Affirmed and Memorandum Opinion filed March 15, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00062-CV

IRENE SILVA AND DAVID SILVA, Appellants

V.

THE CITY OF PASADENA, Appellee

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Cause No. 2013-36912

M E M O R A N D U M   O P I N I O N

In this personal-injury case, the plaintiffs challenge the trial court's rulings (a) granting the defendant's plea to the jurisdiction based on governmental immunity, and (b) denying the plaintiffs' motion for new trial. In both issues, the plaintiffs argue that the governmental defendant's plea to the jurisdiction heard on September 12, 2014 was really a motion for summary judgment heard on October 10, 2014, and because they did not have the required twenty-one days' notice of

the summary-judgment hearing, they had no opportunity to respond. Because this argument is not supported by the record, we affirm.

I.

Irene and David Silva were crossing an apartment complex's parking lot when a Pasadena police officer struck Irene with his patrol car. The Silvas sued the City of Pasadena, alleging that the City's governmental immunity was waived under the Texas Tort Claims Act.[1] The City filed a plea to the jurisdiction in which it presented evidence that the officer was entitled to official immunity. It argued that because official immunity shielded the officer from personal liability, the City's governmental immunity likewise remained intact.[2] The City set the plea to be heard on September 12, 2014, thirty-one days before the case was to be tried.

The Silvas failed to timely respond to the jurisdictional plea. They appeared at the hearing through counsel, but the appellate record does not contain a transcript of that proceeding. The plea to the jurisdiction remained pending until the docket call on October 10, 2014, when the trial court signed the order granting the City's plea and dismissing the Silvas' claims with prejudice.

The Silvas moved for a new trial on the sole ground that the plea to the jurisdiction was really a motion for summary judgment, and thus, they were entitled to twenty-one days' notice of the hearing. *See* TEX. R. CIV. P. 166a(c) (requiring such notice of a summary-judgment hearing). They asserted that

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[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–.109 (West 2011 & Supp. 2015). They also sued the police officer, but their claims against him were dismissed. *See id.* § 101.106.

[2] *See id.* § 101.021(1) (providing that a governmental unit is liable for personal injuries proximately caused by the negligence of its employee acting within the scope of employment if the injuries arose from the employee's operation or use of a motor vehicle and "the employee would be personally liable to the claimant according to Texas law"); *id.* § 101.025(a) (waiving immunity from suit "to the extent of liability created by this chapter"); *see also City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994) ("If the officers are immune from suit, they are not 'personally liable to the claimant according to Texas law.'").

because the City asked the trial court to rule on the plea during the docket call on October 10, 2014, the summary-judgment motion was heard on that date. The Silvas argued that the trial court erred in granting the plea to the jurisdiction because the City failed to give them twenty-one days' notice that the "motion for summary judgment" would be heard on October 10, 2014. After the motion for new trial was overruled by operation of law, the Silvas filed a response to the City's jurisdictional plea and a notice of appeal.

II.

This much is undisputed: the City set its jurisdictional plea for a hearing to take place on September 12, 2014. The Silvas were notified of that hearing, and counsel for all parties attended the noticed hearing. The Silvas did not file a response to the plea, and at the docket call on October 10, 2014, the trial court granted the plea based on the City's uncontroverted jurisdictional evidence. The Silvas do not challenge the substance of the plea or the sufficiency of the City's evidence.

The Silvas' arguments for reversal instead are based on their assertions that (a) the City's plea "was not a proper Plea to the Jurisdiction but a Motion for Summary Judgment"; and (b) a hearing on the "Plea to the Jurisdiction/Motion for Summary Judgment" was held without notice on October 10, 2014. Neither the briefs nor the appellate record afford any basis for us to accept either premise.

Despite their insistence that the plea was actually a summary-judgment motion, the Silvas offer no authority, evidence, or even argument to support that position. A party may challenge the trial court's subject-matter jurisdiction using either procedural vehicle. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("The absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for

summary judgment." (footnotes omitted)). Here, the City used a plea to the jurisdiction to challenge the trial court's subject-matter jurisdiction, and thus, the twenty-one-day notice period applicable to motions for summary judgment did not apply. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228–29 (Tex. 2004) (explaining that when a plea to the jurisdiction challenges the jurisdictional facts, the summary-judgment standard of proof applies, but the twenty-one-day-notice requirement does not).

Rather than attempting to explain why they contend that the plea to the jurisdiction was really a motion for summary judgment, the Silvas simply assert that they made this argument at the September 12, 2014 hearing, and the trial court agreed with them. The City disputes this. According to the City, the Silvas asked for an additional twenty-one days to file a response, and the trial court stated that the Silvas were to file a response by October 3, 2014. In an affidavit attached to their motion for new trial, counsel for the Silvas attested to the truth of their version of events; in an affidavit attached to the City's response, its attorney attested to the truth of the City's version. Presented with conflicting evidence, the trial court implicitly rejected the Silvas' version of events by allowing their motion for new trial to be overruled by operation of law.

On the record before us, we cannot say that the trial court abused its discretion in doing so. *See Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (per curiam) (stating that the refusal to grant a motion for new trial is reviewed for abuse of discretion). The appellate record contains no transcript of the September 12, 2014 hearing; no orders continuing or resetting the hearing; no indication that a second hearing was held; no motion for leave for the Silvas to file a late response to the plea; and no order extending the time for the Silvas to respond. The record shows only that after a properly noticed hearing, the

trial court granted the plea to the jurisdiction based on the uncontroverted evidence.

We overrule the issues presented and affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, McCally, and Busby.