Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00320-CV

CITY OF SAN ANTONIO,
Appellant

v.

Nolan **ANDERSON**,
Appellee

From the 407th Judicial District Court, Bexar County, Texas
Trial Court No. 2019-CI-12758
Honorable David A. Canales, Judge Presiding

Opinion by: Lori I. Valenzuela, Justice

Sitting: Luz Elena D. Chapa, Justice
Liza A. Rodriguez, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: March 10, 2021

REVERSED AND RENDERED

The City of San Antonio appeals the trial court's order denying its plea to the jurisdiction. For the reasons explained below we reverse the trial court's order and render judgment granting the plea to the jurisdiction.

FACTUAL & PROCEDURAL BACKGROUND

Nolan Anderson sued the City for injuries arising from a slip-and-fall outside a terminal of the San Antonio International Airport. Anderson alleged his injuries were the result of the use and/or misuse of tangible personal property, or alternatively, a defective condition in the premises.

Anderson argued the City's immunity from suit was waived by means of the Texas Tort Claims Act.

In his deposition, Anderson stated he was on crutches at the time of the accident and he had walked through the airport with no problem. As he exited the terminal through sliding glass doors, he noticed a rubber mat outside the door and that the ground was wet. As soon as he moved his crutches forward through the doors, he fell and injured himself. He could not recall if it was raining. When asked if the water played a role in his fall, Anderson responded, he "really couldn't answer that as far as, like – it probably could have. I don't know." When he was again asked whether the water caused his fall, he responded he did not know. He also did not know whether the ends of his crutches were on the concrete or the mat when they slipped, he did not know if it was a rainy day, and he did not know how long the water had been there. When asked whether the water was on the mat or only on the concrete, he replied that he only knew "it was moisture out there" and he was "a little bit" wet when he got up from the ground after his fall. When asked if he had any reason to believe anyone from the City knew about the water before he fell, he answered: "Not that I know of, no, sir."

Relying on Anderson's deposition testimony, the City filed a plea to the jurisdiction and, alternatively, a no-evidence motion for partial summary judgment. In its plea, the City asserted the case should be dismissed because Anderson could not establish he was injured due to a condition creating an unreasonable risk of harm, he could not identify what condition caused his fall, and he could not establish the City had actual knowledge of any such condition. In its motion for summary judgment, the City argued it was entitled to summary judgment because Anderson could not offer competent evidence to establish he was injured due to a condition creating an unreasonable risk of harm or that the City had prior actual knowledge of any such condition.

In response to the plea to the jurisdiction, Anderson offered the affidavit of James Clay who was with Anderson at the time. Clay stated:

> When we arrived at the airport in San Antonio I carried Major Anderson's bags for him as he walked with his crutches to the exit of the airport. We were going to be picked up by his parents. As we walked outside it was raining. Despite the sidewalk outside the door being covered by the upper level, the ground was still wet.
>
> Major Anderson began to walk toward the area where his father was parked [sic] I saw him drop. The area was free of debris or any other condition that could have caused him to fall. The only thing that was in that area where he fell was water.

The trial court granted the no-evidence motion for summary judgment with respect to Anderson's cause of action as it related to the condition or use of tangible property and denied it with respect to Anderson's cause of action related to a premises defect. The court denied the plea to the jurisdiction, and the City filed this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) ("A person may appeal from an interlocutory order of a district court . . . that . . . grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001").

STANDARD OF REVIEW

"Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject-matter jurisdiction is a question of law reviewed *de novo*." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Whether undisputed evidence of jurisdictional facts establishes a trial court's jurisdiction is also a question of law. *Id.* When a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider any relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. *Id.* at 227. "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." *Id.* at 227-28. "However, 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." *Id.* at 228.

The above standard generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a. *Id.* The *Miranda* Court explained, "By requiring the state to meet the summary judgment standard of proof . . . we protect the plaintiffs from having to 'put on their case simply to establish jurisdiction.'" *Id*. (citation omitted). Under this procedure, the burden is on the defendant to put forth evidence establishing as a matter of law that the trial court lacks subject-matter jurisdiction. *Id.* The burden then shifts to the plaintiff to demonstrate that there is a disputed issue of material fact regarding the jurisdictional issue. *Id.*

LIMITED WAIVER OF IMMUNITY

"In Texas, sovereign immunity deprives a trial court of subject-matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the state consents to suit." *Id.* at 224. The Tort Claims Act provides a limited waiver of immunity from suit for certain negligent acts. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 94 (Tex. 2012). "Absent a valid statutory or constitutional waiver, trial courts lack subject-matter jurisdiction to adjudicate lawsuits against municipalities." *Suarez v. City of Tex. City*, 465 S.W.3d 623, 631 (Tex. 2015). The City, as a political subdivision of the State, is entitled to such immunity unless it has been waived. *See Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006).

The Tort Claims Act expressly waives immunity in three areas when the statutory requirements are met: (1) use of publicly owned automobiles; (2) injuries arising out of a condition or use of tangible personal property; and (3) premises defects. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016). Anderson contends his claims are within the scope of the Tort Claims Act's waiver of immunity for both injuries arising out of conditions or use of property and premises defects.

Under the Torts Claims Act, a claim for a condition or use of real property is a premises defect claim and the Tort Claims Act waives immunity for two distinct tort causes of action: one arising from tangible personal property and one arising from a premises defect. *See id.* at 385. "The Tort Claims Act thus applies different standards of care upon a governmental unit for negligence claims based on 'a condition or use of tangible personal property' and claims based on a 'premises defect.'" *Id.* (citing TEX. CIV. PRAC. & REM. CODE §§ 101.021(2) (tangible personal property), 101.022(a) (premises defect)). "The Tort Claims Act's scheme of a limited waiver of immunity from suit does not allow plaintiffs to circumvent the heightened standards of a premises defect claim contained in section 101.022 by re-casting the same acts as a claim relating to the negligent condition or use of tangible property." *Miranda*, 133 S.W.3d at 233. "Therefore, if a claim is one for a premises defect, it must be analyzed under section 101.022 and not as a claim for a condition or use of tangible property under section 101.021(2)." *Sampson*, 500 S.W.3d at 386.

As a result, a claim cannot be both for a condition or use of tangible property and a premises defect. The Tort Claims Act does not define "tangible personal property" or "premises defect." However, the Texas Supreme Court, "both within and outside of the Tort Claims Act, has consistently treated slip/trip-and-fall cases as presenting claims for premises defects." *Id.* (and cases cited therein). "Creative pleading does not change the nature of a claim." *Id.*; *see also Miranda*, 133 S.W.3d at 233. "Whether a claim is based on a premises defect is a legal question." *Sampson*, 500 S.W.3d at 385. Accordingly, we must first consider the nature of Anderson's claim and whether it is properly categorized as based on a condition or use of tangible property or a premises defect; if the latter, then the claim must be analyzed according to the heightened requirements of section 101.022." *See id.* at 386.

In his petition, Anderson alleged his condition or use claim as follows: "the failure to use a slip preventing mat on an outdoor surface on a rainy day was a negligent misuse of tangible physical property." He alleged his premises defect claim as follows: "[t]he water in an area that is covered, where one does not expect to find water, represented an unreasonable risk of harm and a dangerous condition on the premises. The fact that it was raining that day would have been known to all parties in control of the premises."

In *Sampson*, the Court discussed the distinction between a cause of action for premises liability and negligent activity. *See id.* at 388 ("The definition of 'premises defect' has been developed at common law through case law distinguishing between two subspecies of negligence: causes of action for premises liability and negligent activity."). The Court "'recognized that negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe.'" *Id.* (quoting *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010)). "When distinguishing between a negligent activity and a premises defect, this Court has focused on whether the injury occurred by or as a contemporaneous result of the activity itself—a negligent activity—or rather by a condition created by the activity—a premises defect." *Id.* "Just as at common law, where the artificial condition upon which a premises liability claim is based may be created by an activity, we conclude that under the Tort Claims Act, the dangerous condition upon which a premises defect claim is based may be created by an item of tangible personal property." *Id.* "The distinction lies in whether it is the actual use or condition of the tangible personal property itself that allegedly caused the injury, or whether it is a condition of real property—created by an item of tangible personal property—that allegedly caused the injury." *Id.*

Thus, to state a "condition or use" claim under the Tort Claims Act, "there must be an allegation of 'defective or inadequate property.'" *Id.* To "state a 'use' of tangible personal property claim under the Tort Claims Act, the injury must be *contemporaneous* with the use of the tangible personal property—'[u]sing that property must have actually caused the injury.'" *Id.* at 388-89 (citation omitted). "Allegations of mere non-use of property cannot support a 'use' claim under the Tort Claims Act." *Id.* at 389. Furthermore, "a governmental unit 'does not 'use' tangible personal property . . . within the meaning of section 101.021(2) by merely providing, furnishing, or allowing . . . access to it.'" *Id.* (quoting *Rusk State Hosp.*, 392 S.W.3d at 98)).

We conclude Anderson alleged only a premises defect claim. Although a mat was located outside the exit, Anderson alleged "the failure to use a slip preventing mat on an outdoor surface on a rainy day was a negligent misuse of tangible physical property." There is no allegation by Anderson or evidence in the record that the mat itself was defective, that his injury was caused by the use or condition of the mat, or that his injury was contemporaneous with the use of the mat. His allegation of mere non-use of a slip preventing mat "cannot support a 'use' claim under the Tort Claims Act." *Id.* Therefore, the trial court erred by denying the City's plea to the jurisdiction based on Anderson's use or condition claim.[1] Accordingly, we next address whether the trial court had subject-matter jurisdiction over Anderson's premises defect claim.

When a claim arises from a premises defect, "the governmental unit owes to the claimant only the duty the private person owes to a licensee on private property . . .." TEX. CIV. PRAC. & REM. CODE § 101.022(a). "The duty owed to a licensee on private property requires that 'a landowner not injure a licensee by willful, wanton or grossly negligent conduct, and that the owner

[1] On appeal, Anderson contends this issue is moot because the trial court granted the City's no-evidence motion for summary judgment with respect to his cause of action as it related to the condition or use of tangible property. We disagree. Because the trial court did not dismiss the claim, the question of whether the trial court erred by not granting the City's plea to the jurisdiction and dismissing this cause of action is properly before us.

use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not.'" *Sampson*, 500 S.W.3d at 385 (quoting *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex.1992)).

Absent willful, wanton, or grossly negligent conduct, a licensee must prove the following elements to establish the breach of duty owed to him: (1) a condition of the premises created an unreasonable risk of harm to the licensee; (2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition; (4) the owner failed to exercise ordinary care to protect the licensee from danger; (5) the owner's failure was a proximate cause of the injury to the licensee. *Id.* at 391. We need not consider whether Anderson raised a genuine issue of material fact on all five elements of his premises defect claim because we conclude that, even if a fact issue exists on some of the elements, Anderson did not demonstrate a disputed issue of material fact regarding the second element.

On the second element that must be established, actual knowledge, as opposed to constructive knowledge, is the type of knowledge required, and the owner must be shown to have actual knowledge at the time of the accident. *Id.* at 392. Moreover, "the licensee must show that the owner actually knew of the 'dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition c[ould] develop over time.'" *Id.* (citation omitted). "Hypothetical knowledge will not suffice." *Id.* "Additionally, that the owner could have done more to warn the licensee is not direct evidence to show that the owner had actual knowledge of the dangerous condition." *Id.* "'Although there is no one test for determining actual knowledge that a condition presents an unreasonable risk of harm, courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition.'" *Id.* (citation omitted). In this case, the only evidence relevant to whether the City had actual knowledge was Anderson's response, "Not that I know of, no, sir," when he was

asked, "Do you have any reason to believe that anybody from the City knew about this water before you fell?"

We conclude the City established as a matter of law that the trial court lacked subject-matter jurisdiction over Anderson's premises defect claim and Anderson did not demonstrate there was a disputed issue of material fact regarding the jurisdictional issue. Therefore, the trial court erred by denying the City's plea to the jurisdiction based on this claim.

CONCLUSION

For the reasons stated above, we reverse the trial court's order and render judgment granting the City's plea to the jurisdiction and dismissing Anderson's claims against the City with prejudice. *See Harris Cty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004) (holding that after governmental entity files plea to jurisdiction and plaintiff fails, after reasonable opportunity, to cure defective pleadings, case should be dismissed with prejudice "because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined").

Lori I. Valenzuela, Justice