Reversed and Rendered and Memorandum Opinion filed September 12, 2017.

In the

Fourteenth Court of Appeals

NO. 14-17-00065-CV

RICHARD MOORE, Appellant

V.

JUSTIN BARKER, Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 2015-75562

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

This is an interlocutory appeal from the trial court's order denying appellant Richard Moore's motion to dismiss filed pursuant to section 101.106(f) of the Texas Civil Practice and Remedies Code. At issue is whether Moore, a police officer with the City of Humble Police Department, was acting within the scope of his employment when he allegedly assaulted appellee Justin Barker while Moore was working an extra job at Coaches Sports Bar & Grill. Because Moore conclusively

established that he was entitled to dismissal, we reverse the trial court's order and render judgment granting Moore's motion to dismiss and dismissing Barker's case against Moore.

I. BACKGROUND

At all times relevant to the underlying events, Moore was employed as a peace officer by the City of Humble Police Department in Harris County. Moore obtained permission from the police department to work an extra night job for Coaches Sports Bar & Grill. Coaches is located in Harris County, outside the city limits of Humble. According to Moore, his general responsibilities at Coaches were "[b]asically to keep the peace, make sure that you have individuals that are being aggressive either—to whoever, I should say. Try to make sure—try to take care of these individuals by either talking to them, conversating [sic] with them, calming them down, all the way to physical altercation depending on the situation. You know, unfortunately, it does happen from time to time."

On the evening of August 24, 2014, Moore was off duty and was working his extra job at Coaches, while wearing his police uniform. Barker was drinking beer with some of his friends at Coaches, where his then-fiancée worked as a waitress. Barker consumed at least four or five beers.

According to Moore, he observed Barker and another man at the bar yelling at and pushing each other. Barker appeared "highly intoxicated." Moore saw Barker "throw a punch" and "attempt to strike" the other man even if no contact actually was made. Moore and another peace officer who was at Coaches intervened to investigate and break up the disturbance. According to Moore, he announced "Police" while approaching the altercation. While Moore was trying to separate Barker and the other man, Moore and Barker fell backward. Moore "defensively" struck Barker while attempting to remove Barker's hand from Moore's throat.

Barker does not dispute that he and another man engaged in a "verbal altercation" involving raised voices after the other man shoved Barker's fiancée. Although the other man's friends surrounded Barker and the other man was yelling profanities at Barker, Barker maintains that "nothing ever got physical between us" and that the interaction was not "heated." Barker asserts that, without any warning, Moore pulled him backwards to the floor and proceeded to punch him in the face seven or eight times.

Moore placed Barker in handcuffs. Later that evening, another peace officer arrested Barker for assaulting a police officer. The Harris County District Attorney moved to dismiss this charge against Barker because, although there was probable cause, there were "proof B[eyond] A R[easonable] D[oubt] issues."

Barker filed suit against Coaches and Richard and Raquel Fallon, individually and d/b/a Coaches (the "Fallon defendants"), alleging assault, negligence and gross negligence, negligent hiring, and respondeat superior. Barker then amended his petition to add Moore as a defendant as to the claims for assault and gross negligence. Around that time, Coaches and the Fallon defendants filed a motion for leave to designate Moore as a responsible third party.

Moore filed a motion to dismiss asserting official immunity under section 101.106(f). Moore argued that he was sued for conduct within the general scope of his employment with the police department and that suit could have been brought under the Texas Tort Claims Act ("TTCA") against the City of Humble.[1] Moore attached excerpts from his deposition as an exhibit. Barker filed a response, arguing

[1] Moore based his claim of immunity solely on section 101.106 and did not contend that he was officially immune under the common law. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994) ("Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.").

that the facts did not support Moore's assertion of immunity. As exhibits, Barker attached: his original petition, the defendants' motion for leave to designate a responsible third party, his deposition, and the motion to dismiss/order of dismissal in Barker's criminal assault case.

The trial signed an order denying Moore's motion to dismiss. Moore timely filed this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(5) (West 2015 & Supp. 2016); Tex. R. App. P. 26.1(b); *Singleton v. Casteel*, 267 S.W.3d 547, 549–50 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

II. ANALYSIS

In his sole issue, Moore contends that the trial court erred in denying his motion to dismiss because: (1) he was acting within the general scope of his employment as a police officer; and (2) Barker's claims against Moore could have been brought against Moore's employer, the City of Humble, under the Texas Tort Claims Act. Accordingly, Moore argues that dismissal was the proper remedy under the election-of-remedies provision in section 101.106(f).

A. Standard of review and applicable law

"A motion to dismiss filed by an employee pursuant to section 101.106(f) is a challenge to the trial court's subject-matter jurisdiction, which we review *de novo*." *Garza v. Harrison*, No. 14-16-00615-CV, 2017 WL 3158946, at *2 (Tex. App.—Houston [14th Dist.] July 25, 2017, no pet. h.) (op.); *see Franka v. Velasquez*, 332 S.W.3d 367, 371 n.9 (Tex. 2011) (in seeking dismissal under section 101.106(f), defendant is asserting claim of governmental immunity); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 221, 227–28 (Tex. 2004) (when appellate court reviews appeal of denial of jurisdictional plea asserting sovereign immunity, and evidence was presented to trial court, appellate court addresses de novo whether

evidence raises material issue of fact). Likewise, we review matters of statutory construction under a de novo standard. *Garza*, 2017 WL 3158946, at *2 (citing *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017)).

When a jurisdictional plea challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties. *Miranda*, 133 S.W.3d at 227. The standard of review for a jurisdictional plea based on evidence "generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c)." *Id.* at 228. Under this standard, we credit evidence favoring the nonmovant and draw all reasonable inferences in the nonmovant's favor. *Id.* The defendant must assert the absence of subject-matter jurisdiction and present conclusive proof that the trial court lacks subject-matter jurisdiction. *Id.* If the movant discharges this burden, then the burden shifts to the plaintiff to present evidence sufficient to raise a material issue of fact regarding jurisdiction. *Id.*

Sovereign immunity and governmental immunity protect the State and its political subdivisions, respectively, from lawsuits and liability. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 & n.2 (Tex. 2008). The TTCA provides a limited waiver of that immunity for certain suits against governmental entities. *Id.* at 655; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West 2011). The TTCA governs all tort claims asserted against a governmental entity and serves as "the only, albeit limited, avenue for common-law recovery against the government." *Garcia*, 253 S.W.3d at 659.

The TTCA was revised in 2003 to include an election-of-remedies provision, which "force[s] a plaintiff to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable, thereby reducing the resources that the government and its employees must use in defending

redundant litigation and alternative theories of recovery." *Id.* at 657; *see* Tex. Civ. Prac. & Rem. Code Ann. § 101.106 (West 2011). In pertinent part, the election-of-remedies statute provides:

> (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
>
> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
>
> . . .
>
> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Tex. Civ. Prac. & Rem. Code Ann. § 101.106(a), (b), (f). The Supreme Court of Texas has cautioned that, because this election-of-remedies provision imposes "irrevocable consequences, a plaintiff must proceed cautiously before filing suit and carefully consider whether to seek relief from the governmental unit or from the employee individually." *Garcia*, 253 S.W.3d at 657.

Under subsection (f), an individual defendant is entitled to dismissal upon proof that the plaintiff's suit is: (1) based on conduct within the scope of the defendant's employment with a governmental unit and (2) could have been brought against the governmental unit under the TTCA. *See Laverie v. Wetherbe*, 517

S.W.3d 748, 752 (Tex. 2017).

Here, the parties do not dispute the City of Humble is a governmental unit that employed Moore as a police officer at all times relevant to this suit. However, the parties dispute whether Moore acted within the general scope of his employment during the incident at Coaches and whether Barker's claims could have been brought against the City of Humble.

B. General scope of Moore's employment

The TTCA defines the term "scope of employment" as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." Tex. Civ. Prac. & Rem. Code Ann. § 101.001(5) (West 2011 & Supp. 2016). The Texas Supreme Court further has clarified the term using the Restatement (Third) of Agency's negative definition: "An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purposes of the employer." *Alexander v. Walker*, 435 S.W.3d 789, 792 (Tex. 2014) (per curiam) (citing Restatement (Third) of Agency § 7.07(2) (2006)); *see Fink v. Anderson*, 477 S.W.3d 460, 466 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("[W]hen an employee engages in conduct 'for the sole purpose' of furthering someone else's interests and not his employer's, the conduct is outside the employee's scope of employment.").

In reversing the denial of a motion for summary judgment filed under section 101.106(f), the Texas Supreme Court recently explained that the determination of whether an employee was acting within the scope of employment "calls for an objective assessment of whether the employee was doing her job when she committed an alleged tort, not her state of mind when she was doing it." *Laverie*, 517 S.W.3d at 753. "The scope-of-employment analysis, therefore, remains

fundamentally objective: Is there a connection between the employee's job duties and the alleged tortious conduct? The answer may be yes even if the employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities." *Id.*

The Texas Code of Criminal Procedure provides for the duties of peace officers, including police officers, in article 2.13. *See* Tex. Code Crim. Proc. art. 2.13 (West 2015) ("Duties and powers"); *see also id.* art. 2.12(3) (West 2015) (city police officers are "peace officers"). "It is the duty of every peace officer to preserve the peace within the officer's jurisdiction." *Id.* art. 2.13(a). Under article 2.13, peace officers "shall . . . in every case authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime." *Id.* art. 2.13(b)(1). The Code also provides, in article 6.06, entitled "Peace officer to prevent injury," that "[w]henever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another, including the person or property of his spouse, or injure himself, it is his duty to prevent it." *Id.* art. 6.06 (West 2015). "When the legislature intends to impose a duty on officers to act with the authority they possess, it has used clear language to do so." *Garza*, 2017 WL 3158946, at *5 (citing Tex. Code Crim. Proc. art. 6.06).

Peace officers retain "their status as peace officers twenty-four hours a day." *Blackwell v. Harris Cty.*, 909 S.W.2d 135, 139 (Tex. App.—Houston [14th Dist.] 1995, writ denied). Nor is a peace officer relieved of his duties merely because he is off duty. *Id.* Therefore, whether an officer is technically on or off duty does not determine whether the officer's conduct falls within the scope of his employment. *See Harris Cty. v. Gibbons*, 150 S.W.3d 877, 882 (Tex. App.—Houston [14th Dist. 2004, no pet.). Rather, the dispositive question is: "[I]n what capacity was the officer acting at the time he committed the acts for which the complaint was made?"

Blackwell, 909 S.W.2d at 139; *see Kraidieh v. Nudelman*, No. 01-15-01001-CV, 2016 WL 6277409, at *5 (Tex. App.—Houston [1st Dist.] Oct. 27, 2016, no pet.) (mem. op.) (citing *Blackwell*, 909 S.W.2d at 139).

"If an off-duty officer observes a crime, as a matter of law he becomes an on-duty officer." *Cherqui v. Westheimer St. Festival Corp.*, 116 S.W.3d 337, 344 (Tex. App.—Houston [14th Dist.] 2003, no pet.). "If an officer is performing a public duty, such as enforcement of general laws, he is acting 'in the course and scope of his employment as a police officer even if the [private] employer directed him to perform the duty.'" *Gibbons*, 150 S.W.3d at 882 (quoting *Bridges v. Robinson*, 20 S.W.3d 104, 111 (Tex. App.–Houston [14th Dist.] 2000, no pet.), *disapproved of on other grounds*, *Telthorster v. Tennell*, 92 S.W.3d 457, 464 (Tex. 2002)).

Here, the evidence put forth by Moore demonstrated that he observed Barker and another man in the bar area of Coaches yelling loudly at each other. Moore averred that he also observed Barker and the other man push each other and then Barker "take a swing" at the other man: "[W]e actually have breach of the peace, first of all, you know. And we have physical altercation. We have an assault taking place." Moore then announced his official presence by calling out "Police" and made his move to quell the assaultive behavior. Once Moore observed Barker physically strike or threaten to strike the other man, he had a duty as a peace officer to intervene in the situation to prevent or suppress the crime. *See* Tex. Code Crim. Proc. arts. 2.13(b)(1), 6.06; Tex. Penal Code Ann. § 22.01 (West 2011 & Supp. 2016) (offense of "Assault" located within title 5, "Offenses against the Person"). This duty is not limited by jurisdiction. *Compare* Tex. Code Crim. Proc. art. 2.13(a), and *Garza*, 2017 WL 3158946, at *5, 7 (officer has duty to preserve the peace within his jurisdiction), *with* Tex. Code Crim. Proc. arts. 2.13(b)(1), 6.06, and *Garza*, 2017 WL 3158946, at *5, 7 ("Texas law recognizes certain circumstances under which an

officer outside his jurisdiction has a duty to act." (citing Tex. Code Crim. Proc. art. 6.06)). From that point forward, Moore was acting as an on-duty peace officer and within the scope of his police employment as a matter of law. *See Kraidieh*, 2016 WL 6277409, at *5; *Cherqui*, 116 S.W.3d at 345.

Barker contends that factual disputes preclude dismissal of his claims against Moore: (1) whether Moore announced his police presence before he intervened, (2) whether Barker was in breach of the peace during the altercation, (3) whether there was any physical contact between Barker and the other man before Moore intervened, and (4) whether Moore's rough conduct in pulling down and striking Barker was cloaked in immunity. Barker also points out that he was not arrested for any offense such as breach of the peace or assault involving the other bar patron. Essentially, Barker argues that Moore misjudged the intensity of the altercation involving Barker and then further compounded this error through his actions. However, under the "fundamentally objective" analysis, these alleged factual disputes regarding whether Moore negligently or wrongfully performed his job duties as a police officer do not change that there was a connection between such duties and the alleged tortious conduct alleged by Barker. *See Laverie*, 517 S.W.3d at 753.

For example, in *Kraidieh v. Nudelman*, our sister court rejected similar arguments in reversing the trial court's denial of a section-101.106(f) plea to the jurisdiction filed by a police-officer resident of an apartment complex. The *Kraidieh* court rejected the plaintiff's arguments that she raised a fact issue where the officer: was personally motivated to oust the plaintiff apartment resident and her guests from the "hot tub"; did not initially identify himself as a police officer; did not have his identification, duty belt, or handcuffs; neglected to file a police report; and did not arrest or cite anyone for any offense such as public intoxication or disorderly

conduct. 2016 WL 6277409, at *5–6 & n.4. This is because "co-existing motivations do not remove an employee's actions from the scope of his employment so long as the conduct serves a purpose of the employer" and "[w]hether an employee is acting within the 'scope of employment' depends on whether he was performing the duties of his governmental employer's office, not on how adequately he performed such duties." *Id.* at *6 (citing *Fink*, 477 S.W.3d at 471).

Barker cites the *Ramirez v. Fifth Club, Inc.*, case. However, there, the appellate court's analysis focused on whether the interaction of the Education Code and the Code of Criminal Procedure even allowed for official immunity for private college campus security personnel. *Ramirez v. Fifth Club, Inc. (Ramirez I)*, 144 S.W.3d 574, 580–84 (Tex. App.—Austin 2004), *rev'd in part on other grounds*, *Fifth Club, Inc. v. Ramirez (Ramirez II)*, 196 S.W.3d 788 (Tex. 2006). In addition, *Ramirez I* involved the authority of the officers under a previous version of article 14.03(d) of the Code of Criminal Procedure to make warrantless arrests outside of their jurisdiction rather than any duty of the officers applicable regardless of jurisdiction. *Id.*; *see also Garza*, 2017 WL 3158946, at *5–7 (affirming denial of officer's section-101.106(f) motion to dismiss where officer had no duty to attempt warrantless arrest outside of his jurisdiction (discussing Tex. Code Crim. Proc. art. 14.03(d), (g)(2)). No official-immunity issue was before the Texas Supreme Court in *Ramirez II*. *See* 196 S.W.3d at 791 n.2.

Barker also relies on *Dillard's, Inc. v. Newman*, 299 S.W.3d 144 (Tex. App.—Amarillo 2008, pet. denied). *Newman*, however, did not involve evidence of any particularized duty of the off-duty peace officer working as a department-store security guard, such as the duty to intervene to prevent or suppress an observed assault. *See id.* at 145, 147 & n.2 (evidence of when and if officer's role changed to public peace office was "unclear" where officer based official-immunity defense on

general theory of "investigation of potential criminal activity").

Barker further insists that he "was absolved of any criminal wrongdoing" for the assault of Moore. *See id.* at 146 (plaintiff found not guilty of evading detention and failure to identify). Although the charge of assaulting a police officer against Barker was dismissed, this does not raise a fact issue that Moore was not acting in the scope of his general employment while he was intervening to break up Barker's assault against the other bar patron. *See Ogg v. Dillard's, Inc.*, 239 S.W.3d 409, 415–16, 418–20 (Tex. App.—Dallas 2007, pet. denied). In *Ogg*, the appellate court affirmed the dismissal on summary judgment of respondeat-superior tort claims against the department store based on the official immunity of the store security officer. The *Ogg* court held that, at the time of the alleged tortious conduct, the police officer "was performing his public duty" during his detention of the plaintiff on reasonable suspicion of the crime of credit-card abuse. *Id.* at 418–20. The *Ogg* court held so despite the fact that the plaintiff was found not guilty on the charge of evading that detention. *Id.* at 415–16, 418–20; *see also Jones v. Wal-Mart Stores Tex., LLC*, No. 05-11-00068-CV, 2012 WL 1676886, at *1–2 (Tex. App.—Dallas May 11, 2012, no pet.) (mem. op.) (affirming summary-judgment dismissal of tort claims where officer detained plaintiff to investigate credit-card abuse and charge for resisting arrest, search, or transport was dismissed).

Finally, Barker argues that *Blackwell v. Harris County*, where this court analyzed and concluded that an off-duty sheriff deputy's conduct in directing or escorting a funeral procession was a law-enforcement function for purposes of worker's compensation, 909 S.W.2d at 140, has no application here. We disagree. Our court's discussion of how to determine whether an off-duty peace officer was injured during the scope of his employment informs how to determine whether an off-duty peace officer was acting in the scope of his employment for purposes of

official immunity under the TTCA. Several Texas appellate courts, including this court, have considered the scope-of-employment concepts espoused in *Blackwell* in the very context of section-101.106(f) appeals involving peace officers. *See Garza*, 2017 WL 3158946, at *5; *McFadden v. Olesky*, 517 S.W.3d 287, 296 (Tex. App.—Austin 2017, pet. denied); *Kraidieh*, 2016 WL 6277409, at *5.

Even considering the evidence in the light most favorable to Barker, we conclude as a matter of law that Moore was acting in the general scope of his employment as a police officer for the City of Humble during the incident with Barker.

C. Claims could have been brought under the TTCA

We next consider whether Barker's tort claims could have been brought under the TTCA against Moore's employer, the City of Humble. "In *Franka*, [the Texas Supreme Court] held that, barring an independent statutory waiver of immunity, tort claims against the government are brought 'under this chapter [the TTCA]' for subsection (f) purposes even when the TTCA does not waive immunity for those claims." *Alexander*, 435 S.W.3d at 792 (citing *Franka*, 332 S.W.3d at 379–80 (quoting Tex. Civ. Prac. Rem. Code § 101.106(f))). Barker did not assert an independent statutory waiver of immunity. Accordingly, Barker's tort claims against Moore could have been brought under the TTCA against the City of Humble. *See id.* (holding same where plaintiff brought claims against officers with the Harris County Sheriff's Department for assault, conspiracy, slander, false arrest, false imprisonment, and malicious prosecution (citing *Franka*, 332 S.W.3d at 379–80)); *Kraidieh*, 2016 WL 6277409, at *6 (holding where appellant did not assert that claim was brought under another statute that independently waived immunity, assault claim was one that could have been brought under TTCA (citing *Franka*, 332 S.W.3d at 381)).

Because Barker's suit against Moore was based on conduct within the general scope of his police employment and could have been brought against the City of Humble, Barker's suit is considered to be against the officer in his official capacity only. *See Alexander*, 435 S.W.3d at 792 (holding that "because [the plaintiff's] suit against the officers was based on conduct within the general scope of their employment and could have been brought under the TTCA against the County, [the plaintiff's] suit [was] considered to be against the officers in their official capacities only") (citing Tex. Civ. Prac. & Rem. Code § 101.106(f)); *Kraidieh*, 2016 WL 6277409, at *6 (same). Having been sued in his official capacity, Moore was entitled to dismissal pursuant to section 101.106(f) unless Barker filed an amended pleading to dismiss Moore and name the City of Humble as a defendant on or before the 30th day after Moore filed his motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f); *Alexander*, 435 S.W.3d at 792; *Kraidieh*, 2016 WL 6277409, at *6. Barker did not file amended pleadings, and therefore the trial court erred as a matter of law in failing to grant Moore's motion to dismiss. *See Kraidieh*, 2016 WL 6277409, at *6.

III. CONCLUSION

We sustain Moore's sole issue. Accordingly, we reverse the trial court's order and render judgment granting Moore's motion to dismiss and dismissing Barker's case against him.

/s/ Marc W. Brown
Justice

Panel consists of Justices Christopher, Brown, and Wise.