



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00437-CV

CITY OF HELOTES,
Appellant

v.

Jean Marie **PAGE,**
Appellee

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CI01629
Honorable Karen H. Pozza, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: December 18, 2019

AFFIRMED

The City of Helotes appeals the trial court's order denying its plea to the jurisdiction. The trial court found that Jean Marie Page's "injuries were caused by a proprietary function." The City argues Page's injuries were the result of a governmental function. We affirm the trial court's order.

BACKGROUND

In 2018, Page sued the City for injuries she sustained when a City employee dropped a table while removing it from a parked golf cart. She alleged the table struck the cart's accelerator which caused the cart to propel forward and strike her. She alleged the City employee was

negligent in leaving the golf cart's ignition in the "on" position, in dropping the table on the accelerator, and in misplacing the table in the golf cart which allowed the table to strike the accelerator when the table was dropped.

The accident occurred when the City employee was setting up for an event called the "MarketPlace at Old Town Helotes." The MarketPlace, which was first held in August of 2008, is held on the first Saturday of each month. The MarketPlace is described as a vendor's fair. The City rents booths to vendors who sell crafts, merchandise, and food, or advertise and display the services they offer.¹ The City has its own booth from which it sells beer. The MarketPlace also has an area for children with activities like an inflatable slide. The MarketPlace is held on public streets in "Old Town Helotes," and the streets are closed to traffic. The MarketPlace is sponsored, supervised, regulated, operated, and managed by the City.

In the City Administrator's deposition, he stated that the rationale for the MarketPlace was "essentially economic development to bring people into [the special district called] Old Town Helotes to improve the finances of [the] existing businesses [and] to generate involvement in the community in that area." The rationale included "economic revitalization of our Old Town Helotes historic district." The administrator further described it as "a place making idea. You bring people into Old Town Helotes and it—and it helps develop that area."

The City filed a plea to the jurisdiction arguing it was immune from suit because the MarketPlace is a governmental function. Page responded that the City was not immune from suit because the MarketPlace is a proprietary function. The trial court found that Page's "injuries were the result of a proprietary function," and it denied the City's plea. The City appeals.

¹ The City charges the vendors about \$40 to rent a booth and an additional \$30 for a food permit or license.

PLEA TO THE JURISDICTION, STANDARD OF REVIEW

Governmental immunity protects political subdivisions of the State, such as municipalities, from suit and liability. *Chambers-Liberty Ctys. Nav. Dist. v. State*, 575 S.W.3d 339, 344 (Tex. 2019); *Wasson Interests, Ltd. v. City of Jacksonville (Wasson I)*, 489 S.W.3d 427, 429–30 (Tex. 2016). Because governmental immunity implicates the trial court’s jurisdiction, it may be asserted in a plea to the jurisdiction. *Chambers-Liberty Ctys. Nav. Dist.*, 575 S.W.3d at 345; *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). “Parties may submit evidence at the plea-to-the-jurisdiction stage, and the trial court’s review generally mirrors the summary judgment standard.” *Chambers-Liberty Ctys. Nav. Dist.*, 575 S.W.3d at 345 (citing *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016)). “When reviewing a plea to the jurisdiction [such as this where] evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the nonmovant. We indulge every reasonable inference and resolve any doubts in the nonmovant’s favor.” *Miranda*, 133 S.W.3d at 228 (citation omitted). “If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder.” *Chambers-Liberty Ctys. Nav. Dist.*, 575 S.W.3d at 345 (quoting *Miranda*, 133 S.W.3d at 227–28). “Whether a pleader has alleged facts that affirmatively demonstrate a trial court’s subject matter jurisdiction is a question of law reviewed *de novo*.” *Miranda*, 133 S.W.3d at 226; accord *Chambers-Liberty Ctys. Nav. Dist.*, 575 S.W.3d at 345.

GOVERNMENTAL/PROPRIETARY FUNCTION DICHOTOMY

“The governmental/proprietary dichotomy recognizes that immunity protects a governmental unit from suits based on its performance of a governmental function but not a proprietary function.” *Wasson Interests, Ltd. v. City of Jacksonville (Wasson II)*, 559 S.W.3d 142, 146 (Tex. 2018). The State’s sovereignty shields a municipality when the municipality acts ““as a

branch' of the State but not when [it acts] 'in a proprietary, non-governmental capacity.'" *Id.* (quoting *Wasson I*, 489 S.W.3d at 430). But if a municipality performs a proprietary function, it is subject "to the same duties and liabilities as those incurred by private persons and corporations." *Id.* (quoting *Gates v. City of Dall.*, 704 S.W.2d 737, 739 (Tex. 1986)).

A. Governmental Functions

Section 101.0215 of the Texas Tort Claims Act defines governmental functions as "those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public." TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a); *accord Wasson II*, 559 S.W.3d at 147. The section then gives a nonexclusive list of thirty-six governmental functions. *Wasson II*, 559 S.W.3d at 147.

B. Proprietary Functions

The Texas Tort Claims Act defines proprietary functions as "those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality." TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(b); *accord Wasson II*, 559 S.W.3d at 147. "Proprietary functions . . . are those 'performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality,' and 'not as an arm of the [state] government,'" *Wasson II*, 559 S.W.3d at 147 (quoting *Gates*, 704 S.W.2d at 739), where the municipality acts on its own behalf, *id.* at 149. Proprietary functions are "usually activities 'that can be, and often are, provided by private persons.'" *Id.* at 147 (quoting Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEX. L. REV. 462, 463 (1971)). The Texas Tort Claims Act gives three nonexclusive examples of proprietary functions. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(b).

C. Governmental, Proprietary Functions Mutually Exclusive

“The proprietary functions of a municipality do not include those governmental activities listed under Subsection (a).” TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(c); *accord Wasson II*, 559 S.W.3d at 147.

D. Factors to Consider When Activity Not Expressly Enumerated

When a municipality’s activity is not listed in the Texas Tort Claims Act as either a governmental or proprietary function, we consider the following four factors in determining whether the activity is governmental or proprietary:

whether (1) the City’s act . . . was mandatory or discretionary, (2) the [activity was] intended to benefit the general public or the City’s residents, (3) the City was acting on the State’s behalf or its own behalf [in performing the activity], and (4) the City’s act . . . was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary.

Hays St. Bridge Restoration Grp. v. City of San Antonio, 570 S.W.3d 697, 705 (Tex. 2019) (quoting *Wasson II*, 559 S.W.3d at 150) (repeating the four *Wasson II* factors).

ANALYSIS

The City and Page each analogize the MarketPlace to functions listed in the statute.

The City analogizes the MarketPlace to governmental functions: “parks and zoos”; “museums”; “civic, convention centers, or coliseums”; “recreational facilities, including but not limited to swimming pools, beaches, and marinas”; and “community development or urban renewal activities.”² See TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a) (13), (14), (16), (23), (34).

² Section 101.0215(a)(34) lists “community development or urban renewal activities undertaken by municipalities *and authorized under Chapters 373 and 374, Local Government Code.*” TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(34) (emphasis added). The Texas Supreme Court has rejected the argument that the reference to the chapters of the Local Government Code is a limitation on this provision. *Hays St. Bridge Restoration Grp.*, 570 S.W.3d at 705 n.46; see also *CHW-Lattas Creek, L.P. v. City of Alice*, 565 S.W.3d 779, 786–87 (Tex. App.—San Antonio 2018, pet. denied) (concluding that community development under Chapter 380 of the Local Government Code is a governmental function).

Page analogizes the MarketPlace to a proprietary function: an “amusement[] owned and operated by the municipality.” *Id.* § 101.0215(b)(2).

Because a vendor’s fair might have some characteristics of the listed examples of governmental or proprietary functions, we must consider *Wasson II*’s four factors.³ In our review, we take the evidence favoring Page as true and make all reasonable inferences in her favor. *See Miranda*, 133 S.W.3d at 228.

A. Mandatory or Discretionary

The City concedes its decision to own, support, and operate the MarketPlace was discretionary. This is some evidence that the MarketPlace is a proprietary function.

B. Public’s or Residents’ Benefit

A city’s proprietary functions “will often benefit some nonresidents,” but in determining whether the MarketPlace was intended to benefit the general public or the City’s residents, we focus on whether the MarketPlace “*primarily* benefits one or the other.” *See Wasson II*, 559 S.W.3d at 151. Although there was some evidence that non-residents participated in and benefited from the MarketPlace, there was also evidence that the City’s *primary* objective was to assist local

³ In his deposition, the City’s administrator referred to “economic development,” “economic revitalization,” and the generation of community involvement. We disagree that a vendor’s fair is a “community development or urban revitalization” activity as those terms are used in section 101.0215(a)(34). The term “economic development” has been defined as “a process used to improve an area’s tax base and keep it economically productive by attracting and retaining businesses and jobs through various financial and other incentives.” *City of Westworth Vill. v. City of White Settlement*, 558 S.W.3d 232, 235 (Tex. App.—Fort Worth 2018, pet. denied). “In its analysis of the 1997 enabling legislation that amended section 101.0215 to add subsection 34, the House Committee on Civil Practice stated “[t]he designation of community development activities as a governmental function should provide reasonable limits on recoveries in this arena and avoid the potential of major losses which would reduce funding of community development projects.” *CHW-Lattas Creek, L.P.*, 565 S.W.3d at 786 (quoting *E. Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 732–33 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (quoting House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 2766, 75th Leg., R.S. 1997)). When we compare the committee’s analysis to the types of activities and programs listed in Chapters 373, 374, and 380 of the Local Government Code, we construe “community development or urban renewal activities” to describe activities which a municipality funds or incentivizes through tax abatements or grants to encourage development—not like a vendor’s fair from which a city profits by renting booths and selling beer. *Cf. Brown v. Vill. of Lincoln Heights*, 958 N.E.2d 1280, 1286 (Ohio Ct. App. 2011) (holding the act of sponsoring a community festival was not a governmental function).

businesses by generating community involvement in the Old Town Helotes area which undisputedly “raised funds for the City’s budget.” *See id.* Under the second factor, there is some evidence that the MarketPlace was operated primarily for the residents’ benefit, and thus the MarketPlace is a proprietary function. *See id.*

C. State’s or City’s Behalf

The City Administrator testified that the City receives a portion of the sales taxes collected and the proceeds from the City’s beer booth sales. The revenues were recorded in the MarketPlace budget, and any profits could remain in the MarketPlace line item or be used for other City needs: the parks and recreation department, public works, or the police or fire departments. Although *Wasson II*’s analysis of this factor is not particularly helpful in this case, the City Administrator’s testimony is some evidence that the City was acting on its own behalf. *See id.* at 152.

D. Relation to a Governmental Function

For the fourth factor, we consider whether the MarketPlace “was sufficiently related to a governmental function as to render the act governmental even if it would otherwise have been proprietary.” *Wasson II*, 559 S.W.3d at 150. In its analysis, the City’s brief interprets this factor broadly by comparing the MarketPlace and its operation to listed governmental functions like zoos. However, “a city’s proprietary action may be treated as governmental [under this fourth factor] only if it is essential to the city’s governmental actions.” *Id.* at 153. The City has not identified, nor have we found, a governmental action to which the operation of the MarketPlace is “essential” as a matter of law. *See Miranda*, 133 S.W.3d at 228 (traditional summary judgment review).

CONCLUSION

Having taken the evidence favoring Page as true, and making all reasonable inferences in her favor, we conclude she met her burden to plead facts that affirmatively demonstrated the trial court’s jurisdiction. She pled that she was struck by a motorized vehicle being used by the City’s

employee during the MarketPlace event—which Page asserts is a proprietary function. The Texas Tort Claims Act does not identify the MarketPlace as a proprietary function, but under the first three *Wasson II* factors, there was some evidence that the MarketPlace was a proprietary function. For the fourth factor, the City failed to identify any governmental action for which the MarketPlace was essential such that it would make the otherwise proprietary function into a governmental one.

The trial court did not err in denying the City’s plea to the jurisdiction. We affirm the trial court’s order.⁴

Patricia O. Alvarez, Justice

⁴ Page asserts, and the City acknowledges, that the trial court did not rule on Page’s claim for declaratory relief. We decline the City’s invitation to review Page’s declaratory judgment claim which the trial court did not address. *See* TEX. R. APP. P. 33.1(a).