Affirmed and Memorandum Opinion filed May 16, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00085-CV

MADALYN MICHAELE MARTIN, Appellant

V.

VILLAGE OF SURFSIDE BEACH, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 112153-CV

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

The trial court granted appellee Village of Surfside Beach's plea to the jurisdiction and dismissed appellant Madalyn Michaele Martin's negligence suit with prejudice. In two issues, Martin argues that the trial court erred in granting the plea and in denying her motion for new trial because she presented evidence raising a fact issue on whether the Village's governmental immunity was waived. We hold that the uncontroverted evidence establishes that the Village's governmental immunity has not been waived, and we affirm.

Background

At approximately 5:30 p.m. on June 28, 2019, Martin was involved in a motor vehicle accident with a Village employee, Pedro Gutierrez, who was driving a Village-owned truck. In an affidavit attached to the Village's plea to the jurisdiction, Gutierrez attested that, when the accident occurred, he was headed home after leaving work and running a personal errand. As a result of the crash, Martin allegedly suffered severe personal injuries.

Martin sued Gutierrez and the Village of Surfside Beach for negligence, alleging that Gutierrez failed to yield the right-of-way at a stop sign and that the Village was vicariously liable for his negligence pursuant to respondeat superior. After the Village filed a motion to dismiss Gutierrez,[1] Martin non-suited with prejudice her claims against Gutierrez, proceeding only against the Village.

The Village filed a plea to the jurisdiction, asserting that Martin had not shown a waiver of governmental immunity under the Texas Tort Claims Act ("TTCA"). The Village argued that Gutierrez was not acting in the course and scope of his employment at the time of the accident and, for that reason, the TTCA's waiver of the Village's immunity did not apply. The Village supported its plea with a certified crash report and a declaration by Gutierrez. In his declaration, Gutierrez stated that he left work, ran a personal errand, and was driving home when the collision occurred. The trial court granted the Village's plea and dismissed Martin's claims with prejudice.

Martin filed a motion for new trial, which the trial court denied. Martin timely appealed.

[1] *See* Tex. Civ. Prac. & Rem. Code § 101.106(e).

Analysis

A. Standard of Review and Analytical Framework

The common law doctrine of governmental immunity protects political subdivisions of the state from suit when they perform governmental functions. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). A governmental unit may be sued only when the legislature has waived the unit's immunity in clear language. *See* Tex. Gov't Code § 311.034; *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). The TTCA waives governmental units' immunity from suit in certain instances when the statutory requirements are met, including, as relevant here, cases involving the use of a motor-driven vehicle by an employee acting within the course and scope of his employment. *See* Tex. Civ. Prac. & Rem. Code § 101.021; *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224-25 (Tex. 2004). The waiver of immunity applies if the employee or governmental unit would be liable to the claimant according to Texas law. *See* Tex. Civ. Prac. & Rem. Code §§ 101.021(1)(B), (2), 101.025.

If a government defendant is immune from suit, the trial court has no subject matter jurisdiction to hear the case against it, and the defendant may properly challenge the suit in a plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 225-26. We review jurisdictional questions like these de novo. *See State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007).

A plaintiff bears the burden of establishing a waiver of immunity under the TTCA. *See Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). A governmental unit challenging whether a claimant has met this burden may, by a plea to the jurisdiction, contest the pleadings, the existence of jurisdictional facts, or both. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d

755, 770 (Tex. 2018). If a plea challenges the pleadings, we determine if the pleader has alleged facts that "affirmatively demonstrate the court's jurisdiction to hear the cause." *Miranda*, 133 S.W.3d at 226. We construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the unchallenged factual jurisdictional allegations in the pleadings. *Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14, 23 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (citing *Miranda*, 133 S.W.3d at 226). If the pleading is sufficient to demonstrate jurisdiction, and if the defendant does not challenge the plaintiff's factual allegations with supporting evidence, then our inquiry ends. *Id.*; *see also Miranda*, 133 S.W.3d at 227-28; *City of Jacksboro v. Two Bush Cmty. Action Grp.*, No. 03-10-00860-CV, 2012 WL 2509804, at *5 (Tex. App.—Austin June 28, 2012, pet. denied) (mem. op.).

When, on the other hand, a plea to the jurisdiction challenges the existence of jurisdictional facts, we look beyond the pleadings and consider evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, even if the evidence implicates both the court's jurisdiction and the merits of a claim. *Miranda*, 133 S.W.3d at 227. For a plea that challenges the existence of jurisdictional facts, our standard of review generally mirrors that of a traditional summary judgment: a plaintiff must raise a genuine issue of material fact to overcome the challenge to the trial court's jurisdiction. *Id.* at 221, 228. In determining whether a plaintiff has met that burden, we take as true all evidence favorable to the plaintiff and indulge every reasonable inference and resolve any doubts in the plaintiff's favor. *Id.* at 228. If the evidence and allegations create a fact question regarding jurisdiction, then a court cannot grant a plea to the jurisdiction, and the fact finder must resolve the fact issue. *Id.* at 227-28. But if the relevant evidence is undisputed or fails to raise a fact question on the

jurisdictional issue, then a court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

B. Course and Scope of Employment

For purposes of the TTCA, an "employee" is

> a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

Tex. Civ. Prac. & Rem. Code § 101.001(2). The employee's "scope of employment" means "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." *Id.* § 101.001(5); *see also Alexander v. Walker*, 435 S.W.3d 789, 792 (Tex. 2014) (per curiam) (citing Restatement (Third) of Agency § 7.07(2) (2006) ("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.")).

When a vehicle involved in a collision is owned by the driver's employer, a presumption arises that the driver was acting in the course and scope of his employment when the collision occurred. *Robertson Tank Lines, Inc. v. Van Cleave*, 468 S.W.2d 354, 357 (Tex. 1971); *Molina v. City of Pasadena*, No. 14-17-00524-CV, 2018 WL 3977945, at *4 (Tex. App.—Houston [14th Dist.] Aug. 21, 2018, no pet.) (mem. op.). But if there is evidence that the driver was on a personal errand, or otherwise not in the furtherance of his employer's business, the presumption vanishes. *Mejia-Rosa v. John Moore Servs.*, No. 01-17-00955-CV, 2019 WL 3330972, at *7 (Tex. App.—Houston [1st Dist.] July 25, 2019, no pet.)

(mem. op.); *see also Molina*, 2018 WL 3977945, at *5; *Lara v. City of Hempstead*, No. 01-15-00987-CV, 2016 WL 3964794, at *4 (Tex. App.—Houston [1st Dist.] July 21, 2016, pet. denied) (mem. op.) (explaining presumption is only a procedural tool and once rebutted, it disappears from case).

If the employer proffers evidence rebutting the presumption, the burden shifts back to the plaintiff to produce other evidence that the driver was acting in the course and scope of his employment at the time of the collision. *Robertson Tank Lines*, 468 S.W.2d at 358; *Molina*, 2018 WL 3977945, at *5; *see generally Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754 (Tex. 2007) (per curiam) (no fact issue that employer was vicariously liable where undisputed evidence showed employee was on personal errand and not acting in furtherance of employer's business).

Generally, under the "coming-and-going rule," an employee does not act within the course and scope of his employment when traveling to and from work. *See Cameron Int'l Corp. v. Martinez*, 662 S.W.3d 373, 376 (Tex. 2022) (citing *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 139 (Tex. 2018)). The rationale informing the rule is that travelers on public roads are equally susceptible to the hazards of doing so, whether employed or not. *See id.* (citing *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 241-42 & nn.6-7 (Tex. 2010)). "Such travel hazards do not arise out of the business of an employer; thus, the law does not hold the employer liable for injuries resulting from engaging in these risks." *Id.*

C. Application

In support of its plea, the Village presented a declaration from Gutierrez. Gutierrez stated under penalty of perjury:

> On June 28, 2019, I was employed as the Public Works Director for the Village of Surfside Beach, Texas ("Surfside

> Beach"). . . . In that position, I was provided a Surfside Beach truck. I would typically work until 4:30 or 5:00 p.m. on a daily basis and then drive the truck to my home located in Oyster Creek.
>
> On June 28, 2019, I had worked in Surfside Beach during the day and headed home to Oyster Creek at the usual time. . . . As I began traveling home, I decided I would stop at the Freeport Municipal golf course pro shop and do some personal shopping. Once I finished that shopping, I left the Freeport golf course and began traveling toward my residence. I was driving southwest on County Road 217 and stopped at the stop sign at the intersection of Highway 36. There were buses that were parked on Highway 36 to my left which were transporting workers to a plant shutdown. Due to this, I could not see traffic coming from the left and after being waived through by a bus driver, I began inching out to turn left onto Highway 36 to go home. As I inched into the second lane, the accident occurred.
>
> At the time of the accident, I was performing no duties or tasks for Surfside Beach. There was nothing about my employment that the trip involved. I was simply returning home after work and the route that I was taking was toward my home. I was allowed to take the Surfside Beach truck home because I was on 24 hour call but I had not been called for any reason on June 28, 2019, before the accident occurred. I was just on my way home. The accident report listed the time of the accident as 5:24 p.m. and that is in line with my memory.

It is undisputed that Gutierrez, a Village employee, was driving a Village-owned truck when the collision occurred. That evidence raised the presumption that Gutierrez was acting in the course and scope of his employment. The Village relied on Gutierrez's declaration to prove that Gutierrez was driving home after stopping to do some personal shopping when the collision occurred. The declaration rebutted the presumption that Gutierrez was acting in the course and scope of his employment when the collision occurred. *See City of Houston v. Carrizales*, No. 01-20-00699-CV, 2021 WL 3556216, at *5-6 (Tex. App.—Houston [1st Dist.] Aug. 12, 2021, pet. denied) (mem. op.) (evidence that employee was returning to work after lunch was sufficient to rebut presumption);

Molina, 2018 WL 3977945, at *4 (presumption that city employee was acting within course and scope of employment rebutted when collision occurred while employee was returning to work after eating lunch); *Lara*, 2016 WL 3964794, at *4 (evidence officer was commuting to work in patrol car at time of collision showed he was "neither engaged in the performance for a governmental unit of the duties" of his office or employment nor performing task "lawfully assigned to an employee by competent authority" and thus was sufficient to rebut presumption that officer was acting in course and scope of employment under TTCA) (internal quotations omitted); *City of Beaumont v. Stewart*, No. 09-12-00316-CV, 2012 WL 5364678, at *3-4 (Tex. App.—Beaumont Nov. 1, 2012, no pet.) (mem. op.) (evidence that employee was driving to her house to eat lunch in city-owned vehicle was sufficient to establish that employee was not acting within scope of employment at time of accident); *see also Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W.2d 202, 212-13 (Tex. App.—Amarillo 1996, no writ); *Drooker v. Saeilo Motors*, 756 S.W.2d 394, 397 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

In her response to the Village's plea, Martin neither disputed the Village's evidence nor attached controverting evidence of her own. She argued that Gutierrez's declaration itself raised a fact question whether he was acting in the scope of his employment because: he was "on 24 hour call"; he was "non-committal" about when he finished work (at 4:30 or 5:00); he was driving a Village-owned truck at the time of the collision; the Village did not give Gutierrez "specific hours to drive his work truck"; he gave the Village's insurance information to the investigating officer; and he was wearing a Village-branded shirt.

None of these facts, however, gives rise to a genuine issue of material fact that Gutierrez was acting in furtherance of the Village's interests, rather than his

own personal interests, at the time of the accident. *See Biggs v. U.S. Fire Ins. Co.*, 611 S.W.2d 624, 627 (Tex. 1981) (an employee is not acting within the scope of his duties unless the activity has some connection with, and is being undertaken in furtherance of, the employer's business); *Vernon v. City of Dallas*, 638 S.W.2d 5, 8-9 (Tex. App.—Dallas 1982, writ ref'd n.r.e.). Martin relies heavily on the fact that Gutierrez was on "24 hour call" as a Village employee and was driving a Village-owned truck. Yet "it is a well-established principle that merely because an employee is on-duty, or on-call twenty-four hours a day, does not mean that the person is always acting within the scope of his employment." *City of Laredo v. Saenz*, No. 04-05-00188-CV, 2006 WL 286006, at *3 (Tex. App.—San Antonio Feb. 8, 2006, no pet.) (mem. op.); *see also J&C Drilling Co. v. Salaiz*, 866 S.W.2d 632, 637 (Tex. App.—San Antonio 1993, no writ) (holding evidence not sufficient to raise fact issue that employee was acting in course and scope of employment when collision occurred as employee was returning from personal errand, despite evidence he was on call twenty-four hours a day and was driving employer's vehicle); *Garcia v. City of Houston*, 799 S.W.2d 496, 499 (Tex. App.—El Paso 1990, writ denied) ("[E]ven where an employee is on call 24 hours a day he must be engaged in or about the furtherance of the affairs or business of his employer to be in the scope of his employment.").

Further, whether Gutierrez left work at 4:30 or 5:00 is not material. Regardless when he left work, it is undisputed that between the time he left work and the time the accident occurred, he had stopped to shop and was heading home. The remaining assertions on which Martin relies are not sufficient to create a fact question on scope of employment. If, for example, Gutierrez's shirt sufficed to create a fact issue that he was in the scope of employment, then scope of employment issues would be in question in every motor vehicle accident involving

a governmental unit employee who wears a uniform or other employer insignia as part of their job. This is contrary to long-established Texas law[2] and ignores the reality that many governmental unit employees must necessarily wear uniforms or other employer-designated clothing while traveling to and from work. Even in those instances, a governmental unit employee is not considered to be in the scope of employment if he or she is simply driving to or from work or otherwise engaged in personal activities. Ultimately, the question is whether an employee's "activity has some connection with, and is being undertaken in furtherance of, the employer's business." *City of Balch Springs v. Austin*, 315 S.W.3d 219, 225 (Tex. App.—Dallas 2010, no pet.) (citing *Biggs*, 611 S.W.2d 627; *Vernon v. City of Dallas*, 638 S.W.2d 5, 8-9 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)).

Because the uncontroverted evidence conclusively proves that Gutierrez was not acting in the course and scope of his employment with the Village when the collision occurred, we hold that the Village's governmental immunity has not been waived, the trial court lacks subject matter jurisdiction over Martin's suit, and the trial court did not err in granting the Village's plea to the jurisdiction or in denying Martin's motion for new trial. *See Mayes*, 236 S.W.3d at 757 (uncontroverted evidence that employee was on personal errand when accident occurred supported summary judgment in favor of employer on vicarious-liability claim); *Mejia-Rosa*, 2019 WL 3330972, at *8.

We overrule Martin's two appellate issues.

[2] *See, e.g.*, *Garza v. Harrison*, 574 S.W.3d 389, 405 (Tex. 2019) ("This is not to say, however, that mere objective indicia of official capacity—for example, wearing a uniform, flashing a badge, or using a police vehicle—establishes course and scope of employment as a matter of law."); *Lara*, 2016 WL 3964794, at *4; *City of Balch Springs v. Austin*, 315 S.W.3d 219, 224, 227 (Tex. App.—Dallas 2010, no pet.).

Conclusion

We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Wise, Jewell, and Poissant.