Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00119-CV

CITY OF SAN ANTONIO,
Appellant

v.

Nadine **REALME**,
Appellee

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2018CI14297
Honorable Rosie Alvarado, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: March 17, 2021

AFFIRMED AND REMANDED

The City of San Antonio appeals the trial court's interlocutory order denying its plea to the jurisdiction based on governmental immunity. We affirm and remand to the trial court for further proceedings.

BACKGROUND

Nadine Realme sued the City for premises liability.[1] Realme alleged she was injured when she tripped and fell while participating in the Turkey Trot, a 5K run/walk that took place on the city's streets and sidewalks. Realme further alleged the City's immunity was waived under the Texas Tort Claims Act (TTCA), which provides that a governmental unit is liable for personal injury caused by a condition of real property if the governmental unit would, were it a private person, be liable according to Texas law. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021(2), 101.025.

The City filed a plea to the jurisdiction asserting the trial court lacked subject-matter jurisdiction because Realme could not establish a waiver of governmental immunity under the TTCA. The City claimed it was not liable to Realme for personal injury caused by a condition of real property because she was a mere licensee. The City further claimed that as a licensee Realme would have to show the City had actual knowledge of the condition that allegedly caused her to trip and fall and that evidence of such actual knowledge did not exist. With its plea to the jurisdiction, the City submitted Realme's deposition testimony. This evidence showed that Realme had registered and paid to participate in the 5K run/walk and was following the 5K course when she stepped onto the grassy area between the sidewalk and the street, tripped on a piece of metal protruding from the ground, fell, and was injured.

In her first amended response, Realme argued that because she had paid to participate in the 5K run/walk she was an invitee and that her claims fell within the waiver of immunity provided

[1]Realme's pleadings also assert a claim for negligence. However, the factual allegations in her pleadings indicate that her injury was the result of the property's condition, rather than an activity. "When the injury is the result of the property's condition rather than an activity, premises-liability principles apply." *Occidental Chem. Corp v. Jenkins*, 478 S.W.3d 640, 644 (Tex. 2016); *see also United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 472 (Tex. 2017) ("We have recognized that slip/trip-and-fall cases have consistently been treated as premises defect causes of action.") (internal quotation omitted).

by sections 101.021(2) and 101.022(a). Section 101.022(a) provides that "if a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises." *See id.* § 101.022(a). Realme asked the trial court to deny the City's plea to the jurisdiction.

At the plea to the jurisdiction hearing, the assistant city attorney stated:

> [Realme] ended up running up on street level following the racetrack and I understand that she then tripped over a piece of metal that was basically the base of a traffic sign that was there. The sign had been removed and/or torn off, not sure how it was removed, but the couple inches of the base was still protruding from the ground. Ms. Realme tripped and ended up suffering injury to her arm and other parts of her body.
>
> [Realme] filed suit alleging a waiver of immunity under 101.021 of the Texas Tort Claims Act, which does waive governmental immunity for premise defects. [Realme] then also alleged that she was owed an invitee duty by the City because she paid for use of the premises. The only problem with that is she didn't pay defendant. The City of San Antonio received no money. It was a race put on by other entities, as admitted by [Realme]. That does not give [Realme] invitee status.

The trial court denied the City's plea to the jurisdiction. The City then filed this appeal.

TEXAS TORT CLAIMS ACT

In its first issue, the City argues the trial court erred in denying its plea to the jurisdiction because Realme failed to establish that its governmental immunity was waived under the TTCA.

Standard of Review

Governmental immunity deprives a trial court of subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). "Whether a court has subject matter jurisdiction is a question of law." *Id*. at 226. Accordingly, we review a trial court's ruling on a plea to the jurisdiction de novo. *Id*. When ruling on a plea to the jurisdiction, a trial court is not required to look solely at the pleadings; instead, it may consider evidence and must do so when necessary to resolve the jurisdictional issue. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). In conducting our review, we

construe the plaintiff's pleadings in her favor and consider any evidence relevant to the jurisdictional issue. *Miranda*, 133 S.W.3d at 226-27. We decide a plea to the jurisdiction "without delving into the merits of the case." *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555.

When, as here, the jurisdictional challenge implicates the merits of the plaintiff's cause of action and the plea to the jurisdiction includes evidence, the trial court's review generally mirrors the summary-judgment standard. *Tarrant Regional Water Dist. v. Johnson*, 572 S.W.3d 658, 664 (Tex. 2019); *Miranda*, 133 S.W.3d at 227-28. This standard "protect[s] the plaintiffs from having to put on their case simply to establish jurisdiction." *Miranda*, 133 S.W.3d at 228 (internal quotations omitted). Thus, once the governmental unit "asserts and supports with evidence" the trial court's lack of subject matter jurisdiction, "we simply require the plaintiffs, when the facts underlying the merits and the subject matter jurisdiction are intertwined, to show that there is a disputed material fact issue regarding the jurisdictional issue." *Id*. If the evidence creates a fact question on the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the factfinder must resolve the fact question. *Johnson*, 572 S.W.3d at 664 (citing *Miranda*, 133 S.W.3d at 227-28).

Waiver of Immunity under the TTCA

Under the TTCA, a governmental unit's immunity is waived for "personal injury" "caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021(2), 101.025. Thus, "[t]he type of duty owed a plaintiff is part of the waiver analysis under the TTCA." *City of Irving v. Seppy*, 301 S.W.3d 435, 441 (Tex. App.—Dallas 2009, no pet.); *see City of Denton v. Page*, 701 S.W.2d 831, 834 (Tex. 1986) (a plaintiff relying on the TTCA "must prove the existence and violation of legal duty owed him by the defendant.").

The TTCA provides that "if a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a). Therefore, in a premise defect case in which the plaintiff did not pay for use of the premises, a governmental unit only owes the plaintiff the duty a private person owes to a licensee. *Id*. This limited duty requires a governmental unit to avoid injuring the plaintiff through willful, wanton, or grossly negligent conduct and to use ordinary care either to warn the licensee of, or to make reasonably safe, a dangerous condition of which the governmental unit is aware and the licensee is not. *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). Yet, when a plaintiff pays for the use of the premises, the governmental unit owes the plaintiff the duty owed to an invitee. *Seppy*, 301 S.W.3d at 441; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a). The duty owed to an invitee "requires [the governmental unit] to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition of which [the governmental unit] is or reasonably should be aware." *Payne*, 838 S.W.2d at 237.

Analysis

In her live pleadings, Realme alleged that she was walking at or near the property located on 299 Washington Street in San Antonio, Texas, when "metal protruding from the ground" caused her to fall and injure her arm. Realme further alleged that the City's immunity was waived under section 101.021 of the TTCA because she was an invitee and the City owed her a duty to protect and safeguard her from unreasonably dangerous conditions or to warn of their existence. The jurisdictional evidence included Realme's deposition[2] in which she testified that she had paid an entry fee online to participate in the Turkey Trot 5K; that the 5K was sponsored by two private

[2]The trial court sustained the City's objections to Realme's jurisdictional evidence. Accordingly, we do not consider this evidence in our analysis. Realme's deposition was attached to the City's plea to the jurisdiction.

entities, the Food Bank and HEB; that the 5K course was on City streets and sidewalks and on the Riverwalk; that when she arrived at the 5K she had to check in with the 5K volunteers and she received a participant number which she clipped onto her clothing; that she participated in the 5K by walking and jogging; that "huge amounts of people" participated in the 5K; that the 5K participants congregated at the HEB arsenal prior to the race; that the participants were told when to start the race; that at the beginning of the 5K the participants were running on the street; that the participants were "directed" off the street and onto the Riverwalk; that she "followed whatever path everyone else was going on;" that the 5K course went into the King William area; that the participants were walking and running on the sidewalk and on the grass; that "all the runners were [] going around the slow people;" that just before she tripped she was "trotting" on the sidewalk; that she saw a family and a dog in her path and she tried to go around them; that as she tried to go around them, she tripped on a metal object protruding from the ground, "went straight into [a] pole," fell, and "ended up on [her] back;" and that after she fell and was on the ground, people were "jumping all over her arm about to just pummel" her.

In its plea to the jurisdiction, the City focused on Realme's allegation that she was an invitee and argued its immunity was not waived because Realme was a licensee and not an invitee. The City argued Realme could not be an invitee because the 5K event "was not a City event and [Realme] did not register through the City." On appeal, the City reasserts this argument and adds several other arguments. The City first argues that "Realme relied on a registration fee she paid to the 5K sponsors" and "payment of a fee to a private entity to register for a 5K does not constitute payment to the City for the use of its public streets and sidewalks that are free for public access and use at any time." The City further argues, "While a registration fee might entitle an individual to certain benefits for participating in a 5K (like a t-shirt or a timed performance), it is not itself a payment for the use of public streets." The City finally argues that to have paid for the premises

under section 101.022(a), Realme "must have paid to the City a specific fee" "to be on and to use specific public premises." (internal quotations omitted).

To the extent the City argues its immunity was not waived because Realme could not be an invitee since her entry fee was not paid to the City, we reject its argument. In *City of Hidalgo v. Hodge*, No. 13-16-00695-CV, 2018 WL 460808, at *3 (Tex. App.—Corpus Christi-Edinburg Jan. 18, 2018, pet. denied), the plaintiff sued the City of Hidalgo after she stepped into a hole and was injured. *Id*., at *1. At the time she was injured, the plaintiff was at an outdoor concert event that had been organized by a private entity. *Id*., at *2. Although the property where the plaintiff fell was owned by the City, the plaintiff had paid an entry fee to the private entity. *Id.*, at *3. The appellate court concluded that whether the City collected and received the plaintiff's entry fee was not part of the analysis under section 101.022(a).[3] *Id*. "The City cites no authority, and we find none, requiring the City itself to collect and receive the entry fee charged." *Id*. Additionally, "the statute itself makes no such distinction." *Id*.

The City also argues that Realme could not be an invitee because she tripped and fell in a public place that was accessible to people who did not pay an entry fee. To support its argument, the City relies on *City of Dallas v. Davenport*, 418 S.W.3d 844, 847-48 (Tex. App.—Dallas 2013, no pet.). In *Davenport*, the plaintiff slipped and fell on an orange liquid substance on a walkway leading to the airport parking garage. *Id*. at 846. The plaintiff argued he was an invitee because he had paid for use of the premises by buying an airline ticket and by paying to park his car in the parking garage. *Id*. The City countered that the plaintiff was only a licensee because the area in

[3]Consistent with this position, the law does not require the plaintiff to have paid for the use of the premises herself. *See Tex. Eng'g Extension Serv. v. Gifford*, No. 10-11-00242-CV, 2012 WL 851742, at *1 (Tex. App.—Waco Mar. 14, 2012, no pet.) (concluding that payment by the plaintiff's employer was sufficient to show that the plaintiff paid for use of the training facilities where the injury occurred); *Sullivan v. City of Fort Worth*, No. 02-10-00223-CV, 2011 WL 1902018, at *8 (Tex. App.—Fort Worth May 19, 2011, pet. denied) (holding the plaintiffs had paid for use under section 101.022(a) even though they were guests at a wedding reception on city-owned property and their host had actually paid the rental fee).

the terminal where the plaintiff fell did not require payment of a fee for entry. *Id*. The appellate court determined that the plaintiff was a licensee because buying an airline ticket and paying to park his car was not payment for entry onto and use of the area of the terminal where he fell. *Id*. at 849. The appellate court reasoned that it could not distinguish between the people in that terminal area who had paid for an airline ticket or paid to park and the people in that terminal area who had not paid. *Id*. ("We see 'no rational basis' . . . for distinguishing between people in this part of the airport on the basis of whether they purchased an airline ticket, paid to park their car in the airport parking garage, or arrived at the airport by cab or other means.").

Nevertheless, in *City of Fort Worth v. Posey*, 593 S.W.3d 924, 929 (Tex. App.—Fort Worth 2020, no pet.), the court of appeals respectfully disagreed with *Davenport*'s approach. In *Posey*, the plaintiff had attended a gift fair hosted by a private entity, the Junior League, at a coliseum owned by the City of Fort Worth. *Id*. at 927. As the plaintiff exited the building and was walking back to her vehicle along a public walkway, she tripped over a metal pipe protruding from the ground, fell face first onto the sidewalk, and broke her teeth. *Id*. The plaintiff sued the City for premises liability. *Id*. The City filed a plea to the jurisdiction asserting governmental immunity. *Id*. The trial court denied the plea to the jurisdiction and the City appealed. *Id*.

On appeal, the City contended its immunity was not waived because the plaintiff had not paid for use of the premises where she fell and could not be an invitee. *Id*. The plaintiff countered that she had paid for use of the premises, including the walkway where she was injured, through her parking fee, her entry fee, and the Junior League's coliseum rental fee. *Id*. at 927-28. In response, the City argued that even if the plaintiff had paid for use of the parking lot and the space within the coliseum, she had not paid to use the walkway where she fell because no payment was required to access the walkway and it was open to the general public. *Id*. at 928. The appellate

court rejected the City's arguments. *Id*. at 929-30. Construing the plain language of section 101.022(a), the appellate court reasoned:

> [A] person is treated as an invitee if she "pays for use of the premises." TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a). The text of the statute makes a person's status dependent on whether she has paid for use of the premises. It says nothing of whether other members of the public must also pay for use of the same premises. And the statute does not say that the claimant must pay for exclusive or nonpublic use of the premises. The public's access to the same space is immaterial. Rather, according to the statute's plain language, a person is entitled to invitee status if the person paid to use the premises, regardless of whether other members of the public might also be present without paying.

Id. at 929. The appellate court noted its interpretation was consistent with both Texas law and the Restatement. *Id*. The appellate court further noted that "people on the same public premises might have different status depending on their purpose, as the Restatement illustrates." *Id*. at 930. After construing the plaintiff's pleadings liberally in her favor and considering the evidence, the appellate court held that a fact issue existed as to whether the plaintiff was an invitee. *Id*. at 930-31.

Following *Posey*'s reasoning, we conclude that Realme was not required to demonstrate exclusive use, such that other members of the public could not use the area where she fell. We reject the City's argument that Realme could not be an invitee because she was injured in an area where other members of the public might be present without paying a fee.

The City further argues that Realme could not be an invitee because she did not pay a specific fee to use the specific public premises. The City points to *Garcia v. State*, a case in which we held that the plaintiff was not an invitee because he did not "pay[] for use" of the roadway by paying his driver's license fee, his vehicle licensing fee, and fuel taxes. 817 S.W.2d 741, 743 (Tex. App.—San Antonio 1991, writ denied). But the present case is readily distinguishable from *Garcia*, where the plaintiff relied on generic fees to establish his payment for general use of the roadways. Unlike the situation in *Garcia*, here the evidence indicates that Realme paid a specific

fee to enter the 5K event on city-owned property and that she was on the designated 5K course and participating in the 5K event when she was injured. We reject the City's argument that Realme could not be an invitee because she did not pay a specific fee for use of the public area where she tripped and fell.

The circumstances in this case are similar to the circumstances in *Hodge* and *Posey*. In *Hodge*, the plaintiff, who had paid an entry fee to attend an outdoor event sponsored by a private entity, fell and was injured on City-owned property. 2018 WL 460808, at *3. Like the plaintiff in *Hodge*, the evidence showed Realme was injured while participating in a privately-sponsored event on City property. In *Posey*, the plaintiff fell on a public walkway after attending the event and while returning to her vehicle parked in a nearby parking lot. 593 S.W.3d at 927. The circumstances supporting Realme's invitee status are even more compelling than the plaintiff's circumstances in *Posey*. Not only had Realme paid an entry fee to participate in the 5K, Realme was participating in the 5K and on its designated course at the time she was injured. Again, whether or not a plaintiff was an invitee "depends in large part on [her] purpose in coming to the property." *Id*. at 930.

After construing Realme's pleadings liberally in her favor and considering the appropriate jurisdictional evidence, we conclude a fact question exists as to whether the City waived its immunity. When the evidence creates a fact question on the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the factfinder must resolve the fact question. *Johnson*, 572 S.W.3d at 664. Therefore, we hold the trial court did not err by denying the City's plea to the jurisdiction. *Hodge*, 2018 WL 460808, at *3 n.2 (concluding the trial court properly denied the City's plea to the jurisdiction when a fact issue existed regarding whether the plaintiff was an invitee under section 101.022(a)). We overrule the City's first issue.

RECREATIONAL USE STATUTE

In its second issue, the City argues that Realme's suit is barred by immunity under the Recreational Use Statute, which "limits the liability of all landowners—public and private—who permit others to use their property for activities the statute defines as 'recreation.'" *Univ. of Tex. v. Garner*, 595 S.W.3d 645, 648 (Tex. 2019); *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.001-.002. The City did not make this argument in its plea to the jurisdiction or otherwise raise this argument in the trial court.

The City urges us to address its Recreational Use Statute argument because a governmental unit may raise immunity, a jurisdictional argument, for the first time on appeal. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). However, to properly raise a jurisdictional argument for the first time on appeal, the governmental unit "has the burden to show either that the plaintiff failed to show jurisdiction despite having had full and fair opportunity in the trial court to develop the record and amend the pleadings; or if such opportunity was not given, that the plaintiff would be unable to show the existence of jurisdiction if the cause were remanded to the trial court and such opportunity afforded." *Id*. at 96.

Here, Realme did not have the opportunity to conduct discovery and develop the record with regard to the Recreational Use Statute, and the City does not show that she did.[4] In her appellate brief, Realme expressly asks us to defer ruling on the issue of subject matter jurisdiction until after she can conduct proper discovery. Because Realme has not had the opportunity to

[4]"As applied to government landowners with immunity from suit and liability, the [Recreational Use Statute's] effect is to limit the scope of the Tort Claims Act's waiver of that immunity by classifying recreational users as trespassers and requiring proof of gross negligence, malicious intent, or bad faith." *Univ. of Tex. v. Garner*, 595 S.W.3d 645, 648 (Tex. 2019) (internal quotations omitted). In its second issue, the City argues that Realme's failure to produce evidence of gross negligence under the TTCA shows that she cannot establish gross negligence under the Recreational Use Statute. In responding to the City's plea to the jurisdiction, Realme took the position that she was an invitee under the TTCA. Because gross negligence is not part of the invitee analysis, it was unnecessary for Realme to present evidence of gross negligence in responding to the City's plea to the jurisdiction.

develop the record regarding the Recreational Use Statute, we cannot address the City's second issue. *See id*. at 100 (remanding to the trial court for further proceedings when the governmental unit failed to show that the plaintiffs had a full and fair opportunity to develop the record as to jurisdiction or that the plaintiffs would be unable to show jurisdiction).

CONCLUSION

The trial court's interlocutory order denying the City of San Antonio's plea to the jurisdiction is affirmed and this cause is remanded to the trial court for further proceedings.

Irene Rios, Justice