

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-16-00356-CV**

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**PORT OF BEAUMONT NAVIGATION  
DISTRICT OF JEFFERSON COUNTY, TEXAS, Appellant**

**V.**

**KIRK HOWARD MCCARTY, Appellee**

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**On Appeal from the 58th District Court  
Jefferson County, Texas  
Trial Cause No. A-197,282**

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**MEMORANDUM OPINION**

The Port of Beaumont Navigation District of Jefferson County, Texas (the Port) appeals the trial court's denial of its plea to the jurisdiction in a personal injury case filed by Kirk Howard McCarty, who was injured when the car he was driving was hit by a train. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (West Supp. 2016) (permitting an interlocutory appeal from a ruling granting or denying a plea to the jurisdiction filed by a governmental unit). When the collision occurred,

McCarty was driving his car on a roadway across an easement held by the Port that crossed the tracks. In one issue, the Port argues that McCarty has not alleged or established that the Tort Claims Act waived its immunity from suit so that a court could exercise jurisdiction over the claims McCarty filed against the Port. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.021, 101.022 (West 2011) (Tort Claims Act). The Port concludes the trial court erred by denying its plea. We reverse and render in part, and we reverse and remand in part.

### Background

In his suit, McCarty alleged that one evening in October 2014, he was injured when his car was hit by a train that was operated by employees of Gerdau Ameristeel US Inc. McCarty alleged that the crossing where the collision occurred had been leased to the Port, and that under its lease, the Port “was responsible for the maintenance and upkeep of the leased premises.” McCarty claimed that an unreasonably dangerous condition existed on the leased premises where the collision occurred, that the Port knew or should have known of the dangerous condition, that there were “no warnings or insufficient warnings of the dangerous condition on the land where [he] was injured[,]” and that the Port “failed to provide adequate lighting” on the roadway where the train hit his car.

In a plea to the jurisdiction, the Port asserted that it did not possess the premises where McCarty's injuries occurred, and that it merely held a roadway easement to the crossing, allowing it to access its property "via an improved roadway that crosses the railroad track." Nonetheless, the Port acknowledged in its brief that it "was responsible for maintaining its roadway access easement" at the crossing where the collision occurred.

When McCarty responded to the Port's plea, he attached copies of the documents that set out the terms that are relevant to the roadway easement the Port holds at the crossing and a copy of a deposition the parties obtained from Matthew Hammer, Gerdau's safety manager, who investigated the collision for Gerdau after it occurred. According to McCarty, the evidence established that the Port is the entity that is responsible for maintaining the crossing where the collision occurred. Generally, the agreements establish that the Port was responsible for maintaining the easement, but they do not specifically state that the Port was also responsible for maintaining the artificial lighting near the crossing. Also, Hammer's deposition reflects that he reached the following conclusions from his investigation: McCarty "ran a stop sign and ran into our train[,]"; McCarty ignored signs that warned of the presence of the railroad tracks, and McCarty ignored signs near the crossing indicating that the traffic on the road was required to yield to trains.

The evidence introduced at the hearing reflects that the crossing where the collision occurred requires vehicles to pass over six sets of tracks. The evidence also shows that the tracks curve in the area where the crossing is located. Hammer estimated the distance from the entry of the crossing to the exit of the crossing at approximately 75 yards. Hammer explained that there were artificial lights on poles near the crossing, but he was not asked to identify whether the poles are within the boundaries of the roadway easement, whether the Port installed the artificial lights that were in the vicinity of the crossing, whether the Port was responsible for maintaining the artificial lighting on the poles, or whether the lights on the poles were working when McCarty's collision with the train occurred.<sup>1</sup> Hammer also addressed whether he had evaluated the lighting at the crossing, and he testified that he never evaluated whether the artificial lighting at the crossing adequately illuminated the crossing. Hammer testified that other than McCarty's collision, no collisions had ever occurred at the crossing.

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<sup>1</sup> Hammer explained that after the collision, Gerdau installed temporary lights that increased the artificial lighting available at night around the crossing; he further testified that Gerdau later replaced the temporary lights that it placed near the crossing with permanent fixtures.

## Standard of Review

Generally, a governmental unit of the State, such as the Port, has sovereign immunity that protects it from being sued in tort unless that immunity has been waived. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001(3)(A),(B) (West Supp. 2016), 101.025 (West 2011); *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 611 (Tex. 2000). Under the definitions in the Tort Claims Act, the Port, which is a navigation district, qualifies as a “governmental unit.” *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(B).

In its appeal, the Port argues the trial court erred by denying its plea to the jurisdiction. According to the Port, McCarty failed to allege any claims against the Port that fell within the limited waivers provided by the Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.021, 101.022. The Port contested the trial court’s power to exercise jurisdiction over the dispute by filing a plea to the jurisdiction. A plea to the jurisdiction is a dilatory plea, which governmental units use to defeat a plaintiff’s cause of action without regard to whether the plaintiff’s claims have merit. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea requires the trial court to decide whether the Legislature waived the governmental unit’s immunity for the claims the plaintiff is asserting in its lawsuit. *Id.* Generally, with the exception of constitutional claims that are not at issue here,

a plaintiff is required to show that the Legislature waived a governmental unit's immunity for the claims the plaintiff is making in the suit. *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 403 (Tex. 1997); *Duhart v. State*, 610 S.W.2d 740, 741 (Tex. 1980). In the absence of an express waiver of governmental immunity in a statute, courts lack jurisdiction to impose duties on governmental units by disregarding their immunity from suit. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224-25 (Tex. 2004) (explaining that immunity to suit and immunity from liability are coextensive under the Tort Claims Act).

Since McCarty seeks to recover against the Port for the personal injuries he sustained on property that he alleges was controlled by the Port, McCarty's claims sound in tort. However, the Tort Claims Act does not waive the immunity of governmental units for all tort claims; instead, the Act provides a limited immunity waiver in personal injury cases when the plaintiff's injury was caused by a premises defect or by a governmental unit's failure to warn of special defects, "such as excavations or obstructions on highways, roads, or streets[.]" Tex. Civ. Prac. & Rem. Code Ann. §§ 101.021(1)(B), 101.022(a), (b). McCarty argues that the conditions at the crossing on the night of his collision are properly categorized as either special

defects or as premises defects. However, even when the Tort Claims Act applies,<sup>2</sup> the governmental unit's duty to plaintiffs who assert premises-defect claims is limited to the duty owed to a licensee who enters private property, unless the claimant paid to use the property. *Id.* § 101.022(a). McCarty did not allege that he paid to use the road over the crossing, so on a premises-defect theory, the duty the Port owed him is limited to the duty owed to licensees.

In cases involving special defects, the State's duty requires that the State exercise ordinary care to protect an invitee from a dangerous condition about which it knew or should have known. *See Denton Cty. v. Beynon*, 283 S.W.3d 329, 331 (Tex. 2009). However, whether McCarty's case actually involved a special defect is disputed, and the term "special defect" is not expressly defined by the Tort Claims Act. Therefore, to decide if the Tort Claims Act waived the governmental unit's immunity in a particular case, courts are often required to examine the merits of the plaintiff's claims. *See Suarez v. City of Tex. City*, 465 S.W.3d 623, 631 (Tex. 2015).

McCarty's pleadings and the evidence that he presented in the hearing indicate that he complained of the following conditions at the crossing: the presence of the train, the presence of the tracks, and inadequate lighting. However, although he was

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<sup>2</sup> McCarty did not allege any claim against the Port for failing to maintain a traffic or road control device. *See Tex. Civ. Prac. & Rem. Code Ann.* § 101.060 (West 2011).

required to plead that he was unaware of the conditions he alleged constituted the premises defect, McCarty failed to allege that he was unaware the road crossed over tracks, that trains used the tracks, or that the artificial lighting in the area of the crossing was inadequate. *See Cty. of Cameron v. Brown*, 80 S.W.3d 549, 559 (Tex. 2002) (explaining that the plaintiffs, to properly plead an inadequate-lighting claim under the Tort Claims Act, must plead that the plaintiffs did not know the lighting was inadequate). Additionally, whether McCarty's pleadings were adequate to properly allege a claim under the Tort Claims Act for either a special-defect or a premises-defect claim were matters the trial court was required to resolve as questions of law. *See State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 238 (Tex. 1992).

We review the trial court's ruling that McCarty's pleadings adequately alleged a claim under the Tort Claims Act using a de novo standard. *See Brown*, 80 S.W.3d at 555 (explaining that if the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend); *Payne*, 838 S.W.2d at 238 (explaining that whether a defect is a premises defect or a special defect "is a question of duty involving statutory interpretation and thus an issue of law for the court to decide"). To determine whether the plaintiff adequately alleged a premises-defect or a special-



defect claim under the Tort Claims Act, “we consider the facts alleged by the plaintiff and, to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties.” *Tex. Nat. Res. Conservation Comm’n v. White*, 46 S.W.3d 864, 868 (Tex. 2001). If the pleadings are insufficient to show that the court has jurisdiction over the claims, but the defect is curable, the issue is one of pleading sufficiency and the plaintiff should be given the opportunity to amend. *Brown*, 80 S.W.3d at 555.

### Analysis

While the term “special defect” is not defined by the Tort Claims Act, the statute associates the term with conditions “such as excavations or obstructions on highways, roads, or streets[.]” Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b); *see also* *Cty. of Harris v. Eaton*, 573 S.W.2d 177, 178-80 (Tex. 1978). Significantly, the Supreme Court has explained that “[t]he class of special defects contemplated by the statute is narrow.” *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010). Additionally, conditions are not special defects unless “they pose a threat to the ordinary users of a particular roadway.” *Beynon*, 283 S.W.3d at 331 (quoting *Payne*, 838 S.W.2d at 238 n.3). Characteristics that courts have considered in determining whether a condition qualifies as a special defect for the purposes of the Tort Claims Act’s waiver include (1) the size of the dangerous condition, (2) whether

the condition poses some unusual quality outside the ordinary course of events, (3) whether the condition unexpectedly and physically impairs a vehicle's ability to travel on the road, and (4) whether the condition presents an unexpected and unusual danger to the ordinary users of the roadway. *See Tex. Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009) (per curiam). The “special-defect jurisprudence turns on the objective expectations of an ‘ordinary user’ who follows the ‘normal course of travel.’” *Hayes*, 327 S.W.3d at 116 (quoting *Beynon*, 283 S.W.3d at 332).

In our opinion, an ordinary user on a road that crosses railroad tracks at a crossing equipped with a crossbuck—the familiar black-and-white, X-shaped signs that read “RAILROAD CROSSING”—is expected to cross railroad tracks only after looking for trains to determine if any trains are in hazardous proximity to the crossing. *See Tex. Transp. Code Ann. § 545.251(c)* (West 2011) (requiring drivers approaching a railroad crossing equipped with crossbuck signs to yield the right-of-way to a train in hazardous proximity of the crossing); *see also Mo. Pac. R.R. v. Limmer*, 299 S.W.3d 78, 80 (Tex. 2009) (describing the markings that are on railroad crossbucks). The evidence presented during the hearing indicates there were signs warning of the tracks on the road approaching the crossing, and reflects the train was in hazardous proximity to the crossing when McCarty drove across the tracks.

Additionally, there was no evidence presented during the hearing to show that the condition of the tracks caused the collision.

The mere presence of railroad tracks and the transitory nature of a train passing through a crossing is unlike an obstruction or excavation, the types of conditions the Legislature classified as special defects under the Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b). While in one sense a train passing through a crossing temporarily obstructs traffic, the presence of the crossbucks and signs, which warn of the tracks, indicate to an ordinary user that he should look for trains to decide whether to yield the right-of-way. Yielding the right-of-way to a train in the hazardous vicinity of a crossing that is marked is required by Texas law. *See* Tex. Transp. Code Ann. § 545.251(c). In summary, the presence of the tracks and the potential presence of trains at a properly marked crossing are not unexpected to those ordinarily required to use roads that intersect railroad tracks. Based on the evidence showing how the collision occurred, the mere presence of tracks and the train at the crossing where McCarty was injured were not special defects for the purposes of the waiver found in section 101.022(b) of the Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b).

Additionally, the artificial lighting that exists on a roadway is completely unlike an unexpected obstruction or excavation that a driver might encounter on a

road. *Id.* In our opinion, a claim that alleges the illumination on a road was inadequate is also not a special defect sufficient to show the waiver required to sue a governmental unit under the Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b); *Wenzel v. New Braunfels*, 852 S.W.2d 97, 100 (Tex. App.—Austin 1993, no writ) (holding that a claim alleging the City failed to provide lighting was insufficient to allege a special defect under the Tort Claims Act).

Next, we turn to the premises-defect claims that McCarty brought against the Port. McCarty argues that the presence of the tracks, the presence of the train, and the artificial lighting at the crossing created an unreasonably dangerous condition sufficient to show that a premises defect existed at the crossing where his injury occurred. With respect to property owned or controlled by the government, a “governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property[.]” Tex. Civ. Prac. & Rem. Code Ann. § 101.022(a).

Generally, owners of private property have a duty to either “warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not.” *Payne*, 838 S.W.2d at 237. Because the duty owed by a governmental unit on property that it controls is the duty owed by private property owners to their licensees, claimants under the Tort Claims Act are required to allege

and prove that they did not actually know of the allegedly dangerous condition to allege a valid claim under the Tort Claims Act. *Id.*

Even if we assume the mere presence of the train and tracks created a premises defect, an issue we expressly need not decide, the evidence from the hearing affirmatively demonstrates McCarty is unable to establish that the Port breached any duty that it owed McCarty at the crossing. The evidence the trial court considered in the hearing established that signs were present near the crossing that provided warnings about the presence of the crossing. *See Miranda*, 133 S.W.3d at 228. We conclude that Hammer's testimony about the warnings at the crossing established that the Port discharged its duty to warn McCarty about the crossing. *See generally Henkel v. Norman*, 441 S.W.3d 249, 252 (Tex. 2014) (addressing the adequacy of warning about a slip hazard); *Montgomery Cty. v. Lanoue*, No. 09-16-00195-CV, 2016 Tex. App. LEXIS 13791, \*7 (Tex. App.—Beaumont Dec. 29, 2016, no pet.) (same).

Last, we address McCarty's claim that the crossing was inadequately illuminated, and that the level of artificial lighting constituted a premises defect for the purposes of the Tort Claims Act. We are unable from the present record to determine whether McCarty will be able to establish a waiver of immunity under the Tort Claims Act with respect to his inadequate-lighting claim. While the evidence at

the hearing on the Port's motion demonstrated that there were signs warning McCarty of the tracks as he approached the crossing, the evidence was undeveloped regarding McCarty's claim that the crossing was not adequately illuminated on the night that he collided with the train.

In certain cases, when supported by sufficient facts, a plaintiff might be able to establish that a governmental unit is liable to him under the Tort Claims Act for failing to maintain adequate lighting on a roadway. *See Brown*, 80 S.W.3d at 557-59. To establish a waiver based on a claim of inadequate lighting, the plaintiff must plead and prove that the governmental unit had actual notice that lights were out, and the inadequacy was due to the governmental unit's failure to maintain the lights. *Id.* However, an inadequate-lighting claim cannot be based on the government's failure to install adequate lighting when the road was designed. *Id.* As the Texas Supreme Court explained in *Brown*, a governmental unit's immunity is not waived if it fails to install adequate lighting, since decisions about how much artificial lighting to install is a discretionary decision. *Id.* The plaintiff must also plead that inadequate maintenance created an unreasonably dangerous condition in the road, and that the condition caused the plaintiff's injuries. *Id.* at 557.

In McCarty's case, we are unable to determine from McCarty's pleadings or the evidence the trial court considered in the hearing whether McCarty is claiming

that the collision resulted from the Port's inadequate maintenance of the lighting at the crossing or whether, instead, the inadequacy was the result of decisions made when the lighting was originally installed. Additionally, the evidence in the hearing failed to address whether the Port had actual knowledge of any maintenance problems with the artificial lights near the crossing before the collision occurred, whether the artificial lights that illuminated the crossing were located within the boundaries of the Port's easement, or whether the Port bore the responsibility to maintain the lighting near the crossing under the terms in its easement.

We cannot determine whether the actual facts surrounding the lighting at the crossing will allow McCarty to plead or to prove that a waiver exist under the Tort Claims Act that will allow the court to exercise jurisdiction over the claim against the Port. It is apparent from the testimony about the characteristics of the crossing that a large number of tracks are present, that the tracks curve as they approach the crossing, that the distance from the point of entry to the point of exiting the crossing is large (approximately 75 yards), and that McCarty's car was struck by the front railroad car that was being pushed by a locomotive through the crossing. Nevertheless, McCarty failed to allege that the inadequacy of the lighting at the crossing resulted from inadequate maintenance, that he was unaware of the inadequacy of the lighting at the crossing before he collided with the train, that the

Port was responsible for maintaining the lights near the crossing before the collision, or that the Port was on actual notice of an unreasonably dangerous condition created by the Port's failure to repair the lights at the crossing after having received notice that lights at the crossing were not being adequately maintained.

We are unable to conclusively determine from the evidence or the pleadings if McCarty's pleadings can be cured. *See Brown*, 80 S.W.3d 557-59. Generally, a plaintiff should be given an opportunity to amend his pleadings when they neither demonstrate that the court has jurisdiction nor affirmatively negate that the court does not. *See Tex. Dep't of Criminal Justice-Cnty. Justice Assistance Div. v. Campos*, 384 S.W.3d 810, 815 (Tex. 2012). We conclude that McCarty should be given an opportunity to amend his pleadings solely with respect to his inadequate-lighting-premises-defect claim. *See Brown*, 80 S.W.3d at 559. If McCarty cures the defects in his pleadings, the parties may then present evidence to allow the trial court to determine whether it has subject-matter jurisdiction over the sole remaining claim that McCarty filed against the Port. *See Miranda*, 133 S.W.3d at 227-28.

#### Conclusion

We reverse the trial court's ruling denying the Port's plea on McCarty's inadequate-lighting-premises-defect claim, and we remand the case to the trial court to allow McCarty the opportunity to replead solely with respect to that claim. We



reverse and render judgment dismissing all of McCarty's remaining claims with prejudice against the Port because the trial court does not have jurisdiction over them.

REVERSED AND RENDERED IN PART; REVERSED AND REMANDED IN PART.

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HOLLIS HORTON  
Justice

Submitted on December 6, 2016  
Opinion Delivered March 23, 2017  
Before Kreger, Horton, and Johnson, JJ.