Opinion issued June 9, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00398-CV

CITY OF FRIENDSWOOD, Appellant

V.

JOSEPH TOSTADO, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Case No. 18-CV-0108

MEMORANDUM OPINION

This appeal concerns a dispute involving certain improvements the City of Friendswood constructed on an easement which Appellee Joseph Tostado contends encroach on his real property. Appellee filed suit against the City of Friendswood asserting several causes of action stemming from the improvements on the easement.

The City of Friendswood filed a plea to the jurisdiction seeking dismissal of Appellee's claims based on governmental immunity and limitations. The trial court denied the plea and this interlocutory appeal ensued.

In four issues, the City of Friendswood contends the trial court erred in denying its plea to the jurisdiction because (1) Appellee's trespass-to-try title claim is barred by governmental immunity and limitations, (2) the characterization of Appellee's trespass-to-try title claim as a declaratory judgment action does not effect a waiver of the City's governmental immunity, (3) Appellee's inverse condemnation claim fails as a matter of law because the City of Friendswood owns an easement traversing Appellee's property and the claim is barred by limitations, and (4) Appellee's common-law claim alleging an "easement violation" (i) is not a recognized cause of action under Texas law, (ii) does not fall within the limited waiver of immunity under the Texas Tort Claims Act, and (iii) is time-barred.

We affirm in part and reverse in part.

Background

In 1977, Daniel and Carmen Tostado ("Tostados") purchased 5.452 acres of land ("Lobit Tract") from their longtime employers, Elizabeth L. Whiteford, Lewis Letzerich Jr., and Edwin N. Letzerich ("Letzerich Family").[1] Years later, in 1986,

[1] The deed was corrected in 1991 and is part of the record on appeal.

the Letzerich Family donated 45.906 acres of land, contiguous to the Lobit Tract, to the H.K. and Esther Speck Foundation, a charitable foundation. Appellant, the City of Friendswood ("City"), later acquired title to the 45.906 acres of land from the Speck Foundation ("City Property"). Because both the Lobit Tract and the City Property devolved from a common ownership, Appellee contends that "his sole path for 'ingress and egress' is across" the City's Property.

In the 1990s, a dispute arose between the Tostados and the City concerning ownership of the Lobit Tract. The Tostados sued the City asserting various claims related to ownership of the Lobit Tract ("First Lawsuit").[2] In 1995, following a jury trial, the trial court entered a final judgment ("1995 Judgment") rendered on the jury's verdict finding, among other things, that the City was the holder of equitable title to the 5.452-acre Lobit Tract and the City's conduct did not constitute a taking of the property.

The trial court ordered that the Tostados take nothing in damages on their claims against the City. Based on the jury's findings that the Tostados did not have actual or constructive notice of the City's claim to the 5.452-acre Lobit Tract and had acted in good faith in purchasing the tract from the Letzerich Family, however,

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[2] The style of the First Lawsuit, filed in 1993, is *Daniel A. Tostado, et ux. v. City of Friendswood,* No. 93-CV-1112; in the 56th Judicial District of Galveston County, Texas.

the trial court ordered that they recover title and possession to the Lobit Tract. The 1995 Judgment stated that "[n]othing in this judgment shall affect any roadway easement that may be held by any governmental entity, including those of the City of Friendswood, relating to a certain roadway known as Windemere Road which traverses across the above described property."

In 2003, the Tostados conveyed the 5.452-acre Lobit Tract via general warranty deed to their son, Appellant Joseph Tostado ("Tostado") and his wife Christine. The deed states in pertinent part:

> This conveyance is made and accepted subject to the following reservations, to the extent same are in effect at this time
>
> > Easements, rights-of-way, and prescriptive rights of record concerning the Property, all presently recorded restrictions, reservations, covenants, conditions, oil and gas leases, mineral severances, and other instruments, that affect the Property, all zoning laws, regulations and ordinances of municipal and/or other governmental authorities, if any, but only to the extent they are still in effect relating to the Property[].

In 2016 or 2017, the City began the development of a park project known as Lake of Friendswood Park. As part of the park project, the City built improvements on the City Property and a roadway easement known as "Windemere Road," which according to the City, is a public right-of-way that "traverses" the Lobit Tract. The City built sidewalks, installed exercise equipment, constructed a boardwalk, and erected locked gates.

In January 2018, Joseph Tostado filed suit against the City stemming from construction of the park project; more specifically, the improvements on Windemere Road. Tostado alleged that he and his wife had purchased the Lobit Tract from his parents in 2003, and that he was deeded the 5.452-acre Lobit Tract upon his divorce in 2010. Tostado alleged that "[a] barricade in the form of a gate ha[d] been constructed by the City of Friendswood, and [Tostado] did not have access to the inner gate on Windamere [sic] Road. After request was made, [Tostado] received a key to the gate which is double-locked and has had access in and to the subject property. However, [Tostado] still does not have access to a lock placed on a gate constructed by City of Friendswood with a 'No Trespassing' sign on the border of [Tostado's] and City of Friendswood property."

In his original petition, Tostado asserted several causes of action against the City seeking to recover both monetary damages and declaratory and injunctive relief. He asserted claims for slander of title and trespass-to-try-title resulting from the City's park project and related improvements. Tostado sought a declaratory judgment declaring his fee simple title in and to the Lobit Tract. And he requested temporary and permanent injunctive relief against the City requesting it be enjoined from accessing Tostado's property. Tostado also alleged the City's actions amounted to a taking of his property for public use without just compensation for which he sought damages.

The City answered asserting a general denial and the affirmative defense of immunity. The City filed a plea to the jurisdiction alleging that the fence and improvements in question had been constructed over a public right-of-way, not on Tostado's property, and that the City had provided Tostado with keys to the gate to access his property. The City also argued the trial court lacked subject matter jurisdiction over Tostado's suit because governmental immunity barred Tostado's trespass-to-try-title claim and his requests for declaratory and injunctive relief.

In response, Tostado argued the City's plea should be denied because his suit sought merely to enforce the 1995 Judgment awarding his parents title to and possession of the Lobit Tract, which he now owns, and res judicata barred the City's attempt to assert governmental immunity. Tostado also alleged that even if his suit involved more than mere enforcement of the 1995 Judgment, the parties' current dispute fell within the trial court's jurisdiction under Section 37.004(c) of the Uniform Declaratory Judgments Act, which according to Tostado, operates as a limited waiver of governmental immunity when the sole issue before the court is determination of the proper boundary line between adjoining properties.

The City replied arguing res judicata did not bar its immunity claim because Tostado's suit involved different claims than those at issue in the First Lawsuit. The City also argued that Section 37.004(c) was inapplicable because Tostado was not seeking solely a determination of the proper boundary line between adjoining

properties, but also sought to impose liability on the City for damages. Thus, the City argued, Tostado's claim is barred by governmental immunity. The City also argued that even if Tostado were granted leave to amend his pleadings to establish a waiver of the City's governmental immunity, his claims failed because they were barred by limitations.

After a hearing on the City's plea to the jurisdiction, the trial court sent a letter to the parties that stated, in relevant part:

> A hearing [on the City's plea to the jurisdiction] was held on 10/26/18, wherein the defendant urged to [sic] court to grant a dismissal without prejudice or, by way of special exception, to require plaintiff to re-plead his case, removing the prayer for damages. Plaintiff acknowledged the potential need to amend his petition and asked for time to respond to issues raised by the defendant.
>
> Does the Plaintiff intend to respond or amend his pleading? If not, the Court is prepared to grant defendant's plea to the jurisdiction, without prejudice. If nothing is forthcoming from the plaintiff, the defendant should submit a proposed order granting the plea within 20 days.

Tostado filed his first amended petition and request for temporary order nine days later. In his amended pleading, Tostado referenced the 1995 Judgment and alleged he was seeking enforcement of the judgment against the City for trespass to try title. Tostado omitted his request for damages.

The City amended its plea to the jurisdiction arguing the first amended petition asserted the same facts and causes of action as Tostado's original petition and similarly failed to establish a waiver of the City's immunity from suit. Pointing to

the language in the 1995 Judgment that "[n]othing in this judgment shall affect any roadway easement that may be held by any governmental entity, including those of the City of Friendswood, relating to a certain roadway known as Windemere Road which traverses across the above described property," the City argued Tostado's claims concerned whether the City owned a public right-of-way traversing the Lobit Tract and therefore his suit did not seek merely to enforce the 1995 Judgment. The City also reasserted its arguments that Tostado's trespass-to-try-title claim and request for declaratory and injunctive relief were barred by the City's immunity from suit.

Before the trial court ruled on the amended plea, Tostado filed a second amended petition and application for permanent injunction asserting a claim for inverse condemnation in violation of Article I, Section 17 of the Texas Constitution, a claim for "easement violations" under the Texas Tort Claims Act, and a trespass claim.[3] Tostado sought declaratory judgment relief, enforcement of the 1995 Judgment, temporary and permanent injunctive relief, and monetary damages, costs, and attorney's fees. Tostado later filed a supplemental petition asserting he had alleged facts demonstrating waiver of the City's governmental immunity and attaching his affidavit as an exhibit. Tostado also responded to the City's amended

[3] Tostado did not assert a slander of title claim in his second amended petition.

plea to the jurisdiction arguing again that his claims were not barred by governmental immunity.

The City filed an application for temporary restraining order and injunctive relief requesting that Tostado be enjoined from removing the City's improvements on Windemere Road or erecting a fence blocking the City's public right-of-way on the road. The City also filed a third amended plea to the jurisdiction reasserting that Tostado had failed to plead facts establishing a waiver of the City's immunity from suit. The City argued that Tostado's suit did not seek to enforce the 1995 Judgment but related only to whether the City owned the public right-of-way that traverses the Lobit Tract. The City also argued that Tostado's request for declaratory relief and his trespass-to-try title claim did not waive the City's immunity from suit, and that his request for injunctive relief was barred. The City further argued that Tostado's inverse condemnation claim was barred by limitations and the Texas Tort Claims Act did not effect a waiver of the City's immunity for Tostado's claim for "easement violations." In the supplement to its third amended plea, the City attached the expert report of Steve Adams ("Adams"), a surveyor, in support of the City's argument that it possesses a roadway easement traversing Tostado's property.[4]

[4] Adam's expert report had been previously admitted as evidence in the First Lawsuit between the City and Tostado's parents.

Tostado filed a partial motion for traditional summary judgment and no-evidence motion for summary judgment. In his combined motion, Tostado argued the City had presented no evidence that a public right-of-way or easement existed traversing his property. He also argued the evidence satisfied each element of his claims against the City. The City responded arguing Tostado's motions were premature because the trial court had not yet ruled on the City's plea to the jurisdiction. Alternatively, the City argued that Tostado's motions failed as a matter of law because the City possessed an easement traversing Tostado's property and, even if the City had taken his property, Tostado's inverse condemnation claim failed because it was barred by limitations. The City amended its answer to add the affirmative defense of limitations. Tostado responded to the City's third amended plea to the jurisdiction arguing the City's immunity was waived, enforcement of the 1995 Judgment was within the trial court's jurisdiction, and res judicata barred the City's affirmative defense of immunity.

The City supplemented its summary judgment response to include Adams' deposition testimony to support its argument that Tostado's inverse condemnation claim was time-barred. The City also replied to Tostado's response to the City's third amended plea to the jurisdiction arguing the City possessed a roadway easement traversing Tostado's property and further that Tostado's inverse condemnation claim was barred by limitations.

Following a hearing, the trial court denied the City's third amended plea to the jurisdiction.[5] This interlocutory appeal ensued.[6]

Discussion

In four issues, the City challenges the trial court's denial of its third amended plea to the jurisdiction. First, it argues Tostado's trespass-to-try-title claim is barred by governmental immunity and the applicable statute of limitations. Second, it contends that despite Tostado's characterization of his trespass-to-try-title claim as a declaratory judgment action, his claim is barred by the City's governmental immunity. Third, it argues that Tostado's takings claim fails as a matter of law because the City owns an easement traversing the Lobit Tract and the claim is barred by limitations. Last, the City asserts that Tostado's common law claim alleging "easement violations" fails because it is not a recognized cause of action under Texas law, does not fall within any limited waiver of immunity, and is time-barred.

A. Subject Matter Jurisdiction

Subject matter jurisdiction is essential to a court's jurisdiction to decide a case. *City of DeSoto v. White*, 288 S.W.3d 389, 393 (Tex. 2009). The plaintiff bears the burden of demonstrating the trial court has subject matter jurisdiction over

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5 The record does not include a reporter's record of the hearing on the City's plea.

6 *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (authorizing interlocutory appeal from trial court's order denying governmental unit's challenge to subject matter jurisdiction).

his case. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). 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); *TitleMax of Tex., Inc. v. City of Austin*, 639 S.W.3d 240, 245 (Tex. App.—Houston [1st Dist.] 2021, no pet.). In general, we analyze jurisdiction separately for each claim. *See Schmitz v. Denton Cty. Cowboy Church*, 550 S.W.3d 342, 352 (Tex. App.—Fort Worth 2018, pet. denied); *Trant v. Brazos Valley Solid Waste Mgmt. Agency, Inc.*, 478 S.W.3d 53, 58 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). We review a trial court's ruling on a plea to the jurisdiction de novo. *See 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. Vallejo*, 371 S.W.3d 499, 501 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

There are two general categories of pleas to the jurisdiction: (1) those that challenge only the pleadings, and (2) those that present evidence to challenge the existence of jurisdictional facts. *Texas Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004). When a plea to the jurisdiction challenges only the pleadings, we determine whether the pleader has alleged facts establishing the court's jurisdiction to hear the case. *Id.* at 226. Our de novo review looks to the pleader's intent and construes the pleadings in its favor. *Id.* If the plaintiff fails to

plead facts establishing jurisdiction, but the petition does not show incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Id.* at 226–27. On the other hand, "[i]f the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend." *Id.* at 227.

Review of a plea challenging the existence of jurisdictional facts mirrors the standard of review on a motion for summary judgment. *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 [its] 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). A court may consider evidence necessary to resolve a dispute over 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. If the defendant meets its burden to establish the trial court lacks jurisdiction, the

plaintiff is then required to show there is a question of material fact over the jurisdictional issue. *Id.* at 227–28. If the evidence raises a fact issue concerning jurisdiction, the plea cannot be granted, and the 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. *Garcia*, 372 S.W.3d at 635.

B. Governmental Immunity

Sovereign immunity and its counterpart for political subdivisions, governmental immunity, protect the State and its political subdivisions, including counties, cities, and municipalities, from lawsuits and liability for money damages. *Garcia*, 253 S.W.3d at 655 & n.2; *see also Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). "Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction." *Miranda*, 133 S.W.3d at 225–26.

"Absent a valid statutory or constitutional waiver, trial courts lack subject-matter jurisdiction to adjudicate lawsuits against municipalities." *Suarez v. City of Texas City*, 465 S.W.3d 623, 631 (Tex. 2015). The trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed. *Miranda*, 133 S.W.3d at 226.

C. Trespass-to-Try-Title and Declaratory Judgment Claims

In its first and second issues, the City argues that governmental immunity bars Tostado's trespass-to-try-title claim and that his characterization of the claim as a declaratory judgment action under Section 37.004 of the Uniform Declaratory Judgments Act does not effect a waiver of the City's immunity. The City argues that Tostado's suit does not involve a dispute over the proper boundary line between Tostado's property and City-owned property, as Tostado claims. Rather, the lawsuit concerns whether the City possesses an easement traversing Tostado's property, which does not waive the City's immunity from suit. The City further argues that Tostado's claim is barred by the applicable statute of limitations.

Tostado responds that his claim is not barred by immunity because he seeks a declaration that he is the rightful owner of the Lobit Tract by virtue of the 1995 Judgment establishing his predecessors-in-interest's ownership of the property and, therefore, his own. He argues that because he seeks redress under Section 37.004 of the Uniform Declaratory Judgments Act, he need not establish an independent waiver of immunity. Tostado finally argues that his claim is not time-barred.

1. Applicable Law

In Texas, a trespass-to-try-title claim is generally the exclusive method for adjudicating disputed claims for title to real property. *See* TEX. PROP. CODE § 22.001(a) ("A trespass to try title action is the method of determining title to lands,

tenements, or other real property."); *Texas Parks and Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 389 (Tex. 2011). In a trespass-to-try-title action, an owner sues to recover immediate possession of land unlawfully withheld. *Sawyer Trust*, 354 S.W.3d at 391. Sovereign immunity bars a "suit for land" against the State or its agency. *State v. Lain*, 349 S.W.2d 579, 582 (1961). "A 'suit for land' necessarily includes a trespass-to-try-title claim." *Koch v. Tex. Gen. Land Off.*, 273 S.W.3d 451, 455–56 (Tex. App.—Austin 2008, pet denied). Sovereign immunity thus bars a trespass-to-try title claim against the State. *See id*. (concluding landowner's claims concerning extent of Texas General Land Office's mineral estate rights were claims disputing title to real property and therefore barred by sovereign immunity). Similarly, when a trespass-to-try-title action is asserted against a city, governmental immunity bars the claim and the trial court lacks subject matter jurisdiction. *See Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 741 (Tex. 2019) ("As an extension of sovereign immunity, governmental immunity protects political subdivisions performing governmental functions as the state's agent."); *see also City of San Antonio v. Davila*, No. 04-20-00478-CV, 2021 WL 3376949, at *2 (Tex. App.—San Antonio Aug. 4, 2021, pet. denied) (mem. op.) (concluding city retained governmental immunity and trial court lacked jurisdiction where plaintiffs asserted only trespass-to-try-title action based on adverse possession); *City of Dallas v. Turley*, 316 S.W.3d 762, 773 (Tex. App.—Dallas 2010, pet. denied) (holding trial

court did not err in dismissing landowners' claim for title to property by adverse possession against city where landowners did not allege any statutory provision by which city clearly and unambiguously waived its governmental immunity).

The Uniform Declaratory Judgments Act ("UDJA") is remedial in nature and seeks "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." TEX. CIV. PRAC. & REM. CODE § 37.002. While the UDJA waives sovereign immunity for certain claims, it is not a general waiver of immunity. *Sawyer Trust*, 354 S.W.3d at 388. The UDJA is "merely a procedural device for deciding cases already within a court's jurisdiction . . . ." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). Consequently, a UDJA claim against a city is barred by governmental immunity unless the Legislature has waived immunity for that claim. *See Sawyer Trust*, 354 S.W.3d at 389; *City of Houston v. Williams*, 216 S.W.3d 827, 828–29 (Tex. 2007). The UDJA does not generally create an exception to a state's immunity from suit for claims involving title to land. *See Sawyer Trust*, 354 S.W.3d at 388–89 (stating trespass-to-try-title action against State is barred by sovereign immunity even if it is brought as declaratory judgment action under UDJA where State has not consented to suit); *Koch*, 273 S.W.3d at 455 ("It follows, then, that if a claim for declaratory relief against a state agency is, in effect, an attempt to establish title, sovereign immunity bars the claim absent legislative consent.").

"In 2007, the Texas Legislature added an exception to the rule that a trespass-to-try-title claim is the exclusive method for adjudicating disputed claims for title to real property." *Sawyer Trust*, 354 S.W.3d at 389. Under Section 37.004(c) of the UDJA, a person interested under a deed, will, written contract, or other writings constituting a contract may obtain a determination of title based on a property boundary line "when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties." TEX. CIV. PRAC. & REM. CODE § 37.004(c).[7]

Tostado asserts that Section 37.004 is a waiver of immunity that allows him to pursue his trespass-to-try title and declaratory judgment claims against the City.

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[7] Section 37.004 of the UDJA provides, in relevant part:

> (a) A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.
>
> . . . .
>
> (c) Notwithstanding Section 22.001, Property Code, a person described by Subsection (a) may obtain a determination under this chapter when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties.

TEX. CIV. PRAC. & REM. CODE § 37.004.

The question before us is thus whether Section 34.007(c) is applicable, and if so, whether it waives the City's immunity for Tostado's trespass-to-try-title and declaratory judgment claims.

2. Analysis

In his response to the City's plea and on appeal, Tostado contends that "[w]hen asserting a claim under section 37.004 [of the UJDA], as [he] has here, 'no consent or waiver of governmental immunity is required' because 'the suit seeks only a declaration or enforcement of rights.'" In his brief on appeal, Tostado argues that his trespass-to-try-title and declaratory judgment claims "fall[] squarely within section 37.004(c) [of the UDJA], as [he] seeks a determination of the boundary between his property and the City's, as they are adjoining property holders," and thus the City's immunity is waived. Based on the record, we disagree.

"The central test for determining jurisdiction is whether the 'real substance' of the plaintiff's claims falls within the scope of a waiver of immunity from suit." *Sawyer Trust*, 354 S.W.3d at 389. In his second amended petition, under the heading "Facts That Apply to All Causes of Action and The Injunction Application," Tostado alleges that the City "has entered upon and exercised dominion and control over [his] private property and has obstructed and/or destroyed easements that allow [his] access to [his] private property" and he enumerates the City's alleged wrongful actions. Under the heading "Declaratory Judgment," Tostado seeks a declaration

and enforcement of the property rights (1) bestowed in the 1995 Judgment and his 2003 deed, (2) in the abandoned Windemere Road, and (3) in the easement appurtenant to the road. Thus, the record shows that the real substance of Tostado's pleadings and arguments does not concern, as Tostado argues, the proper boundary line between City-owned property and Tostado's Lobit Tract, but rather whether a public right-of-way easement that traverses Tostado's property exists and whether the City owns such an easement. Indeed, Tostado argues that "[t]he City has never identified an instrument filed in the Galveston County deed records where [he]—or anyone in his chain of title—dedicated a public roadway or easement across the property" or provided "any document, signed by someone in [Tostado's] chain-of-title creating an easement across [his] property" concluding that none of the City's allegations, even if true, "could have created an easement."

As pleaded, and as explained by Tostado below and on appeal, Tostado's claim for declaratory relief and his related trespass claim, which he seeks to pursue under Section 37.004 of the UDJA, are claims against the City to determine the existence and ownership of an easement. Section 37.004(c) of the UDJA is thus inapplicable and does not effect a waiver of the City's immunity from suit.[8] *See*

[8] Because we conclude Section 37.004(c) is inapplicable, we do not decide whether Section 37.004(c) waives the City's governmental immunity from suit for boundary disputes. *See Texas Parks and Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 389 (Tex. 2011) ("We need not decide whether section 37.004(c) effects a waiver of the State's immunity from suit for boundary disputes because this controversy is not

Sawyer Trust, 354 S.W.3d at 384 (holding that Section 37.044(c) was inapplicable because the real substance of the controversy between the parties was not over the boundary line between State-owned land and Trust-owned land); *Armstrong DLO Props., LLC v. Furniss*, No. 05-13-01581-CV, 2015 WL 265653, at *14 (Tex. App.—Dallas Jan. 21, 2015, no pet.) (mem. op.) (concluding that Section 37.004(c) was inapplicable where record showed controversy was not over boundary between land owned by property company and land owned by homeowners but instead involved rival claims to ownership of entire front strip of land); *Lile v. Smith*, 291 S.W.3d 75, 78 (Tex. App.—Texarkana 2009, no pet.) (concluding section 37.004(c) was inapplicable where plaintiff's petition did not dispute location of boundary but rather sought declaration that plaintiffs were owners of disputed property by virtue of deed and granting them "ownership" of property; thus "issue was not one of the location of a boundary but was, instead, the determination of the title to a well-defined parcel of land").[9]

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over the boundary between State-owned land and Trust-owned land; rather it is over whether the State owns any land at all.").

[9] In his original petition and first amended petition, Tostado alleged a cause of action for trespass to try title. In his second amended petition, he appears to assert a cause of action for intentional trespass. Notwithstanding the nature of Tostado's trespass claim, he seeks to pursue the claim under Section 37.004 of the UDJA. For the reasons articulated, Section 37.004 is not applicable and thus Tostado's claim is barred by the City's immunity. *See Sawyer Trust*, 354 S.W.3d at 388–89 ("When in this state the sovereign is made a party defendant to a suit for land, without legislative consent, its plea to the jurisdiction of the court based on sovereign

The trial court erred in denying the City's plea to the jurisdiction for Tostasdo's trespass-to-try title and declaratory judgment claims. We sustain the City's first and second issues.[10]

D. Inverse Condemnation Claim

In its third amended plea, the City contended generally that Tostado failed to plead sufficient facts establishing the City's immunity was waived for his takings claim. The City disagreed with Tostado's assertion that its actions constituted a taking but argued that, even if they did, Tostado's takings claim is time-barred. Tostado responded that "his primary cause of action arises from the fact that his real property was taken, damaged or destroyed for public use by the City in violation of Section 17 of Article 1 of the Texas Constitution." Tostado argued that his affidavit attached to his first supplemental petition adequately described the City's intentional acts and that those acts constituted a taking of his property for public use without compensation.

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immunity should be sustained . . . .") (citing *State v. Lain*, 349 S.W.2d 579, 582 (Tex. 1961)).

[10] Having concluded that Tostado's trespass-to-try-title claim is barred by the City's immunity, we need not reach the City's additional argument that his claim is barred by the statute of limitations. We further note that the City did not assert a statute-of-limitations argument as to Tostado's trespass-to-try-title claim either in its original plea or in its amended pleas to the jurisdiction.

1. Applicable Law

The Texas Constitution provides a limited waiver of a governmental unit's immunity from suit when property is taken, damaged, or destroyed for public use without adequate compensation. *See* TEX. CONST. art. I, § 17; *see also Gen. Servs. Comm'n v. Little–Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001); *Gulf Coast Waste Disposal Auth. v. Four Seasons Equip., Inc*., 321 S.W.3d 168, 173 (Tex. App.—Houston [1st Dist.] 2010, no pet.).[11] If the government appropriates property without paying adequate compensation, the owner may bring an inverse condemnation claim to recover the resulting damages. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). An inverse condemnation may occur when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development. *Id*.

To plead a valid inverse condemnation claim and establish waiver of immunity under the takings clause, a plaintiff must allege that the governmental entity (1) intentionally performed certain acts in the exercise of its lawful authority (2) that resulted in taking, damaging, or destroying the plaintiff's property (3) for

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[11] Article I, Section 17 of the Texas Constitution, known as the "takings clause," provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . ." TEX. CONST. art. I, § 17(a).

public use. *Gen. Servs. Comm'n*, 39 S.W.3d at 598*; Flores v. City of Galveston*, No. 01-20-00042-CV, 2022 WL 120018, at *9 (Tex. App.—Houston [1st Dist.] Jan. 13, 2022, no pet.) (mem. op.). A claimant pleads the necessary intent for a constitutional takings claim by alleging the governmental entity knew that a specific act would cause the resulting identifiable property damage or knew the specific property damage was substantially certain to result from the government action. *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004); *San Jacinto River Auth. v. Burney*, 570 S.W.3d 820, 833 (Tex. App.—Houston [1st Dist.] 2018), *aff'd*, 627 S.W.3d 618 (Tex. 2021). A governmental entity does not have immunity from a valid takings claim. *Little–Tex Insulation Co.*, 39 S.W.3d at 598. If, however, the plaintiff fails to allege a valid takings claim, the governmental entity retains its immunity from suit. *Id.* "Whether particular facts are enough to constitute a taking is a question of law." *Id.*

2. Sufficiency of the Pleadings

Tostado's second amended petition alleges that (1) the land acquired by the City surrounds Tostado's Lobit Tract but did not originally "landlock" his property because Windemere and McFarland Roads "were attached to the property;" (2) the City closed off the two roads landlocking Tostado's Lobit Tract and destroying its value; and (3) the City "has entered upon and exercised dominion and control" over Tostado's property by (a) cutting off Tostado's right-of-way and easement granting

access to his property via Windemere and McFarland Roads, (b) placing locked gates on Windemere Road and placing fences and pedestrian-locked gates blocking access to McFarland Road, (c) placing obstructions on all paths through the park preventing motorized vehicles from traversing the park and reaching Tostado's property, (d) closing Windemere Road and McFarland Road thereby cutting off Tostado's vehicular access to his property, (e) prohibiting motorized vehicles from entering the City's park thereby cutting off Tostado's access to his property, (f) entering upon Tostado's land without his permission and erecting fences preventing him and others from accessing his property by vehicle, (g) entering upon Tostado's land without his permission to erect exercise equipment and park benches, install sidewalks, and erect a bridge/boardwalk traversing three-quarters of Tostado's property thereby blocking access to his property, and (h) directing others to use and trespass upon Tostado's property without his permission.

Under the heading "Inverse Condemnation," Tostado alleges that the City's acts "constitute an intentional taking, damaging, or destruction of [his] property, for public use in violation of Section 17 of Article l of the Constitution" because the City "had and has actual knowledge that the closing of Windemere Road, the intentional abandonment of the Windemere Road easement and right-of-way, the fencing and erection of permanent improvements upon [Tostado's] property and the entire Windemere Road easement, and the use of the lake portion of [Tostado's]

property as a public lake, would occur and will continue in the future or that the harm was and continues to be substantially certain to occur." Tostado alleges that the City's acts "interfered with [his] use and enjoyment of the property . . . and constitute an intentional, complete taking of [his] property for public use without adequate compensation."

In the affidavit attached to his first supplemental petition, Tostado states that in August 2017, he discovered that the City had encroached on his private property by erecting two padlocked gates on Windemere Road, building obstructions on the road preventing vehicular access to his property, and putting up "No Trespass" signs and cable fences on his property. Tostado stated the City almost completely destroyed the value of his land because he cannot access his private property by vehicle, bring in equipment to build on his property, or sell his property because it can only be reached on foot. Tostado stated that "the City appears to be performing a 'back door' maneuver designed to try and steal [his] land."

Liberally construing Tostado's pleadings, as we must, we conclude they include sufficient facts alleging that (1) the City's actions were intended to, or were known to be substantially certain to, landlock Tostado's property and restrict his access to his property, and (2) the City's actions constituted a taking of his property for public use. *See City of Justin v. Rimrock Enters., Inc*., 466 S.W.3d 269, 282 (Tex. App.—Fort Worth 2015, pet. denied) (concluding evidence was sufficient to

support finding that city knew that, by constructing concrete road on landowner's property, landowner was substantially certain to be harmed, and thus city acted with requisite intent for takings claim, despite city's contention that it believed existing gravel road was public road; evidence showed that city undertook public-works project to improve roads located in its industrial park, including subject road, landowner testified that at some point before city began construction, city officials asked her for right-of-way deed to release property to them, and owner testified that she refused to allow city to perform work on her property but that city proceeded anyway); *Burney*, 570 S.W.3d at 835 (concluding homeowners' pleadings included sufficient facts alleging that river authority's release of water from lake was intended to, or was known to be substantially certain to, result in flooding or exacerbated flooding of homeowners' properties and that river authority's actions constituted taking for public use); *City of Socorro v. Campos*, 510 S.W.3d 121, 128 (Tex. App.—El Paso 2016, pet. denied) (concluding residents adequately alleged actual physical appropriation or invasion of their properties by city and intent element of taking claim with respect to combined effects of city's construction of a water diversion ditch and subsequent funneling of water toward residents' properties years later).

3. Statute of Limitations

The City contends that, even if a taking occurred, Tostado's inverse condemnation claim is time-barred. It argues that the ten-year statute of limitations applicable to inverse condemnation claims began to run, at the latest, on October 10, 2003, when Tostado acquired the Lobit Tract by deed subject to any easements and rights-of-way, and that he did not assert his inverse condemnation claim until February 18, 2019, when he filed his second amended petition.

There is no statutory provision specifically providing a limitations period for inverse condemnation actions. *City of Justin*, 466 S.W.3d at 279; *Trail Enters., Inc. v. City of Houston*, 957 S.W.2d 625, 631 (Tex. App.—Houston [14th Dist.] 1997, pet. denied), *cert. denied*, 525 U.S. 1070 (1999). Texas courts agree, however, that a plaintiff's claim for inverse condemnation is barred after the expiration of the ten-year period of limitations to acquire land by adverse possession. *See Trail Enters.*, 957 S.W.2d at 631; TEX. CIV. PRAC. & REM. CODE § 16.026.[12] A cause of action

[12] *See also, e.g., Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 110 (1961) (holding that ten-year limitations period applied while rejecting claim that two-year limitations barred action for taking that occurred when operation of dam and formation of lake caused flooding of sewage disposal plant); *Waddy v. City of Houston*, 834 S.W.2d 97, 102 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (affirming summary judgment where city established that sewer pipe's installation seventy years before suit was filed was significantly more than ten-year limitations period for inverse condemnation); *Hudson v. Arkansas Louisiana Gas Co.*, 626 S.W.2d 561, 563 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) (reversing summary judgment where trial court failed to apply ten-year limitations period to inverse condemnation claim); *Hubler v. City of Corpus Christi*, 564 S.W.2d 816,

accrues for limitations purposes when facts come into existence authorizing a claimant to seek a judicial remedy. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex.1990). For adverse possession cases, a cause of action accrues and limitations begin to run when entry upon the land is made. *City of Justin*, 466 S.W.3d at 279; *Trail Enters.*, 957 S.W.2d at 631; *Waddy v. City of Houston*, 834 S.W.2d 97, 103 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (noting evidence showing that city installed sewer pipe across landowner's property established date of taking for purposes of determining when owner's inverse condemnation claim accrued).

In support of its statute-of-limitations argument, the City points to Tostado's testimony that he acquired title to the Lobit Tract in 2003 subject to any easements and rights-of-way, that an easement traverses his property, and that the 1995 Judgment expressly identified a roadway easement traversing Tostado's property. Thus, the City reasons, the ten-year statute of limitations began to run, at the latest, on October 10, 2003, when Tostado acquired the Lobit Tract with knowledge that an easement existed. The City argues that because Tostado did not assert his inverse condemnation claim until February 18, 2019, when he filed his second amended petition, his claim is time-barred. We find this argument unavailing.

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823 (Tex. App.—Corpus Christi 1978, writ ref'd n.r.e.) (distinguishing ten-year limitations period for "taking" from two-year period for "damaging" of property).

The evidence shows that the City began construction of Lake of Friendswood Park in 2016 or 2017. In his affidavit, Tostado testified that "when the City of Friendswood was deeded the property and when I acquired my interest from my parents, my land was NOT landlocked. I had roads and easements that gave me free ingress and egress to my private property." He testified that "[i]n August 2017, I discovered that the City of Friendswood had encroached on the private property that I own" and that "I do not live on the property and discovered the problem when I visited my private property." He testified that the City had installed two padlocked gates and erected obstructions (sidewalks, boardwalks, park benches, signs, and a fence) leading up to and on his property, without notice to him and without his permission. Tostado filed suit in January 2018 and amended his petition to add a claim for inverse condemnation in February 2019, well within the ten-year period for limitations purposes. Tostado's inverse condemnation claim is not time-barred. *See City of Justin*, 466 S.W.3d at 279 (explaining that cause of action for takings claim accrues and limitations begins to run when entry upon land is made); *Trail Enters.*, 957 S.W.2d at 631 (explaining that inverse condemnation claim is subject to ten-year statute of limitations).

We overrule the City's third issue.

E. Easement Violations

In its fourth issue, the City contends that Tostado's common-law claim for "easement violations" does not exist under Texas law or fall within the limited waiver of governmental immunity under the Texas Tort Claims Act. It argues that even if Tostado had asserted a valid claim for "easement violation," his claim is time-barred. Tostado responds that he has pleaded multiple causes of action that are covered by the Texas Tort Claims Act.

In his second amended petition, under the heading "Second Cause of Action, Easement Violation Under Texas Tort Claims Act (Texas Civil Practice and Remedies Code Chapter 101)," Tostado alleges that he is the owner of the dominant estate and "has an easement to access his property that is implied from existing use" of the subservient estate owned by the City. He alleges that the City "acted—and continues to act—ultra vires in its proprietary capacity when it interfered with his easement rights, and is not entitled to governmental immunity" In the alternative, he alleges that the City's actions in "constructing and operating a city park on and completely around" his property denied him the use and enjoyment of his property and caused a diminution in the value of his property, and that the City is liable for damages under the Texas Tort Claims Act.

Section 101.021 of the Texas Tort Claims Act ("TTCA") provides that a governmental unit in the state is liable for:

> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> > (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
> >
> > (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE § 101.021. Tostado's claim that the City "interfered with his easement rights" and "denied him the use and enjoyment of his property" by constructing and operating a park on and around his property alleges neither (1) that the damage to his property was caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment nor (2) that the damage arose from the operation or use of a motor-driven vehicle or motor-driven equipment.[13] *See id.* Tostado's allegations do not state a claim under the TTCA for which the City's immunity is waived.

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[13] Tostado does not allege that the City is liable for personal injury or death caused by a condition or use of tangible personal or real property. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(2).

Tostado's allegation that the City acted and continues to act ultra vires by interfering with his easement rights fares no better. While the ultra vires doctrine is an exception to sovereign immunity under which "claims may be brought against a state official for nondiscretionary acts unauthorized by law," the proper defendant in such a case is not the governmental entity itself but the official whose acts or omissions allegedly violated the plaintiff's rights. *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011); *City of Houston v. Hope for Families, Inc.*, No. 01-18-00975-CV, 2020 WL 97176, at *4 (Tex. App.—Houston [1st Dist.] Jan. 9, 2020, no pet.) (mem. op.) (noting ultra vires suit alleges that government employee has acted without legal authority or has failed to perform purely ministerial act) (citing *Houston Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 157–58, 160–61 (Tex. 2016)). Because Tostado's claims are against the City, not City officials, the ultra vires exception is inapplicable.

Because Tostado's allegations of easement violations do not state an actionable claim under the TTCA, the trial court erred in denying the City's plea to the jurisdiction as to such claim. We sustain the City's fourth issue.[14]

[14] Because we conclude that Tostado's claim of easement violation does not state a claim under the TTCA, we need not reach the City's additional argument that his claim is barred by the statute of limitations. We further note that the City did not assert a statute-of-limitations argument as to Tostado's claim of easement violation in the trial court.

Conclusion

We hold the trial court erred in denying the City's plea to the jurisdiction on Tostado's claims for trespass-to-try-title, declaratory judgment, and easement violations. We reverse the portion of the trial court's order denying the City's third amended plea to the jurisdiction as to those claims and remand the case to the trial court with instructions to dismiss Tostado's claims for trespass to try title, declaratory judgment, and easement violations for lack of jurisdiction. We affirm the remainder of the trial court's order.

Veronica Rivas-Molloy
Justice

Panel consists of Justices Landau, Hightower, and Rivas-Molloy.