Opinion issued October 12, 2021.

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00570-CV

ANDRE GIBBS, Appellant

V.

THE CITY OF HOUSTON, Appellee

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Case No. 2018-79338-A

MEMORANDUM OPINION

In this personal injury suit, appellant Andre Gibbs ("Gibbs") appeals the trial court's order granting summary judgment in favor of the City of Houston ("City") on Gibbs' negligence claims based on limitations. In one issue, Gibbs contends his claims are not barred by the applicable statute of limitations because they fall under

the "inadvertent omission" exception to the Texas relation-back doctrine. We affirm.

Background

This personal injury lawsuit arises from an auto accident involving multiple parties. On July 6, 2017, Erin Brannon ("Brannon") was driving a pickup truck when she collided with a Houston Police Department SUV, driven by a City employee. Gibbs was one of six passengers riding in the pickup truck.

Brannon sued the City on November 1, 2018, asserting negligence claims under the Texas Tort Claims Act. She alleged she sustained personal injuries when the City employee, operating a city-owned vehicle and traveling eastbound on Holly Hall Street in Harris County, Texas, struck her Ford F150 as she was traveling westbound on Holly Hall Street. Brannon alleged the City employee failed to yield the right-of-way while making a left turn, disregarded oncoming traffic, failed to control the vehicle and operate it in a prudent manner, failed to turn the vehicle to the right in a safe manner, and was inattentive. Brannon asserted the employee was in the course and scope of his employment at the time of the accident and thus the City was liable vicariously for his negligence. The City filed a general denial asserting governmental immunity among other defenses.

On January 17, 2019, Brannon filed a first amended petition in which five of the six truck passengers—Faith Barrett, Rajahnae Flemings, Shawtrella Brannon,

Mary Robertson, and Shantea Tardy, as next friend of Eslynn Tunwar, a minor—joined the lawsuit as plaintiffs. Gibbs, the sixth passenger, was not named in this amended petition. On February 8, 2019, Brannon and the other five named plaintiffs filed a second amended petition changing the legal capacities for Brannon and Faith Barrett to "Erin Brannon, Individually and ANF of Faith Barrett, Minor." Gibbs was not included as a party in this amended petition either.

On July 12, 2019—days after the statute of limitations passed—Brannon and the other five named plaintiffs filed a third amended petition naming Gibbs as a plaintiff for the first time.[1] On July 15, 2019, the City filed a second amended answer asserting Gibbs' claims were barred by the two-year statute of limitations. The City then filed a motion for summary judgment seeking dismissal of Gibbs' claims based on limitations. Gibbs did not respond.

The trial court granted summary judgment in favor of the City on Gibbs' claims. One month later, Gibbs filed a motion for new trial arguing (1) his failure to file a response to the City's motion was not intentional or the result of conscious indifference but rather a calendaring mistake, (2) his motion for new trial presented evidence sufficient to raise a genuine issue of material fact on limitations because his lawsuit related back to the filing of plaintiffs' second amended petition and was thus timely, and (3) granting a new trial would not cause delay or injury to the City.

[1] The addition of Gibbs as a plaintiff was the only change in the amended pleading.

The City opposed Gibbs' motion for new trial. The trial court granted Gibbs' motion for new trial and vacated its September 23, 2019 summary judgment order.

Three months later, the City again filed a motion for summary judgment seeking dismissal of Gibbs' claims for lack of jurisdiction based on limitations and immunity. The City argued that Gibbs' claims did not fall within any waiver of immunity under the Texas Tort Claims Act because they were barred by the applicable statute of limitations. Gibbs responded arguing his appearance in the lawsuit related back to the filing of plaintiffs' second amended petition on February 8, 2019, and thus his appearance was timely. The City replied arguing the relation-back doctrine was inapplicable.

The trial court granted summary judgment in favor of the City on Gibbs' claims and severed the remaining claims and parties into a new cause number. Gibbs timely appealed.

Discussion

A. Standard of Review

We review a trial court's decision to grant a motion for summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Under the traditional summary judgment standard, the movant has the burden to show that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c*); Mann Frankfort Stein & Lipp Advisors, Inc. v.*

Fielding, 289 S.W.3d 844, 848 (Tex. 2009); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). To determine whether there are disputed issues of material fact, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference in the nonmovant's favor. *Nixon*, 690 S.W.2d at 548–49.

A defendant is entitled to summary judgment on an affirmative defense if the defendant proves all elements of the defense. *Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). Summary judgment will be affirmed only if the record establishes the movant proved all elements of its cause of action or affirmative defense as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). When a defendant seeks summary judgment based on limitations, it must establish that limitations expired before the claimant filed suit. *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 818 (Tex. 2021).

Subject matter jurisdiction is essential to a court's power to decide a case. *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013) (per curiam); *City of DeSoto v. White*, 288 S.W.3d 389, 393 (Tex. 2009). The lack of subject matter jurisdiction may be raised in a motion for summary judgment. *See Bland Independent School Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000); *see also Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 374 (Tex. 2006). Whether a

court has subject matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

B. Texas Tort Claims Act

Sovereign immunity and its counterpart for political subdivisions, governmental immunity, protect the State and its political subdivisions, including municipalities, from lawsuits and liability for money damages. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008); *see also Reata Constr. Corp.*, 197 S.W.3d at 374. The immunity doctrine includes two distinct principles: immunity from liability and immunity from suit. *City of Dall. v. Albert*, 354 S.W.3d 368, 373 (Tex. 2011). Immunity from liability is an affirmative defense, while immunity from suit deprives a court of subject matter jurisdiction. *City of Houston v. Nicolai*, 539 S.W.3d 378, 386 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

The City of Houston is a governmental unit generally immune from tort liability except where the legislature specifically waives that immunity. *Id.*; *see Dall. Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). The Texas Tort Claims Act ("TTCA") provides limited waivers of immunity for suits against governmental entities arising from (1) injury caused by an employee's operation or use of a motor-driven vehicle or motor-driven-equipment, (2) injury caused by a condition or use of tangible personal property, or (3) injury caused by a condition or use of real property. *See* TEX. CIV. PRAC. & REM.

CODE § 101.021; *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 657 (Tex. 2007). These waivers of immunity apply only if the governmental employee or governmental unit would, were it a private person, be liable to the plaintiff according to Texas law. *DeWitt v. Harris Cty.*, 904 S.W.2d 650, 653 (Tex. 1995); *Quested v. City of Houston*, 440 S.W.3d 275, 279–80 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *William Marsh Rice Univ. v. Coleman*, 291 S.W.3d 43, 45 (Tex. App.—Houston [14th Dist.] 2009, pet. dism'd). Thus, to determine whether a TTCA waiver applies, we must first determine whether the governmental unit or its employee would otherwise be liable to the plaintiff. *See White v. Smith*, 591 S.W.3d 198 (Tex. App.—Tyler, Oct. 31, 2019, no pet.) (mem. op.) (holding waiver of immunity did not apply to plaintiff's tort claims against governmental employees brought under TTCA because they were barred by two-year statute of limitations).

The party suing a governmental entity has the burden to establish jurisdiction by pleading—and ultimately proving—not only a valid immunity waiver but also a claim that falls within the waiver. *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 135–36 (Tex. 2015); *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 586–87 (Tex. 2001). We interpret waivers of immunity narrowly because the intent to waive must be expressed by clear and unambiguous language. *Garcia*, 253 S.W.3d at 655; *Reata Constr. Corp.*, 197 S.W.3d at 375.

C. Analysis

In his sole issue, Gibbs contends the trial court erred in granting summary judgment because his claims against the City are not time-barred. While he concedes he filed suit after expiration of the two-year statute of limitations, he argues the Texas relation-back doctrine's "inadvertent omission" exception applies precluding limitations.

Under Texas Civil Practice and Remedies Code Section 16.003(a), suits for personal injury must be brought no later than two years after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE 16.003(a). The automobile collision giving rise to this suit occurred on July 6, 2017. Thus, Gibbs had to file suit within two years of accrual, or by July 8, 2019.[2] Gibbs was not named as a party in the (1) original petition filed on November 1, 2018, (2) first amended petition filed on January 17, 2019, or (3) second amended petition filed on February 8, 2019. Gibbs appeared as a party in the lawsuit for the first time in the third amended petition filed on July 12, 2019, four days after expiration of the limitations period.

In its summary judgment motion, the City argued that neither it nor its employee could be liable to Gibbs under Texas law because Gibbs' claims are barred

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[2] Because the last day of the limitations period fell on a Saturday, the period for filing suit was extended to Monday, July 8, 2019. *See* TEX. CIV. PRAC. & REM. CODE § 16.072 ("If the last day of a limitations period under any statute of limitations falls on a Saturday, Sunday, or holiday, the period for filing suit is extended to include the next day that the county offices are open for business.").

by limitations. Thus, the City argued, Gibbs' claims do not fall within any TTCA waiver, the City retained its immunity from suit, and the trial court lacked subject matter jurisdiction over Gibbs' claims. Gibbs responded that application of the "inadvertent omission" exception to the Texas relation-back doctrine acts as a bar to limitations in this case.

Section 16.068 of Texas Civil Practice and Remedies Code, entitled "Amended and Supplemental Pleadings," governs the relation-back doctrine. It provides:

Amended and Supplemental Pleadings

> If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

TEX. CIV. PRAC. & REM. CODE § 16.068. As written, the language of Section 16.068 refers generally to claims or grounds of liability or defense.

"Ordinarily, an amended pleading adding a new party does not relate back to the original pleading." *Alexander v. Turtur & Assocs., Inc*., 146 S.W.3d 113, 121 (Tex. 2004); *see Brown v. Enter. Recovery Sys., Inc.*, No. 02-11-00436-CV, 2013 WL 4506582, at *11 (Tex. App.—Fort Worth Aug. 22, 2013, pet. denied) (mem. op.) (refusing to apply Section 16.068 in holding claims under federal debt collection practices act were time-barred where plaintiff was not added until after

one-year statute of limitations); *Nolan v. Hughes*, 349 S.W.3d 209, 214 (Tex. App.—Dallas 2011, no pet.) (rejecting argument that Section 16.068 permits relation back when amended pleading names new party as defendant after expiration of limitations). Thus, under Texas law, unless an exception applies, an amended pleading that adds a new party does not relate back to the original pleading. *See Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey*, 332 S.W.3d 395, 400 (Tex. 2011).[3]

Relying on *American Petrofina, Inc. v. Allen*, 887 S.W.2d 829 (Tex. 1994), Gibbs contends the Texas Supreme Court carved out an "inadvertent omission" exception that encompasses his addition as a plaintiff in this suit. In *American Petrofina*, the initial pleading named 101 plaintiffs and 9 defendants. Subsequent pleadings named various new plaintiffs and defendants, dropped others, and renamed some previously omitted plaintiffs. *See id.* at 830–31. The live pleading—the seventh amended petition—named 985 plaintiffs and 55 defendants. *See id.* at 831.

Among other things, the court of appeals held that "the omission of four plaintiffs who were dropped from amended petitions but renamed in later petitions

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[3] Gibbs does not assert that he falls within the recognized exceptions of misnomer or misidentification. *See Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey*, 332 S.W.3d 395, 400 (Tex. 2011) ("Misnomer is an exception, misidentification a more limited one.").

was due to excusable inadvertence or mistake" and thus their claims were not barred. *Id.* at 830. Holding that two of those plaintiffs' claims had been properly dismissed on other grounds, the Texas Supreme Court focused solely on the two remaining plaintiffs: Dwyer and Fazio.[4] *See id.* The Court held that Dwyer's claims were not barred by limitations because Dwyer or a representative of his estate had been named in each of the amended petitions. The other omitted plaintiff, Fazio, was named in the first, second, and third amended petitions, omitted from the fourth petition, and then renamed thirty-seven days later in the fifth amended petition. *See id*. The Court thus held that

> Normally, omission of a party from an amended petition indicates an intent to non-suit. Here, however, the omission of Fazio seems to have been inadvertent. While again there is no pertinent Texas decision concerning this question, certain amendments and supplements to pleadings are by statute permitted to relate back to the time of the original pleading for purposes of limitations. CIV. PRAC. & REM. CODE ANN. § 16.068 (1986). Consistent with that provision, Fazio's claim relates back and is, therefore, not time barred.

Id.

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[4] The Court noted in a footnote that although the "court of appeals indicated that claims involving the deaths of [the other two plaintiffs] were also not barred by limitations through their omission in amended pleadings, their actions were already time barred when initially filed." *American Petrofina, Inc. v. Allen*, 887 S.W.2d 830 n.4 (Tex. 1994).

Gibbs asserts that the "inadvertent omission" exception espoused by the *American Petrofina* Court applies equally here.[5] *American Petrofina*, however, is distinguishable from this case in a key respect. The omitted plaintiffs in *American Petrofina* appeared and filed suit *before* the limitations period expired but were later omitted inadvertently from amended petitions after the limitations period ran. *See id.* at 830–31. Indeed, the *American Petrofina* Court acknowledged that Fazio and Dwyer "had claims not barred by limitations at the time each was first named in the suit." *Id* By contrast, Gibbs never appeared in any petition before expiration of the limitations period. Instead, he joined as a party in the suit for the first time *after* limitations expired.

Gibbs' reliance on *Woodruff v. Wright*, 51 S.W.3d 727 (Tex. App.—Texarkana 2001, pet. denied) is also misplaced. Unlike the facts here, the omitted parties in that case were originally named before the expiration of limitations. After first appearing in the case, the relevant parties were omitted inadvertently from amended pleadings and named again in plaintiffs' twenty-second amended petition. *See id.* at 730. Following the ruling in *American Petrofina*, the court of appeals held

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[5] According to Gibbs, under the *American Petrofina* exception, adding a party in an amended petition relates back to a timely filed pleading when omission of the party from the lawsuit was inadvertent, multiple parties are involved, and the defendant presents no evidence of prejudice resulting from the addition.

that the "*renaming* of all the plaintiffs and the *reassertion* of their claims in their twenty-second amended petition was not time-barred." *Id.* at 733 (emphasis added).[6]

Gibbs was not named before limitations expired and later omitted in amended pleadings inadvertently. He appeared as a party for the first time after limitations had run. Thus, because Gibbs' claims against the City are barred by limitations and do not fall within any TTCA waiver, the City retained its immunity from suit and the trial court lacked subject matter jurisdiction over Gibbs' claims. *See DeWitt*, 904 S.W.2d at 653; *Quested*, 440 S.W.3d at 279–80. The trial court properly granted summary judgment for the City on Gibbs' claims. We overrule Gibbs' sole issue.

Conclusion

We affirm the trial court's judgment.

Veronica Rivas-Molloy
Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.

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[6] Gibbs cites numerous federal authorities and cases from other jurisdictions urging us to expand the relation-back doctrine to multi-party cases where an amended pleading adds a new plaintiff for the first time after limitations expires. We decline to do so. We are obligated to follow only higher Texas courts and the United States Supreme Court. *See Penrod Drilling Corp. v. Williams*, *868* S.W.2d 294, 296 (Tex. 1993) ("While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court ... they are *obligated* to follow only higher Texas courts and the United States Supreme Court.") (emphasis in original).