

Opinion issued May 5, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-15-00599-CV

BILLY JOE HENDERSON, Appellant

V.

**IOWA COLONY, IOWA COLONY POLICE DEPARTMENT, AND LOUIS
C. HEARN, JR., Appellees**

**On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Case No. 80216-CV**

MEMORANDUM OPINION

Appellant, Billy Joe Henderson, sued appellees, Iowa Colony, a municipality, its police department, and its police chief, Louis C. Hearn, Jr., alleging claims for false arrest and malicious criminal prosecution. After the claims against Hearn were dismissed, Iowa Colony filed a Plea to the Jurisdiction,

which the trial court granted. In three related issues on appeal, Henderson contends the trial court erred in granting Iowa Colony's plea to the jurisdiction. We affirm.

BACKGROUND

In May 2013, Henderson was arrested and charged with criminal mischief for allegedly tampering with his electricity meter. In January 2015, Henderson filed suit Hearn and the City of Iowa Colony, alleging that Hearn "obtain[ed] a[n] illegal search and coerced [Centerpoint Energy} into filing a complaint against [Henderson]." Specifically, Henderson asserted the following false arrest claim:

[Hearn] willfully detained [Henderson] by coercing Centerpoint [E]nergy by filing a false report with the Iowa Colony Police Department alleging [Henderson] stole electricity in the amount of \$1,229.87 from 1/12/2011 to 5/15/2013. [Hearn] used the coerced complaint to consult with the D.A. and obtain a warrant that effected [Henderson's] arrest and detainment in the Brazoria County jail.

Henderson also alleged a cause of action for malicious criminal prosecution, asserting that "defendant[s] and its agents coerced Centerpoint Energy to procure[] a criminal prosecution against [Henderson,]" and "[t]he institution of proceedings against [Henderson] was initiated by the defendant[s] and its agents in a malicious manner." Henderson claimed that "Defendants and its agents have a personal vendetta against the plaintiff leading to malicious acts[,]" and sought one million dollars in damages.

The claims against Hearn were dismissed pursuant to section 101.106(e) of the Texas Civil Practices and Remedies Code, which provides that “[i]f 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 TEX. CIV. PRAC & REM. CODE ANN. art 101.106(e) (West 2011).

Iowa Colony then filed a Plea to the Jurisdiction, arguing that Henderson’s claims against it “do not fall within the limited waiver of immunity provisions of § 101.021 of the Texas Tort Claims Act, [] no other specific waiver of immunity applies in this instance[,]” and “the causes of action asserted by the Plaintiff are specifically barred by the provisions of the Texas Tort Claims Act.” The trial court granted Iowa Colony’s Plea to the Jurisdiction and dismissed the claims against it. This appeal followed.

PLEA TO THE JURISDICTION

In three related issues on appeal, Henderson contends the trial court erred in granting Iowa Colony’s Plea to the Jurisdiction. Specifically, Henderson argues that section 51.013 of the Texas Local Government Code provides that a

¹ The trial court’s dismissal of the claims against Hearn is not a part of this appeal. Henderson’s appellate brief does not address Hearn’s dismissal, thus any appellate issues associated with that ruling are waived. *See* TEX. R. APP. P. 38.1(i); *San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209–210 (Tex. 1990) (“A court of appeals may not reverse a trial court’s judgment in the absence of properly assigned error.”).

“municipality may sue and be sued,” and that section 101.0215 of the Texas Tort Claims Act [TTCA] “[h]olds a municipality liable for damages arising from its government functions that includes the [p]olice functions.” These two provisions, Henderson contends, give him the right to pursue his claims against Iowa Colony.

Standard of Review

A plea to the jurisdiction challenges the trial court’s authority to determine the subject matter of the action. *See Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). The standard of review of an order granting a plea to the jurisdiction based on governmental immunity is de novo. *Tex. Nat. Res. Conservation Comm’n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex. 2002). It is the plaintiff’s burden to allege facts that affirmatively establish the trial court’s subject matter jurisdiction. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). In determining whether the plaintiff has met this burden, we look to the allegations in the plaintiff’s pleadings, accept them as true, and construe them in favor of the plaintiff. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). While we must construe the allegations in favor of the plaintiff, we are not bound by legal conclusions. *City of Pasadena v. Kuhn*, 260 S.W.3d 93, 95 (Tex. App.—Houston [1st Dist.] 2008, no pet).

Texas Local Government Code Section 51.013

We first address Henderson’s argument that section 51.013 of the Local Government Code provides jurisdiction for his suit against Iowa Colony. Section 51.013 provides, “The municipality may sue and be sued, implead and be impleaded, and answer and be answered in any matter in any court or other place.” TEX. LOC. GOV’T CODE ANN. § 51.013 (West 2008). While section 51.013 provides that a municipality may sue or be sued, it does not act as an unambiguous waiver of sovereign immunity from suit. *See City of Houston v. Allco, Inc.*, 206 S.W.3d 113, 114 (Tex. 2006). Absent a waiver of sovereign immunity, section 51.013 does not provide jurisdiction over Henderson’s claims.

Section 101.0215 of the Texas Tort Claims Act

We next address Henderson’s argument that section 101.0215 of the TTCA provides jurisdiction. It is undisputed that Iowa Colony performed a governmental function in committing the alleged tortious actions. *See TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(1)* (West 2011) (defining municipality’s governmental functions as including “police and fire protection and control”). A city’s performance of a governmental function entitles it to immunity from suit brought by private parties for tort damages arising out of performance of that governmental function, absent a waiver of that immunity from suit in, for example, the TTCA. *City of Sugarland v. Ballard*, 174 S.W.3d 259, 264 (Tex. App.—Houston [1st

Dist.] 2005, no pet.). While section 101.0215(a) brings certain municipal functions within the purview of the TTCA, it does not automatically “itself operate as an independent waiver of sovereign immunity.” *City of Mission v. Cantu*, 89 S.W.3d 795, 802 (Tex. App.—Corpus Christi 2002, no pet.). Instead, the plaintiff must demonstrate that none of the exceptions to the waiver of immunity apply and that the claims “fall within the areas of liability provided by section 101.021 of the Act.” *Id.*

“Sovereign immunity to suit is waived and abolished to the extent of liability created by” the TTCA. TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a) (West 2011). The TTCA provides, in turn, for the following waiver of liability:

A governmental unit in the state is liable 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:
 - (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
- (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 (West 2011). Thus, the TTCA establishes liability, and creates waiver of immunity from suit, for certain damages (1) arising from operation of a motor-driven vehicle or motor-driven equipment (“the motor-vehicle waiver”) and those (2) caused by a condition or use of tangible personal or real property (“the property waiver”). *See id.* The TTCA “provides a limited waiver of sovereign immunity” from suit. *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001); *accord Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex.1998).

Here, Henderson’s claims—false arrest and malicious criminal prosecution—do not arise out of the use or a motor vehicle or a condition or use of personal or real property. As such, Henderson’s claims do not fall within the limited waiver of immunity contained in section 101.021, and said section provides no basis for jurisdiction in the trial court. *See Hardin County Sheriff’s Dept. v. Smith*, 290 S.W.3d 550, 553 (Tex. App.—Beaumont 2009, no pet.) (holding that person alleging wrongful arrest did not state actionable claim under § 101.021 because no injury was caused by motor vehicle or condition or use of property).

Intentional Torts

Finally, Henderson’s claims fail for another reason. His claims—false arrest and malicious prosecution—are for intentional torts. *See City of Hempstead v. Kmiec*, 902 S.W.2d 118, 122 (Tex. App.—Houston [1st Dist.] 1995, no writ)

(recognizing false arrest and malicious prosecution as intentional torts). Section 101.057 of the TTCA provides: “This chapter does not apply to a claim . . . arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities.” TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (West 2011). Thus, the TTCA does not waive immunity for intentional torts, the only type of claims asserted by Henderson. *See City of San Antonio v. Dunn*, 796 S.W.2d 258, 261 (Tex. App.—San Antonio 1990, writ denied) (holding city immune from liability for false arrest by police officer).

CONCLUSION

Because Henderson’s claims do not fall within the limited waiver of immunity found in §101.021 of the TTCA, and because they are based on intentional torts, the trial court did not err in granting Iowa Colony’s Plea to the Jurisdiction. Accordingly, we overrule issues one through three.

We affirm the trial court’s judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.