



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00748-CV

CITY OF SAN ANTONIO,
Appellant

v.

Britnee Amber **REYES** and Stephanie Aguirre,
Appellees

From the County Court at Law No. 3, Bexar County, Texas
Trial Court No. 2015CV05655
Honorable Walden Shelton, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: August 23, 2017

REVERSED and RENDERED

The City of San Antonio appeals from the trial court's order denying its plea to the jurisdiction. Because we conclude the City of San Antonio is immune from suit under the facts presented, we reverse the trial court's order and render judgment dismissing the cause for lack of jurisdiction.

BACKGROUND

This case involves a collision between Britnee Amber Reyes's automobile in which Stephanie Aguirre was a passenger and a patrol car driven by San Antonio Police Officer Justin

Ayars. On October 12, 2013, Officer Ayars was responding to a “City-wide Emergency Tone that an officer needed assistance.” While responding to the Emergency Tone, Officer Ayars proceeded through the intersection of Rector and San Pedro, and Reyes’s vehicle collided with Officer Ayars’s patrol car.

Reyes and Aguirre sued the City of San Antonio for damages arising out of the collision, alleging Officer Ayars was negligent while acting in the course and scope of his employment. The City filed a plea to the jurisdiction, asserting Reyes and Aguirre failed to plead a valid waiver of immunity. Reyes and Aguirre then filed an amended petition in which they alleged the City waived its immunity by Officer Ayars’s action of operating his vehicle with reckless disregard for their safety.

The trial court denied the City’s plea to the jurisdiction, which was based on sovereign immunity and good faith immunity. Thereafter, the City filed this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West Supp. 2016).

ANALYSIS

Plea to the Jurisdiction

Standard of Review

A plea to the jurisdiction is a dilatory plea which challenges a trial court’s subject matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The purpose of a dilatory plea is to establish a reason why the trial court should not reach the merits of the claims. *Id.* Sovereign immunity defeats a trial court’s subject matter jurisdiction and, therefore, is properly asserted in a plea to the jurisdiction. *Tex. Dep’t of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). In a plea to the jurisdiction, a movant may raise two possible challenges: (1) a challenge to the sufficiency of the pleadings, that is, whether the plaintiff alleged facts that affirmatively demonstrate the court’s jurisdiction to hear the cause, and (2) a challenge to the

existence of jurisdictional facts. *Id.* at 226-28. A plea may assert either or both of these challenges. *See id.* The question of whether a court has subject matter jurisdiction is a matter of law; accordingly, we review de novo the trial court's ruling on a plea to the jurisdiction based on governmental immunity. *Hoff v. Nueces Cty.*, 153 S.W.3d 45, 48 (Tex. 2004); *Miranda*, 133 S.W.3d at 226.

When, as here, a plea to the jurisdiction challenges both the plaintiff's pleadings and the existence of jurisdictional facts, we first review the challenge to the pleadings. *See Miranda*, 133 S.W.3d at 226-27; *Perez v. Webb Cty.*, 511 S.W.3d 233, 235 (Tex. App.—San Antonio 2015, pet. denied). When a plea to the jurisdiction challenges the plaintiff's pleadings, we must determine if the plaintiff alleged facts that affirmatively demonstrate the trial court's subject matter jurisdiction. *Miranda*, 133 S.W.3d at 226. The trial court may grant the plea only if the pleading, even after amendment, does not contain sufficient facts to invoke the trial court's subject matter jurisdiction. *Id.*; *see also Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839-40 (Tex. 2007). We construe the pleadings liberally in the plaintiffs' favor. *See Miranda*, 133 S.W.3d at 226.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, if necessary, we may look beyond the pleadings and consider the relevant evidence submitted; however, we must confine our evidentiary review to evidence relevant to the jurisdictional issue. *Miranda*, 133 S.W.3d at 227-28; *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555. In reviewing a plea challenging jurisdictional facts, we employ a standard of review which mirrors summary-judgment review under Texas Rule of Civil Procedure 166a(c). *Miranda*, 133 S.W.3d at 228; *City of San Antonio v. Rogers Shavano Ranch, Ltd.*, 383 S.W.3d 234, 241-42 (Tex. App.—San Antonio 2012, pet. denied). The movant must assert and meet the summary judgment standard of proof that the trial court lacks subject-matter jurisdiction. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *Miranda*, 133 S.W.3d at 227-28. If the movant satisfies this burden, the

burden then shifts to the non-movant to show a disputed material fact issue exists regarding the jurisdictional issue. *Miranda*, 133 S.W.3d at 227-28; *Perez*, 511 S.W.3d at 235. If the evidence raises a fact issue concerning the existence of jurisdiction, then the plea must be denied, and the fact finder must resolve the jurisdictional issue. *Miranda*, 133 S.W.3d at 227-28. However, if the evidence is undisputed or fails to raise a fact question, the trial court must rule on the plea as a matter of law. *Miranda*, 133 S.W.3d at 228.

Immunity

A governmental unit is immune from both suit and liability unless it waives immunity. *See Texas Dep't of Transp. v. Garza*, 70 S.W.3d 802, 806 (Tex. 2002). Under the Texas Tort Claims Act (the "TTCA"), a governmental unit waives immunity for claims arising from the use of a motor vehicle driven by its employee; however, the governmental unit retains its immunity from suit if one of the exceptions to the waiver of immunity in the TTCA applies. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1) (West 2011); *Garza*, 70 S.W.3d at 806; *Smith v. Janda*, 126 S.W.3d 543, 545 (Tex. App.—San Antonio 2003, no pet.).

Here, the City asserted the "emergency exception" to any waiver of immunity. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2) (West 2011). Under the emergency exception, the City retains its immunity from suit on a claim arising "from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action" *Id.*; *Tex. Dep't of Pub. Safety v. Little*, 259 S.W.3d 236, 238 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The Texas Transportation Code provides that the driver of an emergency vehicle must drive "with appropriate regard for the safety of all persons" and is not relieved of "the consequences of reckless disregard for the safety of others." TEX. TRANSP. CODE ANN. § 546.005 (West 2011). The Texas Supreme Court interpreted the uncodified predecessor of Section 546.005 and held the provision "imposes

a *duty* to drive with due regard for others by avoiding negligent behavior, but it only imposes *liability* for reckless conduct.” *City of Amarillo v. Martin*, 971 S.W.2d 426, 431 (Tex. 1998); *Perez*, 511 S.W.3d at 236. To engage in “reckless conduct” that would subject a governmental unit to liability, the driver must commit an act he knew or should have known posed a high degree of risk of serious injury. *Martin*, 971 S.W.2d at 430; *Perez*, 511 S.W.3d at 236. “Reckless conduct” requires more than a momentary lapse of judgment. *Perez*, 511 S.W.3d at 236. “Thus, a governmental entity is liable for damages resulting from the emergency operation of an emergency vehicle if the operator acted recklessly; that is, if the operator ‘committed an act that the operator knew or should have known posed a high degree of risk of serious injury.’” *Id.* (quoting *Martin*, 971 S.W.2d at 430).

Discussion

In their original petition, Reyes and Aguirre alleged Officer Ayars was negligent while acting in the course and scope of his employment. The City filed a plea to the jurisdiction asserting Reyes and Aguirre did not plead a valid waiver of immunity by failing to address the manner in which the City waived governmental immunity. The City further asserted that even if Reyes and Aguirre amended their petition to allege such waiver, the evidence attached to the plea established the City retained its sovereign immunity, thus protecting it from suit. The City attached a supporting affidavit by Officer Ayars to the plea.

In their amended petition, Reyes and Aguirre alleged the City waived its immunity through Officer Ayars’s actions of operating his vehicle with reckless disregard for their safety “by entering an intersection through a red light without his lights on or siren blaring at a high rate of speed” By amending their petition, Reyes and Aguirre sufficiently plead facts to allege a valid waiver of immunity.

Because the City challenged the jurisdictional facts through Officer Ayars's affidavit, we must also consider relevant evidence submitted by the parties to resolve the jurisdictional issue raised. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 555. The record before this court does not indicate that Reyes and Aguirre responded to the City's plea to the jurisdiction. The record further indicates they did not present any evidence to controvert Officer Ayars's affidavit.

The undisputed evidence establishes Officer Ayars was responding to a "City-wide Emergency Tone that an officer needed assistance." It is also undisputed that while en route to reach the officer, Officer Ayars evaluated the traffic conditions and determined the traffic conditions were good, there were no pedestrians in the area, and the weather was clear and dry. Officer Ayars attests he "slowed [his] vehicle while approaching traffic lights, engaged [his] emergency lights and sirens at all times, and went through each intersection after visually clearing them for traffic."

When he approached the intersection where the accident occurred, Officer Ayars slowed, "cleared the intersection for traffic" and proceeded "in the outside lane" when a vehicle approaching from his left collided with his patrol car. Although Reyes and Aguirre allege in their pleadings that Officer Ayars proceeded through the intersection where the accident occurred against a red light, Officer Ayars attests he "slowed at each intersection, whether [his] light was green, yellow, or red, before proceeding." Assuming Officer Ayars proceeded through the intersection in question against a red light, "proceeding through a red light is a specifically enumerated privilege of emergency vehicles in emergency situations." *Martin*, 971 S.W.2d at 431 (citing TEX. TRANSP. CODE ANN. § 546.001(2)). The Transportation Code provides that, in operating an authorized emergency vehicle, a state employee may proceed past a red light after slowing as necessary for safe operation. TEX. TRANSP. CODE ANN. § 546.001(2) (West 2011). The operator must use, at his discretion and in compliance with local government or department policy,

appropriate audible or visual signals. *Id.* § 546.003 (West 2011). Thus, an emergency vehicle operator responding to an emergency call may proceed against a red traffic light after slowing for safe operation. *Id.*; *see also Martin*, 971 S.W.2d at 430-31.

Through evidence provided by Officer Ayars, the City established the patrol officer was responding to an emergency situation and his actions complied with the laws applicable to emergency action. TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2) (West 2011); TEX. TRANSP. CODE ANN. §§ 546.001, 546.003 (West 2011). Further, the City established Officer Ayars did not operate his vehicle in a reckless manner. Officer Ayars slowed his patrol car when he approached traffic lights, engaged his emergency lights and sirens at all times, and proceeded through each intersection only after visually checking each for traffic. Consequently, the burden shifted to Reyes and Aguirre to raise a genuine issue of material fact on the jurisdictional issue whether Officer Ayars violated a law or ordinance applicable to emergency action or operated his patrol car in reckless disregard for the safety of others. TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2); *also see City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005); *Miranda*, 133 S.W.3d at 227-28; *Perez*, 511 S.W.3d at 235. Neither Reyes nor Aguirre presented any controverting evidence to raise a jurisdictional fact issue. Consequently, the City's undisputed evidence established as a matter of law it retained its governmental immunity.

Alternate Grounds

Reyes and Aguirre present three alternative grounds for affirming the trial court's order.

Without citing any supporting authority, Reyes and Aguirre contend the trial court could have denied the plea because the City waited eleven months to assert it. Reyes and Aguirre contend that while there is no precedent to support this conclusion, this is a "logical interpretation" of *Bland* and *Miranda*. We disagree.

A party may challenge a trial court's jurisdiction at any time, even for the first time on appeal. *Strode v. Tex. Dep't of Criminal Justice*, 261 S.W.3d 387, 389-90 (Tex. App.—Texarkana 2008, no pet.) (citing *Univ. Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004) *superseded by statute on other grounds*, Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen. Laws 3783, 3783 (codified at Tex. Gov't Code § 311.034)). “A governmental unit need not file its plea to the jurisdiction simultaneously with its original answer before the trial court may rule on the merits of the plea.” *See id.* at 389-90. Therefore, an eleven-month delay in asserting a plea to the jurisdiction is not a valid basis for denial. *See id.*

Reyes and Aguirre also assert the trial court could have denied the plea to the jurisdiction to allow them additional time for discovery to develop the jurisdictional facts. Nothing in the record, however, indicates Reyes and Aguirre requested the trial court to continue or abate the hearing to allow them additional time to conduct discovery that would lead to evidence that Officer Ayars violated any law or ordinance applicable to emergency action or that he operated his patrol car in reckless disregard for the safety of others.

Finally, Reyes and Aguirre assert the City's plea to the jurisdiction became moot when they amended their pleading to cure any pleading defects, thereby requiring a new plea to the jurisdiction to challenge the existence of jurisdictional facts.

When Reyes and Aguirre amended their petition, they cured only the first challenge. That is, they alleged facts sufficient to assert waiver of the City's governmental immunity. The amendment did not address or cure the City's second challenge — that the trial court lacked jurisdiction because it was entitled to the emergency exception to any waiver of immunity. This second challenge was not rendered moot by the amended pleading. Therefore, Reyes and Aguirre's three alternate grounds in support of the trial court's denial of the City's plea to the jurisdiction lack merit.

The undisputed evidence before the trial court established that Reyes and Aguirre’s claims arise “from the action of an employee while responding to an emergency call or reacting to an emergency situation” and that Officer Ayars’s actions were in compliance with the laws and ordinances applicable to emergency action” TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2). The undisputed evidence also established the officer acted with appropriate regard for the safety of others while operating his patrol car, that is, Officer Ayars did not act with reckless disregard for the safety of others in the operation of his vehicle. Consequently, the City did not waive its sovereign immunity and it is, therefore, immune from suit arising from Officer Ayars’s actions.

Because we conclude the City did not waive its sovereign immunity, we need not address the City’s second issue on appeal. *See* TEX. R. APP. P. 47.1

CONCLUSION

Accordingly, we reverse the trial court’s order denying the City’s plea to the jurisdiction and render judgment dismissing the cause for lack of subject-matter jurisdiction.

Irene Rios, Justice