Affirmed and Memorandum Opinion filed May 31, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01053-CV

CITY OF TEXAS CITY, Appellant

V.

JOYCE WOODKINS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 15-CV-0228

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

Appellee Joyce Woodkins sued appellant City of Texas City for injuries she suffered in a bicycle accident at the city-owned Carlos Garza Sports Complex. Woodkins alleged the City waived its governmental immunity under the Texas Tort Claims Act because her injury was caused by a premise defect: an uncovered drain trench. The City filed a plea to the jurisdiction, arguing that it was immune from Woodkins's suit because evidence showed it did not have actual knowledge

of the alleged defect. The trial court denied the City's plea, and the City filed this interlocutory appeal.

For the reasons stated below, we conclude that the City failed to meet its burden to show there is no genuine issue of material fact as to its actual knowledge of the alleged defect. We therefore affirm the trial court's order.

BACKGROUND

In her petition, Woodkins alleged that she was riding her bicycle on a sidewalk in the Carlos Garza Sports Complex when she unexpectedly crashed into an "uncovered and unmarked trench" that caused her to fall. As a result, Woodkins sustained multiple injuries.[1] The trench extends across the sidewalk and is six inches deep and thirty inches wide. The trench serves as a drain, directing rain runoff from the parking lot across the sidewalk into a grassy area.

There are two trench drains that cross the sidewalk where Woodkins fell. Each drain was designed to be covered by a 169-pound metal plate; the edges of the plate sit in an indentation in the adjacent sidewalk so that the plate's top is flush with the sidewalk. According to Woodkins, one of the drains was missing its metal plate when she encountered it.

Woodkins sued the City, alleging negligence and gross negligence. She also alleged that the City had waived its immunity under provisions of the Texas Tort Claims Act and the recreational use statute because the case involved premise and special defects and misuse of tangible personal property.[2]

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[1] Under the standard of review applicable to a trial court's denial of a plea to the jurisdiction, we take all facts alleged by the plaintiff and not challenged by the defendant as true. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

[2] Woodkins also alleged the doctrine of attractive nuisance, but she has affirmatively abandoned it on appeal. We therefore do not discuss attractive nuisance or the jurisdictional arguments made to the trial court regarding the doctrine.

The City filed an answer followed by a plea to the jurisdiction. In its plea, the City argued, in part, that the recreational use statute limits the governmental unit's liability for premise defects when the injured party is engaged in a recreational activity. The City argued that under the statute, it did not owe Woodkins a greater degree of care than that owed to a trespasser, and therefore the City could be liable (and its immunity waived) only if it was grossly negligent or acted with malicious intent or bad faith. According to the City, Woodkins could not establish gross negligence without evidence that the City had actual knowledge of the alleged premise defect, which the evidence did not show. The City included affidavits from two city employees who testified that a crew member was assigned to the complex for routine maintenance on the day of the incident and the two previous days, but there was no work request regarding the drain or cover.

After a hearing, the trial court denied the City's plea. This appeal followed.

ANALYSIS

In two issues, the City argues that the trial court erred in denying the City's plea to the jurisdiction. We address these issues together and affirm the trial court's order.

I. Standard of review

Political subdivisions of the state, including cities, are entitled to immunity from suit under the common-law doctrine of governmental immunity. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Under this doctrine, the City is not liable for the torts of its agents unless there is a constitutional or statutory waiver of immunity. *City of Houston v. Daniels*, 66 S.W.3d 420, 424 (Tex. App.—Houston [14th Dist.] 2001, no pet.). A city may raise its immunity from suit in a plea to the jurisdiction, and we review the trial court's ruling on a plea de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133

S.W.3d 217, 226, 228 (Tex. 2004). We must uphold the trial court's order denying the City's plea to the jurisdiction on any legal theory properly before the court. *See Carroll Indep. Sch. Dist. v. Nw. Indep. Sch. Dist.*, 245 S.W.3d 620, 625 n.19 (Tex. App.—Fort Worth 2008, pet. denied) (citing *Guar. County Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex.1986)).

A plea to the jurisdiction may challenge whether the facts alleged in the petition support a cause of action for which immunity has been waived; it may also challenge the existence of the alleged jurisdictional facts. *City of Houston v. Ranjel*, 407 S.W.3d 880, 887 (Tex. App.—Houston [14th Dist.] 2013, no pet.). When the plea disputes that the facts alleged are sufficient to show a waiver of immunity, we construe the pleadings liberally in favor of the plaintiff, taking all factual assertions as true and looking to the pleader's intent. *Miranda*, 133 S.W.3d at 226. We also "take as true all evidence favorable to the non-movant [and] indulge every reasonable inference and resolve all doubts in the non-movant's favor." *Id*. at 228. A plaintiff generally will not be required to marshal evidence and prove a claim just to overcome a plea to the jurisdiction. *See Mission Consol. Indep. Sch. Dist. v. Garcia,* 372 S.W.3d 629, 637 (Tex. 2012). If the plaintiff alleges basic facts adequate to establish the elements of a claim such that the court can determine whether it is barred by immunity, then the plaintiff will only be required to submit evidence if the defendant presents evidence negating one of those basic facts. *Id.*

When the plea challenges the facts alleged and offers contrary evidence, the standard of review "generally mirrors that of a [traditional] summary judgment." *Miranda*, 133 S.W.3d at 228. As movant, the City has the burden to prove there are no genuine issues of material fact and that the trial court lacks jurisdiction as a matter of law. *See id*. at 227–28. In other words, the governmental unit must

conclusively negate at least one essential element of the pleaded cause of action for which immunity has been waived. *City of San Antonio v. Peralta*, 476 S.W.3d 653, 656, 660 (Tex. App.—San Antonio 2015, no pet.) (citing *Miranda*, 133 S.W.3d at 228); *see KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015) ("In a traditional summary-judgment motion, . . . a defendant who conclusively negates at least one essential element of a cause of action . . . is entitled to summary judgment."). The governmental unit cannot simply deny the existence of jurisdictional facts and force the plaintiff to demonstrate the existence of a fact issue. *See Thornton v. Ne. Harris Cty. MUD 1,* 447 S.W.3d 23, 38 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("A no-evidence motion for summary judgment is not a valid means to attack the existence of jurisdictional facts.").

II. Applicable law

A. Texas Tort Claims Act

The Tort Claims Act provides a limited waiver of sovereign immunity from suit for personal injury "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 Ann. §§ 101.021(2), 101.025 (West 2011); *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 657 (Tex. 2007).[3] If a claimant sues a governmental unit for injuries allegedly caused by a premise defect, the governmental unit generally owes the claimant only the duty that a private person owes a licensee on private property. Tex. Civ. Prac. & Rem. Code Ann § 101.022(a). For injuries allegedly caused by a special defect, such as an excavation or obstruction on a highway, road, or street,

[3] This waiver applies to a municipality exercising its governmental functions, which include operation of parks. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(13).

the governmental unit owes the claimant the greater duty owed to an invitee. *Id*. § 101.022(b); *see City of Denton v. Paper*, 376 S.W.3d 762, 765–766 (Tex. 2012); *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). A licensee seeking to recover from the owner must prove that the owner actually knew of the condition, but an invitee need only prove that the owner knew or reasonably should have known of the condition. *Payne*, 838 S.W.2d at 237.

B. Recreational use statute

When a plaintiff is injured while participating in a recreational activity like bicycling, the recreational use statute limits the Tort Claims Act's waiver of immunity. Tex. Civ. Prac. & Rem. Code §§ 75.001(3)(M) (defining recreation to include bicycling), 101.058; *Miranda*, 133 S.W.3d at 225. The recreational use statute provides that "if a person enters premises owned, operated, or maintained by a governmental unit and engages in recreation on those premises, the governmental unit does not owe to the person a greater degree of care than is owed to a trespasser on the premises." Tex. Civ. Prac. & Rem. Code Ann. § 75.002(f). A premises owner owes a trespasser a common-law duty "not to injure that person willfully, wantonly, or through gross negligence." *Miranda*, 133 S.W.3d at 225; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 75.003 (preserving recreational use liability for deliberate, willful, or malicious injury to a person or to property).

The parties do not dispute the recreational use statute's application to this case. Further, Woodkins does not allege the City acted willfully or wantonly. Therefore, the issue under the recreational use statute is whether the City was grossly negligent.

C. Gross negligence

The recreational use statute does not define gross negligence, but the

Supreme Court of Texas and the Texas Legislature have defined the term as "an act or omission which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk . . . of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others." Tex. Civ. Prac. & Rem. Code Ann. § 41.001(11) (West Supp. 2015); *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006). The City's plea does not challenge Woodkins's allegation that the uncovered trench in the sidewalk was unreasonably dangerous. Thus, for present purposes, what differentiates gross negligence from ordinary negligence is the requirement that the governmental entity had "actual knowledge 'of the dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition c[ould] develop over time.'" *City of Corsicana v. Stewart*, 249 S.W.3d 412, 413–14 (Tex. 2008) (quoting *City of Dallas v. Thompson,* 210 S.W.3d 601, 603 (Tex. 2006)); *see also Peralta*, 476 S.W.3d at 657.

A landowner may be liable for gross negligence only to the extent that it owed the plaintiff a legal duty. *City of Waco v. Kirwan*, 298 S.W.3d 618, 623 (Tex. 2009). For example, a landowner has no duty to warn or protect trespassers from obvious defects or conditions, but a landowner can be liable for gross negligence in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of the permitted use. *Shumake*, 199 S.W.3d at 288. This approach is consistent with the supreme court's holding in *Miranda* that the recreational use statute limits the state's liability for premise defects, but its effect is not to reinstate the state's immunity from suit. *See id*. A recreational plaintiff, such as Woodkins, may therefore maintain a premise defect claim against a landowner as long as there exists a factual dispute regarding the

landowner's gross negligence with respect to the alleged defect. *Miranda*, 133 S.W.3d at 230–31.

III. The City failed to meet its burden to negate the existence of a genuine issue of material fact.

A. Woodkins alleged the City was grossly negligent, which is the applicable standard for a waiver of immunity.

Woodkins had the initial burden to plead jurisdictional facts to show a waiver of the City's governmental immunity. *Peralta*, 476 S.W.3d at 658. We examine Woodkins's petition to determine whether she alleged sufficient facts for her claims to survive a plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 230. The City relies on the evidence attached to its plea to negate the court's jurisdiction. Before turning to whether the City's evidence negated the trial court's jurisdiction as a matter of law, we briefly address Woodkins's allegations of jurisdictional fact.

In her petition, Woodkins alleged facts showing that she was injured by a premise defect, which would require her to prove that a city employee had actual knowledge of the defect (among other things) in order to hold the City liable. She also alleged that the open trench was a special defect, which would require only that an employee should have known of the defect. *See Payne*, 838 S.W.2d at 237. We need not determine whether the open trench was a premise or special defect, however, because the recreational use statute imposes a trespasser standard of care in either event. *See* Tex. Civ. Prac. & Rem. Code. Ann. § 75.003(g) ("To the extent that this Chapter limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under [the Tort Claims Act], this chapter controls."). Under that standard, Woodkins must allege that the City acted with gross negligence, which requires actual knowledge of the premise defect. *See Miranda*, 133 S.W.3d at 225. Her petition alleges that the

City was grossly negligent in removing the metal plate or allowing the dangerous condition to exist, and that it had actual awareness of the condition.

Woodkins also alleged that her injuries resulted from a misuse of tangible personal property—a claim that would be governed by an ordinary negligence standard. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). Woodkins alleged in her petition that the City created a dangerous condition when it failed to replace the covering after it was removed. A claim for misuse of tangible personal property—also known as a negligent-activity claim—requires that the claimant's injury be a contemporaneous result of a negligent activity by an employee, not the result of a condition created on the premises by the activity. *Ranjel*, 407 S.W.3d at 888; *E.I. Du Pont de Nemours & Co. v. Roye*, 447 S.W.3d 48, 56–57 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd by agr.); *City of Houston v. Harris*, 192 S.W.3d 167, 177 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The allegations in Woodkins's petition, which involve the City's removal of the drain cover and failure to adequately warn of the dangerous trench, state a claim of premise liability. Woodkins does not allege that she was injured by a contemporaneous misuse of tangible personal property, such as the drain cover, by an employee. Rather, she contends that the City created the unsafe condition prior to her arrival and failed to warn her or make the condition safe when she encountered the uncovered trench on her bicycle.

Woodkins may not "circumvent the heightened standards of a premises defect claim contained in section 101.022 by re-casting the same acts as a claim relating to the negligent condition or use of tangible property." *Miranda*, 133 S.W.3d at 233. Accordingly, we conclude that Woodkins has not alleged a cause of action under the Tort Claims Act for misuse of tangible personal property. Woodkins is therefore required to meet the standards prescribed by the Tort Claims

Act and recreational use statute pertaining to a premise defect claim. *See City of San Antonio v. Parra*, 185 S.W.3d 61, 63 (Tex. App.—San Antonio 2005, no pet.) ("Once a claim is determined to be a premises defect, the claimant is limited to the provisions delineated by the section on premises defects and may not assert a general negligence theory.").

Moreover, the trespasser standard of the recreational use statute applies equally to claims for premise defects and misuse of tangible personal property. *See, e.g., Shumake*, 199 S.W.3d 279, 284–85 (interpreting Tex. Civ. Prac. Rem. Code. Ann. § 75.002(d) and concluding that recreational use statute does not distinguish between injuries caused by activities and conditions). The City has therefore waived its immunity from suit for Woodkins's injuries if it acted with gross negligence, having actual knowledge that the drain cover was missing.

B. On this record, the City has not negated the actual-knowledge component of gross negligence as a matter of law.

After Woodkins met her pleading burden, the burden shifted to the City to prove its entitlement to traditional summary judgment by disproving one of the essential jurisdictional facts she alleged. *See Miranda*, 133 S.W.3d at 228. To negate her allegation of actual knowledge, the City offered affidavits from two city employees: Byron Sefcik, the Parks Superintendent for Texas City; and Dennis Harris, Director of the Recreation and Tourism Department for the City.

Sefcik, who supervises maintenance and upkeep in the parks, gave the following testimony regarding the City's knowledge of the drain cover's removal:

> - I received notice of the injury to Joyce Woodkins on July 10, 2014, the date of the alleged incident . . . [and] went to the Complex and observed the drain in question . . . . I did observe the drain cover to be missing from one of the drains in the Complex, near the ball fields.

- My staff has never removed or replaced the metal cover during the course of their duties, prior to the alleged incident involving Ms. Woodkins.

- I have been the supervisor in charge of the Complex since its opening in 2010. I do not personally recall any work requests, complaints, or injuries involving the drains at the Complex during my tenure prior to the July 10, 2014 incident reported by Joyce Woodkins[.] [I] also have not heard or found any reports on the drain cover ever being removed.

- Work requests can be based on an observation by crew leaders or complaints and requests submitted to my department by the public. . . . I retain a [copy] of the daily work requests and keep them in a folder in my office for one year. After one year has passed, I have the records destroyed.

- After receiving notice of the claim filed by Joyce Woodkins, I checked the one year printouts of work requests for the Complex. I have not found any work requests for the drains or drain covers in the Complex.

- I have specifically reviewed the work requests and assignments for the days preceding the alleged incident on July 10, 2014. I discovered that on July 8th, 9th, and 10th of 2014 the reports indicate that a crew member was assigned to the Complex for routine maintenance, as is common for the Complex. As previously noted, on the two dates prior to and including the date of the alleged injury to Ms. Woodkins, there was no work order for the drain or the drain cover.

- Based on my investigation, the City was unaware of any defective condition that caused or contributed to the incident. The City had no notice of any defective condition at the Complex on or prior to the date of Ms. Woodkins' fall on July 10, 2014. The City had no knowledge of any defective condition at Carlos Garza Sports Complex on or prior to the date of Ms. Woodkins' fall on July 10, 2014.

Harris, Sefcik's supervisor, gave similar testimony:

- Work requests and complaints related to City parks can be received in four different ways [including by Sefcik directly or by Harris's department].

- I have searched my emails and notes. I have not found any work requests for the drains or drain covers in the Complex. I do not personally recall any work requests, complaints, or injuries involving the drains or removed metal covers at the Complex during my tenure, prior to the July 10, 2014 incident reported by Joyce Woodkins.

- Based on my investigation, the City was unaware of any defective condition that caused or contributed to the incident. The City had no notice of any defective condition at the Complex on or prior to the date of Ms. Woodkins' fall on July 10, 2014. The City had no knowledge of any defective condition at Carols Garza Sports Complex on or prior to the date of Ms. Woodkins' fall on July 10, 2014.

The City's burden was to conclusively negate the existence of subject-matter jurisdiction. *Miranda*, 133 S.W.3d at 288; *Peralta*, 476 S.W.3d at 660. Although the City's witnesses concluded that it was unaware of any defective condition prior to Woodkins's alleged injury, we hold for the following reasons that the facts offered in these affidavits fall short of negating the actual-knowledge component of gross negligence as a matter of law.

Sefcik said his "staff has never removed or replaced the metal cover during the course of their duties, prior to the alleged incident involving Ms. Woodkins." The statement does not define what constitutes "the alleged incident," leading to two possible interpretations: (1) the incident includes the drain cover's removal, which led to Woodkins's fall and resulting injuries; or (2) the incident encompasses only Woodkins's fall and resulting injuries. Adopting the first interpretation, as we must under the standard of review, one could reasonably conclude that Sefcik testified only that his staff never removed the drain cover

prior to this incident, in which the cover was removed and Woodkins rode her bike across the uncovered trench. Sefcik's statement fails to conclusively establish that park staff did not, as Woodkins alleged in her petition, remove the cover or have actual awareness of the uncovered condition of the trench.

Second, nothing else in the affidavits conclusively establishes the lack of a genuine issue of material fact. Sefcik states that on the day of the incident as well as the two preceding days, a park crew member was assigned to the Complex for routine maintenance. Sefcik does not address who the crew member was, what he did, or what he observed. Sefcik's statement thus did not disprove, as a matter of law, that a crew member removed the drain cover for routine maintenance or saw that the cover had been removed.[4] Sefcik instead focused his affidavit on the work requests that park staff and patrons generated and Sefcik reviewed. But Sefcik did not discuss generally what type of work was done as routine maintenance and what type of work required a request, nor did he address specifically whether removal of the cover would have generated a work request.[5] On the limited record before us, therefore, the City has not carried its burden to show as a matter of law that it lacked actual knowledge of the drain cover's removal.

The City also argues that it could not have acted with gross negligence

[4] *Cf. Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 392–93 (Tex. 2016) (concluding governmental unit presented evidence that it did not lay extension cord on which plaintiff tripped and that no employee observed a cord in the area before the fall, thereby shifting burden to plaintiff to raise genuine issue of material fact regarding actual knowledge).

[5] Sefcik also stated that he did not recall any previous complaints or work requests involving the drains. But he acknowledged that all records of work requests were destroyed after one year. Regardless, the absence of reports is but one factor to consider in determining the City's actual knowledge. *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 118 (Tex. 2010). That factor is not dispositive here because, as noted above, the City has not shown that removal of a drain cover would have generated a work request. In addition, the lack of prior complaints fails to establish conclusively that park staff did not, in this particular instance, have actual awareness of the trench's uncovered condition.

because it owed no duty to warn Woodkins of open and obvious hazards. *See Shumake*, 199 S.W.3d at 288. The City submitted no evidence, however, that the uncovered trench was open and obvious to a bike rider on the sidewalk. Woodkins alleged in her petition that the danger was "concealed," that she "suddenly and unexpectedly crashed into an uncovered and unmarked trench," and that "[t]he premises in question gave the appearance that the sidewalk was safe for bike riders." In her response to the City's plea to the jurisdiction, Woodkins reiterated that the uncovered drain was a "concealed, unexpected, and unusual danger" that "cannot be perceived by eyesight." A landowner can be liable for gross negligence in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of the permitted use. *Id*. Finding no evidence to the contrary in the record, we take Woodkins's allegations as true and conclude the City failed to establish as a matter of law that the hazard was open and obvious.

Finally, the City points to a Texas City ordinance to argue it was not foreseeable that a person would ride a bicycle on the sidewalk across the uncovered drain, and therefore the City did not owe Woodkins a duty to remove the hazard or adequately warn her of its existence. According to the affidavits, the ordinance prohibits a person older than twelve years of age from riding a bicycle "upon any sidewalk in any district." Because Woodkins is older than twelve years of age, the City argues it could not have foreseen that Woodkins would ride her bicycle on the Complex's sidewalk.

The City's ordinance does not relieve it of the duty to refrain from gross negligence, however. Even assuming that Woodkins rode her bicycle in violation of the ordinance,[6] she would be owed no less than the duty owed a trespasser under

[6] It is not clear from our record whether the complex is in a "district" to which the ordinance

the common law. As discussed above, a landowner owes a common-law duty to refrain from injuring a trespasser willfully, wantonly, or through gross negligence. Under this standard, "a landowner, who has actual knowledge that a trespasser is coming and will encounter a known dangerous condition created by the landowner, may owe a duty to warn or take some other action for the trespasser's protection." *Shumake*, 199 S.W.3d at 285 (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 58 at 393–94 (5th ed. 1984)). Woodkins's alleged violation of the Texas City Ordinance does not change the City's duty to negate the existence of actual knowledge in its plea.[7]

Because the pleadings allege jurisdictional facts sufficient to show a waiver of the city's governmental immunity and the City failed to conclusively negate actual knowledge of the dangerous condition, we overrule the City's two issues.[8]

CONCLUSION

We overrule the City's issues and affirm the trial court's order denying the City's plea to the jurisdiction.

/s/ J. Brett Busby
Justice

Panel consists of Justices Busby, Donovan, and Wise.

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applies. Nor does the record disclose whether signs were posted regarding this prohibition.

[7] The City also neglects to address why it could not have foreseen a person riding a bicycle on the sidewalk given that the ordinance only prohibits bicycle riders over the age of twelve. The ordinance's language indicates that the City would have expected younger patrons to ride their bicycles in the Complex, including on the portion of the sidewalk where Woodkins fell.

[8] In her brief, Woodkins requests an opportunity to replead if we conclude that her allegations are insufficient to support jurisdiction, or an opportunity to conduct targeted discovery if necessary to illuminate the jurisdictional facts. Given our disposition of the City's issues, we need not consider these requests.