construction and design is classified as a governmental function for which a municipality is immune from suit except where immunity has been waived under the Texas Tort Claims Act. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(3); *see also id.* § 101.021. Likewise, the issuance and denial of permits is classified as a governmental function. *See Teague*, 570 S.W.2d at 393.

The Texas Tort Claims Act waives sovereign immunity 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:
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> > (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
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> (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. The trial court can have subject matter jurisdiction over the Chemams' negligence claims only if the City's sovereign immunity is waived by subsection (1) of section 101.021. *See id.* § 101.021(1)–(2).

Here, the Chemams pled negligence causes of action alleging that the City breached its "duty to deal fairly with its citizens' . . . valuable property rights" and its duty "to coordinate actions between its various departments so as to serve and benefit all its citizens and to not take advantage of its powers of law enforcement and superior knowledge of its plans." Neither of these negligence claims asserts a cause for property damage caused by a motor vehicle. Therefore the Chemams' negligence claims do not fall within the waiver provided by the Tort Claims Act. *See id.*

We conclude that the trial court erred in denying the City's plea to the jurisdiction on the Chemams' tort claims.

We sustain the City's fourth issue.

Declaratory Judgment Act Claim

In its sixth issue, the City argues that the Chemams failed to establish the trial court's jurisdiction under the Uniform Declaratory Judgments Act ("UDJA") because their allegations duplicate pending claims and fail to arise under a deed, will, or written contract and because the Chemams are seeking damages. In its seventh issue,

the City argues that the trial court does not have jurisdiction to award attorney's fees under the UDJA when no UDJA cause is properly alleged.

The UDJA states:

> A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Id. § 37.004(b). A party can maintain a suit against a governmental unit to obtain an equitable remedy or determine its legal rights without legislative permission. *Freedman v. Univ. of Houston*, 110 S.W.3d 504, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.). However, "[t]he [UDJA] does not extend a trial court's jurisdiction, and a litigant's request for declaratory relief does not confer jurisdiction on a court or change a suit's underlying nature." *IT-Davy*, 74 S.W.3d at 855.

In *Freedman*, we observed that the Texas Supreme Court has "consistently held that private parties may not circumvent a governmental unit's immunity from suit by characterizing a suit for money damages as a declaratory judgment claim." *Id.*; *see IT-Davy*, 74 S.W.3d at 855. We further held in *Freedman* that parties may not "recast their . . . claims . . . as equitable claims to avoid the requirement of legislative consent to suit." *Freedman*, 110 S.W.3d at 508.

Here, the Chemams asked the trial court to determine their rights "under the

Texas Constitution and any other applicable statutes" regarding the City's order that the wall be removed without just compensation. However, the trial court does not have jurisdiction to consider the Chemams' arguments under the takings clause, as we discuss below.[7] Because the UDJA does not itself confer jurisdiction or change a suit's underlying nature, the trial court does not have jurisdiction to consider this claim or any claim for attorney's fees arising under it. *See IT-Davy*, 74 S.W.3d at 855.

We conclude that the trial court erred in denying the City's plea to the jurisdiction on the Chemams' claims under the UDJA.

We sustain the City's sixth and seventh issues.

Selective Enforcement Claim

In its second issue, the City argues that it retains its immunity from suits seeking damages for constitutional torts like the Chemams' selective enforcement claim. In their second amended petition to the trial court, the Chemams supported their detrimental reliance claim with a sentence alleging that the City engaged in "selective enforcement." The Chemams responded that their claims for selective enforcement were within the jurisdiction of the trial court because they were not

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[7] The district court does not have jurisdiction over the Chemams' takings claim because the Texas Government Code states that county civil courts at law have exclusive jurisdiction over this type of claim. *See* TEX. GOV'T CODE ANN. § 25.1032(c) (Vernon 2004); *City of Houston v. Boyle*, 148 S.W.3d 171, 178 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

solely seeking monetary damages, but were also seeking "such other and further relief [which] they may show themselves justly entitled to receive."[8]

Selective enforcement is considered a constitutional claim. *See Miller v. State*, 874 S.W.2d 908, 915 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). To establish a selective enforcement claim, a plaintiff must show that he has been singled out for prosecution while others similarly situated and committing the same acts have not. *Combs v. STP Nuclear Operating Co*., 239 S.W.3d 264, 275 (Tex. App.—Austin 2007, pet. denied); *see also Long v. Tanner*, 170 S.W.3d 752, 754–55 (Tex. App.—Waco 2005, pet. denied) ("To successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right.") (quoting *Beeler v. Rounsavall*, 328 F.3d 813, 817 (5th Cir.), *cert. denied*, 540 U.S. 1048, 124 S. Ct. 820 (2003).

Suits for damages against governmental entities for constitutional violations are barred by governmental immunity. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 147 (Tex. 1995) (holding that no private cause of action for money damages exists against governmental entity for alleged violations of constitutional rights). However, suits seeking equitable remedies for constitutional violations are

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[8] The Chemams also state in their appellate brief that they will once again amend their pleadings to seek injunctive relief prohibiting the City of Houston from removing the wall, but that pleading is not included in the appellate record.

not barred by governmental immunity. *See id.* at 149.

In their second amended petition to the trial court, the Chemams "allege[d] a selective enforcement claim against [the City] in which [the Chemams] have been intentionally and knowingly treated differently than similarly situated citizens which additionally confirms their justified detrimental reliance upon the actions of the [City]." The Chemams prayed to be awarded "damages, a declaration of their rights under Texas law, . . . and for such relief both general and equitable as [they] may show themselves to be justly entitled to receive." To the extent that the Chemams are seeking monetary damages from the City for selective enforcement, their claims are barred by governmental immunity. *Id.* at 147.

We conclude that the trial court erred in denying the City's plea to the jurisdiction as it relates to the Chemams' suit for damages on the selective enforcement claim.

We sustain the City's second issue.

Takings Claim

In its fifth issue, the City argues that the trial court did not have jurisdiction over the Chemams' takings claim.

The takings clause of the Texas Constitution mandates that "[n]o 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. Condemnation is the procedure by which the sovereign exercises its right to take property of a private owner for public use, without consent, upon the payment of just compensation. *Villareal v. Harris County*, 226 S.W.3d 537, 542 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Inverse condemnation occurs when a property owner seeks compensation for property taken for public use without process or a proper condemnation proceeding. *City of Houston v. Boyle*, 148 S.W.3d 171, 178 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

The Texas Government Code provides, "A county civil court at law has exclusive jurisdiction in Harris County of eminent domain proceedings, both statutory and inverse, regardless of the amount in controversy." TEX. GOV'T CODE ANN. § 25.1032(c) (Vernon 2004); *see Boyle*, 148 S.W.3d at 177–78 (holding that "Harris County Civil Courts at Law have exclusive jurisdiction over article 1, section 17 claims").

The district court does not have jurisdiction over this inverse condemnation claim because the Texas Government Code states that county civil courts at law have exclusive jurisdiction over this type of claim. *See* TEX. GOV'T CODE ANN. § 25.1032(c); *Boyle*, 148 S.W.3d at 177–78.

We conclude that the trial court erred in denying the City's plea to the jurisdiction on this cause of action.

We sustain the City's fifth issue.

Conclusion

We reverse the order of the trial court denying the City's plea to the jurisdiction. We render judgment dismissing the Chemams' detrimental reliance, estoppel, tort, UDJA, and selective enforcement claims for lack of subject matter jurisdiction. We dismiss the case without prejudice to the Chemams' bringing their inverse condemnation claim in a court of appropriate jurisdiction.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Alcala, and Hanks.