Dissenting Opinions from Denial of En Banc Reconsideration filed October 18, 2022.

In The

Fourteenth Court of Appeals

NO. 14-19-00963-CV

JASON KOWNSLAR, Appellant

V.

THE CITY OF HOUSTON, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2017-18307A

D I S S E N T I N G O P I N I O N F R O M D E N I A L O F E N B A N C R E C O N S I D E R A T I O N

I dissent from the denial of en banc reconsideration because the panel's decision materially departs from this court's decisions concerning pleas to the jurisdiction. *See* Tex. R. App. P. 41.2(c). Specifically, the majority opinion held the condition at issue was not a special defect as a matter of law; the dissent countered that the condition was a special defect as a matter of law. Under this

court's clear precedent, I conclude the circumstances of this case neither allow nor require us to decide whether the condition was a special defect as a matter of law at this stage (particularly given the City's failure to present evidence establishing a fact question regarding jurisdiction).

I. Pleas to the Jurisdiction

The City's plea to the jurisdiction challenges the trial court's subject matter jurisdiction. In a plea to the jurisdiction, a party may challenge either the pleadings or the existence of jurisdictional facts. *Tex. Dep't of Transp. v. Olivares*, 316 S.W.3d 89, 95 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004); Rebecca Simmons & Suzette Kinder Patton, *Plea to the Jurisdiction: Defining the Undefined*, 40 St. Mary's L.J. 627, 651-52 (2009)). Here, the City of Houston challenged plaintiff's jurisdictional facts and the panel majority concluded:

> The evidence before the trial court conclusively proved that the Alleged Defect does not fall within the narrow class of defects that are special defects under section 101.022(b) of the Civil Practice and Remedies Code. There is no genuine fact issue as to whether the Alleged Defect constitutes a special defect. Presuming, without deciding, that the trial court erroneously considered arguments by the City that exceeded the scope of a proper jurisdictional challenge and that the trial court erred in considering issues raised for the first time at the oral hearing on the jurisdictional plea, any such error was harmless.

I believe this conclusion materially departs from this court's jurisprudence concerning pleas to the jurisdiction.

When examining jurisdictional facts in a plea to the jurisdiction, we (1) consider relevant evidence submitted by the parties, (2) take as true all evidence favorable to the nonmovant, (3) indulge every reasonable inference, and (4) resolve any doubts arising from such evidence in the nonmovant's favor. *See*

Olivares, 316 S.W.3d at 96 (citing *Miranda*, 133 S.W.3d at 228). "If the relevant evidence is undisputed or a fact question is not raised relative to the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law." *Id.* (citing *Miranda*, 133 S.W.3d at 228). "If the evidence creates a fact question regarding the jurisdictional issue, the trial court cannot grant the plea, and the fact issue will be resolved by the fact finder." *Id.* (citing *Miranda*, 133 S.W.3d at 227-28).

II. Improper Burden Shift

The panel's insistence on deciding that Kownslar failed as a matter of law to plead or prove sufficient facts to withstand the City's plea to the jurisdiction is contrary to this court's precedent that plaintiffs have no burden to produce any evidence in support of their pleas until after a defendant has produced evidence that the trial court lacks jurisdiction. *See Olivares*, 316 S.W.3d at 103 ("a defendant must produce evidence that the trial court lacks jurisdiction *before* the plaintiff has the burden to present evidence establishing a fact question regarding jurisdiction") (emphasis in original) (citing *Miranda*, 133 S.W.3d at 228). Here, the panel ignored this precedent. This deviation alone requires en banc correction to maintain the uniformity of this court's decisions. *See* Tex. R. App. P. 41.2(c).

The panel's opinion acknowledges that the City's only evidence was (1) an agreement between the City of Houston and the Metropolitan Transit Authority of Harris County, Texas; (2) the transcript from Kownslar's deposition; and (3) four photographs of Rusk Street. Whether viewed in isolation or collectively, none of this evidence even tends to establish that the trial court lacked jurisdiction; therefore, Kownslar had no burden to do anything. *See Olivares*, 316 S.W.3d at 103. The panel's decision that he effectively failed to meet a burden he did not possess is contrary to this court's decisions and requires correction via this en banc

court. *See* Tex. R. App. P. 41.2(c).

III. Improperly Resolved Doubts

Ignoring that departure from this court's decisions and assuming *arguendo* that Kownslar was burdened to "present evidence establishing a fact question regarding jurisdiction" (*Olivares*, 316 S.W.3d at 103), the only relevant considerations are (1) the size of the condition, (2) whether the condition unexpectedly and physically impairs a vehicle's ability to travel on the road, (3) whether the condition presents some unusual quality apart from the ordinary course of events, and (4) whether the condition presents an unexpected and unusual danger to the ordinary users of the roadway. *The Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010) (per curiam) (citing *Tex. Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009) (per curiam)). While I believe this court's precedents require this question to be decided by a fact finder because there is a fact question as to whether the condition at issue was a special defect (*Olivares*, 316 S.W.3d at 96 (citing *Miranda*, 133 S.W.3d at 227-28)), I also believe that (1) we are required to "indulge every reasonable inference" and "resolve any doubts arising from such evidence in the nonmovant's favor" (*id.*) and (2) the panel refused to do so when viewing the sparse evidence in the record even after reading Kownslar's allegations.

IV. Previous Application of *York*

Finally, this court has previously relied upon the supreme court's four-part test in *York*. *See, e.g.*, *City of Houston v. Kiju Joh*, 359 S.W.3d 895, 898 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Therefore, the panel's reliance upon a single factor (*i.e.*, unmeasured size via photographs) while ignoring the other three

creates a lack of uniformity with respect to this court's decisions and requires correction from this en banc court. *See* Tex. R. App. P. 41.2(c). Because of this, I respectfully dissent.

/s/ Meagan Hassan
Justice

En Banc Court consists of Chief Justice Christopher and Justices Wise, Jewell, Bourliot, Spain, Hassan, Poissant, and Wilson. (Justice Zimmerer not participating). Justices Bourliot, Spain, Hassan and Poissant would grant Appellant's Motion for En Banc Reconsideration. Justice Spain filed a Dissenting Opinion. Justice Hassan filed a Dissenting Opinion, in which Justice Bourliot joined. Justice Poissant filed a Dissenting Opinion, in which Justice Bourliot joined.