

Affirmed and Memorandum Opinion filed March 15, 2022.



In The

Fourteenth Court of Appeals

NO. 14-20-00284-CV

CITY OF HOUSTON, Appellant

V.

**ERIKA CAVAZOS, INDIVIDUALLY AND AS NEXT FRIEND OF HER
MINOR CHILDREN, E.R. AND A.R., Appellee**

**On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 2017-68328**

MEMORANDUM OPINION

In this personal injury case arising from a collision between a Cadillac Escalade driven by Erika Cavazos (“Cavazos”) and a garbage truck driven by City of Houston employee Esteban Espinoza (“Espinoza”), the City of Houston appeals the denial of its plea to the jurisdiction based on governmental immunity. Because we conclude that a material fact question exists in this case, we affirm the trial court’s order denying the City’s plea to the jurisdiction.

BACKGROUND

Cavazos was driving her Cadillac at about 20 to 25 MPH on Mango Street in Houston on September 28, 2017. Her seventeen-year-old daughter, Estefania, was a front-seat passenger and her fifteen-year-old son, Axel, was a back-seat passenger at the time. As Cavazos was passing through the intersection of Mango Street and Aldis Street, Espinoza was backing up a City side-loader garbage truck from Aldis Street into the intersection and collided with Cavazos. The garbage truck's tailgate knocked the Cadillac's back passenger window out during the collision.

In October 2017, Cavazos, individually and as next friend of Estefania and Axel, sued the City for injuries sustained in the collision.¹ The City filed a plea to the jurisdiction in February 2020, arguing that it was entitled to governmental immunity and that the facts of this case do not fall within the Texas Tort Claims Act's waiver of immunity because its employee Espinoza was not operating the garbage truck at the time of the accident. The City argued that Espinoza testified during his deposition that the garbage truck "was at a complete stop" in the intersection at the time of the accident because Espinoza saw Cavazos approaching. The City contended that Espinoza's testimony "conclusively establishes that the garbage truck was stopped at the time of the accident. There is no genuine issue of fact that this accident does not arise from Espino[z]a's use or operation of a motor vehicle; if anything, Espino[z]a's operation of the vehicle did

¹ During the prosecution of this case, Estefania and Axel reached the age of majority. There is no amended petition filed in the trial court to show that Estefania and Axel elected to prosecute the suit in their own names. "An election can be inferred from conduct showing the former minor recognized the later prosecution of the action for the former minor's benefit, such as knowingly allowing the action to be carried on in the former minor's name or in the name of the next friend." *Garza v. Fliedner*, No. 05-15-01067-CV, 2016 WL 7438756, at *3 (Tex. App.—Dallas Dec. 27, 2016, pet. denied) (mem. op.). Based on the record, Estefania and Axel seemingly elected to have the case carried on in the name of the next friend, Erika Cavazos.

nothing more than furnish the condition that made the accident possible, (i.e., the back of his truck was already in the intersection as Plaintiffs approached).” As evidence that the Texas Tort Claims Act’s “limited waiver of immunity for motor vehicle accidents does not apply here,” the City attached excerpts from the deposition testimony of Espinoza, Cavazos, Estefania, and Axel.

Ten days later, Cavazos filed a response arguing that a valid waiver of immunity was alleged because the City’s “employee, while acting in the course and scope of employment, negligently operated a city owned motor vehicle and caused this crash.” Cavazos also asserted:

Not only was Espinoza operating a COH vehicle in the course and scope of his employment, but also his employer investigated the incident and concluded he was at fault for the crash (see Plaintiff’s exhibit B). The evidence supports, and Defendant has conceded through its own investigation that its employee Espinoza was in the process of backing his vehicle into an intersection that was controlled by a traffic control device (stop sign) and into right of way traffic. Espinoza testified that he allegedly stopped his vehicle at the time he saw Plaintiff’s vehicle, which was seconds before the crash occurred. Yet Defendant’s own investigation fails to support Espinoza’s self-serving statement, but rather provides evidence that Espinoza caused this crash while operating a city owned vehicle (see exhibits B and C). Accordingly, there is no genuine dispute that Espinoza was operating the vehicle at the time of the collision.

In support of the response, Cavazos attached as evidence a (1) Texas Peace Officer’s Crash Report; (2) Solid Waste Management Department Safety Representative’s Report; and (3) Root Cause Analysis Form. Cavazos also attached a second amended petition to the response; however, the petition appears to never have been actually filed.

In March 2020, the City filed its Objections to Plaintiffs’ Evidence and Reply in Support of its Plea to the Jurisdiction. It claimed that “this case does not

fall within the TTCA's limited waiver of immunity because the City of Houston's driver was already stopped in the seconds before the collision occurred and the moment of impact" and none of the reports Cavazos attached to her response "create a genuine issue of material fact as to whether Houston's driver was motionless at the time of the accident." The City objected to the Texas Peace Officer's Crash Report because "Plaintiffs failed to lay the proper predicate for the causation opinion for which Plaintiffs proffer it." The City also objected to the Solid Waste Management Department Safety Representative's Report and the Root Cause Analysis Form because "Plaintiffs did not lay the proper predicate for any expert/opinion conclusions reached in the report" and "these reports are inadmissible under Rule 407 as subsequent remedial measures."

On March 27, 2020, the trial court signed an order denying the City's plea to the jurisdiction. The City sent a letter to the trial court on April 1, 2020, requesting "an order ruling on Defendant City of Houston's objections to the evidence Plaintiffs submitted in response to the plea." When the trial court did not sign an order, the City filed Defendant City of Houston's Objections to the Trial Court's Refusal to Rule on its Objections to Plaintiffs' Evidence on April 13, 2020. The City timely filed its notice of interlocutory appeal on April 15, 2020.²

ANALYSIS

The City argues that the trial court erred in denying its plea to the jurisdiction because "the only competent, admissible evidence demonstrated

² Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code provides for an interlocutory appeal from an order granting or denying a plea to the jurisdiction by a governmental unit. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8). The party seeking the interlocutory appeal must timely file a notice of appeal within twenty days of the signing of the order of judgment that pertains to the trial court's ruling granting or denying the movant's challenge to the trial court's jurisdiction. *See City of Houston v. Estate of Jones*, 388 S.W.3d 663, 666 (Tex. 2012) (per curiam); *see also* Tex. R. App. P. 26.1(b).

conclusively that this motor vehicle accident did not arise from Espinoza’s negligent operation or use of a motor vehicle.” In that regard, the City asserts that (1) its “plea to the jurisdiction presented evidence that conclusively proved Espinoza’s operation or use of his garbage truck did not actually cause Cavazos’s alleged injuries;” and (2) the Texas Peace Officer’s Crash Report, Solid Waste Management Department Safety Representative’s Report, and Root Cause Analysis Form, which Cavazos attached as evidence, were inadmissible and did not create a genuine issue of material fact as to whether this accident arose from the operation or use of a motor vehicle.

I. Standard of Review

The existence of subject matter jurisdiction is a question of law that can be challenged by a plea to the jurisdiction. *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015); *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We review a trial court’s ruling on a plea to the jurisdiction *de novo*. *Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019); *Vitol, Inc. v. Harris Cty. Appraisal Dist.*, 529 S.W.3d 159, 165-66 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Parties may submit evidence supporting or opposing a plea to the jurisdiction, which we review under the same standard applicable to a traditional motion for summary judgment. *Chambers-Liberty Ctys. Navigation Dist.*, 575 S.W.3d at 345. We take as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant’s favor. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016). If the evidence creates a fact issue as to the jurisdictional issue, then it is for the factfinder to decide and the trial court must deny the plea to the jurisdiction. *See City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009); *Miranda*, 133 S.W.3d

at 228. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Kirwan*, 298 S.W.3d at 622; *Miranda*, 133 S.W.3d at 228.

II. Governing Law

Governmental immunity and sovereign immunity are related common law doctrines protecting the government from suit and liability. *Harris Cty. v. Annab*, 547 S.W.3d 609, 612 (Tex. 2018); *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 57-58 (Tex. 2011). Sovereign immunity protects the state and its various divisions (such as agencies and boards) from suit and liability while governmental immunity provides similar protection to the political subdivisions of the state (such as counties, cities, and school districts). *Annab*, 547 S.W.3d at 612; *Norman*, 342 S.W.3d at 57-58; *see also Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). An assertion of governmental immunity implicates a court's subject matter jurisdiction and is therefore properly asserted in a plea to the jurisdiction. *Annab*, 547 S.W.3d at 613; *Miranda*, 133 S.W.3d at 225-26.

Unless waived, governmental immunity from suit defeats a trial court's subject matter jurisdiction. *See Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). The Texas Tort Claims Act provides a limited waiver of governmental immunity if certain conditions are met. *See Tex. Civ. Prac. & Rem. Code Ann.* §§ 101.021, 101.025. As relevant here, governmental immunity from suit and liability is waived for personal injuries or property damage proximately caused by the wrongful act or omission or the negligence of a governmental employee acting within the scope of employment if the harm or damage "arises from the operation or use of a motor-driven vehicle" and "the employee would be personally liable to the claimant according to Texas law." *Id.* § 101.021(1).

Given the Legislature’s preference for a limited immunity waiver, courts should strictly construe section 101.021’s operation-or-use requirement. *See Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 927 (Tex. 2015) (per curiam); *Galveston Cty. v. Leach*, No. 14-20-00181-CV, 2021 WL 5831123, at *3 (Tex. App.—Houston [14th Dist.] Dec. 9, 2021, pet. filed). “‘Operation’ refers to ‘a doing or performing of practical work.’” *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992) (quoting *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989)). “[U]se means ‘to put or bring into action or service; to employ for or apply to a given purpose.’” *Id.* (quoting *Mount Pleasant Indep. Sch. Dist.*, 766 S.W.2d at 211).

Although the statute does not define “arises from”, the supreme court has “defined this standard as a ‘nexus between the operation or use of the motor-driven vehicle or equipment and a plaintiff’s injuries.’” *Ryder Integrated Logistics, Inc.*, 453 S.W.3d at 928 (quoting *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 543 (Tex. 2003)). The court also described the threshold as something more than actual cause but less than proximate cause. *Id.* at 928-29 (citing *Utica Nat’l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004)). Accordingly, the “arising from” standard can be satisfied by demonstrating proximate cause, which is particularly appropriate in the context of the Texas Tort Claims Act because it only reaches injuries “proximately caused by the wrongful act or omission or the negligence of an employee.” *Id.* at 928 (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.021).

III. Application

The City asserts that its “plea to the jurisdiction presented evidence that conclusively proved Espinoza’s operation or use of his garbage truck did not actually cause Cavazos’s alleged injuries.” In support of its assertion, it

specifically points to Espinoza's deposition, in which he testified that (1) "before Cavazos approached the intersection, he slowly and carefully backed into the intersection, checking his mirrors and honking his horn"; (2) "[h]e was mid-way into the intersection when he saw Cavazos approach"; (3) "because he saw her coming, he stopped moving the truck"; (4) Cavazos "tried to pass" him and hit the garbage truck; and (5) "his truck was at a complete stop" at the moment of impact. Additionally, the City states that the following evidence conclusively establishes that "Cavazos was the striking vehicle; prior to the collision Espinoza had already stopped his truck and it remained at a complete stop at the moment of impact":

Although Cavazos contends that Espinoza was the striking vehicle, neither she nor her children actually witnessed the accident. Erika Cavazos testified that she does not know whether Espinoza was stopped or not because she did not see if he was stopped or not. She did not recall seeing the garbage truck as she approached the intersection; in fact, she did not see the garbage truck until the moment of impact. Estefania and Axel were both eating and on their phones. Estefania saw the garbage truck before her mother entered the intersection. Estefania agreed it was a very big blue truck. When she saw it, she did not see back-up lights on, she did not hear a horn, she did not hear a backup indicator. To her, the garbage truck looked parked. She never saw reverse lights come on the blue garbage truck and at no point did the truck appear to be moving. But she also did not know whether the garbage truck was stopped at the moment of impact.

(citations to record omitted).

We cannot agree with the City that the evidence conclusively proved that Espinoza's operation or use of the garbage truck "was not the actual cause of this accident" and that Cavazos caused the accident because "she failed to keep a proper lookout for the very big blue garbage truck in the middle of the intersection and went around him when it was not safe to do so." To the contrary, Cavazos's and Estefania's deposition testimony excerpts (to which the City points and which

it attached as evidence to its plea) raises at the very least a fact question as to whether Espinoza hit Cavazos's Cadillac. As relevant here, Cavazos testified as follows:

Q. What was your speed at the time of the accident?

A. 20, 25.

Q. And what makes you say 20, 25?

A. Because I never like to go over the speed limit, the street speed limit whenever I'm driving.

Q. What was the speed limit on that street?

A. 25.

Q. The garbage truck was stopped at the time of the accident. Correct? [Objection omitted]

A. No. I don't know.

Q. What makes you say you don't know?

A. Because I really didn't — I didn't see him, if he was stopped or not.

Q. When was the first time you saw the garbage truck?

A. When he hit my car.

Q. You didn't see the truck as you approached the intersection?

A. I don't recall.

* * *

Q. Are you telling the jury that you did not see the garbage truck before the moment of impact? [Objection omitted]

A. What are you trying to say when you asked if I saw?

Q. You testified that you didn't see the garbage truck until the moment of impact.

A. Uh-huh. Yes. That's right.

Q. As you approached this intersection, what were you looking at?

A. I was looking forward and just making sure that I didn't have an intersection or that I didn't have a stop to go forward.

Q. And did you see any stop signs?

A. Not for me. I did see one for — for the other side.

* * *

Q. If you're not sure whether the garbage truck was stopped or not, can you testify as to whether you hit him or whether he hit you? [Objection omitted]

A. Well, the thing is he hit me because I already passed the intersection. You could probably say halfway through the intersection.

Q. I'm not sure I follow. Can you explain that a little bit more?

A. Well, I was on Mango Street, and in the intersection, I had already gone past the intersection when I felt — I got hit — when I felt that I got hit. The truck hit me.

* * *

Q. When you went through the intersection, you went straight the whole time?

A. Yes.

Q. You didn't swerve to avoid the garbage truck?

A. No.

Further, Estefania testified as follows:

Q. At the time of the collision, the garbage truck was stopped? [Objection omitted]

A. I don't know.

Q. This was a cross intersection. Correct?

A. Yes.

Q. And the street that your mom was on didn't have a stop sign. Correct?

A. Yes.

Q. But the road where the garbage truck was had a stop sign?

A. Yes.

* * *

Q. You saw the garbage truck before your mom entered the intersection. Correct?

A. Yes.

Q. It's a very big, blue truck. Right?

* * *

A. Yes.

* * *

A. I was — I still do pay attention, but the garbage truck, for sure, was not in the intersection when we went by.

* * *

Q. So when you testified a little bit ago that when your car, which is marked with the star, was at that point, it's your testimony that you saw the garbage truck, and it hadn't yet approached the dumpster?

A. Yes.

Q. Okay. When you looked up and you saw it in that position, did you see brake lights on?

A. No.

Q. Did you see backup lights on?

A. No.

* * *

Q. Was it stationary, or was it moving forward or backward?

* * *

A. To me, it looked parked.

Q. Okay. As you-all proceeded through the intersection, what happened next? . . .

A. Well, after that, I just — I don't remember anything. I just remember the dumpster truck hitting us.

* * *

Q. When your mom went through the intersection, did she go in a straight line, or at some point before the collision did she swerve left or right?

A. No. She went straight. She was going straight.

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*

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Q. You say here you didn't see the car until it was too late. Is the car that you were referring to the blue garbage truck?

A. Yes.

Q. And you say here that it was moving back too — the truck was moving back too fast. I believe you testified earlier that it appeared to be stopped, and you didn't — the truck did not appear to be moving. [Objection omitted]

A. Like when he was backing up, and it was already too late, he was — all I know is that by the time I knew that the thing was backing up, we were already in the middle of the intersection.

Q. Okay. I guess I'm confused because you just testified that the truck did not appear to be moving. [Objection omitted]

A. Yes. Like I said earlier, I thought it was parked until he was backing up, and we were already in the middle of the intersection when I saw it, and it hit us.

Cavazos's and Estefania's deposition testimony negates the City's contention that the evidence "conclusively proved Espinoza's operation or use of his garbage truck did not actually cause Cavazos' alleged injuries." Their testimony also negates the City's assertion that (1) Cavazos "failed to keep a proper lookout for the very big blue garbage truck in the middle of the intersection and went around [the truck] when it was not safe to do so"; (2) Espinoza "was mid-way into the intersection when he saw Cavazos approach"; (3) "because he saw her coming, he stopped moving the truck"; (4) "Cavazos was the striking vehicle"; and (5) "prior to the collision Espinoza had already stopped his truck and it remained at a complete stop at the moment of impact."

Therefore, the evidence the City presented in the trial court does not conclusively establish its theory of the case, *i.e.*, that the garbage truck was completely stopped in the middle of the intersection when Cavazos approached and that she hit the truck while attempting to maneuver around it. Instead, the evidence

shows that a genuine question of material fact exists as to whether Espinoza was backing into the intersection as Cavazos's Cadillac was either driving in the intersection or had already passed the intersection, and whether it was Espinoza that caused the collision.³

Accordingly, we hold that the trial court did not err in denying the City's plea to the jurisdiction based on governmental immunity, and we overrule the City's issue.

CONCLUSION

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

/s/ Meagan Hassan
Justice

Panel consists of Chief Justice Christopher and Justices Hassan and Poissant.

³ Because we conclude the trial court did not need to rely on the Texas Peace Officer's Crash Report, Solid Waste Management Department Safety Representative's Report, or Root Cause Analysis Form that Cavazos attached as evidence to the response to the City's plea to the jurisdiction, we need not address the City's argument that this evidence was inadmissible and "did not create a genuine issue of material fact as to whether this accident arose from the operation or use of a motor vehicle."