Opinion issued July 21, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00987-CV

PETRA LARA, Appellant

V.

CITY OF HEMPSTEAD, TEXAS, Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Case No. 2015-19223

MEMORANDUM OPINION

Petra Lara sued the City of Hempstead after a collision between her motor vehicle and one driven by Hempstead's Assistant Chief of Police. The trial court granted Hempstead's plea to the jurisdiction on the grounds that Hempstead is entitled to governmental immunity. Lara appeals, arguing that she raised a fact

issue regarding whether the Assistant Police Chief was acting within the scope of his employment and, therefore, raised a fact issue regarding whether Hempstead had waived immunity, preventing dismissal. We affirm.

Background

The motor vehicle collision occurred while Lara, who was then in the second trimester of a pregnancy, was driving her vehicle on South Jones Road in Houston, Texas. As she was doing so, P. Christian, Assistant Chief of the Hempstead police department, approached a stop sign at the intersection of Ranchstone Street and Jones Road. Assistant Chief Christian was driving his assigned police vehicle at the time, commuting from his home in Harris County to work in Hempstead, in Waller County. Christian stopped his vehicle, then turned left onto Jones Road. Lara's and Christian's vehicles collided. Christian received a written warning from law enforcement responding to the scene for failure to yield the right of way to a vehicle at an intersection and, subsequently, a written reprimand from the Hempstead police department for the same reason.

Lara alleges that the accident injured her and her then-unborn daughter. Lara alleges that her daughter required several months of treatment in an intensive care unit after birth.

Eighteen months after the accident, having failed to reach a settlement, Lara sued Hempstead, naming no other defendants. She alleged that Assistant Chief

"Christian was in the course and scope of his employment with" Hempstead at the time of the collision. She further alleged that Christian's operation of the vehicle constituted negligence and negligence per se and that Hempstead was liable for that negligence under the doctrine of respondeat superior.

Hempstead answered, asserting that it was protected by governmental immunity. Six months after Lara filed suit—and more than two years after the collision—Hempstead filed a plea to the jurisdiction asserting that Christian was not acting within the course and scope of his employment when the collision occurred. Hempstead reasoned that, as a result, no waiver of immunity applied.

As support for its plea, Hempstead presented affidavits by Assistant Chief Christian and Hempstead Chief of Police D. Hartley, both of whom testified that Christian is primarily assigned to "office" duties, has no regular duties involving operation of a police vehicle, was off-duty at the time of the collision, was not being paid for his service at that time, had no official duties or assignments at that time, was driving to work, and would be considered on-duty only upon his arrival at work. Each also specifically testified that Hartley had expressly authorized Christian to use a police vehicle to commute to and from his work and that Hartley knew when he gave that authorization that Christian lived in Harris County. Hartley further testified that Hempstead's police department policies do not permit use of police vehicles outside the city of Hempstead unless the officer operating

the vehicle is on official business or authorized by the chief to operate the vehicle outside city limits. According to Chief Hartley, had an officer operated a vehicle outside Hempstead's city limits while not on official business and without his authorization, such an action would mean that the officer was in violation of police department policy; it would not mean that the officer was on-duty or in service of the city at the time of the violation. Hartley testified that as it was, Christian did have authorization to drive his official vehicle outside of Hempstead, but he was not on official business of the City when the accident occurred.

Lara responded, arguing that Hempstead itself had produced "an overwhelming amount of evidence to show [that] Christian was in fact acting within the course and scope of his employment," and at the very least a fact issue had been raised. Her argument centered on Hempstead police department documents produced by Hempstead stating, "Personnel living in [the] City [of Hempstead] may be allowed to take home a police unit," and "Police vehicles shall not be used outside the City limits of the City of Hempstead unless on official business."

The trial court sustained the plea to the jurisdiction, dismissing the case with prejudice. This appeal followed.

Governmental Immunity

In her sole issue on appeal, Lara argues that she raised a question of fact as to whether Assistant Chief Christian was acting within the scope of his employment, which would bar dismissal on grounds of sovereign immunity.

A. Standard of review

We review de novo a trial court's ruling on a plea to the jurisdiction. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "In a suit against a governmental unit, the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). The plaintiff must 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); *City of Pasadena v. Kuhn*, 260 S.W.3d 93, 95 (Tex. App.—Houston [1st Dist.] 2008, no pet.). In determining whether this burden has been satisfied, we must construe the pleadings liberally in the claimant's favor and deny the plea if the claimant has alleged facts affirmatively demonstrating jurisdiction to hear the case. *Miranda*, 133 S.W.3d at 226; *Smith v. Galveston Cty.*, 326 S.W.3d 695, 697–98 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

If the governmental entity challenges the plaintiff's jurisdictional allegations, then the plaintiff must adduce some evidence to support jurisdiction. *Miranda*, 133 S.W.3d at 227–28. In such a case, the trial court then considers the relevant evidence submitted by the parties. *Id.* at 227. When the relevant evidence is undisputed or fails to raise a fact question on the issue of jurisdiction, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228. If, however, the evidence creates a fact question regarding jurisdiction, then the trial court must deny the plea, and the fact issue will be resolved by the factfinder. *Id.* at 227–28. In reviewing the evidence presented, we indulge every reasonable inference in the plaintiff's favor. *Id.* at 228.

Under the doctrine of governmental immunity, political subdivisions of the State, including municipalities like Hempstead, cannot be held liable for the actions of their employees unless the municipality's common-law immunity is waived by the Texas Tort Claims Act. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994). In the Tort Claims Act, the Texas Legislature expressly has waived the blanket of governmental immunity in limited circumstances. *Dallas Cty. MHMR v. Bossley*, 968 S.W.2d 339, 342–43 (Tex. 1998). Section 101.021 of the Act provides:

> 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).

For purposes of the Act, an "employee" is "a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control." *Id.* § 101.001(2) (West 2015). The employee's "'scope of employment' means the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." *Id.* § 101.001(5) (West 2015).

B. Christian did not act in the scope of his employment

Hempstead is a governmental unit and therefore is entitled to governmental immunity, unless that immunity has been waived. *See id.* § 101.001(3)(B) (defining "governmental unit" to include "any city"). Hempstead, like all governmental units in Texas, is entitled to a "heavy presumption in favor of

immunity." *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007); *see Whitley*, 104 S.W.3d at 542; *City of Pasadena v. Thomas*, 263 S.W.3d 43, 45 (Tex. App.—Houston [1st Dist.] 2006, no pet.). To overcome this presumption, Lara must affirmatively demonstrate a waiver of immunity. *Miranda*, 133 S.W.3d at 226; *Whitley*, 104 S.W.3d at 542; *Tex. Ass'n of Bus.*, 852 S.W.2d at 446; *Kuhn*, 260 S.W.3d at 95.

Lara alleges that the Tort Claims Act waives immunity for the actions of a government employee within the scope of his employment. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021. She alleges no other waiver. Thus, our examination focuses on whether Section 101.021 applies to preclude Hempstead's assertion of governmental immunity.

Uncontested evidence shows that (1) Assistant Chief Christian is an employee of Hempstead; (2) Lara alleges that the collision between Assistant Chief Christian and Lara caused property damage and personal injury; and (3) the alleged damage and injuries resulted from the operation or use of a motor-driven vehicle. *See id.* And the parties do not dispute that Christian, if he acted negligently as alleged, could be, if timely sued, held personally liable to Lara. *See id.* § 101.021(1)(B), (2). Thus, the only issue is whether Christian was "an employee acting within his scope of employment" at the time of the accident. *Id.* § 101.021(1).

"In general, whether a person is acting within the scope of his employment depends on whether the general act from which an injury arose was in furtherance of the employer's business and for the accomplishment of the objective for which the employee was employed." *City of Balch Springs v. Austin*, 315 S.W.3d 219, 225 (Tex. App.—Dallas 2010, no pet.) (citing *Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972)). Even an officer who is on-duty or on call twenty-four hours a day is not necessarily acting within the scope of his employment; his actions at the time of the incident are critical to the determination. *Id.* (citing *City of Laredo v. Saenz*, No. 04-05-00188-CV, 2006 WL 286006, at *3 (Tex. App.—San Antonio Feb. 8, 2006, no pet.) (mem. op.); *Garcia v. City of Houston*, 799 S.W.2d 496, 499 (Tex. App.—El Paso 1990, writ denied)). "In short, an employee is not acting within the scope of his duties unless the activity has some connection with, and is being undertaken in furtherance of, the employer's business." *City of Balch Springs*, 315 S.W.3d at 225 (citing *Biggs v. U.S. Fire Ins. Co.*, 611 S.W.2d 624, 627 (Tex. 1981); *Vernon v. City of Dallas*, 638 S.W.2d 5, 8–9 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)).

Moreover, Christian's use of a police vehicle is not dispositive; courts must also examine what the officer was doing at the time of the incident and why he was doing so. *City of Houston v. Wormley*, 623 S.W.2d 692, 694 (Tex. Civ. App.—Houston 1981, writ ref'd n.r.e.); *City of Houston v. Love*, 612 S.W.2d 211, 213

(Tex. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). It is true that "[i]n automobile collision cases [under the Tort Claims Act] a presumption arises that the driver was acting within the scope of his employment by the defendant when it is proved that the employer owned the vehicle and employed the driver." *Wormley*, 623 S.W.2d at 694 (citing *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354, 357 (Tex. 1971)). "The presumption is only a procedural tool, however, and it disappears from the case once it has been rebutted by positive evidence to the contrary." *Id.* (citing *Robertson Tank Lines*, 468 S.W.2d at 357). The plaintiff retains the burden of proof. *Id.* at 694–95 (reversing judgment on jury verdict against city when evidence tending to show that officer was not acting in scope of employment was improperly excluded).

Hempstead produced evidence with its plea to the jurisdiction that Christian was off-duty, was not being paid for his time, had no official duties, and was merely commuting to work at the time of the collision. He had not performed any official duties before the collision and, indeed, had not performed any services for the city or been asked to do so since leaving work on Friday of the previous week. This evidence supports Hempstead's contention that Christian was not acting in the scope of his employment, as he was neither engaged in the "performance for a governmental unit of the duties of an employee's office or employment" nor "in or about the performance of a task lawfully assigned to an employee by competent

authority." TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(5). This evidence is sufficient to rebut the presumption that Christian was acting in the scope of his employment. *See Wormley*, 623 S.W.2d at 694.

Lara responds that the Hempstead police department policies suffice to counter this evidence and at least raise a fact question as to whether Christian was acting in the scope of his employment. The policies provide, first, that Hempstead police personnel living in Hempstead "may be allowed to take home a police unit," that is, a vehicle. Second, they provide that "[p]olice vehicles shall not be used outside the City limits of the City of Hempstead unless on official business." Lara concludes that Christian's operation of a police vehicle in Harris County at least implies that he was on official business at the time.

Hempstead, however, adduced evidence that Chief Hartley had the power to authorize and did authorize Assistant Chief Christian to take a vehicle to and from his residence. Lara did not adduce any evidence that tended to controvert Hempstead's evidence, such as evidence that Hartley did not actually have power to authorize Christian's use of a take-home vehicle or had not actually given such authorization. And Hartley testified that, had Christian lacked proper authorization to operate the vehicle in Harris County, his operation of the vehicle there would simply mean that he was in violation of police department policies. It would not confer on-duty status to Christian or impose upon him any official duties on behalf

of Hempstead. Not only were these assertions uncontroverted; they are consistent with Hempstead's policies, which do not impose any official duty in return for granting permission for an officer to use a police vehicle to commute to work.

Lara relies heavily on *City of Houston v. Love*, in which the Fourteenth Court of Appeals held that some evidence supported a jury verdict that an off-duty officer was acting in the scope of his employment at the time of a vehicle collision. 612 S.W.2d at 212–13. The officer was not merely permitted but required to keep a police vehicle at his place of residence because he could be called on at any time to investigate hit-and-run accidents. *Id.* at 212. On the day of the accident, he was not required to report to the police station, but took the police vehicle to play golf because his personal vehicle was unavailable. *Id.* After playing golf, he drove the police vehicle to the city garage to obtain gasoline and have the oil changed, as police policies required him to maintain the vehicle. *Id.* On his way from the garage to his home, he hit another vehicle, whose occupants sued the City of Houston. *Id.* The officer testified that he "was clocking a speeder immediately prior to the collision" and that "he had planned to get his police car serviced on the day of the accident even if he had used his personal car to go to the golf course." *Id.* at 213. As the court of appeals explained, the officer was "engaged in the service of the City of Houston" at the time of the collision, having entered that service by taking the vehicle to the garage pursuant to city policy and being under

a further affirmative duty to take the vehicle back to his home and keep it there, available for use. *Id.*

This case is distinguishable from *Love*, as Assistant Chief Christian's use of a police vehicle was permissive, not mandatory. It is further distinguishable in that he had not engaged in any active service of Hempstead on the day of his collision with Lara, whereas the officer in *Love* both had taken a police vehicle for service, entailing a subsequent duty to return it to his home, and was enforcing speeding laws in the moments before his collision. *Id.* While both the police department policies at issue in *Love* and those in this case impose certain duties and limitations on officers operating take-home vehicles, the officer in *Love* was actively engaged in fulfilling those obligations, while Assistant Chief Christian was not. *Id.* Thus, the jury in *Love* had some evidence before it upon which it could find that the officer was acting within the scope of his employment, but the trial court did not have any such evidence in this case.

We hold that Lara has failed to overcome the presumption of governmental immunity by raising a fact question regarding any waiver of that immunity. Accordingly, we overrule her sole issue on appeal.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Keyes, Brown, and Huddle.