COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00177-CV

TARRANT COUNTY, TEXAS — APPELLANT

V.

MARGIELENE CARTER-JONES — APPELLEE

FROM THE 67TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 067-276319-15

MEMORANDUM OPINION[1]

While accompanying a family member to pretrial services on the morning of October 8, 2014, Margielene Carter-Jones slipped and fell on water in a hallway of the Tarrant County Corrections Center in downtown Fort Worth. She sued Tarrant County, Texas, and it filed a plea to the jurisdiction claiming that governmental immunity barred Carter-Jones's claims. The trial court denied the

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

plea, and the County appealed. Because Carter-Jones failed to plead and prove claims for which the County's governmental immunity is waived—in particular, because she has not shown that the County actually knew about the puddle on which she slipped—we reverse the trial court's order and render judgment dismissing Carter-Jones's claims for lack of subject-matter jurisdiction.

Background

On her way into work that October morning, Cynthia Marks—a Tarrant County pretrial-services caseworker who offices in the corrections center—saw a puddle of water directly in front of a locked men's restroom.[2] The restroom is in an alcove that is separated from the hallway where Carter-Jones fell by a wall with an opening directly in front of the restroom. According to Marks, when she happened upon it, the puddle was roughly two feet long, was confined to the alcove, and did not extend into the hallway. She reported the puddle to support staff whose procedure was to call maintenance. She assumed that staff did so but did not "know for a fact" that they did. Regardless, the County does not deny that it knew about the puddle in the alcove.

About an hour later, Carter-Jones entered the corrections center through the same entrance Marks had used, and slipped and fell on water that was now

[2]This staff-only restroom is always locked; the door locks automatically when closed, and only certain county employees have a key to it.

into the hallway.[3] Marks did not actually see Carter-Jones fall but saw her on the floor afterwards. Marks testified that the puddle in the alcove had expanded into the hallway where Carter-Jones fell—that is, beyond its original location behind the partition. But when asked if she had seen the initial water "moving" or had heard it "flowing" when she had first encountered it, Marks was unequivocal: "No."

Carter-Jones sued the County for personal injuries under the Texas Tort Claims Act (the TTCA), asserting negligence and premises-defect claims. Carter-Jones specifically pleaded that the County's governmental immunity was waived under the TTCA because her injuries were "caused by a premises defect that posed an unreasonable risk of harm, about which [the County] had actual knowledge and [she] did not, and for which [the County] would be liable to [her] under Texas law if it were a private person." *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.021(2), 101.022(a) (West 2011). The County answered and filed a plea to the jurisdiction. In its jurisdictional plea, the County asserted that Smith had failed to plead and could not prove claims for which the TTCA waived the County's governmental immunity. Specifically, the County argued that (1) Carter-Jones failed to plead negligence claims that were within the TTCA's governmental-immunity waiver, and (2) the evidence showed that the County did not know about the water on the hallway floor before Carter-Jones fell.

[3]Carter-Jones testified that, before she slipped, she did not "see anything that would give [her] any kind of warning that [she] might begin to slide or fall."

The County attached the following evidence to its jurisdictional plea: (1) Marks's deposition and affidavit; (2) an affidavit with the corrections center's floorplan attached from William Paul Patton, the operations manager for all county-owned buildings in downtown Fort Worth; (3) excerpts from Carter-Jones's deposition; (4) affidavits from Prentis Goss and Ashlei Belcher, two Tarrant County Hospital District employees who were working at the corrections center on October 8, 2014, and were summoned to help Carter-Jones after her fall; and (5) an affidavit from David Phillips, the County's facilities-management director and business-records custodian. Phillips attached to his affidavit photographs of the hallway and alcove and video-surveillance footage of Carter-Jones's fall from two vantage points. In support of her response, Carter-Jones submitted excerpts from her own and from Marks's depositions.

After a hearing, the trial court denied the County's plea. The County has appealed,[4] asserting two issues: (1) the TTCA does not waive the County's governmental immunity for Carter-Jones's negligence claims because those claims do not involve the use or condition of personal property, and (2) the TTCA does not waive immunity for her premises-liability claim because the County's evidence proved that the County did not have actual knowledge of the water in

[4]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. 2017).

the hallway at the time of the accident, and Carter-Jones's evidence failed to raise a fact issue about the County's actual knowledge.

Standard of Review

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject-matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Whether a court has subject-matter jurisdiction is a legal question, and so 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, 226, 228 (Tex. 2004).

When a plea challenges the pleadings, we determine whether the plaintiff has alleged facts affirmatively demonstrating that the trial court has subject-matter jurisdiction. *See id.* at 226. We construe the pleadings 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 do not suffice to establish the trial court's jurisdiction but do not affirmatively show an incurable jurisdictional defect, 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 jurisdictional plea may be granted without allowing a (necessarily futile) chance to amend. *See id.* at 227.

When a plea challenges the existence of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties to resolve the

jurisdictional issues raised. *Id*. 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 jurisdictional evidence is undisputed or fails to raise a fact question, the trial court must rule on the plea as a matter of law. *Id.* at 228. This standard generally mirrors that of a traditional summary judgment. *Id.*; *see* Tex. R. Civ. P. 166a(c).

The TTCA's Immunity Waiver

Unless waived, governmental immunity protects political subdivisions of the State, including counties, from suit. *See Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Relevant to this case, the TTCA provides a limited immunity waiver for personal injuries caused by the condition or use of tangible personal or real property if Texas law would impose liability on a private person for the same condition or use. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (stating that a "governmental unit" is liable for "personal injury and death so 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"), § 101.025 (West 2011) (providing that "[s]overeign 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. 2017) (defining "governmental unit" to include counties).

Merely referring to the TTCA in a petition does not establish an immunity waiver under the act. *See Tex. Dep't of Transp. v. Ramirez*, 74 S.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)). To invoke the TTCA's immunity waiver, "the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003) (citing *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)). In determining whether Carter-Jones met this burden, we consider the facts she alleged and, to the extent relevant to the jurisdictional issue, the parties' evidence. *See id.*; *see also Biermeret v. Univ. of Tex. Sys.*, No. 2-06-240-CV, 2007 WL 2285482, at *3 (Tex. App.—Fort Worth Aug. 9, 2007, pet. denied) (mem. op.) ("We must look to the terms of the TTCA and then determine whether the liability theories pleaded, the facts pleaded, and the evidence presented demonstrate a claim falling within the TTCA's waiver of immunity.").

Carter-Jones's Negligence Claims

In its first issue, the County argues, and Carter-Jones concedes, that her negligence claims do not fall within the TTCA's immunity waiver because they do not involve the use or condition of personal property. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). We agree.

Carter-Jones did not specifically allege that the use or condition of personal property caused her injuries. She alleged that the County breached its duty of ordinary care owed to her by (1) failing to place warning signs; (2) failing to instruct or train its agents, servants, and employees to maintain a hazard-free environment; and (3) failing to supervise its agents, servants, and employees to ensure invitees' safety. We construe Carter-Jones's pleadings liberally in her favor, accept all factual allegations as true, and look to her intent. *See Heckman*, 369 S.W.3d at 150. But the TTCA does not waive immunity from suit for injuries caused by the nonuse of property, such as the failure to place warning signs. *See City of Fort Worth v. Crockett*, 142 S.W.3d 550, 554 & n.21 (Tex. App.—Fort Worth 2004, pet. denied) (op. on reh'g) (citing cases); *see also Tarrant Reg'l Water Dist. v. Johnson*, 514 S.W.3d 346, 363 (Tex. App.—Fort Worth 2016, pet. pending) ("To the extent that [plaintiffs] alleged a misuse of the warning signs because they are inadequate, [the Water District]'s liability is not waived; a nonuse or failure to erect adequate signage is not an allegation of misuse of personal property."). Nor does the TTCA waive immunity for Carter-Jones's claims of negligent training and supervision because, as she concedes, they do not involve the use or condition of tangible personal property. *See Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580–81 (Tex. 2001).

Because Carter-Jones has failed to plead—and cannot plead—an immunity waiver for her negligence claims, we sustain the County's first issue.

Carter-Jones's Premises-Defect Claims

As noted, the TTCA waives governmental immunity for personal injuries arising from the condition or use of real property "if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2). "Liability for premises defects is implied under section 101.021(2) because a premises defect arises from a condition existing on real property." *City of Haltom City v. Aurell*, 380 S.W.3d 839, 845 (Tex. App.—Fort Worth 2012, no pet.) (quoting *Perez v. City of Dallas*, 180 S.W.3d 906, 910 (Tex. App.—Dallas 2005, no pet.)). With exceptions not relevant here, the TTCA limits a governmental unit's duty in ordinary premises-defect cases to "only the duty that a private person owes to a licensee on private property." Tex. Civ. Prac. & Rem. Code Ann. § 101.022(a) ("Except as provided in Subsection (c), 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.").

To establish an immunity waiver under the TTCA, then, a plaintiff must plead and prove either willful, wanton, or grossly negligent conduct, or that the defendant actually knew of the dangerous condition, that the plaintiff did not, and that the defendant failed to warn of the condition or make it safe. *See State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992) (op. on reh'g); *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 this case, Carter-Jones did not allege—and there is no evidence of—willful, wanton, or grossly negligent conduct. So, to establish an immunity waiver, Carter-Jones was required to plead and to the extent necessary present evidence that (1) a condition of the premises created an unreasonable risk of harm to her; (2) the County actually knew of the condition; (3) she did not actually know of the condition; (4) the County failed to exercise ordinary care to protect her from danger; and (5) the County's failure proximately caused her injuries. *See Sampson*, 500 S.W.3d at 391; *Payne*, 838 S.W.2d at 237. To sustain a premises-defect claim under the TTCA, actual, not constructive, knowledge of the dangerous condition is required. *See, e.g.*, *Sampson*, 500 S.W.3d at 392; *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414–16 (Tex. 2008); *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974).

In its second issue, the County challenges whether it had actual knowledge of the dangerous condition. But Carter-Jones and the County disagree about what the known "dangerous condition" in this case actually was. Carter-Jones asserts that the water on the alcove floor that later spread to the hallway created an unreasonable risk of harm of which the County had actual knowledge. The County narrows the issue, contending that the dangerous condition was the water in the hallway that Carter-Jones slipped on (as opposed to the water in the alcove) and arguing that because the evidence showed that it did not have actual knowledge of the *hallway* water, the TTCA does not waive its immunity.

To establish an immunity waiver under the TTCA, Carter-Jones was required to plead and prove that the County actually knew of a condition in the corrections center that created an unreasonable risk of harm to her. *See Sampson*, 500 S.W.3d at 391; *Payne*, 838 S.W.2d at 237. Actual knowledge requires proof that the County "knew of the dangerous condition that caused the injury," not just proof that the County "was aware of a related condition that may create a danger at some time in the future." *Prairie View A&M Univ. v. Brooks*, 180 S.W.3d 694, 707 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *see also Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406, 407 (Tex. 2006) ("Ordinarily, an unreasonably dangerous condition for which a premises owner may be liable is the condition *at the time and place injury occurs*, not some antecedent situation that produced the condition." (emphasis added)).

The County does admit that it knew about the water in the alcove: Marks, the County employee who reported it, stated that when she arrived for work, the puddle was close to two feet long, was confined to the alcove, and did not extend into the hallway. But by the time Carter-Jones fell about an hour later, the water had expanded into the hallway; it was this water on which she slipped. Marks estimated that the spot in the hallway where Carter-Jones fell was about five feet from the original alcove puddle in front of the men's restroom. Patton measured the distance from the restroom door to the near edge of the hallway at a little over seven feet. The condition that created an unreasonable risk of harm to Carter-Jones and that caused her injury was the water in the hallway, not the

water in the alcove. *Brooks*, 180 S.W.3d at 707 (concluding that the dangerous condition that caused plaintiff's injury was the entry of steam into the section of pipe being repaired, not a faulty isolation valve or the presence of steam in the pipes generally).

The County's evidence established that it did not have actual knowledge of the water in the hallway at the time Carter-Jones fell. In determining whether a premises owner[5] actually knew of the dangerous condition, "courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition." *Univ. of Tex.-Pan Am. v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008). In his affidavit, Phillips averred that the facilities-management department would have responded to a water leak or hazard in the corrections-center hallway. Phillips further stated that he examined the facilities-management department's records for October 8, 2014, and that they "contain no reference to any knowledge on the part of Tarrant County or any of its employees of a water hazard located on the floor of the [corrections-center] hallway [where Carter-Jones fell] before [her fall]."

Carter-Jones contends that Marks's knowledge of the water in the alcove established that the County had actual knowledge of the water that caused her fall. But "actual knowledge" requires knowing that "the dangerous condition existed *at the time of the accident*, as opposed to constructive knowledge which

[5]Carter-Jones pleaded—and the County does not dispute—that the County owned, operated, and controlled the corrections center.

can be established by facts or inferences that a dangerous condition could develop over time." *Stewart*, 249 S.W.3d at 414–15 (emphasis added) (citing *City of Dallas v. Thompson*, 210 S.W.3d 601, 603 (Tex. 2006)). Although circumstantial evidence can establish actual knowledge, it does so "only when it 'either directly or by reasonable inference' supports that conclusion." *Id.* at 415 (quoting *State v. Gonzalez*, 82 S.W.3d 322, 330 (Tex. 2002)).

Here, the evidence does not reasonably support the inference that the County actually knew that water was on the hallway floor. When Marks saw the puddle an hour before Carter-Jones fell, it was small and confined to the alcove, and—critically—she did not see any water moving or hear any water flowing.[6] Marks's knowledge of motionless water in the alcove, five feet from the hallway, thus does not suffice to establish that the County had actual knowledge of the hallway water that Carter-Jones fell on an hour later. *Cf. Biermeret*, 2007 WL 2285482, at *6 (concluding that knowledge that a tile floor in the shower area routinely became wet and slick, that an earlier shower user had slipped and fallen on the wet tile, and that the wet, slick tile floor was a hazard to shower users was insufficient to establish that the governmental unit had actual knowledge of the "unreasonably dangerous condition, that being that the water

[6]Had Marks observed or reported facts from which we could reasonably infer that the alcove puddle was in a dynamic rather than a static condition, our holding might be different.

on which [plaintiff] slipped, was in fact on the floor in the shower area on [the day plaintiff fell].").

Carter-Jones alternatively argues that she raised a fact issue about the County's actual knowledge of the water in the hallway. In her deposition, she testified that after her fall, a blonde-haired woman wearing purple gloves said that she knew that "water was there," but "didn't know it was that bad." But Carter-Jones offered no evidence that this woman was a County employee. Goss and Belcher, the paramedic and nurse who were called to help Carter-Jones after she fell, testified that they were wearing purple gloves when they attended to Carter-Jones and that they were the only people at the scene so attired. Both denied having known about water on the floor. But more importantly, both stated in their affidavits that they were Tarrant County Hospital District employees—rather than County employees—and had never been County employees.[7] As a

[7]"The Tarrant County Hospital District was created under the authority of the Texas Constitution and chapter 281 of the Texas Health and Safety Code." *Tarrant Cty. Hosp. Dist. v. GE Auto. Servs.*, 156 S.W.3d 885, 891 (Tex. App.—Fort Worth 2005, no pet.) (citing Tex. Const. art. IX, § 4; former Tex. Health & Safety Code Ann. §§ 281.001–.124). It is a separate entity from the County. *See Driscoll v. Harris Cty. Comm'rs Court*, 688 S.W.2d 569, 573 n.1 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (op. on reh'g) (recognizing that while Harris County's flood-control and hospital districts "are in a sense administratively under the control of commissioners court*, each is a separate governmental entity, independent and distinct within itself*" (emphasis added)). *See generally* Tex. Health & Safety Code Ann. §§ 281.028 (authorizing a hospital district's board to hire employees), .047 ("The [hospital district's] board shall manage, control, and administer the hospital or hospital system of the district.") (West 2017).

result, Carter-Jones's deposition testimony does not raise a fact question on whether the County actually knew about the water in the hallway.

Carter-Jones pleaded generally that the County had "actual knowledge of the dangerous condition on the premises." But after considering the evidence under the applicable standard of review, we conclude that the evidence here fails to create a jurisdictional fact question about whether the County had actual knowledge of the existence of the water in the hallway on which Carter-Jones slipped. *See Brooks*, 180 S.W.3d at 711 (reversing jury verdict and dismissing case for lack of subject-matter jurisdiction when evidence was legally insufficient to establish that governmental unit had actual knowledge of the dangerous condition of steam entering the section of pipe being repaired). *See generally Miranda*, 133 S.W.3d at 227–28 (setting out standard of review). The TTCA therefore does not waive the County's immunity from Carter-Jones's premises-defect claim, and we sustain the County's second issue.

Conclusion

Having sustained both of the County's issues, we reverse the trial court's order denying the County's jurisdictional plea and dismiss Carter-Jones's claims against the County for lack of subject-matter jurisdiction.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: SUDDERTH, C.J.; GABRIEL and KERR, JJ.

DELIVERED: January 25, 2018