



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-16-00258-CV

CHARLES BROWN, APPELLANT

V.

WACO TRANSIT SYSTEM, APPELLEE

On Appeal from the 170th District Court
McLennan County, Texas
Trial Court No. 2013-1026-4, Honorable Jim Meyer, Presiding

October 27, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Appellant Charles Brown appeals a trial court order sustaining the plea to the jurisdiction filed by appellee Waco Transit System, Inc. (WTSI) and dismissing his personal-injury lawsuit for want of subject-matter jurisdiction. Finding WTSI did not conclusively demonstrate that it shares the governmental immunity enjoyed by the City of Waco, we reverse and remand.

Background

Brown sued WTSI alleging he suffered personal injuries while riding a bus operated by WTSI and driven by its employee, Leon Matthews, Jr. According to Brown's petition, on June 1, 2011, as Matthews operated bus number four, a rear "overhead door panel" fell open. Matthews stopped the bus and "attempt[ed] to secure the overhead door." Later that day Brown boarded bus number four and took a seat under the overhead door. During Brown's ride the door fell open, striking him on the head and causing injury.

Brown alleged WTSI negligently operated bus number four in the following ways:

- a. Operating a Waco Transit System bus that had a known defect which constituted a dangerous condition to the safety of the bus passengers.
- b. Failing to take proper action to secure the broken overhead door panel and to protect the safety of passengers sitting in the area of the broken and defective overhead door panel;
- c. Allowing bus passengers to sit directly under the broken and defective overhead door panel with knowledge that the overhead door panel had already fallen open.
- d. Continuing to operate Bus No. 4 with knowledge that hitting a bump in the road would likely cause the defective rear overhead door panel to suddenly fall open and strike a passenger sitting below the panel door.
- e. Operating the Waco Transit System bus in such a way that an ordinary prudent person would have under the same or similar circumstances in the operation and use of a motor-driven vehicle such that Defendant's employee would be personally liable to Plaintiff under Texas law.
- f. Failing to exercise that degree of care that would be exercised by a very cautious and prudent person under the same or similar circumstances in the operation and use of a motor-driven vehicle such that Defendant's employee would be personally liable to Plaintiff under Texas law.

According to Brown’s petition, WTSI is “a for-profit corporation doing business in the State of Texas.” Elsewhere in the pleading Brown alleges that WTSI is a governmental unit. WTSI filed a plea to the jurisdiction, however, alleging it is immune from suit under governmental immunity because it is the “agent” of the City of Waco. According to WTSI, its relationship with the City, and implicitly its entitlement to share the City’s immunity, is established by its contract with the City. It attached a copy of its written contract to its amended plea to the jurisdiction.

In relevant part the contract provides:

WHEREAS, the City [of Waco] has entered into a contract with McDonald Transit Associates, Inc. to manage the motor bus transit system (“MBTS”) conducted in and about the City of Waco (“the McDonald Transit Contract”);

WHEREAS, WTSI will continue to be the employer of the transit system employees; and

WHEREAS, there is a need to set out the responsibilities of the parties in connection with their roles regarding the motor bus transit system in and about the City of Waco;

* * *

Subject to the terms and conditions set forth in this Agreement, City hereby engages WTSI, and as agent for City for the limited purpose of operating the MBTS conducted in and about the City of Waco and WTSI hereby accepts such engagement.

* * *

WTSI shall: . . . Be the employer of the transit system employees and employ and provide the drivers, mechanics, and such other personnel as necessary to fully operate and maintain the MBTS. WTSI employees shall not for any purpose be considered to be employees of City, and WTSI shall be solely responsible for their supervision and daily direction and control and for personnel decisions relating to WTSI’s employees. . . .

* * *

[WTSI shall] Operate the transit system and cooperate with the City and McDonald Transit in order that the City and McDonald Transit can fulfill their respective responsibilities under the McDonald Transit Contract.

[WTSI shall] Maintain all vehicles, and equipment provided by the City in accordance with all applicable federal and state safety standards and all recommended Manufacturers' standards for maintenance and repair.

* * *

[WTSI shall] Provide all other services necessary to operate and maintain the [bus system] and the property and equipment provided by the City[.]

* * *

In consideration for the services provided by WTSI hereunder:

The City agrees to provide such funds as may be necessary to meet payroll and all other approved budgeted expenses of the operation of the MBTS as set forth in the City's annual budget.

The City agrees to provide all office, office furniture, motor buses, equipment, materials, supplies, rolling stock, bus maintenance and storage facilities and equipment, fueling stations and equipment and automobile transportation which may be required for the operation of the MBTS. Title to all such property shall be and remain in the City of Waco.

The City shall also provide major maintenance for the transit office and maintenance facility.

The City will provide accounting, purchasing and cash management assistance to WTSI in connection with its performance of services. However, WTSI will be solely responsible for its required corporate filings and reporting, federal and state payroll tax reporting, preparation and distribution of W-2s for employees and 1099s for independent contractors, and required maintenance of payroll records.

* * *

City agrees to obtain or caused to be obtained general liability coverage, automobile liability coverage, errors and omissions coverage, and workers compensation coverage for WTSI through an insurance company(ies) or a risk pool of governmental entities in amounts as may be determined by the City from time to time.

The trial court sustained WTSI's plea to the jurisdiction and dismissed Brown's suit for want of jurisdiction. He appeals.

Analysis

On appeal Brown argues the trial court erred in sustaining WTSI's plea to the jurisdiction because he alleged acts of negligence coming within the Texas Tort Claims Act's limited waiver of immunity. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1),(2) (West 2011). We first consider, however, whether WTSI sufficiently proved to the trial court its entitlement to assert governmental immunity. WTSI claims immunity from suit by virtue of its status as the City's agent. In its plea to the jurisdiction it sought to establish that status through its contract with the City.

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject-matter jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Review of the trial court's ruling on a plea to the jurisdiction begins with the live pleadings. *Id.* A plaintiff must affirmatively demonstrate the trial court's jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

The trial court's order sustaining WTSI's plea states that in reaching its decision it considered evidence. And WTSI filed its contract with the City in support of its immunity claim. "When a plea to the jurisdiction challenges the existence of facts alleged by the pleader to establish the trial court's subject-matter jurisdiction, the trial court must consider relevant evidence submitted by the parties." *Id.* at 227 (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)). This standard generally mirrors that of a traditional summary judgment. *Harris County Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 798 (Tex. 2016) (op. on rehearing) (citing *Miranda*, 133 S.W.3d at 227-28); TEX. R. CIV. P. 166a(c). Thus, the trial court may consider affidavits and other summary

judgment-type evidence. *FKM P'ship v. Board of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 628 (Tex. 2008). The court takes as true evidence favorable to the nonmovant and indulges every reasonable inference and resolves any doubts in the nonmovant's favor. *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009).

Governmental immunity protects political subdivisions of the State from lawsuits and liability for money damages. See *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008) (citing *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006)); *Tex. A & M Univ. v. Bishop*, 156 S.W.3d 580, 583 (Tex. 2005) (immunity shields the State from liability for negligence of its employees). Governmental immunity from suit deprives the trial court of subject-matter jurisdiction over a plaintiff's claims against a governmental entity. *Sykes*, 136 S.W.3d at 638; *Univ. of Tex. Health Sci. Ctr. v. Rios*, No. 01-15-01071-CV, 2016 Tex. App. LEXIS 9862, at *5 (Tex. App.—Houston [1st Dist.] Sept. 1, 2016, pet. granted) (“If immunity applies, the trial court lacks subject-matter jurisdiction over the case”).

We begin by inquiring whether WTSI is entitled to derivatively assert the City's governmental immunity from suit. See *Nettles v. GTECH Corp.*, No. 05-15-01559-CV, 2017 Tex. App. LEXIS 6850 (Tex. App.—Dallas July 21, 2017, no pet. h.) (mem. op.) (analyzing question of derivative immunity of state-agency contractor and considering evidence). If it is so entitled, we will then consider Brown's claim that immunity was waived. If it is not, our analysis will end because the record otherwise provides no indication that the trial court lacked subject-matter jurisdiction over Brown's suit.

A private entity generally is not entitled to claim governmental immunity unless “its actions were actions of’ the government, ‘executed subject to the control of’ the governmental entity.” *Nettles*, 2017 Tex. App. LEXIS 6850, at *12 (quoting *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994) and citing *Brown & Gay Eng’g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015)); see also *Brown & Gay*, 461 S.W.3d at 130 (Hecht, C.J., concurring) (distinguishing independent contractor who acts “as the government” from one who acts only “for the government”).

Whether a private entity contracting with a governmental unit should derivatively share governmental immunity chiefly comes down to whether the contractor or agent acted as the government without discretion. *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 86 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (op. on reh’g) (citing *Brown & Gay*, 461 S.W.3d at 125-26). Specifically, “[i]f the contractor or agent lacked discretion, its actions were the actions of the governmental unit; if it had discretion, then it may be sued like any other private actor for its negligent exercise of that discretion.” *Lenoir*, 491 S.W.3d at 86 (citing *Brown & Gay*, 461 S.W.3d at 125 n.9).

Right of control may be established by a contractual provision that explicitly assigns the right of control or, in the absence of such contractual agreement, by evidence of how the work was performed. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002). The record before us shows merely that the City and WTSI agreed to the appointment of WTSI as the City’s agent for the limited purpose of operating the City’s bus system. The contract appended to WTSI’s plea to the jurisdiction states the

bus system was managed by another entity, McDonald Transit Associates, Inc.¹ The contract indicates its purpose is to “set out the responsibilities of” the City and WTSI “in connection with their roles regarding the motor bus transit system.” Under the contract, while the City agreed to “provide” the buses, WTSI is the employer of the transit system employees, including the drivers and mechanics. WTSI expressly agreed with the City that it would be solely responsible for supervision and daily direction and control of its employees. The breadth of WTSI’s intended control over operation of the bus system is shown by a Mother Hubbard provision obligating WTSI to provide “all other services necessary to operate and maintain” the bus system. The parties’ agreement thus does not give the City control over the details of the operation or use of the buses, and the record contains no evidence that the work was performed in a manner giving the City such control. See *City of Houston v. Ranjel*, 407 S.W.3d 880, 890 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Olivares v. Brown & Gay Eng’g, Inc.*, 401 S.W.3d 363, 369 (Tex. App.—Houston [14th Dist.] 2013), *aff’d Brown & Gay Eng’g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015)) (“A written contract expressly providing for an independent-contract relationship is determinative of the parties’ relationship in the absence of extrinsic evidence indicating the contract was subterfuge, the hiring party exercised actual control in a manner inconsistent with the contract, or if the written contract has been modified by a subsequent agreement”) (citing *Weidner v. Sanchez*, 14 S.W.3d 353, 373 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Brown’s suit alleged his injury was caused by WTSI’s negligent operation or use of bus number four and by a condition or use of the bus as tangible personal property.

¹ The role of McDonald Transit Associates, Inc. is not further described in the City of Waco-WTSI contract.

WTSI's ability to assert the City's governmental immunity depends on proof its actions were those of the City, and it exercised no discretion in its activities. See *Lenoir*, 491 S.W.3d at 82 (citing *Brown & Gay*, 461 S.W.3d at 124-25). Other evidence not before us might lead to a different conclusion, but the contract assigns WTSI, not the City, with responsibility and discretion over operation of the bus system and maintenance of vehicles. WTSI has not shown it is entitled to share the City's governmental immunity. See *Brown & Gay*, 461 S.W.3d at 126 n.9. Cf. *Bay, Inc. v. Ramos*, 139 S.W.3d 322, 328 (Tex. App.—San Antonio 2004, pet. denied) (finding contractor had no immunity where it had considerable discretion in placing barricades in an area of road construction where a motor vehicle accident occurred).

While Brown alleged in conclusory fashion that WTSI is a "government unit," WTSI's contract with the City does not support the allegation. We find that WTSI failed to show conclusively it was entitled to assert the City's governmental immunity.

Conclusion

Because WTSI did not meet its plea-to-the-jurisdiction burden of showing its entitlement to assert the City's governmental immunity, it is unnecessary for us to consider whether Brown alleged any acts of negligence coming within a Tort Claims Act waiver. The record does not prove the trial court lacked subject-matter jurisdiction over Brown's suit. We reverse the dismissal order, render an order denying WTSI's plea to the jurisdiction, and remand the case to the trial court.

James T. Campbell
Justice