

Affirmed and Memorandum Opinion filed March 29, 2016.



In The

Fourteenth Court of Appeals

NO. 14-15-00176-CV

**JOSLYN M. JOHNSON, INDIVIDUALLY AND AS EXECUTRIX FOR
THE ESTATE OF RODNEY JOHNSON, DECEASED, Appellant**

V.

CITY OF HOUSTON, Appellee

**On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 2008-53919**

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

Appellant Joslyn Johnson is a sergeant in the Houston Police Department and the widow of Houston Police Officer Rodney Johnson. Ten years ago, Rodney was killed in the line of duty by a man who was present in this country illegally, and who subsequently was convicted of Rodney's murder. Joslyn sued the City of Houston for actual and exemplary damages and declaratory relief, alleging, *inter alia*, that Rodney's death was proximately caused by a Houston Police Department

general order that violated federal law in that it permitted officers to contact federal immigration authorities only regarding a person arrested on a separate criminal charge other than a class C misdemeanor, and only if the officer knew that the person was in the country illegally.

The City filed a plea to the jurisdiction in which it argued that Joslyn's claims were barred by governmental immunity and by the exclusive-remedy provision of the Texas Workers' Compensation Act. The City also moved for traditional and no-evidence summary judgment on various grounds. The trial court granted the plea to the jurisdiction, and in the alternative, it granted the City's motion for summary judgment.

Joslyn appeals both rulings. Because the trial court did not err in granting the City's plea and in dismissing Joslyn's claims with prejudice, we affirm the judgment without reaching the merits of her claims.

I. BACKGROUND

The factual background to Joslyn's lawsuit through the first half of 2011 is recounted in our opinion in an earlier appeal in this case. *See City of Houston v. Johnson*, 353 S.W.3d 499, 501–02 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (“*Johnson I*”). In that appeal, we reversed the trial court's denial of the City's plea to the jurisdiction regarding Joslyn's claim for exemplary damages based on the City's alleged gross negligence in causing Rodney's death, and her claim that the unavailability of such a claim violated her right to equal protection under the Texas Constitution. *Id.* at 505–06. Because Joslyn had other claims against the City that were still pending in the trial court when *Johnson I* was decided, we remanded the case with instructions to the trial court to sever Joslyn's gross-negligence and equal-protection claims from the remainder of the case and dismiss them with prejudice. *Id.* at 506.

After the case was returned to the district court, the City removed it to federal court, which remanded it back to the district court, where Joslyn amended her petition several more times. In her ninth amended petition, Joslyn continued to assert that Rodney's death was caused by the City's gross negligence and intentional conduct, and she continued to seek actual damages, exemplary damages, and declaratory relief. She did not allege any facts showing a waiver of the City's governmental immunity.

In its plea to the jurisdiction, the City argued, among other things, that Joslyn "cannot recast her claims to avoid an immunity bar," and that recovery of workers' compensation benefits was Joslyn's exclusive remedy against the City for Rodney's death. In the same document, the City also sought traditional summary judgment on the grounds of *res judicata*, the law of the case, and the exclusive-remedy provisions of the Texas Workers' Compensation Act,

Joslyn responded by objecting to the City's motion for summary judgment and filing a verified motion for continuance to respond to the City's summary-judgment motion. She did not file a response to the City's plea to the jurisdiction. At the conclusion of the hearing on the plea, the trial court said it would take the matter under advisement, and would let the parties know if another hearing were necessary. The trial court additionally stated that if another hearing were not necessary, it would rule either on the City's plea to the jurisdiction or on Joslyn's motion to continue the summary-judgment hearing.

When nearly eight months had passed without a ruling, the City filed a motion for entry of judgment on its plea to the jurisdiction, or in the alternative, on its motion for summary judgment. Joslyn filed a response to the motion for entry of judgment, but did not address the issues of governmental immunity and the exclusive-remedy provisions of the Texas Workers' Compensation Act.

The trial court rendered final judgment granting the City's plea to the jurisdiction on all of Joslyn's claims, and in the alternative, granting the City's motion for summary judgment.

II. ISSUES

In two issues, Johnson argues that (a) the trial court erred in granting the plea to the jurisdiction because Houston Police Department General Order 500-05 violates federal statutes, and (b) the trial court erred in granting summary judgment because there had not been adequate time for discovery.

III. PLEA TO THE JURISDICTION

A defendant seeking dismissal of a case for want of jurisdiction may file a plea to the jurisdiction challenging the plaintiff's pleadings or challenging the existence of jurisdictional facts. *See City of Waco v. Kirwan*, 298 S.W.3d 618, 621–22 (Tex. 2009). Where, as here, a plea to the jurisdiction challenges the plaintiff's pleadings, we determine whether the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We review this question of law de novo. *Id.* In doing so, we liberally construe the pleadings, taking all factual assertions as true and looking to the pleader's intent. *See City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015) (per curiam). If the pleading's factual allegations do not affirmatively demonstrate that the trial court has jurisdiction, but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency, and the plaintiff should be afforded an opportunity to amend. *See Miranda*, 133 S.W.3d at 226–27. If the pleadings affirmatively negate jurisdiction, then the court should sustain the plea and dismiss the suit without allowing the plaintiff an opportunity to amend. *See id.* at 227.

A. Governmental Immunity

Under the common-law doctrine of sovereign immunity, the state cannot be sued without its consent. *See City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). Sovereign immunity encompasses both immunity from suit and immunity from liability. *See Miranda*, 133 S.W.3d at 224. Absent waiver, political subdivisions of the state are entitled to the same immunity, which is then referred to as governmental immunity. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006) (op. on reh'g).

Home-rule cities like Houston derive their powers from the Texas Constitution, and have “all the powers of the state not inconsistent with the Constitution, the general laws, or the city’s charter.” *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007) (quoting *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998) (sub. op.)). Thus, when a home-rule city is sued for its performance of a governmental function and responds with a plea to the jurisdiction, courts do not ask whether any statute grants immunity from suit, but whether any statute limits the city’s immunity from suit. *See id.* The party suing the governmental entity must establish that the governmental entity waived its immunity from suit, “which may be alleged either by reference to a statute or to express legislative permission.” *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam).

B. Failure to Make a Jurisdictional Argument

On appeal, Joslyn makes a single argument for reversing the judgment granting the plea to the jurisdiction. She argues that the Houston Police Department General Order No. 500-05 violates federal law, and that this alleged violation of federal law is a producing or proximate cause of Rodney’s death. She made a similar argument to this court in the earlier appeal in this case. *See*

Johnson I, 353 S.W.3d at 503 (Johnson argued that Texas law should recognize a waiver of immunity “when a political subdivision’s alleged disregard of state and federal law ‘creates an unnecessary risk of fatality to those charged with the day to day safeguarding of Texans and their communities.’”).

Just as we did when Joslyn first advanced this position, we must reject it, because “[n]o statute or other act of the legislature waives immunity from suit in the circumstances Joslyn describes.” *Id.* Indeed, Joslyn does not contend otherwise. She does not argue that the City has waived its governmental immunity from suit. She also does not dispute that under the Texas Workers’ Compensation Act, recovery of workers’ compensation benefits is a legal beneficiary’s exclusive remedy against a governmental employer for the death of a covered employee. *See City of Bellaire v. Johnson*, 400 S.W.3d 922, 923–24 (Tex. 2013) (per curiam) (holding that a city asserting governmental immunity based in part on the exclusive-remedy provisions of the Texas Workers’ Compensation Act was entitled to dismissal of the injured workers’ claims); *see also* TEX. LAB. CODE ANN. § 408.001 (West 2015) (describing the general bar, but permitting recovery of exemplary damages by certain heirs of an employee whose death was caused by the employer’s gross negligence or by its intentional act or omission); *id.* § 504.002 (providing that the exemplary-damages exception does not apply to a political subdivision, and that Chapter 504 does not authorize “a cause of action or damages against a political subdivision . . . beyond the actions and damages authorized” by the Texas Tort Claims Act); TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(3) (West 2011) (stating that the Texas Tort Claims Act does not apply to a claim arising from the method of providing police protection). Finally, Joslyn admits that she received workers’ compensation benefits. Her lawsuit against the City accordingly is barred.

Because the trial court did not err in granting the City's plea to the jurisdiction, we overrule Joslyn's first issue. We do not reach Joslyn's second issue, in which she challenges the trial court's alternative ruling granting the City's motion for summary judgment.

III. CONCLUSION

Because governmental immunity and the exclusive-remedy provision of the Texas Workers' Compensation Act bar Joslyn's claims, the trial court did not err in granting the City's plea to the jurisdiction and dismissing her claims with prejudice. We affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, McCally, and Busby.