IN THE
TENTH COURT OF APPEALS

No. 10-17-00399-CV

MCLENNAN COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT #2,

Appellant

v.

MATTHEW AND RACHEL GEER, INDIVIDUALLY AND AS NEXT FRIENDS OF MINOR CHILDREN A-E,

Appellees

From the 170th District Court
McLennan County, Texas
Trial Court No. 2017-2070-4

MEMORANDUM OPINION

In one issue with numerous sub-parts, Appellant McLennan County Water Control and Improvement District #2 (the "District" or "WCID") appeals the trial court's order denying its plea to the jurisdiction. We reverse the trial court's order.

Background

Appellees Matthew and Rachel Geer, Individually and as Next Friends of Minor Children A-E (the "Geers"), received water service at their residence from the District. On June 29, 2015, a District employee, at the direction of the District, disconnected the water service to the Geers's property. The reason for this action was that two dwellings on the Geers's property were connected to a single water meter. Mr. Geer went to the District's office the next day to inquire about the termination. The water was restored to the property by the District after the Geers disconnected one of the dwellings from the water meter. A District employee later entered the Geers's property without permission in order to take pictures.

The Geers filed suit against the District asserting claims for breach of contract and negligence. The District filed a plea to the jurisdiction asserting that the Geers's claims were barred by governmental immunity, which the trial court denied. The District then filed this interlocutory appeal.

Issues

The District asserts that the trial court erred in denying its plea to the jurisdiction because the District has governmental immunity for the claims asserted by the Geers and because the Geers have failed to plead specific facts that overcome that immunity. Included as subparts to this issue, the District asserts the following:

A. The District is immune from the Geers's suit for breach of contract because any alleged contract was the result of a governmental function.

B. The District is immune from both suit and liability for the trespass and invasion of privacy claims brought by the Geers because they are intentional torts for which there is no waiver of immunity.

C. The District is immune from both suit and liability for the negligence claims brought by the Geers under the Tort Claims Act because:

1. The action by the District to turn off the Geers's water was an intentional act, not a negligent act.

2. There was no negligent use of tangible personal property; and

3. There was no contemporaneous injury resulting from the allegedly negligent act.

Standard of Review

Governmental immunity from suit implicates a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *See Engelman Irrigation Dist. v. Shields Brothers, Inc.*, 514 S.W.3d 746, 751 (Tex. 2017). We review the trial court's ruling on a plea to the jurisdiction *de novo*. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016). Our ultimate inquiry is whether the particular facts presented affirmatively demonstrate a claim within the trial court's subject-matter jurisdiction. *Id.*; *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009).

Our analysis must begin with an evaluation of the plaintiff's pleadings. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). When examining the pleadings, we construe them liberally in favor of conferring jurisdiction. *Id*. If the

pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be given the opportunity to amend. *Id*., at 226-27. But if the pleadings affirmatively negate jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id*., at 227.

Governmental Immunity

Under the common-law doctrine of sovereign immunity, the sovereign cannot be sued without its consent. *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). "Sovereign immunity protects the State and its various divisions, such as agencies and boards, from suit and liability. . . ." *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 57-58 (Tex. 2011). Governmental immunity operates like sovereign immunity but provides protection to political subdivisions of the State, including counties, cities, and other recognized entities. *Id*., at 58. Unless the legislature has expressly waived immunity, the governmental entity maintains immunity even if its liability is undisputed. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002).

Water districts are political subdivisions of the State and are, therefore, generally immune from suit and liability absent a waiver of that immunity. *See* TEX. CONSTITUTION, art. XVI, § 59; *see also Tarrant Regional Water Dist. v. Johnson*, 572 S.W.3d 658, 663 (Tex. 2019).

Breach of Contract

In their first amended petition, the Geers assert that the District breached its contractual duty to them to provide uninterrupted water service to their property. Section 271.152 of the Local Government Code waives qualifying local governmental entities' immunity from suit for certain breach of contract claims. TEX. LOC. GOV'T CODE ANN. § 271.152; *Williams*, 353 S.W.3d at 134. This section provides:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

Id. § 271.152. This statute, when applicable, waives a governmental entity's immunity from suit for breach of contract by clear and unambiguous language. *Williams*, 353 S.W.3d at 134.

For immunity to be waived, three elements must be established: (1) the party against whom the waiver is asserted must be a "local governmental entity," as defined by § 271.151(3); (2) the entity must be authorized by statute or the Constitution to enter into contracts; and (3) the entity must in fact have entered into a contract that is "subject to this subchapter," as defined by § 271.151(2). *Id*., at 134-35. It is undisputed that the District is a "local governmental entity" as that term is defined in § 271.151(3), and that the District is authorized to enter into contracts. Therefore, the only question is whether

the agreement to provide water services to the Geers constitutes the type of contract that waives the District's immunity if breached.

> The phrase "contract subject to this subchapter" means:
>
> (A) a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity;
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> (B) A written contract, including a right of first refusal, regarding the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use.

TEX. LOC. GOV'T CODE ANN. § 271.151(2)(A) and (B).

The agreement between the Geers and the District does not involve the provision of goods or services to the District or the sale of water intended for industrial use. The agreement does not, therefore, waive the District's immunity.

The Geers argue that the District's governmental immunity is waived because the contract to supply them water is a proprietary function rather than a governmental function. However, as a local governmental entity "created pursuant to the provisions of article XVI, section 59 of the Texas Constitution, [the District] is a political subdivision of this State and performs only governmental functions." *Bexar Metropolitan Water Dist. v. Education and Economic Development Joint Venture*, 220 S.W.3d 25, 28 (Tex. App.—San Antonio 2006, pet dism'd as moot) (citing *Bennett v. Brown County Water Imp. Dist. No. 1*, 153 Tex. 599, 272 S.W.2d 498 (Tex. 1954); and *Lloyd v. ECO Res., Inc.*, 956 S.W.2d 110, 121-22 (Tex. App.—Houston [14th Dist.] 1997, *abrogated on other grounds by Tooke v. City of*

Mexia, 197 S.W.3d 325, 342-43 (Tex. 2006) ("Water districts and like entities created under section 59 of article XVI of the Texas Constitution can only perform governmental functions.")); *see also Tarrant Regional Water Dist. v. Gragg*, 43 S.W.3d 609, 614 (Tex. App.—Waco 2001, *aff'd*, 151 S.W.3d 546 (Tex. 2004) ("The District, as a water control and improvement district, is a political subdivision created under article XVI, section 59 of the Texas Constitution. It serves only governmental functions."); *N. Texas Mun. Water Dist. v. Jinright*, No. 05-18-00152-CV, 2018 WL 6187632, at *3 (Tex. App.—Dallas Nov. 27, 2018, pet. denied) (mem. op.) ("A water conservation district is a political subdivision of the State and performs only governmental functions.").

Even assuming that the governmental/proprietary function analysis applies to water districts, the Texas Tort Claims Act ("TTCA") specifically identifies water service as a governmental function. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(32). The common-law distinction between governmental and proprietary acts "applies in the contract claims context just as it does in the tort-claims context." *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 439 (Tex. 2016); *see also Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 452 (Tex. 2016) (noting that court has deferred to TTCA when classifying acts as governmental or proprietary when dealing with contract claims).

The trial court erred in denying the District's plea to the jurisdiction as to the Geers's breach of contract claim.

Tort Claims

The Geers assert the following claims under the TTCA: (1) trespass and invasion of privacy as the result of a District employee entering their property without permission and taking photographs; and (2) negligence through the use of tangible personal property when a District employee disconnected their water with the use of a wrench or other tool.

As previously noted, the Legislature may waive a governmental entity's immunity by statute or legislative resolution. *Johnson*, 572 S.W.3d at 663. Under the TTCA, governmental immunity is waived for two types of claims: (1) those involving property damage, personal injury, or death arising from an employee's operation or use of a motor-driven vehicle or equipment; and (2) those involving personal injury or death caused by a condition or use of tangible personal property or real property. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021. Under both types of claims, the TTCA waives liability only if the employee would be liable at common law or the governmental entity, were it a private person, would be liable to the claimant at common law. *Id*. As a result, the TTCA "does not create a cause of action; it merely waives [governmental] immunity as a bar to a suit that would otherwise exist." *El Paso Cty. Water Improvement Dist. #1 v. Ochoa*, 554 S.W.3d 51, 55 (Tex. App.—El Paso 2018, no pet.) (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997)). We must, therefore, determine whether the Geers have pleaded recoverable causes of action that would waive immunity under the TTCA.

Trespass/Invasion of Privacy. In determining whether a plaintiff's claims are barred by immunity, we look to the substance of the claims alleged because governmental immunity cannot be circumvented by artful pleading. *Hidalgo Cty. v. Dyer*, 358 S.W.3d 698, 704 (Tex. App.—Corpus Christi 2011, no pet.). The Geers's first amended petition contains the following facts as it relates to their claims of trespass and invasion of privacy:

> Following Plaintiffs' remedying of the alleged basis for the unlawful disconnection, as witnessed and confirmed by an employee or agent of WCID, on or about July 7, 2015, an employee or agent of WCID unlawfully entered and trespassed on the Property without express or implied permission, going far beyond any area necessary for any inspection of WCID equipment, and took pictures of Plaintiffs' property, violating their right to privacy.
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> . . .
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> WCID through its authorized employees and agents entered Plaintiffs' Property without their consent or authorization and therefore trespassed on Plaintiffs' Property, causing them the special and general damages described herein. WCID also used a camera, tangible personal property, to take photographs of Plaintiffs' property, invading their privacy, while trespassing.

The foregoing factual allegations encompass intentional rather than negligent acts. The TTCA does not waive immunity for claims based on "assault, battery, false imprisonment, or any other intentional tort. . . ." TEX. CIV. PRAC. & REM. CODE § 101.057(2). Trespass and invasion of privacy are regarded as intentional torts. *See El Paso County*, 554 S.W.3d at 58 n.3 (citing *Dyer*, 358 S.W.3d at 704) (trespass); *Texas State Technical College v. Wehba*, No .11-05-00287-CV, 2006 WL 572022, at *2 (Tex. App.—Eastland Mar. 9, 2006, no pet.) (mem. op.) (invasion of privacy).

The trial court erred in denying the District's plea to the jurisdiction as to the Geers's claims for trespass and invasion of privacy.

Negligence. The Geers's first amended petition includes the following in support of their claims of negligence through the use of tangible personal property:

> 6. Plaintiffs' personal injuries were caused by a condition or use of tangible personal property by WCID, and WCID would be liable to Plaintiffs if it were a private person under Texas law. Among other things, WCID used a wrench or other tool, which is tangible personal property, to shut off Plaintiffs' water supply by a valve which is also tangible personal property, which harmed the Plaintiffs. WCID deprived Plaintiffs of a fundamental need – fresh water, without legal basis and in violation of WCID and TCEQ rules and regulations. Had a private person used a tool to turn off Plaintiffs' water without cause, it would be liable; thus, under Tex. Civ. Prac. & Rem. Code Ann. § 101.001, et seq. and Sec. 101.021(2); 101.0215(32); and 101.025, WCID is liable under the Texas Tort Claims Act.
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> . . .
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> 10. On or about June 29, 2015, WCID, acting through its authorized employees and/or agents, used a wrench or other tool constituting tangible personal property, to disconnect water service to the Property.
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> 11. WCID failed to provide proper notice to Plaintiffs of its intention to disconnect water service, as required by TCEQ §291.88 as well as other laws, regulations, common law duties, and common decency.
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> 12. At the time of WCID's unlawful disconnection of water service, one of Plaintiffs' minor children was ill; thus the normal and serious inconvenience and damage foreseeably resulting from disconnection of water services was magnified greatly, causing extreme mental and emotional anguish to all Plaintiffs and threatening their health and safety.
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> . . .

> 22. By reason of the foreseeable risks associated with their actions, WCID owed Plaintiffs a duty to act with reasonable care, skill, and diligence in carrying out their activities so as not to create excessive risk of property damage and personal injury.
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> 23. WCID breached its duties and was negligent in causing or allowing its employees and/or agents to use tangible personal property, in the form of a wrench or other tool, to disconnect water service without proper notice to a family with multiple minor children, one of whom was ill at the time.

A "use" of tangible personal property has been defined to mean "to put or bring into action or service; to employ for or apply to a given purpose." *Sampson v. Univ. of Texas at Austin*, 500 S.W.3d 380, 388 (Tex. 2016) (quoting *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 588 (Tex. 1996)). In order "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.* There is nothing in the Geers's first amended petition to indicate that the actual use of a wrench or other tool or turning the water valve was the cause of any injury to them. Their injuries, if any, were the result of the District's decision to disconnect their water. Additionally, the acts of the District's employee in utilizing the wrench or other tool was an intentional rather than a negligent act.

The trial court erred in denying the District's plea to the jurisdiction as to the Geers's negligence claims.

Conclusion

In light of the foregoing, we sustain the District's sole issue on appeal. We reverse the trial court's order denying the District's plea to the jurisdiction and render a judgment of dismissal with prejudice in favor of the District. *See Miranda*, 133 S.W.3d at 227 ("If the pleadings effectively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend.").

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Reversed and rendered
Opinion delivered and filed July 22, 2020
[CV06]