**Opinion issued December 14, 2021**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-20-00823-CV**

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**CITY OF JERSEY VILLAGE, TEXAS Appellant**

**V.**

**THOMAS KILLOUGH, Appellee**

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**On Appeal from the 270th District Court**
**Harris County, Texas**
**Trial Court Case No. 2019-20129**

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## MEMORANDUM OPINION

In this interlocutory appeal,[1] appellant, City of Jersey Village, Texas (the "City"), challenges the trial court's order denying its plea to the jurisdiction and

[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8); *see also Thomas v. Long*, 207 S.W.3d 334, 338 (Tex. 2006) (summary-judgment motion challenging trial court's subject-matter jurisdiction is subsumed under Texas Civil Practice and

summary-judgment motion filed in the suit of appellee, Thomas Killough, against it for premises liability. In its sole issue, the City contends that the trial court lacks subject-matter jurisdiction.

We reverse and render.

## Background

In his first amended petition, Killough alleged that on March 30, 2018, he was riding his motorcycle on the eastbound U.S. Highway 290 ("U.S. 290") frontage road when he attempted to enter the highway. Immediately in front of Killough was a disabled car that was blocking the entrance ramp to the highway. To avoid a collision with the disabled car, Killough "attempted to merge back onto the [frontage] road," and while doing so, hit a concrete median barrier "that had no paint or reflectors." Killough did not see the concrete median barrier and upon impact was thrown from his motorcycle, suffering serious injuries. According to Killough, he was "injured as a result of a [special] defect owned and maintained" by the City.

Killough brought a premises liability claim against the City[2] and sought damages for past and future medical expenses, past and future pain and suffering,

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Remedies Code section 54.014(a)(8)); *City of Houston v. Garza*, No. 01-18-01069-CV, 2019 WL 2932851, at *3 (Tex. App.—Houston [1st Dist.] July 9, 2019, no pet.) (mem. op.) ("When a governmental unit asserts immunity in a motion for summary judgment, a court of appeals has jurisdiction to review an interlocutory order denying summary judgment.").

[2] Killough also brought a premises liability claim against the Texas Department of Transportation. It is not a party to this appeal.

past and future mental anguish, and past and future lost wages or income. As to his premises liability claim, Killough alleged that the City owed Killough a duty to repair and maintain a special defect that could cause injury to a person who is an ordinary user of the roadway, the City was responsible for the care and maintenance of the roadway on which Killough was injured, the City failed to paint, illuminate, or provide reflective markings on the concrete median barrier that Killough hit, which created a special defect that the City knew or should have known about, the City failed to warn or make safe the area where the collision occurred, and the City's "lack of care proximately caused [Killough's] injuries." Killough also asserted that the Texas Tort Claims Act ("TTCA")[3] waived the City's governmental immunity because Killough's injuries were caused by a special defect.[4]

The City answered, generally denying the allegations in Killough's petition and asserting that the trial court lacked jurisdiction over Killough's suit against it.

The City then filed a combined plea to the jurisdiction and summary-judgment motion, arguing that the trial court lacks subject-matter jurisdiction over Killough's suit because the City is entitled to governmental immunity and Killough failed to show that his suit against the City fell under the waiver of governmental immunity

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

4 *See id.* § 101.021(2); *see also id.* § 101.022.

provided by the TTCA.[5] According to the City, the TTCA expressly waives governmental immunity in three general areas: use of publicly owned automobiles, premises defects, and injuries arising out of a condition or use of tangible personal property.[6] Here, Killough alleged a premises defect claim against the City, and he pleaded that he was injured by a special defect.[7] But according to the City, the "concrete median barrier separating the [U.S.] 290 eastbound frontage road from the [U.S.] 290 eastbound entrance ramp" was an ordinary premises defect rather than a special defect under the TTCA because it was a longstanding permanent condition. The City also asserted that the roadway and the concrete median barrier were not constructed, owned, or controlled by the City, but rather by the Texas Department of Transportation. And because the City did not own or control the roadway or the concrete median barrier, the City did not owe Killough a duty to repair and maintain the concrete median barrier that Killough hit. Without a duty, the TTCA did not waive the City's governmental immunity, and the trial court lacks subject-matter jurisdiction over Killough's suit against the City.

The City attached to its plea to the jurisdiction and summary-judgment motion the affidavits of Frank Leong and Austin Bleess. Leong testified that he had been

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5 *See id.* § 101.021(2); *see also id.* § 101.022.

6 *See Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021.

7 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022.

employed by the Texas Department of Transportation since 2007 as a civil engineer and an engineering assistant in the Houston Division. He was familiar with the 17,800 block of the eastbound U.S. 290 frontage road in Harris County, Texas, where the collision involving Killough occurred. According to Leong:

> The subject roadway was designed and built in accordance with official plans and specifications. The structures in place as of the date of the [collision] were not installed other than in accordance with the design. No decision had been made to make any changes before the date of the [collision] in the then existing design and signage for the road and the approach to it.
>
> Based on the available information, and then existing traffic rates and needs, the design and signage that existed on the [Texas Department of Transportation's] right of way (that was within its control at and before the time of the [collision]) was performed by [Texas Department of Transportation] employees acting within the scope of their employment and within the latitude afforded by good engineering guidelines. There [was] nothing to suggest that the design of the structures or signage was outside [the Texas Department of Transportation's] reasonable design discretion. Nothing suggest[ed] that any pertinent [Texas Department of Transportation] employee acted other than within the course and scope of official duties. No pertinent [Texas Department of Transportation] employee [was] known to have acted other than in reasonable good faith and discretion in connection with the use and maintenance of said design.

Leong also averred that the Texas Department of Transportation did not have knowledge of any problems with the concrete median barrier or knowledge of any unreasonable risk, if any, related to the concrete median barrier that Killough hit.

Bleess testified that he was employed by the City as City Manager and he was "familiar with the roads and streets constructed and maintained in the City." He was

also familiar with "the 17,800 [b]lock of [U.S.] 290 eastbound frontage road (near the 7,900 [b]lock of Wright Road) and the concrete median barrier separating the entrance ramp onto . . . [U.S.] 290 eastbound from the frontage road." Bleess stated that the City did not construct the concrete median barrier and did not "maintain any structures at the 17,800 [b]lock of [U.S.] 290 eastbound frontage road, including the concrete median barrier separating the entrance ramp onto . . . [U.S.] 290 eastbound from the frontage road." According to Bleess, "any construction and maintenance [was] performed by a public entity other than the City."

In response to the City's plea to the jurisdiction and summary-judgment motion, Killough argued that the concrete median barrier constituted a special defect because it was "an obstruction on the [frontage] road of [U.S.] 290" and posed "an unexpected and unusual danger to ordinary users of the roadway in such a way that a vehicle's ability to travel on the roadway would be unexpectedly and physically impaired." (Internal quotations omitted.) And he argued that the City had control over the concrete median barrier because the City was a "home-rule municipality" with "exclusive control over and under the public highways, streets, and alleys of the municipality." (Emphasis and internal quotations omitted.) Thus, whether the Texas Department of Transportation "owned the road where [Killough] was injured [was] immaterial" because the City owed Killough a legal duty based on its "home-rule" status.

In its reply to Killough's response,[8] the City reiterated that the trial court lacks subject-matter jurisdiction over Killough's suit against it because the roadway and the concrete median barrier were constructed and controlled by the Texas Department of Transportation, the City did not own, control, or maintain the concrete median barrier, the U.S. 290 entrance ramp, or the frontage road where the collision occurred, the City did not owe Killough a duty to maintain the location where the collision occurred, and the concrete median barrier did not constitute a special defect.

The trial court denied the City's plea to the jurisdiction and summary-judgment motion.

**Standard of Review**

Subject-matter jurisdiction is essential to a court's power to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Several different procedural vehicles may be used to challenge a trial court's subject-matter jurisdiction, including a plea to the jurisdiction and a summary-judgment motion. *See Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018); *Amboree v. Bonton*, 575 S.W.3d 38, 42–43 (Tex. App.—Houston [1st Dist.] 2019, no pet.). We review a trial court's ruling on a plea to the jurisdiction and a

[8] The City also filed a supplemental reply to Killough's response. The parties filed additional replies to subsequent responses.

summary-judgment motion de novo. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007); *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivs. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006); *City of Houston v. Carrizales*, No. 01-20-00699-CV, 2021 WL 3556216, at *3 (Tex. App.—Houston [1st Dist.] Aug. 12, 2021, pet. denied) (mem. op.); *City of Houston v. Vallejo*, 371 S.W.3d 499, 501 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject-matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Villarreal v. Harris Cty.*, 226 S.W.3d 537, 541 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A defendant may use a plea to the jurisdiction to challenge whether the plaintiff has met its burden of alleging jurisdictional facts or to challenge the existence of jurisdictional facts. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004).

Review of a plea challenging the existence of jurisdictional facts mirrors that of a matter-of-law summary-judgment motion. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *Miranda*, 133 S.W.3d at 228 ("[T]his standard generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c). . . . . By requiring the [S]tate to meet the summary judgment standard of proof . . . , we protect the plaintiff[] from having to put on [his] case

simply to establish jurisdiction." (internal quotations and citations omitted)); *see also* TEX. R. CIV. P. 166a(c). "[A] court deciding a plea to the jurisdiction . . . may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). And a court may consider evidence as necessary to resolve a dispute over the jurisdictional facts even if the evidence "implicates both the subject[-]matter jurisdiction of the court and the merits of the case." *Miranda*, 133 S.W.3d at 226.

We take as true all evidence favorable to the non-movant and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Id.* at 228. If the defendant meets its burden to establish that the trial court lacks jurisdiction, the plaintiff is then required to show that there is a material fact question regarding the jurisdictional issue. *Id.* at 227–28. If the evidence raises a fact issue about jurisdiction, the plea cannot be granted, and a fact finder must resolve the issue. *Id.* On the other hand, if the evidence is undisputed or fails to raise a fact issue, the plea must be determined as a matter of law. *Id.* at 228; *see also Garcia*, 372 S.W.3d at 635.

**Governmental Immunity**

In its sole issue, the City argues that the trial court erred in denying its plea to the jurisdiction and summary-judgment motion because the TTCA does not waive

its governmental immunity and the trial court lacks subject-matter jurisdiction over Killough's suit against it.

Sovereign immunity and its counterpart, governmental immunity, exist to protect the State and its political subdivisions from lawsuits and liability for money damages. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008); *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). Although the terms "sovereign immunity" and "governmental immunity" are often used interchangeably, sovereign immunity "extends to various divisions of state government, including agencies, boards, hospitals, and universities," while governmental immunity "protects political subdivisions of the State, including counties, cities, and school districts." *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist.*, 212 S.W.3d at 323–24; *see also Odutayo v. City of Houston*, No. 01-12-00132-CV, 2013 WL 1718334, at *2 n.8 (Tex. App.—Houston [1st Dist.] Apr. 18, 2013, no pet.) (mem. op.). We interpret statutory waivers of sovereign immunity and governmental immunity narrowly, as the Texas Legislature's intent to waive immunity must be clear and unambiguous. *See LMV-AL Ventures, LLC v. Tex. Dep't of Aging & Disability Servs.*, 520 S.W.3d 113, 120 (Tex. App.—Austin 2017, pet. denied); *see also* TEX. GOV'T CODE ANN. § 311.034. Without an express waiver of sovereign immunity or governmental immunity, courts do not have subject-matter jurisdiction over suits against the State or its political subdivisions.

*State v. Shumake*, 199 S.W.3d 279, 283 (Tex. 2006); *Miranda*, 133 S.W.3d at 224–25; *see also Harris Cty. v. S. Cty. Mut. Ins. Co.*, No. 01-13-00870-CV, 2014 WL 4219472, at *2 (Tex. App.—Houston [1st Dist.] Aug. 26, 2014, no pet.) (mem. op.) ("Governmental immunity from suit deprives a trial court of subject-matter jurisdiction.").

The TTCA provides a limited waiver of immunity for certain suits against governmental units. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–.109; *Garcia*, 253 S.W.3d at 655; *City of Houston v. Garza*, No. 01-18-01069-CV, 2019 WL 2932851, at *4 (Tex. App.—Houston [1st Dist.] July 9, 2019, no pet.) (mem. op.); *City of Dallas v. Hillis*, 308 S.W.3d 526, 530 (Tex. App.—Dallas 2010, pet. denied). The City is a governmental unit protected by governmental immunity, absent waiver. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(B); *cf. City of Houston v. Hussein*, No. 01-18-00683-CV, 2020 WL 6788079, at *6 (Tex. App.—Houston [1st Dist.] Nov. 19, 2020, pet. denied) (mem. op.) ("[T]he City [of Houston] is a governmental entity protected by governmental immunity, unless its immunity has been waived.").

Relevant here, the TTCA waives a governmental unit's immunity for a personal injury "caused by a condition or use of . . . real property if the governmental unit would, were it a private person, be liable to the [plaintiff] according to Texas law." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2); *see also Shumake*, 199

S.W.3d at 283 ("The [TTCA] includes, among other things, a limited waiver of the [S]tate's immunity from suits alleging personal injury . . . caused by premises defects."); *City of Grapevine v. Roberts*, 946 S.W.2d 841, 843 (Tex. 1997); *City of San Antonio v. Anderson*, No. 04-20-00320-CV, 2021 WL 883472, at *3 (Tex. App.—San Antonio Mar. 10, 2021, no pet.) (mem. op.) ("Under the [TTCA], a claim for a condition or use of real property is a premises defect claim . . . ."). But to establish waiver of governmental immunity for a premises defect claim under the TTCA, the plaintiff must first show that the governmental unit owed a legal duty to the plaintiff. *City of Denton v. Page*, 701 S.W.2d 831, 834 (Tex. 1986); *see also City of Houston v. Gonzales*, No. 14-20-00165-CV, 2021 WL 2154155, at *5 (Tex. App.—Houston [14th Dist.] May 27, 2021, no pet.) (mem. op.) (noting City of Houston immune from suit unless plaintiff showed city owed her legal duty); *City of Pearland v. Contreras*, No. 01-15-000345-CV, 2016 WL 358612, at *2 (Tex. App.—Houston [1st Dist.] Jan. 28, 2016, no pet.) (mem. op.); *City of Wichita Falls v. Romm*, No. 2-09-237-CV, 2010 WL 598678, at *2 (Tex. App.—Fort Worth Feb. 18, 2010, no pet.) (mem. op.) ("A plaintiff relying on the TTCA must prove the existence and violation of a legal duty owed him by the [City of Wichita Falls]." (internal quotations omitted)); *Dominguez v. City of Fort Worth*, No. 2-06-196-CV, 2008 WL 623583, at *2 (Tex. App.—Fort Worth Mar. 6, 2008, pet. denied) (mem. op.) ("If a plaintiff fails to prove the existence and violation of a legal duty sufficient

to impose liability under the [TTCA], sovereign immunity remains intact."); *Anderson v. Anderson Cty.*, 6 S.W.3d 612, 614 (Tex. App.—Tyler 1999, pet. denied) (duty is threshold question). The existence of a legal duty is a question of law. *Military Highway Water Supply Corp. v. Morin*, 156 S.W.3d 569, 572 (Tex. 2005); *Romm*, 2010 WL 598678, at *2.

In its plea to the jurisdiction and summary-judgment motion, the City argued that it did not owe Killough any duty because, at the time of the collision, the City did not create, maintain, or control the U.S. 290 eastbound frontage road, the highway entrance ramp, or the concrete median barrier that Killough hit.

To impose a legal duty on a governmental unit, the plaintiff must show that the governmental unit owned, occupied, or controlled the premises where the injury occurred. *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 554 (Tex. 2002); *Contreras*, 2016 WL 358612, at *3; *Cty. of Hidalgo v. Alejandro*, No. 13-06-044-CV, 2006 WL 2885530, at *3 (Tex. App.—Corpus Christi–Edinburg Oct. 12, 2006, no pet.) (mem. op.); *see also Wilson v. Tex. Parks & Wildlife Dep't*, 8 S.W.3d 634, 635 (Tex. 1999) ("As a rule, to prevail on a premises liability claim a plaintiff must prove that the defendant possessed—that is, owned, occupied, or controlled—the premises where the injury occurred."). In other words, a plaintiff must show that a governmental unit "assumed sufficient control over the part of the premises that presented the alleged danger so that [it] had the responsibility to remedy it." *Brown*, 80 S.W.3d at

556; *see also Contreras*, 2016 WL 358612, at *3. A duty arises only if the governmental unit has control of the premises. *Carter v. City of Galveston*, No. 01-07-01010-CV, 2008 WL 4965351, at *2–3 (Tex. App.—Houston [1st Dist.] Nov. 20, 2008, no pet.) (mem. op.).

Here, the City attached to its plea to the jurisdiction and summary-judgment motion the affidavits of Leong and Bleess. Leong testified that he was employed by the Texas Department of Transportation as a civil engineer and an engineering assistant and he was familiar with the 17,800 block of the eastbound U.S. 290 frontage road where the collision involving Killough occurred. Leong stated that the "subject roadway was designed and built in accordance with official plans and specifications" of the Texas Department of Transportation and was "within the control [of the Texas Department of Transportation] at and before the time of the [collision]." Bleess testified that he was employed by the City as City Manager and he was "familiar with the roads and streets constructed and maintained in the City." He was also familiar with "the 17,800 [b]lock of [U.S.] 290 eastbound frontage road (near the 7,900 [b]lock of Wright Road) and the concrete median barrier separating the entrance ramp onto . . . [U.S.] 290 eastbound from the frontage road." Bleess stated that the City did not construct the concrete median barrier and did not "maintain any structures at the 17,800 [b]lock of [U.S.] 290 eastbound frontage road, including the concrete median barrier separating the entrance ramp onto . . . [U.S.]

290 eastbound from the frontage road." According to Bleess, "any construction and maintenance" on the roadway or the structures where the collision occurred was "performed by a public entity other than the City." This jurisdictional evidence shows that, at the time of the collision, the City did not own or control the roadway or the concrete median barrier where Killough's collision occurred.

Killough argued in his response to the City's plea to the jurisdiction and summary-judgment motion that the City controlled the roadway where the collision occurred because of Texas Transportation Code section 311.001 and the City's "home[-]rule charter." *See* TEX. TRANSP. CODE ANN. § 311.001;[9] City of Jersey Village, Tex., Code of Ordinances, art. I, § 1.04.[10] Essentially, because the City is a

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[9] Section 311.001, titled "General Authority of Home-Rule Municipality," states, in part:

> (a) A home-rule municipality has exclusive control over and under the public highways, streets, and alleys of the municipality.
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> (b) The municipality may:
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> > (1) control, regulate, or remove an encroachment or obstruction on a public street or alley of the municipality;
> >
> > (2) open or change a public street or alley of the municipality; or
> >
> > (3) improve a public highway, street, or alley of the municipality.

TEX. TRANSP. CODE ANN. § 311.001(a)–(b); *cf. City of Wichita Falls v. Romm*, No. 2-09-237-CV, 2010 WL 598678, at *4 (Tex. App.—Fort Worth Feb. 18, 2010, no pet.) (explaining section 311.001 authorizes action, by stating municipality "may," but it does not controvert city's jurisdictional evidence demonstrating that city did not exercise control over roadway).

[10] Section 1.04, titled "Regulation of streets and public property," states:

"home-rule municipality," Killough argued that it had "control over and under the public highways, streets, and alleys of the municipality" and thus owed him a duty to repair and maintain the concrete median barrier that he hit. But our sister appellate courts have rejected appellant's argument. *See, e.g.*, *Romm*, 2010 WL 598678, at *1–4; *Sipes v. City of Longview*, 925 S.W.2d 764, 765–67 (Tex. App.—Texarkana 1996, writ denied).

In *Sipes*, the plaintiffs brought suit against the City of Longview after a car collision. 925 S.W.2d at 765. The plaintiffs were in their car on U.S. Highway 80 when tall grass or other vegetation in the median prevented the plaintiffs from seeing another car, resulting in the collision. *Id.* The plaintiffs asserted that the City of Longview owed them a duty to eliminate or warn of tall grass in the median of U.S. Highway 80 at the location of the collision because the collision occurred inside the city limits and City of Longview was a "home-rule city" with "exclusive control"

> The city shall have exclusive dominion, control and jurisdiction in, upon, over and under the public streets, sidewalks, alleys, public squares and public ways within the corporate boundaries of the city and in, upon, over and under all public property of the city. With respect to each and every public street, sidewalk, alley, highway, public square, public park or other public way within the corporate boundaries of the city, the city shall have the power to establish, maintain, improve, alter, abandon or vacate the same; to regulate, establish or change the grade thereof; to control or regulate the use thereof; and to abate or remove in a summary manner any encroachment thereon.

City of Jersey Village, Tex., Code of Ordinances, art. I, § 1.04.

over its highways, streets, and alleys. *Id.* at 765–66 (internal quotations omitted). Yet, the City of Longview's summary-judgment evidence showed that the location of the collision, although within the city limits, was on a part of the state highway system, there was no contract between the City of Longview and the State under which the City of Longview agreed to assume responsibility for the median's maintenance, and the City of Longview did not maintain the median. *Id.* at 765.

In analyzing the issue of ownership and control of the median as between the Texas Department of Transportation and the City of Longview, the Texarkana court of appeals noted that the City of Longview's summary-judgment evidence showing its lack of ownership and control of the median was not controverted. *Id.* at 766. But the plaintiffs asserted that the City of Longview owed them a duty to eliminate or warn of tall grass in the median of U.S. Highway 80 based on the City of Longview's status as a "home-rule city" with "exclusive control" over its highways, streets, and alleys. *Id.* at 765–67 (internal quotations omitted) (plaintiffs relying on Texas Transportation Code section 311.001 and municipal ordinance); *see also* City of Longview, Tex., Official Charter art. I, § 1.05(a) (stating "[t]he City of Longview shall have exclusive dominion, control, and jurisdiction in, upon, and over and under public streets, avenues, alleys and highways of the city and may provide for the improvement thereof by paving, repaving, raising, draining or otherwise in accordance with the provisions of the general laws of the State of Texas. Such

exclusive dominion, control and jurisdiction . . . shall also include, but not be limited to, the right to regulate, locate, relocate, remove, or prohibit the location of, all utility pipes, lines, wires or other property").

In rejecting the plaintiffs' "home-rule city" argument, the court concluded that the Texas Transportation Code placed the maintenance and improvement of the state highway system under the "exclusive and direct control" of the Texas Department of Transportation and gave the Texas Transportation Commission the task of "efficient maintenance" of the state highway system. *See Sipes*, 925 S.W.2d at 767 (quoting TEX. TRANSP. CODE ANN. §§ 224.031, 224.032); *see also State v. City of Austin*, 331 S.W.2d 737, 353 (Tex. 1960) (explaining "[t]he statutory power of cities and towns over public ways within their corporate limits has now been abridged . . . . [T]he State Highway Commission shall have the power to construct, maintain and operate designated state highways in any area of the state, whether in or outside the limits of any municipal corporation, and . . . the exercise of such power shall qualify and render inexclusive the dominion of any city or town with respect to the specific streets, alleys or other public ways affected thereby"). Although the Texas Transportation Code allows the Texas Department of Transportation to contract with counties, transportation corporations, and municipalities for the improvement, control, or supervision of a designated state highway, when the department chooses to retain maintenance control, "there [is] no

basis . . . for construing the 'home-rule' provisions of the [Texas] Transportation Code[, i.e., section 311.001,] to bring about a contrary result." *Sipes*, 925 S.W.2d at 767. In short, our sister appellate court directly disagreed with the plaintiffs' reliance on Texas Transportation Code section 311.001 and the City of Longview's status as a home-rule municipality to establish that the City of Longview had control over the location on U.S. Highway 80 where the car-collision occurred. *Id.* (noting placement of section 311.001 in Texas Transportation Code versus the placement of Transportation Code sections on which court relied); *see also Romm*, 2010 WL 598678, at *4 (rejecting plaintiff's reliance on Texas Transportation Code section 311.001 and assertion that City of Wichita Falls's status as home-rule municipality established that city, rather than Texas Department of Transportation, owned sign and highway exit ramp; also explaining section 311.001 authorizes action, by stating municipality "may," but it does not controvert city's jurisdictional evidence demonstrating that city did not exercise control over particular roadway).

Still yet, the court specifically held that "the fact that [a] [c]ity . . . is a 'home-rule' municipality, standing alone, without a showing of ownership, dominion, or control of the median [or roadway] at [the relevant] location, does not create any duty" on the part of the city. *Id.* Thus, because the plaintiffs failed to show that the City of Longview controlled the roadway or median where the collision occurred, the court determined that the City of Longview owed no duty to

the plaintiffs to eliminate or warn of tall median grass at the location on a state highway where the collision occurred. *Id.*

Here, Killough has asserted that the City owed him a duty to repair and maintain the concrete median barrier that he hit, which allegedly lacked paint and reflectors. Yet the uncontroverted jurisdictional evidence shows that at the time of the collision, the City did not own or control the roadway or the concrete median barrier where the collision occurred. *Id.* at 765–67; *see also Romm*, 2010 WL 598678, at *4 (plaintiff put forth no evidence raising fact question in response to City of Wichita Falls's jurisdictional evidence that it exercised or assumed no control over sign or highway exit ramp; also explaining section 311.001 authorizes action, by stating municipality "may," but it does not controvert city's jurisdictional evidence demonstrating that city did not exercise control over particular roadway). In asserting that the City owed him a duty to repair and maintain the concrete median barrier, Killough relied solely on the City's status as a "home-rule municipality" with "exclusive control" over its highways, streets, and alleys. (Emphasis and internal quotations omitted.) But the City's status as "a 'home-rule' municipality, standing alone, without a showing of ownership, dominion, or control of the [concrete median barrier or roadway] at [the relevant] location, does not create any

duty" on the part of the City.[11] *Sipes*, 925 S.W.2d at 767; *see also Romm*, 2010 WL 598678, at *4 (rejecting plaintiff's reliance on Texas Transportation Code section 311.001 and assertion that City of Wichita Falls's status as home-rule municipality established that city, rather than Texas Department of Transportation, owned sign and highway exit ramp). A lack of ownership or control by the City of the roadway or the concrete median barrier where the collision occurred means that the City owed Killough no duty to repair and maintain the concrete median barrier that Killough hit. *See Page*, 701 S.W.2d at 834; *Romm*, 2010 WL 598678, at *4; *Sipes*, 925 S.W.2d at 767.

Because the uncontroverted evidence establishes that the City did not owe Killough a legal duty, we hold that the TTCA does not waive the City's governmental immunity, the trial court lacks subject-matter jurisdiction over

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[11] On appeal, Killough asserts that the Texas Department of Transportation and the City "have a shared duty to maintain the concrete barrier on the [frontage] road in issue," but Killough did not raise this argument in the trial court in response to the City's plea to the jurisdiction and summary-judgment motion. *See D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009) (argument not raised in response to summary-judgment motion waived); *Tello v. Bank One, N.A.*, 218 S.W.3d 109, 118 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (non-movant must expressly present to trial court, by written answer or response, any issues defeating a movant's entitlement to summary judgment); *see also Murphy v. City of Galveston*, 557 S.W.3d 235, 244–45 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (non-movants could not rely on argument not raised in trial court to defeat city's entitlement to dismissal for lack of jurisdiction). Still yet, the uncontroverted jurisdictional evidence presented to the trial court in connection with the City's plea to the jurisdiction and summary-judgment motion shows that at the time of the collision, the City did not own or control the roadway or the concrete median barrier where the collision occurred.

Killough's suit against the City, and the trial court erred in denying the City's plea to the jurisdiction and summary-judgment motion. *See Page*, 701 S.W.2d at 834; *Gonzales*, 2021 WL 2154155, at *5; *Contreras*, 2016 WL 358612, at *2; *Romm*, 2010 WL 598678, at *1–4; *Dominguez*, 2008 WL 623583, at *2.

We sustain the City's sole issue.[12]

## Conclusion

We reverse the trial court's order denying the City's plea to the jurisdiction and summary-judgment motion and render judgment dismissing Killough's suit against the City for lack of subject-matter jurisdiction.

Julie Countiss
Justice

Panel consists of Justices Goodman, Landau, and Countiss.

[12] We need not address the City's other arguments in its briefing. *See* TEX. R. APP. P. 47.1.