COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00436-CV

CITY OF BEDFORD — APPELLANT

V.

LEAH SMITH — APPELLEE

FROM THE 17TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 017-287272-16

MEMORANDUM OPINION[1]

Appellee Leah Smith lived at The Arbors of Central Park, an apartment complex in Bedford, Texas. In July 2015, as she was walking across the grass to reach a sidewalk in front of her apartment, she stepped onto a manhole lid covering a water-meter box within an easement owned by Appellant City of Bedford. The lid flipped open, and Smith fell into the manhole and was injured.

[1]*See* Tex. R. App. P. 47.4.

Smith sued the City, and the City filed a plea to the jurisdiction claiming the protections of governmental immunity. The trial court overruled the City's plea and gave Smith additional time to amend her pleadings and conduct discovery. The City appealed; we affirm in part and reverse and render in part.

Background

Smith initially sued the City[2] in early 2016 in county court, but she nonsuited those claims. On August 31, 2016, Smith sued the City[3] in district court under the Texas Tort Claims Act (the TTCA), alleging that the "manhole cover was broken, defective, and/or improperly secured, which caused it to flip open." She asserted claims for premises defect, special defect, negligence, and respondeat superior and claimed that the City's acts or omissions had proximately caused her injuries. Smith specifically pleaded that the City's governmental immunity was waived under the TTCA because her injuries were caused by the condition or use of tangible personal or real property. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (West 2011).

On October 17, 2016, the City filed a combined answer, special exceptions, and plea to the jurisdiction. In its jurisdictional plea, the City asserted that Smith had failed to plead and could not prove claims for which the City's

[2]Smith also sued Avenue5 Holdings, Inc. (the apartment complex's owner and operator) and Olameter Corporation (a company that used the manhole cover for meter-reading services).

[3]Smith also sued Avenue5 Holdings and Olameter in district court, but they are not parties to this appeal.

governmental immunity was waived under the TTCA. The City set its plea for hearing on Monday, October 31, 2016. At around 4:30 p.m. the Friday before the hearing, the City filed a brief in support of its plea along with affidavits from (1) Mike Green, a crew leader for the City's water department; (2) Kenneth Overstreet, the Interim Director and Field Operations Manager for the City's public-works department;[4] and (3) Charles Carlisle, the City's Fleet and Facilities Manager and Risks and Contractual Services Manager. Each of these City employees averred that, among other things, neither they nor the City was "aware of the allegedly defective/unreasonable [sic] lid/meter box prior to Plaintiff's fall." After an evidentiary hearing at which the three affidavits were admitted into evidence without objection, the trial court overruled the City's plea, stating that

> [a]fter due consideration of the pleadings, the Plea, the Response, the arguments of counsel[,] and the evidence submitted at the hearing, this Court is of the opinion that such Plea should be OVERRULED without prejudice. However, the Court finds the incident in question does not involve a special defect. Plaintiff may amend her pleadings and conduct discovery in an attempt to prove her premises liability claim or other claims as pled.
>
> IT IS THEREFORE ORDERED that Defendant's Plea to the Jurisdiction is OVERRULED without prejudice.

[4]The City's water department is a part of its public-works department.

The City has appealed,[5] asserting two issues: (1) the City's governmental immunity barred Smith's claims, and (2) the trial court erred by finding it had jurisdiction over Smith's claims.

Smith's Special-Defect Claim

Governmental immunity protects political subdivisions of the State, including cities, from lawsuits for money damages unless immunity has been waived. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006) (op. on reh'g). The TTCA provides a limited waiver of immunity for personal injuries arising from premises defects. *See* Tex. Civ. Prac. & Rem. Code § 101.021(2) (stating that a "governmental unit" is liable for personal injury "caused by a condition or use of . . . real property" if Texas law would impose liability on a private person for the same condition or use); § 101.025 (West 2011) (providing that "sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter" and that "[a] person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter"); *see also id.* § 101.001(3)(B) (West Supp. 2016) (defining "governmental unit" to include cities). The TTCA imposes different standards of care depending on whether the condition is a premises defect (the licensee standard) or a special defect (the more lenient invitee standard). *See id.*

[5]Section 51.014(a)(8) of the civil practice and remedies code gives us jurisdiction over this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (West Supp. 2016).

§ 101.022(a), (b) (West 2011); *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010); *Tex. Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009) (op. on reh'g); *see also State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992) (op. on reh'g) (comparing standards of care).

Whether a condition is a special defect is a legal question that we review de novo. *York*, 284 S.W.3d at 847. The legislature did not define "special defect," but the TTCA likens them to "excavations or obstructions on highways, roads, or streets." Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b). The supreme court long ago decided that "[u]nder the ejusdem generis rule, we are to construe 'special defect' to include those defects of the same kind or class" as excavations or obstructions. *Harris Cty. v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978). The supreme court has described the narrow class of conditions contemplated by section 101.022(b) as those that, because of their size or some unusual quality outside the ordinary course of events, pose an unexpected and unusual danger to ordinary users of roadways. *Tex. Dep't of Transp. v. Perches*, 388 S.W.3d 652, 655 (Tex. 2012); *Reyes v. City of Laredo*, 335 S.W.3d 605, 607 (Tex. 2010). But the only "express statutory requisite is that the defect be 'a condition of the same kind or class as an excavation or roadway obstruction.'" *City of Houston v. Joh*, 359 S.W.3d 895, 898 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (quoting *Denton Cty. v. Beynon*, 283 S.W.3d 329, 331 n.11, 332 n.15 (Tex. 2009)).

We review de novo a trial court's ruling on a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). The City asserts that the trial court should have granted its plea as to Smith's special-defect claim rather than simply finding that "the incident in question does not involve a special defect." Smith does not challenge this finding on appeal. Moreover, this court has recently held that an improperly sized manhole cover was not a special defect under the TTCA because it does not fall within the "excavation" class. *City of Arlington v. S.C.*, No. 02-17-00002-CV, 2017 WL 3910992, at *5 (Tex. App.—Fort Worth Sept. 7, 2017, no pet. h.) (mem. op.) (citing *Peterson v. City of Fort Worth*, 966 S.W.2d 773, 774, 776 (Tex. App.—Fort Worth 1998, no pet.)). In light of the trial court's finding and our recent precedent, we hold that the "broken, defective, and/or improperly secured" manhole cover in this case is not special defect. *See id.*

Accordingly, we sustain the City's first and second issues as to Smith's special-defect claim.

Smith's Premises-Defect and Negligence Claims

The City also complains that the trial court erred by overruling its jurisdictional plea because Smith did not plead or prove premises-defect or negligence claims[6] for which the City's governmental immunity has been waived.

[6]Without citing any authority, the City claims that Smith abandoned her negligence claim. Smith pleaded a negligence claim, but she stated in her response to the City's plea that her petition "does not contain any allegation of negligence" by the City. At the hearing, Smith's counsel stated that he did not

With respect to Smith's premises-defect claim, the City asserts that it conclusively proved that it did not know about a "defect involving a meter box/lid and/or manhole cover" at The Arbors before Smith was injured, a fact that, if true, would be fatal to that claim. *See, e.g.*, *Hayes*, 327 S.W.3d at 117 (stating that the owner's actual knowledge of the dangerous condition is required to establish an immunity waiver for a premises-defect claim). Smith counters that the trial court was required to allow her to amend her pleadings and had discretion "to await further development of the case before ruling on a jurisdictional challenge that requires the evaluation of evidence."

A plea to the jurisdiction can make two types of challenges: a challenge to pleading sufficiency or a challenge to the existence of jurisdictional facts. *Miranda*, 133 S.W.3d at 226–27. Here, the City challenges both. We discuss each separately.

The sufficiency of the pleadings

When a plea challenges the pleadings, we determine whether the plaintiff has met her burden of alleging facts affirmatively demonstrating that the trial court has subject-matter jurisdiction. *See id.* at 226. We construe the pleadings

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intend to bring a negligence claim and that he would "be happy to amend to take the respondeat superior part out." But he later asked that if the trial court did dismiss the negligence claim, it would do so without prejudice so that if discovery revealed some negligence by the City, Smith could later bring that claim. Based on this record, we cannot conclude that Smith abandoned her negligence claim. *See, e.g.*, *In re J.M.*, 352 S.W.3d 824, 826–27 (Tex. App.—San Antonio 2011, no pet.) (discussing claim abandonment); *In re C.C.J.*, 244 S.W.3d 911, 921–22 (Tex. App.—Dallas 2008, no pet.) (same).

liberally in the plaintiff's favor, accept all factual allegations as true, and look to the plaintiff's intent. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). If the pleadings are insufficient to establish the trial court's jurisdiction but do not affirmatively demonstrate an incurable defect in jurisdiction, the issue is one of pleading sufficiency, and the plaintiff should be given an opportunity to amend. *Miranda*, 133 S.W.3d at 226–27. But if the pleadings affirmatively negate the existence of jurisdiction altogether, then a plea to the jurisdiction may be granted without allowing a (necessarily futile) chance to amend. *See id.* at 227.

The City argues that Smith has not pleaded sufficient facts supporting an immunity waiver for her premises-defect claim. In such a case, as noted, the governmental unit owes the duty of care "that a private person owes to a licensee on private property." Tex. Civ. Prac. & Rem. Code Ann. § 101.022(a). This standard requires a plaintiff to plead and prove the following: (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; and (5) the owner's failure was a proximate cause of injury to the licensee. *Payne*, 838 S.W.2d at 237; *see also Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 391 (Tex. 2016) (citing *Payne*, 838 S.W.2d at 237).

In her live pleading, Smith alleged that the City's immunity is waived for personal injuries caused by the condition or use of real property. But even

construing Smith's pleadings liberally in her favor, they do not contain sufficient allegations to support a premises-defect claim against the City.

As to Smith's negligence claim, the TTCA waives immunity for personal injuries "caused by a condition or use of tangible personal . . . property." Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). As the City points out, a claim cannot be both a premises-defect claim and a claim relating to a condition or use of tangible property. *See Rogge v. City of Richmond*, 506 S.W.3d 570, 575 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Sampson*, 500 S.W.3d at 385–86). The TTCA's "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.

Here, Smith alleged that the City's immunity is waived for personal injuries caused by the condition or use of tangible personal property. She also alleged that the City was liable for the negligent acts or omissions of its agents, servants, and employees under the doctrine of respondeat superior. *See, e.g.*, *Dewitt v. Harris Cty.*, 904 S.W.2d 650, 653 (Tex. 1995) ("There is no question that [section 101.021(2)] provides for governmental liability based on respondeat superior for the misuse by its employees of tangible personal property."); *Harrison v. Univ. of Tex. Health Sci. Ctr. at Houston*, No. 01-12-00980-CV, 2013 WL 4680407, at *3 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, no pet.) (mem. op.) ("In order to state a claim under the TTCA based upon the use or misuse of tangible

personal property, a plaintiff must allege that the property was used or misused by a governmental employee acting within the scope of his or her employment." (citing *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 33 (Tex.1983))). But Smith has not pleaded any facts apart from those alleging a premises defect to support a claim that a condition or use of tangible personal property caused her injuries, nor has she pleaded any facts supporting a City employee's use or misuse of tangible personal property.

At this point, then, Smith's pleadings do not state a claim for which immunity is waived under the TTCA. *See Tex. Dep't of Transp. v. Ramirez*, 74S.W.3d 864, 867 (Tex. 2002) ("To sue the State for a tort, the pleadings must state a claim under the [TTCA]. Mere reference to the [TTCA] is not enough." (citations omitted)). As noted, if the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively reveal *incurable* jurisdictional defects, the appropriate remedy is to grant leave to amend rather than to dismiss. *See Miranda*, 133 S.W.3d at 226–27. Because Smith's pleadings do not affirmatively demonstrate incurable jurisdictional defects, she may amend her pleadings to attempt to cure her pleading defects.[7] *See id.*; *Ramirez*, 74 S.W.3d at 867 ("A plaintiff has a right to amend her pleadings to attempt to cure pleading defects if she has not alleged enough

[7]The City also asserts that because Smith had previously sued in county court and amended her petition in that forum, she has already had an adequate opportunity to amend. But the City cites no authority supporting this proposition.

jurisdictional facts."). Accordingly, the trial court did not err by denying the City's plea to give Smith the opportunity to replead.

The existence of jurisdictional facts

The City further complains that the trial court erred by overruling its plea because the jurisdictional facts show that it did not have actual knowledge of any "defect involving a meter box/lid and/or manhole cover" at The Arbors before Smith was injured and because there are no facts supporting her negligence claim.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties to resolve the jurisdictional issues raised. *Miranda*, 133 S.W.3d at 227. If the evidence raises a fact question on jurisdiction, the trial court must deny the plea and let the factfinder resolve the question. *Id.* at 227–28. In contrast, if the evidence is undisputed or fails to raise a fact question regarding jurisdiction, the trial court must rule on the jurisdictional plea as a matter of law. *Id.* at 228.

But when a plea to the jurisdiction requires examining evidence, a trial court has the discretion to decide "whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case." *Id.* at 227; *see Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion."). A trial court

may postpone its consideration of a jurisdictional plea so that the plaintiff has sufficient opportunity to produce evidence that might raise a fact issue. *Combs v. City of Webster*, 311 S.W.3d 85, 91 n.1 (Tex. App.—Austin 2009, pet. denied) (citing *Miranda*, 133 S.W.3d at 227; *Hendee v. Dewhurst*, 228 S.W.3d 354, 369 (Tex. App.—Austin 2007, pet. denied) (op. on reh'g)). Because a trial court should make a jurisdictional determination as early as practicable, the court should allow "reasonable opportunity for targeted discovery" if necessary to illuminate jurisdictional facts. *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 491 (Tex. 2012) (quoting *Miranda*, 133 S.W.3d at 233), *cert. denied*, 133 S. Ct. 1999 (2013). Whether to allow such discovery and to give the parties more time to gather evidence and prepare for the hearing on the plea is within the trial court's broad discretion. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 642–43 (Tex. 2012) (citing *Miranda*, 133 S.W.3d at 229, 233).

The supreme court has also stated that the procedure for addressing a plea to the jurisdiction "does not dramatically differ from that outlined in Texas Rule of Civil Procedure 120a governing special appearances." *Miranda*, 133 S.W.3d at 229; *see* Tex. R. Civ. P. 120a. The supreme court also recognized that rule 120a allows the trial court to order a continuance and allow time for discovery if the development of the case requires it, *see* Tex. R. Civ. P. 120a(3), and that "[n]othing prevents a trial court from doing the same with a plea to the jurisdiction where evidence is necessary." *Miranda*, 133 S.W.3d at 229. "[T]he Texas civil procedural scheme entrusts many scheduling and procedural issues

to the sound discretion of the trial court." *Id.* Additional time to prepare for hearings or to conduct discovery may be permitted upon a showing of sufficient cause, and the trial court's ruling on such a motion is reviewed for an abuse of discretion. *Id.* (citing Tex. R. Civ. P. 166a(g), 247, 251, 252).

The City contends that because Smith had conducted discovery in the (nonsuited) county-court suit and because the City had filed the same affidavits in that suit in March 2016, Smith had ample opportunity to conduct discovery and respond to the City's affidavits before the October 2016 district-court hearing. During that hearing, Smith's counsel admitted that he had not served the City with any written discovery because he had not finished drafting it, but complained that he had not had adequate time to conduct discovery and asked for time to serve written discovery and take depositions. Counsel did not, though, move for a continuance or question the City's affiants, who were in the courtroom during the hearing.

But based on the record before us, we cannot conclude that the trial court abused the discretion it had to decide "whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case." *Id.* at 227; *see Bland*, 34 S.W.3d at 554. This case was new to the district-court judge, who heard the City's plea to the jurisdiction only two months after suit was filed in that court and a mere two weeks after the City appeared in the case and filed its plea. Also, the City filed its affidavits at around 4:30 p.m. the

Friday before the Monday hearing. All in all, the decision to give Smith additional time for discovery was within the trial court's discretion.

We overrule the City's first and second issues as to Smith's premises-defect and negligence claims.

Conclusion

Having sustained the City's first and second issues as to Smith's special-defect claim, we reverse the trial court's order overruling the City's plea to the jurisdiction as to Smith's special-defect claim, and we render judgment dismissing that claim with prejudice. Having overruled the City's first and second issues as to Smith's premises-defect and negligence claims, we affirm the remainder of the trial court's order overruling the City's plea.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: WALKER, MEIER, and KERR, JJ.

DELIVERED: October 12, 2017