Opinion issued August 31, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00656-CV

HARRIS COUNTY, TEXAS, Appellant

V.

DENNIS SHOOK AND JANET SHOOK, Appellees

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Case No. 2016-54211

O P I N I O N

In this personal injury appeal, we determine whether the conduct alleged falls within the waiver of governmental immunity in the Texas Tort Claims Act

("TTCA").[1] Dennis Shook ("Shook") and his wife Janet Shook sued Harris County, alleging that its negligence and a premises defect caused the injuries Shook sustained when he struck a tollway gate arm while riding his motorcycle on a Houston-area tollway.[2] The trial court denied Harris County's plea to the jurisdiction based on governmental immunity. On appeal, Harris County contends the trial court erred by denying the jurisdictional plea because (1) Shook alleged a claim for premises defect, not a claim for negligence, and (2) there is no evidence of essential elements of a premises defect claim.

For the following reasons, we reverse that part of the trial court's order denying Harris County's plea to the jurisdiction as to Shook's claim for negligence and render judgment dismissing that claim. We affirm the remainder of the trial court's order.

Background

On the morning of March 14, 2016, Shook was commuting to work on his motorcycle in the HOV lane of the Katy Freeway. Shook was knocked off his motorcycle when he struck the arm of the gate at the tollway's exit. According to Shook, although a green light signaled he could proceed and a vehicle had passed

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1 *See* TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109.

2 Janet Shook seeks to recover for loss of consortium and loss of household services due to her husband's injuries. Though our references to Shook's claims herein are singular, they also include Janet's derivative claims.

through the tollway gate before him, the tollway gate's loop-detection system—a series of inductive sensors embedded in the pavement that signal the tollway gate arm when to open based on the disruption of a magnetic field—failed to detect his motorcycle and, thus, the tollway gate arm either did not open or did not stay open long enough for him to pass through.

Shook sued Harris County,[3] pleading alternative claims for negligence and premises defect. Shook attributed his injuries to Harris County's failure, through its agents and employees, to properly program and maintain "the transportation system, specifically the [tollway gate] arm and the coordinating light." He also attributed his injuries to the unreasonably dangerous condition of the tollway, and Harris County's failure to eliminate, reduce, or warn of the dangerous condition despite having actual or constructive knowledge thereof. Further, Shook alleged that Harris County failed to "correct the malfunction[ing] [tollway gate arm] within a reasonable time after notice" and, thus, did not protect tollway users from "the known and unusually high risk accompanied by allowing toll highway users to approach, use, and move through

[3] Shook also sued the Harris County Toll Road Authority, the City of Houston, the maintenance contractors allegedly responsible for inspecting and repairing the tollway gate (BP Equipment Company and Siemens Industry, Inc.), and the alleged manufacturer of the tollway-gate-arm system (Magnetic Automation Corporation). The record does not fully indicate the status of these other parties. But they are not before us in this appeal.

the area with the dangerous condition of the down [tollway gate] arm while it was known that dangerous conditions existed in such area."

Shook pleaded multiple waivers of governmental immunity. Relying on the TTCA, Shook alleged that the Legislature waived immunity under Section 101.060(a)(2) because "the dangerous condition and/or malfunction of the [tollway gate] arm, a traffic or road sign, signal, or warning device, was not corrected by [ ] Harris County within [a] reasonable time after receiving actual and/or constructive notice of its condition and/or malfunction." Shook also alleged that his injury arose from a "dangerous condition of [Harris County's] real property"—that the tollway gate arm was either a premises defect or special defect of which Harris County had actual or constructive knowledge—and thus Harris County owed him a duty of care under Section 101.022 of the TTCA.

Harris County answered and filed a combined motion for traditional summary judgment, no-evidence summary judgment, and plea to the jurisdiction. In the motions for summary judgment, Harris County argued that Shook's claim sounded in premises liability—not negligence—and there was no evidence that Harris County had requisite knowledge of an unreasonably dangerous condition on its premises or had failed to exercise ordinary care. Based on the same arguments, Harris County argued in its plea to the jurisdiction that the trial court lacked subject-matter

jurisdiction because there was no waiver of governmental immunity under the TTCA.

After a hearing, the trial court denied Harris County's plea to the jurisdiction by written order. The trial court's written order does not include any ruling on Harris County's motions for summary judgment.[4]

Standard of Review

Whether the trial court has subject-matter jurisdiction is a question of law, which we review de novo. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). A plaintiff must allege facts that affirmatively establish the trial court's subject-matter jurisdiction. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). In determining whether the plaintiff has satisfied this burden, we construe the pleadings liberally in the plaintiff's favor and deny the plea to the jurisdiction if facts affirmatively demonstrating jurisdiction have been alleged. *Id.* at 643; *Miranda*, 133 S.W.3d at 227.

When a defendant challenges the sufficiency of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties. *City of Waco v.*

[4] The parties disagree whether the lack of an express ruling on Harris County's summary-judgment motions precludes Harris County from arguing that summary judgment should have been granted on governmental immunity. We need not resolve the dispute because, given the standard of review for a plea to the jurisdiction set out below, the result of our analysis on that point would be the same as the result of our analysis on the plea to the jurisdiction.

Kirwan, 298 S.W.3d 618, 622 (Tex. 2009); *Miranda*, 133 S.W.3d at 227. In doing so, the court will "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. When the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, 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, the trial court must deny the plea, and the fact issue will be resolved by the factfinder. *Id.* at 227–28.

Plea to the Jurisdiction

Harris County raises two issues on appeal. Harris County argues that the trial court erred in denying its plea to the jurisdiction based on governmental immunity because (1) the alleged negligence is based on a premises defect, not a condition or use of tangible personal property, and (2) "it had no actual or constructive notice of any alleged defect and [it] exercised ordinary care."

A. Waiver of immunity under the TTCA

Under the doctrine of governmental immunity, political subdivisions in Texas enjoy immunity from suit absent a clear and unambiguous waiver of that immunity by the Legislature. *See City of Hou. v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). The TTCA provides a limited waiver of immunity for political subdivisions, including counties. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653,

655 (Tex. 2008); *see* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B). Relevant here,[5] immunity is waived 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 § 101.021(2); *see id.* §§ 101.022, .060; *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 554 (Tex. 2002).

B. Classification of cause of action

To decide Harris County's first issue, we must decide how to characterize Shook's cause of action. In the trial court, he pleaded alternative causes of action based on theories of negligence and premises liability. The TTCA imposes different standards of care upon a governmental unit for negligence claims based on "a condition or use of tangible personal property" and claims based on a "premises defect." *See Sampson v. Univ. of Tex. at Aus.*, 500 S.W.3d 380, 385 (Tex. 2016) (citing TEX. CIV. PRAC. & REM. CODE §§ 101.021(2), 101.022(a)). A claim cannot be both a premises defect claim and a claim relating to a condition or use of tangible property. *See id.* at 385–86; *Miranda*, 133 S.W.3d at 233 ("The [TTCA's] scheme of a limited waiver of immunity from suit does not allow plaintiffs to circumvent the

[5] The TTCA also waives immunity for claims involving property damage, personal injury, and death arising from the operation or use of a motor-driven vehicle or equipment. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1). That exception is not at issue in this case.

heightened standards of a premises defect claim contained in [S]ection 101.022 by re-casting the same acts as a claim relating to the negligent condition or use of tangible property."). "Whether a claim is based on a premises defect is a legal question." *Sampson*, 500 S.W.3d at 385.

When "liability 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 as specified in [S]ection 101.022 of the [TTCA]," the claim is based on an allegation of premises liability. *DeWitt v. Harris Cty.*, 904 S.W.2d 650, 653 (Tex. 1995); *see Sampson*, 500 S.W.3d at 388. "[N]egligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010) (internal citations omitted). Thus, when distinguishing between a negligent activity and a premises defect, we must focus on "whether the injury occurred by or as a contemporaneous result of the activity itself—a negligent activity—or rather by a condition created by the activity—a premises defect." *Sampson*, 500 S.W.3d at 388 (citing *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992)). "The distinction lies in whether it is the actual use or condition of the tangible personal property itself that allegedly caused the injury, or whether it is

a condition of real property—created by an item of tangible personal property—that allegedly caused the injury." *Id.*

Within the context of the TTCA, "condition" has been defined as "'either an intentional or an inadvertent state of being.'" *Id*. (quoting *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 49 (Tex. 2015)). To state a "condition" claim under the TTCA, there must be an allegation of "defective or inadequate property." *Id*. Furthermore, "use" has been defined to mean "'to put or bring into action or service; to employ for or apply to a given purpose.'" *Id*. (citing *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 588 (Tex. 2001)). "As with negligent activity claims under common law, to state a 'use' of tangible personal property claim under the [TTCA], the injury must be *contemporaneous* with the use of the tangible personal property—'[u]sing that property must have actually caused the injury.'" *Id*. (quoting *Miller*, 51 S.W.3d at 588).

Our determination turns on whether the contemporaneous "action or service" (use) or "state of being" (condition) of the tangible personal property itself caused the injury, or whether the tangible personal property created a dangerous real property condition, making it a premises defect. *See id*. "Just as at common law, where an activity may create a condition of the premises, under the [TTCA] an item of tangible personal property may create a condition of the premises, resulting in a premises defect claim." *Id*. (citing *Keetch*, 845 S.W.2d at 264).

As described above, Harris County argues that the trial court lacks subject-matter jurisdiction over Shook's negligence cause of action because the alleged malfeasance is based on a premises defect, not a condition or use of tangible personal property. Although Shook concedes that his allegations related to the failure of the loop-detection system to properly communicate with the arm of the tollway gate state a claim for a premises defect, which he contends is a claim based on a special defect, he responds that he may also maintain a cause of action for negligence based on Harris County's failure to ensure that its maintenance contractor properly maintained, inspected, and repaired the gate arm.[6] According to Shook, this failure of supervision—or failure to maintain, inspect, and repair—supports a waiver of immunity based on a theory of negligent activity. Alternatively, Shook argues that his claim falls within the waiver of immunity based on the use or condition of tangible personal property "because the [tollway] gate arm is . . . an item of personal property [which Harris County] used . . . to control traffic flow."

To the extent that Shook bases his personal injury claim on the theory that Harris County negligently supervised a maintenance contractor, we note that this is

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[6] Specifically, Shook argues he has "separately and distinctly asserted that despite [Harris County's] assignment of maintenance duties regarding the gate to [a maintenance contractor], [Harris County] retained ownership and control of the gate, failed to observe that [the maintenance contractor] was in fact . . . not performing maintenance at all, and actually knew, because the gate broke frequently, that it had a persistent and well-documented tendency to do so. That is a negligent activity claim and it is entirely *prima facie* valid."

not one of the areas for which the Legislature has waived immunity under the TTCA and, thus, the trial court could not have denied the plea to the jurisdiction on that basis. *See id.* at 384 (TTCA waives immunity in "three areas when the statutory requirements are met: (1) use of publicly owned automobiles; (2) injuries arising out of a condition or use of tangible property; and (3) premises defects"). But further analysis is required of Shook's assertion that the waiver of immunity for claims based on the use or condition of tangible personal property is implicated here.

Harris County argues that because the toll gate arm is permanently affixed to the concrete tollway and the loop-detection system is embedded under the concrete, Shook's claim relates to the condition of real property, the tollway, and "not tangible, movable personal property." Shook argues that the tollway gate arm is not disqualified from the category of tangible personal property because the tollway gate arm is motorized and is designed to move up and down.

In this regard, we find Harris County's citation to our sister court's decision in *City of Houston v. Harris* instructive. *See* 192 S.W.3d 167 (Tex. App.—Houston [14th Dist.] 2006, no pet.). There, the court considered whether a statue affixed near an entrance to the Houston Zoo was tangible personal property or real property. *Id.* at 173–75. The court correctly observed that under the TTCA, "the Texas Supreme Court has held that real property is defined as 'land, and generally whatever is erected or growing upon or affixed to the land.'" *Id.* at 173 (quoting *Miranda*, 133

S.W.3d at 229–30). The court further noted that when allegedly defective property has been affixed to land or other property, courts have held that the case is based on a premises defect, citing as examples premises defect cases involving defective window screens, a defective elevator, a defective swing, a defective sprinkler, and a defective baseball outfield fence. *Id.* (collecting cases). Comparing the statue to the defective property discussed in these authorities, the court concluded that the allegedly defective elephant statue was "not materially different" because it was affixed to the ground, and thus the plaintiff's allegations of injury attributable to the statue thus gave rise to a claim for premises defect under the TTCA. *Id.* at 174.

There is no evidence or suggestion in this case that the tollway gate was temporary in either use or design. Indeed, Shook does not dispute Harris County's assertion that the tollway gate was affixed to the tollway pavement. The maintenance records submitted by Shook in his response to the plea to the jurisdiction reference the tollway gate's anchor bolts and suggest the tollway gate was in place for at least two years before Shook struck it.

In addition, Shook's evidence included the deposition of Richard Goodman, a manager of traffic signal maintenance with Harris County, who described the tollway gate and its maintenance history. Goodman explained that the tollway gate arm is activated by an inductive loop system embedded in the pavement, which he described as including coil wire embedded in saw cuts to the pavement. The

inductive loop system generates a magnetic field above the pavement. Vehicles travelling through the loop system disrupt the magnetic field. The sensitivity between the tollway gate and magnetic field is determined based on the setting of a detector unit housed in the tollway gate pedestal. The disruption of the magnetic field communicates the vehicle's approach and causes the tollway gate arm to rise. The first of three detection zones is embedded in the pavement about 300 to 400 feet from the tollway gate, and the second detection zone is embedded midway between the first zone and the tollway gate. The final detection zone is at the tollway gate. According to Goodman, if the tollway gate and loop-detection system are working properly, the tollway gate arm lowers after the vehicle passes through the detection zone at the tollway gate.

Given it is undisputed that the gate is attached to the pavement and operates as part of an inductive loop system embedded into the pavement that generates a magnetic field on the tollway, we conclude that Shook's claim involves a premises defect. *Harris*, 192 S.W.3d at 173–74. That the gate arm lifts and lowers—and thus is moveable in a sense—does not mandate a different conclusion or create a fact issue as to the nature of the property. *See Univ. of Tex. Med. Branch at Galv. v. Davidson*, 882 S.W.2d 83, 85–86 (Tex. App.—Houston [14th Dist.] 1994, no writ) (concluding claim related to defective elevator equipment involved premises defect). As the *Harris* court recognized, "Defective elevators, window screens, swings,

sprinklers and fences can all be moved or replaced, but the moveable nature of these items does not convert them into personal property for the purposes of claims under the TTCA." 192 S.W.3d at 174. Property of that nature stands in contrast to property like "[h]ighway barrel signs, . . . [which] are readily moveable and are not affixed to the ground." *Id.*; *see also Tex. Dep't of Transp. v. Henson*, 843 S.W.2d 648, 653 (Tex. App.—Houston [14th Dist.] 1992, writ denied) ("the barrel-signs were moveable, portable and temporary in nature"). The tollway gate, which necessarily includes the gate arm, is more analogous to the former.

Moreover, Shook's allegation is that the defective condition of the tollway gate caused an obstruction on the tollway, which made the tollway unsafe for vehicles to pass. Thus, even if the tollway gate arm were tangible personal property, the nature of the claim would still be properly characterized under a premises defect theory because the use or condition of the tangible personal property created a dangerous condition of real property. *See Sampson*, 500 S.W.3d at 390 ("The distinction between a use or condition of tangible personal property claim as opposed to a premises defect claim, however, is whether it was the contemporaneous, affirmative action or service (use) or the state of being (condition) of the tangible property itself that allegedly caused the injury, or whether it was a condition created on the real property by the tangible personal property (a premises defect)."); *Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (explaining negligent activity claims

require that "the claimant's injury result from [the] contemporaneous activity itself rather than from a condition created on the premises by the activity"); *Keetch*, 845 S.W.2d at 264 (explaining premises defect claim exists when injury allegedly occurred as result of condition created by activity).

We thus conclude that Shook's cause of action is properly classified as a premises defect claim, and not one based on the use or condition of tangible property. *See Sampson*, 500 S.W.3d at 385–86.

Accordingly, we sustain Harris County's first issue.

C. Notice of the condition of the tollway gate arm

Having classified Shook's claim as involving a premises defect, we turn to Harris County's second issue concerning the duty element Shook must prove to bring the claim under the applicable TTCA waiver of immunity. Harris County urges that its duty to Shook is limited to that owed by a private landowner to a licensee with respect to an ordinary premises defect (requiring proof that it had actual knowledge of an unreasonably dangerous condition presented by the tollway gate arm), which is the standard that generally governs claims arising from a premises defect when the claimant has not paid for use of the premises or those arising from a premises defect "on a toll highway, road, or street[.]" *See* TEX. CIV. PRAC. & REM. CODE § 101.022(a), (c). But Shook urges that he need only establish that Harris County had constructive knowledge of the dangerous condition because the tollway

gate arm is a special defect, which triggers an alternative standard. *See* TEX. CIV. PRAC. & REM. CODE § 101.022(b). In our view, neither party has accurately stated the duty.

As described above, Shook's premises defect claim falls within the theories of liability for which the TTCA waives governmental immunity in Section 101.021. *See* TEX. CIV. PRAC. & REM. CODE § 101.021 (governmental unit is liable for "personal injury . . . caused by a condition or use of . . . real property"). But other provisions of the TTCA modify the scope and effect of that waiver. Relevant here are Section 101.022—which the parties urge applies with differing effect—and Section 101.060(a)(2)—which Shook pleaded and referenced in his appellate brief and in our view is controlling as to the duty owed by Harris County.[7] *See Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 389 (Tex. 2011) (stating "real substance" of claims, and not pleading labels, determines immunity and jurisdiction).

Section 101.022(a) modifies the elements of a premises defect theory otherwise imported from the common law by generally limiting the duty owed by a governmental unit to "the duty that a private person owes to a licensee on private

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[7] Citing *McKnight v. Calvert*, 539 S.W.3d 447, 454–56 (Tex. App.—Houston [1st Dist.] 2017, pet. denied), Shook argues that he has a "viable negligence claim under the TTCA" because "Section[s] 101.022 and 101.060 of the [TTCA], read together, establish a duty owed by the State to a plaintiff who asserts a premises-liability claim involving a traffic signal."

property, unless the claimant pays for the use of the premises." TEX. CIV. PRAC. & REM. CODE § 101.022(a). Section 101.022(c)—on which Harris County relies—similarly limits the duty owed for claims arising from "a premises defect on a toll highway, road, or street[.]" *Id.* § 101.022(c) ("[T]he governmental unit owes the claimant only the duty that a private person owes to a licensee on private property."). That duty consists of not injuring the licensee through willful, wanton, or grossly negligent conduct, and to either warn the licensee or make reasonably safe an unreasonably dangerous condition of which the owner has actual knowledge and the licensee does not. *Sampson*, 500 S.W.3d at 385; *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

Section 101.022(b)—on which Shook primarily relies—sets out an invitee standard for premises defect claims that arise from "special defects," TEX. CIV. PRAC. & REM. CODE § 101.022(b), a term the Texas Supreme Court has defined as akin to "excavations or obstructions" that threaten the "ordinary users" of roadways in "the normal course of travel." *Univ. of Tex. v. Hayes*, 327 S.W.3d 113, 116–17 (Tex. 2010). As compared to a licensee, an invitee need only prove that the premises owner knew or reasonably should have known of the unreasonably dangerous condition. *See Payne*, 838 S.W.2d at 237. Section 101.022(b) also contains an exemption from the licensee standard for "the duty to warn of the absence, condition,

or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060."[8] TEX. CIV. PRAC. & REM. CODE § 101.022(b).

Section 101.060 addresses premises defect claims arising from certain dangerous conditions involving "a traffic or road sign, signal, or warning device" and imposes special limitations on a waiver of immunity in that context. TEX. CIV. PRAC. & REM. CODE § 101.060; *see Tex. Facilities Comm'n v. Speer*, 559 S.W.3d 245, 255 (Tex. App.—Austin 2018, no pet.) (noting Section 101.060 is not stand-alone waiver of immunity but instead modifies waiver of immunity under Section 101.021). Section 101.060(a)(2) retains immunity for claims arising from "the absence, condition, or malfunction of a traffic or road sign, signal, or warning device unless the absence, condition, or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice." TEX. CIV. PRAC. & REM. CODE § 101.060(a)(2); *see State Dep't of Highways & Public Transp.*

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[8] To the extent Harris County argues that Section 101.022(b) defines special defects to include both "excavations or obstructions on highways, roads, or streets" and "the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060," we disagree. *See* TEX. CIV. PRAC. & REM. CODE § 101.022(b). The use of the disjunctive "or" in Section 101.022(b) indicates that a "special defect" is not inclusive of the "absence, condition, or malfunction of traffic signs, signals, or warning devices." *See In re B.N.S.*, 247 S.W.3d 807, 809 (Tex. App.—Dallas 2008, no pet.) ("When used in a statute, the word 'or' is typically disjunctive and signifies a separation between two distinct ideas.") (internal quotation and citation omitted). Rather, under Section 101.022(b), both "the duty to warn of special defects" and, separately, **"**the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060" are exempted from the limitation of duty in Section 101.022(a). *See* TEX. CIV. PRAC. & REM. CODE § 101.022(b).

v. Gonzalez, 82 S.W.3d 322, 327 (Tex. 2002) (stating "condition" may be "an intentional or inadvertent state of being" and that Section 101.060(a)(2) "requires the State to maintain traffic signs in a condition sufficient to perform their intended traffic-control function"); *Tex. Dep't of Transp. v. Ramming*, 861 S.W.2d 460, 465 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (recognizing traffic-control device's malfunction may be caused by failure of component part). This Court previously held that "notice" under subsection (a)(2) can be "actual" or "constructive." *McKnight v. Calvert*, 539 S.W.3d 447, 455 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

"Read together, the net effect of these provisions is that the TTCA waives immunity with respect to a premises-defect claim founded on an unreasonably dangerous condition arising from 'the absence, condition, or malfunction of a traffic or road sign, signal, or warning device' only in instances where the governmental unit had actual or constructive notice of the 'absence, condition, or malfunction' and failed to correct it within a 'reasonable time' thereafter." *Speer*, 559 S.W.3d at 252 (quoting TEX. CIV. PRAC. & REM. CODE § 101.060(a)(2)); *see McKnight*, 539 S.W.3d at 455–56. Such a claim is not subject to the licensee standard generally imposed by Section 101.022(a). *See* TEX. CIV. PRAC. & REM. CODE § 101.022(b); *Speer*, 559 S.W.3d at 252. But the statute provides the governmental unit a safe harbor once it

"correct[s]" the "absence, condition, or malfunction." *See* TEX. CIV. PRAC. & REM. CODE § 101.060(a)(2).

The question then becomes whether subsection (a)(2)'s "traffic or road sign, signal, or warning device" applies to the tollway gate arm on which Shook's premises defect claim is based. When read with its surrounding statutory context, we conclude that it does. *See, e.g., TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("We . . . consider statutes as a whole rather than their isolated provisions [and] presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." (citations omitted)); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008) (recognizing courts are to use "any technical or particular meaning the words have acquired" in lieu of "plain and common meaning" when so defined or "apparent from [ ] context").

Section 101.060(b) specifies that "[t]he signs, signals, and warning devices referred to in this section are those used in connection with hazards normally connected with use of the roadway." TEX. CIV. PRAC. & REM. CODE § 101.060(b). In this regard, the statute denotes a class of roadway hazards that are distinguished from special defects, which, again, are akin to "excavations or obstructions on highways, roads, or streets" and thus are "special" in the sense of presenting an "unexpected and unusual danger" to ordinary users of the roadway. *See Denton Cty.*

v. Beynon, 283 S.W.3d 329, 331–32 (Tex. 2009) ("[A] court cannot classify as 'special' a defect that is not linked to an excavation or obstruction on a roadway." (quotation omitted)); *Payne*, 838 S.W.2d at 238–39 & n.3 (condition of same class of excavation or obstruction would characteristically present "unexpected and unusual danger" to roadway users, although "unexpected and unusual danger" is not independent requirement or element of special defect). "Against [this] backdrop, 'hazards *normally* connected with the use of the roadway' is a term of contrast contemplating hazards more routinely or inherently connected with roadway use, such as relating to vehicle speed, intersecting paths of movement, or features of the roadway that do not rise to equivalence with excavations or obstructions." *Speer*, 559 S.W.3d at 254.

The record supports that Shook's claim arose from a "condition" or "malfunction" of "a traffic or road sign, signal, or warning device" in a sense relevant to Section 101.060(a)(2). Harris County argues that the "Interstate 10 toll gate is a traffic barrier designed to separate traffic and prevent collisions" and that its "very purpose is to stop traffic." The crash report prepared by a Texas Peace Officer and attached to Harris County's plea to the jurisdiction describes the tollway gate arm's function in signaling traffic how to proceed through an intersection. The crash report states:

> The driver of unit 1 [Shook] approached the . . . intersection where the gate arm failed to raise as it is intended to when a vehicle approaches

> the light. This particular intersection has a gate arm to help prevent vehicle[s] from entering the wrong ramp.

Shook's deposition testimony, also submitted with Harris County's jurisdictional plea, confirms that the gate arm's function was to control the flow of traffic through the intersection at the tollway exit. In this regard, the tollway gate arm acts as a traffic-control device that governs intersecting paths of movement and thus is in the nature of a hazard normally connected with the use of a roadway. *See* TEX. CIV. PRAC. & REM. CODE § 101.060(b); *Speer*, 559 S.W.3d at 254.

Because the tollway gate arm falls within the purview of a "traffic or road sign, signal, or warning device" under Section 101.060(a)(2) and Shook's claim is based on its condition or malfunction, we disagree with Harris County that a fact issue must exist as to its actual knowledge of an allegedly dangerous condition of the tollway gate arm. This Court's precedent instructs that a fact issue on constructive notice will suffice to avoid dismissal of Shook's claim. *See McKnight*, 539 S.W.3d at 455 ("Section 101.060(a)(2) requires 'notice' of the relevant absence, condition, or malfunction. This 'notice' can be 'actual' or 'constructive.'"); *see also Kenneally v. Thurn*, 653 S.W.2d 69, 71–72 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (reversing summary judgment based on governmental immunity because there was "sufficient evidence to raise a question of fact as to whether the condition had existed for such a length of time that City, in the exercise of reasonable diligence, should have discovered it"). Shook's premises defect claim is thus not subject to

dismissal based on a lack of evidence of actual knowledge or actual notice. *See McKnight*, 539 S.W.3d at 455–56; *see also City of Aus. v. Lamas*, 160 S.W.3d 97, 101 (Tex. App.—Austin 2004, no pet.) ("[S]ubsection (a)(2) [of Section 101.060] does not require actual notice.").

In premises defect cases, constructive knowledge of a dangerous condition, which is equivalent to constructive "notice," may be established by facts or inferences that the condition could develop over time." *McKnight*, 539 S.W.3d at 455–56; *see Sampson*, 500 S.W.3d at 397. Shook's evidence submitted in opposition to Harris County's jurisdictional plea included a two-page document produced in discovery by Harris County's maintenance contractor. The document purports to summarize the service calls made for the tollway gate at issue between March 2014 and January 2018—roughly the two years before the accident and the two years after the accident.

The summary of the pre-accident service calls indicates that the tollway gate at issue was serviced 13 times in the two years before the accident. Multiple service calls involved the tollway gate arm being stuck down or malfunctioning. Repairs specifically involving the loop-detection system are noted twice. An entry for July 7, 2014—about 18 months before the accident—reads:

> [R]eported arm has been hit[.] [U]pon arrival arm has been hit[.] [B]ent arm back to it[s] original position[,] also tested loop to make sure that the arm goes up and down[.] [O]bserved car going thru hot lane gates was operational.

Another reference to the loop-detection system is found in the entry for a service call on November 19, 2015—about four months before the accident—which reads:

> UPON ARRIVAL ARMS WHERE [sic] DOWN. SET SIGN ON LOOPS AND ARMS WHEN UP BUT NOTICE [THEY WERE] NOT COMING DOWN. POWER CYCLE UNIT, AND PAST THRU AND ARMS ARE OPERATING AS THEY SHOULD. CLOSE BOTH DOOR ON GATES UP AND LOCK THEM UP. RESET ALL LOOP DETECTORS, SET SIGN ON LOOP AND ARMS ARE NOW OPERATING NORMAL . . . .

Viewing the evidence that the tollway gate arm failed on multiple occasions before the accident and required 13 service calls in the light most favorable to Shook, as we must, we conclude it is sufficient to raise a fact issue as to whether Harris County had reason to know, i.e., notice, that the condition of the tollway gate arm was not sufficient to perform its intended traffic-control function and failed to correct it within a reasonable time after notice.[9] *See, e.g.*, *McKnight*, 539 S.W.3d at 455–56 (evidence showing tree limbs obscured stop sign and police officer had patrolled area for ten years was sufficient to permit factfinder to find constructive notice); *Capshaw v. Tex. Dep't of Transp.*, 988 S.W.2d 943, 946 (Tex. App.—El Paso 1999, pet. denied) (reasonableness of time that passed between notice and correction was fact question); *State v. Norris*, 550 S.W.2d 386, 391–92 (Tex. Civ.

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[9] Harris County frames its duty as involving the exercise of ordinary care. However, our conclusion that Section 101.060(a)(2) states the duty owed in this case means that the inquiry is whether the "condition" or "malfunction" of the "traffic or road sign, signal, or warning device" was "corrected . . . within a reasonable time after notice." TEX. CIV. PRAC. & REM. CODE § 101.060(a)(2).

App.—Corpus Christi 1977, writ ref'd n.r.e.) (evidence indicating traffic signal light system in question was old, in need of replacement, frequently malfunctioned, and was generally in defective condition was evidence of notice).

Consequently, a fact issue exists concerning the trial court's jurisdiction under Section 101.060(a)(2) over Shook's claim arising from the "condition" or "malfunction" of the tollway gate arm as a "traffic or road sign, signal, or warning device." TEX. CIV. PRAC. & REM. CODE § 101.060(a)(2); *see Lamas*, 160 S.W.3d at 100 ("If evidence raises a fact issue concerning the court's jurisdiction, it would be inappropriate for the court to grant a plea to the jurisdiction."); *see also Lorig v. City of Mission*, 629 S.W.2d 699, 701 (Tex. 1982) (question whether city had notice of stop sign's obstruction from view was fact question that precluded summary judgment under TTCA); *Zambory v. City of Dallas*, 838 S.W.2d 580, 583 (Tex. App.—Dallas 1992, writ denied) (summary judgment under TTCA was not appropriate based on existence of multiple fact issues, including whether city received notice), *disapproved of on other grounds by City of Grapevine v. Sipes*, 195 S.W.3d 689, 693–95 (Tex. 2006).

Because Harris County's plea to the jurisdiction is only a procedural hurdle, we make no conclusion regarding whether the merits of Shook's claim will satisfy the requisite notice and reasonableness standards under Section 101.060(a)(2). Our

only conclusion is that the trial court properly denied the plea to the jurisdiction as to this claim. *See Miranda*, 133 S.W.3d at 227–28.

Accordingly, we overrule Harris County's second issue.

Conclusion

Having concluded that Shook's cause of action may not be characterized as one for negligence, we reverse the part of the trial court's order denying Harris County's plea to the jurisdiction as to the negligence claim and render judgment dismissing that claim. Because the evidence raises an issue of fact as to Harris County's notice of the gate arm's condition or malfunction, however, we affirm the part of the trial court's order denying Harris County's plea to the jurisdiction as to Shook's premises defect claim.

Amparo Guerra
Justice

Panel consists of Justices Countiss, Rivas-Molloy, and Guerra.