Opinion issued November 10, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-10-01071-CV

CITY OF HOUSTON, Appellant

V.

KARLA SAN MIGUEL, INDIVIDUALLY AND AS NEXT FRIEND OF FABIAN SOSAS, A MINOR; AND CRISTINA CASIQUE, Appellees

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On Appeal from 190th District Court
Harris County, Texas
Trial Court Cause No. 1034363

MEMORANDUM OPINION

After a car accident, Karla San Miguel, individually and as next friend of Fabian Sosas, a minor, and Cristina Casique (collectively San Miguel) sued the City of Houston and its employee, Shirley James, alleging James's negligence

caused the accident. The trial court granted the City's motion to dismiss James under the Texas Tort Claims Act's election-of-remedies provision. The City then filed a plea to the jurisdiction, claiming that San Miguel's filing suit against James perfected the City's statutory immunity from suit. The trial court denied the City's plea to the jurisdiction, and the City brought this interlocutory appeal.[1] We conclude that the trial court properly denied the City's plea to the jurisdiction. We affirm.

Background

San Miguel sued the City and James, alleging that James negligently operated a motor vehicle, causing a collision that injured San Miguel. The City specially excepted to James having been named in the petition and moved to dismiss San Miguel's claims against James under section 101.106(e) of the Texas Civil Practices and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e). That provision states:

> If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West 2008) (authorizing interlocutory appeal from denial of governmental unit's plea to jurisdiction).

After the trial court granted the motion and dismissed James, the City filed a plea to the jurisdiction, asserting that section 101.106(b) also applied to bar San Miguel's claims against the City. That provision states:

> The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the government unit consents.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b). The trial court denied the City's plea to the jurisdiction. In its single issue, the City contends that the trial court erred in denying its plea to the jurisdiction. Specifically, the City asserts that because San Miguel made the "fatal error of filing suit against both [the City] and James regarding the same subject-matter," the provisions of 101.106(b) and (e) both apply to bar San Miguel from pursuing her claims against James or the City.

Standard of Review

A plea to the jurisdiction challenges the trial court's subject-matter jurisdiction to hear a case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *Kamel v. Univ. of Tex. Health Sci. Ctr.*, 333 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). Whether a governmental entity is immune from suit is a question of subject matter jurisdiction. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). The existence of subject-matter jurisdiction is a question of law that we review de novo. *State Dep't of Hwys. &*

Pub. Transp. v. Gonzalez, 82 S.W.3d 322, 327 (Tex. 2002); *Kamel*, 333 S.W.3d at 681. We may not presume the existence of subject-matter jurisdiction; the burden is on the plaintiff to allege facts affirmatively demonstrating it. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44, 446 (Tex. 1993); *Kamel*, 333 S.W.3d at 681. 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. *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *Kamel*, 333 S.W.3d at 681.

Section 101.106 of the Texas Tort Claims Act

A. The Parties' Contentions

Citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008), the City contends that because San Miguel sued both James and the City, San Miguel lost the opportunity to sue either. Specifically, the City asserts that James was properly dismissed under section 101.106(e) of the Texas Tort Claims Act, and that, regardless of James's dismissal from the suit, the City is immune under section 101.106(b).

In response, San Miguel argues that she never sued James for purposes of the election-of-remedies provision, because she amended her petition to drop her claims against James in response to the City's special exception and motion to dismiss, and because James never was served with a live petition. San Miguel also

contends that the City is estopped from seeking dismissal because the City's actions caused San Miguel to drop her claims against James and because the City previously has taken the position that, in cases in which both the City and one of its employees were named in a suit, it should remain as the only defendant.

B. *City of Houston v. Esparza*

This court recently construed section 101.106 of the Texas Tort Claims Act in a case with facts similar to this case. *City of Houston v. Esparza*, No. 01-11-00046-CV, 2011 WL 4925990 (Tex. App.—Houston [1st Dist.] Oct. 7, 2011, no pet. h.). In that case, the plaintiff, Esparza, filed suit against both the City of Houston and its employee, claiming that the employee was negligent in causing a car accident. *Id*. at *1. The City moved to dismiss the employee under section 101.106(e). *Id*. It also filed a plea to the jurisdiction asserting that Esparza's claims against the City were barred by section 101.106(b) of the Act. *Id*. The trial court granted the motion to dismiss the employee but denied the City's plea to the jurisdiction. *Id.*

On rehearing, this Court affirmed the judgment of the trial court. We rejected the City's contention that subsections (b) and (e) apply without reference to each other when a claimant sues both the government and its employee together, thus requiring dismissal of both defendants. *Id*. at *6. We concluded, instead, that when a claimant fails to elect between defendants and instead sues both the

government unit and its employee, subsection (e) forces an election upon the claimant: the governmental unit is the proper defendant and the employee must be dismissed. *Id*. at *10 ("By operation of subsection (e), Esparza's filing of suit and the City's motion to dismiss [the employee] resulted in a forced election: whether she intended to or not, Esparza elected to pursue her claims against the City rather than [the employee]."). In arriving at this conclusion, we rejected Esparza's contention, analogous to the contention made by San Miguel here, that she did not sue the City's employee within the meaning of the election-of-remedies provision because the employee was not served and did not appear in the case. We follow these holdings.

C. Application of Section 101.106 to San Miguel's Claims

We reject San Miguel's contention that she "never had a suit against [James]" and that section 101.106 therefore does not apply. *See Esparza*, 2011 WL 4925990, at *4 (rejecting claim that employee was not sued for purposes of the statute because he was not served and did not appear in the case). Under the plain language of the statute, the bar to suit or recovery against a governmental employer stems from the claimant's filing of a suit against its employee, not the trial court's acquiring personal jurisdiction over the employee, and it is triggered "immediately." *Id*. (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a), (b)). When San Miguel filed her petition naming James and the City as defendants, she

filed suit against both of them within the meaning of the election-of-remedies provision. *See id.*

Following *Esparza*, we also reject the City's contention that subsections (b) and (e) apply without reference to each other. Under section 101.106, San Miguel's filing of suit against both James and the City invoked subsection (e). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e). By operation of subsection (e), San Miguel's filing of suit and the City's motion to dismiss James resulted in a forced election: whether she intended to or not, San Miguel elected to pursue her claims against the City rather than James. *Id.*; *see Esparza*, 2011 WL 4925990, at *10; *see also Garcia*, 253 S.W.3d at 657 ("recovery against an individual employee is barred and may be sought against the governmental unit only . . . when suit is filed against both the governmental unit and its employee, [TEX. CIV. PRAC. & REM. CODE ANN.] § 101.106(e)"). The trial court therefore properly dismissed San Miguel's claims against James, and San Miguel is barred forever from bringing common law tort claims against James arising out of the accident at issue here. *See Esparza*, 2011 WL 4925990, at *10; TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a), (e). But, so long as she has otherwise complied with the jurisdictional requisites of the Tort Claims Act,[2] subsection (b) does not bar San

[2] The City does not challenge San Miguel's compliance with any of the Tort Claims Act's jurisdictional requirements other than the election-of-remedies provision.

Miguel from pursuing her claims against the City, her elected defendant.[3] *See Esparza*, 2011 WL 4925990, at *10; TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b), (e).

Conclusion

We hold that the trial court properly denied the City's plea to the jurisdiction under 101.106(b) of the Tort Claims Act. We therefore affirm the trial court's order.

Rebeca Huddle
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

[3] Given our conclusion on this issue, we need not address the parties' other contentions.