TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

ON MOTION FOR REHEARING

NO. 03-15-00292-CV

City of Austin, Appellant

v.

Jennifer Frame, Individually, and as Personal Representative of the Estate of John William Griffith; Greg Griffith; Cheryl Burris; and Diana Pulido, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT NO. D-1-GN-12-003557, HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

We withdraw the opinion and judgment dated May 27, 2016, and substitute the following opinion and judgment in their place. We deny appellees' motion for rehearing.

Appellees Jennifer Frame, Greg Griffith, Cheryl Burris, and Diana Pulido sued the City of Austin under the Texas Tort Claims Act and the recreational-use statute for damages related to an incident allegedly caused by the City's failure to address a safety hazard. *See generally* Tex. Civ. Prac. & Rem. Code §§ 101.001-.109 (Texas Tort Claims Act); *id.* §§ 75.002, .003(g) (recreational-use statute). The City filed a plea to the jurisdiction, arguing that its governmental immunity was preserved under the Act by the discretionary-powers exception. *See id*. § 101.056. The trial court denied the City's plea to the jurisdiction, and the City filed this interlocutory appeal.

For the following reasons, we will reverse the district court's order denying the City's plea to the jurisdiction and render judgment dismissing the case.

BACKGROUND

The tragic incident that resulted in this lawsuit occurred when Joseph Louis Rosales, who was driving under the influence, drove his eastbound vehicle off of West Cesar Chavez Street where North Lamar Boulevard crosses over West Cesar Chavez, jumping the curb and driving onto the hike-and-bike trail located next to the road. Rosales's vehicle and debris, including a traffic warning sign installed by the City, struck and seriously injured two pedestrians, Colonel John William Griffith and Diana Pulido. Colonel Griffith died as a result of his injuries. Rosales was sentenced to five years' imprisonment for aggravated assault with a deadly weapon.

The appellees[1] sued Rosales and the City. Their claims against the City included negligence, gross negligence, premises defect, special defect, and breach of duty owed under the recreational-use statute. The appellees alleged that the City (1) failed to safely construct and maintain the trail, (2) was aware of prior instances of vehicles traveling dangerously over the curb onto the trail in the same or substantially same location, and (3) failed to correct or adequately warn of this dangerous condition. The appellees further alleged that the City had policies requiring it to take corrective action after a safety hazard is identified. Accordingly, the appellees alleged, the Parks and Recreation Department's failure to construct a guardrail or barrier was a failure to carry out a ministerial act required by the City's policy of addressing known hazards.

[1] Jennifer Frame, Greg Griffith, and Cheryl Burris are Colonel Griffith's children. Appellee Pulido is unrelated but was injured during the incident.

The City filed a plea to the jurisdiction, asserting that governmental immunity bars the appellees' claims against it because the Act does not waive immunity for discretionary decisions about roadway design and the installation of safety features. The City further asserted that this jurisdictional defect in the appellees' petition[2] could not be cured by amendment because their factual complaints all concern discretionary decisions. In their response to the City's plea to the jurisdiction, the appellees argued that the City does not have immunity because its failure to address an identified safety hazard on the hike-and-bike trail was a negligent failure to implement an existing policy, not an initial policy or design decision for which immunity is preserved. The district court denied the City's plea to the jurisdiction, and the City perfected this accelerated appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8); Tex. R. App. P. 28.1(a).

ANALYSIS

Statutory framework

A municipality derives governmental immunity from the State's sovereign immunity when the municipality is performing governmental functions. *See City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007). The Texas Tort Claims Act includes, among other things, a limited waiver of governmental immunity from suits alleging personal injury or death caused by the condition or use of property or by premises defects. *See* Tex. Civ. Prac. & Rem. Code §§ 101.021(2), .022. It also provides that in premises-defect cases, a governmental unit owes

[2] The City filed its plea to the jurisdiction after the appellees added the City as a defendant in their first amended original petition. Because the first amended original petition is the appellees' live pleading, we refer to it as the "petition."

the claimant only the duty that a private person owes to a licensee on private property. *Id.* § 101.022(a), (c). When injury or death results on city-owned recreational land, however, the Texas recreational-use statute further limits the city's duty to that owed by a landowner to a trespasser. *Id.* § 75.002; *see also id.* §§ 75.003(g) ("To the extent that this chapter limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under [the Texas Tort Claims Act], this chapter controls."), 101.058 (same). The only duty a premises owner owes a trespasser is the duty not to injure him willfully, wantonly, or through gross negligence. *Texas Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191, 193 (Tex. 1997). Thus, a municipality waives immunity under the Texas Tort Claims Act and the recreational-use statute only if it is grossly negligent or if it willfully or wantonly injures the plaintiff.[3] *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225 (Tex. 2004).

However, the Legislature has specifically preserved immunity against claims arising from discretionary acts and omissions "to avoid judicial review or interference with those policy decisions committed to the other branches of government." *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 657 (Tex. 2007). The Act provides that its waiver of immunity does not apply to claims based on:

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[3] Willful and wanton conduct is synonymous with "gross negligence," and means that the act or omission complained of was the result of conscious indifference to the welfare of the person affected by it. *See Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 916–20 (Tex. 1981); *see also Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 230-31, 233 (Tex. 2004) (applying gross-negligence standard to determine question of waiver of sovereign immunity under recreational-use statute).

> (1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or
>
> (2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.

Tex. Civ. Prac. & Rem. Code § 101.056 (discretionary-powers exception). Determining whether a governmental entity's act or failure to act is discretionary is a question of law, not a question of fact. *See, e.g.*, *State v. Miguel*, 2 S.W.3d 249, 251 (Tex. 1999) (per curiam); *Wenzel v. City of New Braunfels*, 852 S.W.2d 97, 99 (Tex. App.—Austin 1993, no writ).

Standard of review

A plea to the jurisdiction seeks dismissal of a case for lack of subject-matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Because governmental immunity from suit defeats a trial court's subject-matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *Miranda*, 133 S.W.3d at 225-26; *see also Sykes*, 136 S.W.3d at 638 (explaining that governmental immunity operates like sovereign immunity to afford similar protection to subdivisions of the State, including cities). Subject-matter jurisdiction is a question of law; therefore, we review a trial court's ruling on a plea to the jurisdiction de novo. *Miranda*, 133 S.W.3d at 226.

A plea to the jurisdiction often may be determined solely from the pleadings and sometimes must be. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554-55 (Tex. 2000). When a plea to the jurisdiction challenges the *pleadings*, we construe the pleadings liberally in favor of the plaintiff to determine whether the plaintiff has met its initial burden of alleging facts that

affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Id.* "Mere unsupported legal conclusions do not suffice." *Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 170 (Tex. App.—Austin 2013, no pet.). "Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*." *Miranda*, 133 S.W.3d at 226. 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. *Id.* at 227.

When the plea challenges *the existence of jurisdictional facts*, the court should consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised. *See id.* at 226; *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554-55. Such cases fall into two categories: those in which the jurisdictional issue or facts do not implicate the merits of the plaintiff's case and those in which they do. *See University of Tex. v. Poindexter*, 306 S.W.3d 798, 806 (Tex. App.—Austin 2009, no pet.). Courts treat these two categories of cases in different ways. When the jurisdictional facts do not implicate the merits, the trial court either (1) makes the necessary fact findings to resolve the jurisdictional issue if the facts are disputed, and those explicit or implicit fact findings may be challenged on appeal for factual and legal sufficiency, *see Miranda*, 133 S.W.3d at 226, or (2) makes the jurisdictional determination as a matter of law based solely on undisputed facts, *id.*, and the appellate court reviews the trial court's decision de novo, *id.* at 227-28. In contrast, when the challenged jurisdictional facts implicate the merits of the plaintiff's claims, the party asserting the plea to the jurisdiction must overcome a burden similar to a movant's burden on a traditional summary-judgment motion and conclusively negate those facts, which we would otherwise presume to be true. *Id.*; *Bacon*, 411 S.W.3d at 171. If the evidence

creates a fact question on the jurisdictional issue, the factfinder must resolve the jurisdictional issue, but if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 227-28. "Our ultimate inquiry is whether the plaintiff's pleaded and un-negated facts, taken as true and liberally construed with an eye to the pleader's intent, would affirmatively demonstrate a claim or claims within the trial court's subject-matter jurisdiction." *Brantley v. Texas Youth Comm'n*, 365 S.W.3d 89, 94 (Tex. App.—Austin 2011, no pet.).

In this case, the City challenged only the appellees' pleadings, asserting that those pleadings affirmatively negate jurisdiction because the appellees' factual allegations concern only the City's discretionary decisions of roadway design and installation of safety features. The City does not contend that the appellees failed to state a claim for gross negligence, and it did not submit evidence to controvert the appellees' factual allegations that the City had a policy to identify and address known safety hazards. The appellees responded to the City's plea with evidence to support their allegations that the City's immunity is waived because the City had a policy of addressing known safety hazards and it negligently failed to implement that policy. The appellees' evidence does not change the nature of the City's plea, which challenged the appellees' pleadings as affirmatively negating jurisdiction, not the existence of the appellees' jurisdictional facts alleged in the pleadings.

On rehearing, the appellees urge that their evidence, which concerned the City's alleged awareness of prior accidents (i.e., the alleged awareness of the existence of a safety hazard), the alleged City policy to address safety hazards, and the City's alleged failure to address the alleged

safety hazard, relates to both the jurisdictional issue and the merits of their gross-negligence claim.[4] Therefore, they contend, the jurisdictional facts "implicate the merits" of their case, meaning that we should apply a summary-judgment-like burden to the City, find that appellees' evidence creates a fact question on the jurisdictional issue, and affirm the trial court's denial of the City's plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 227-28; *Poindexter*, 306 S.W.3d at 807. However, as explained above, the summary-judgment-like standard only applies when the plea to the jurisdiction challenges the existence of jurisdictional facts, as opposed to the sufficiency of the pleadings. *See Miranda*, 133 S.W.3d at 227-28; *Poindexter*, 306 S.W.3d at 806-07. Furthermore, for a case to be one in which the jurisdictional inquiry "implicates the merits" or is "inextricably linked to the merits," "the essential constituent [of the case] is that many if not most of the challenged jurisdictional facts will also determine whether the plaintiff is entitled to relief on the merits of her case." *Poindexter*, 306 S.W.3d at 807. In this case, the City did not challenge any jurisdictional facts in its plea—instead, it asserted that even when the appellees' factual allegations are taken as true, those allegations do not overcome governmental immunity for discretionary decisions.[5] In other words, the City's argument in support of its plea does not depend on the truth or falsity of the

[4] Gross negligence involves an objective component, which is that the premises owner's act or omission must involve "an extreme degree of risk, considering the probability and magnitude of the potential harm to others," as viewed from the premises owner's standpoint, and a subjective component, which is the actor's actual awareness of and conscious indifference to an extreme risk of harm. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225 (Tex. 2004) (quoting *Louisiana-Pac. Corp. v. Andrade*, 19 S.W.3d 245, 246 (Tex. 1999)).

[5] Although the City argues on appeal that the appellees' allegations of a "policy" of ensuring safety hazards in general at all recreational facilities do not provide enough specific details about the policy to overcome governmental immunity for discretionary decisions, the City's challenge is not to the existence of such a policy, but rather to the jurisdictional implications of such a policy if it exists as alleged.

appellees' factual allegations. The essence of the City's argument is that even if it had a broad generic "policy" of identifying and addressing safety hazards, and even if it had actual knowledge of prior traffic accidents at that location, the policy as alleged by the appellees does not mandate any action by the City that the City failed to take. While the City has not necessarily conceded all those facts as they relate to the merits of the appellees' gross-negligence claims, for purposes of its jurisdictional argument, it is not disputing them. Instead, it asserts that those "facts," even if true, cannot prevent the application of the discretionary-powers exception to the appellees' case, and therefore its immunity has not been waived.

Resolution of the jurisdictional issue in this case requires us to construe Section 101.056 of the Texas Tort Claims Act. We review issues of statutory construction de novo. *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). Our primary objective when construing statutes is to give effect to the Legislature's intent, which we seek first and foremost in the text of the statute. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631-32 (Tex. 2008). The plain meaning of the text is the best expression of legislative intent, unless a different meaning is apparent from the context or application of the plain language would lead to absurd results. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). "Where text is clear, text is determinative of [legislative] intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

Discretionary-powers exception

The sole issue on appeal is whether the appellees' allegations concern discretionary roadway design and installation of safety features, as the City contends, or a negligent failure to

implement a previously formulated policy, as the appellees contend. *See Flynn*, 228 S.W.3d at 657 ("[A] distinction is drawn between the negligent formulation of policy, for which sovereign immunity is preserved, and the negligent implementation of policy, for which immunity is waived."); *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999) (per curiam) ("Design of any public work, such as a roadway, is a discretionary function involving many policy decisions, and the governmental entity responsible may not be sued for such decisions."), *abrogated on other grounds by Denton Cty. v. Beynon*, 283 S.W.3d 329, 331 n.11 (Tex. 2009). The City asserts that the appellees' factual allegations demonstrate that the alleged negligence concerns roadway design and the installation of safety features. The appellees' allegations include the following:

- "[V]ehicles traveling at a high rate of speed on West Cesar Chavez Boulevard enter a sharp turn . . . and in the very same location joggers, bikers, and other pedestrians on City park land come within feet of those vehicles as the path of the trail converges with the road. . . . That is why the City, through the assistant director of its Parks and Recreation Department, decided a [solid concrete] barrier should be installed on the south side of the road as well."

- Less than two months before the incident, a Parks and Recreation employee "noted that 'concerns keep coming up'" from citizens about the absence of a barrier on the south side of the road near the Lamar Boulevard overpass, particularly after a barrier had been installed on the north side of the road.

- The location of the incident "was a danger and peril that the City of Austin knew existed, never warned of and should have corrected and averted through simple construction and maintenance. Instead, the City failed to safely construct and maintain the Trail for the worst reason possible—to save a little money. . . . Incredibly, the estimated $35,000 cost was cited as one reason [a barrier] was not constructed."

The appellees respond that their allegation that the City failed to implement an existing policy to eliminate or control identified hazards states a claim that is not barred by immunity.

In construing Section 101.056's discretionary-powers exception to the Texas Tort Claims Act's waiver of immunity, the Supreme Court of Texas has determined that "[a]n act is discretionary if it requires exercising judgment and the law does not mandate performing the act with such precision that nothing is left to discretion or judgment." *Rodriguez*, 985 S.W.2d at 85 (citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994)). This construction comports with the United States Supreme Court's construction of the Federal Tort Claims Act's discretionary-function exception, from which the Texas Tort Claims Act's discretionary-powers exception is derived. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991) (Federal Tort Claims Act's discretionary-function exception applies only to acts that "'involv[e] an element of judgment or choice,'" and "[t]he requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1998))); *see also Flynn*, 228 S.W.3d at 661-62 (Hecht, J., concurring) ("The discretionary function exception, like other exceptions in the [Texas Tort Claims] Act, was taken from the Federal Tort Claims Act."). Although not all conduct involving an element of judgment is shielded by immunity, those actions and decisions grounded in social, economic, or political policy are exactly the type of actions and decisions that the discretionary-powers exception is designed to protect. *See Gaubert*, 499 U.S. at 322-25; *Flynn*, 228 S.W.3d at 662 (Hecht, J., concurring). The United States Supreme Court has said that the question of whether an action is discretionary turns not on the government agent or his subjective intent when exercising discretion,

"but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325.

In deciding whether a university was immune from suit after its sprinkler system sprayed water into a public trail and knocked a bicyclist off of her bicycle, the majority in *Flynn* recognized two tests that Texas courts have applied for determining when conduct involves protected discretion. *Flynn*, 228 S.W.3d at 657. One draws the line between policy-level decisions and operational-level decisions while the other draws the line between the design of public works and their maintenance. *Id*. Although the *Flynn* majority did not articulate its decision in terms of social, economic, or political considerations, its decision aligns with the federal analysis. The majority did not consider the university's decision to install a sprinkler system (a decision that would necessarily implicate economic concerns) to be the relevant decision for the purposes of determining whether the exception applied; instead, the relevant decisions were "operational- or maintenance-level" decisions about where and when the sprinklers should spray water. *Id*. at 658.

Texas courts have generally found that actions and decisions implicating social, economic, or political considerations are discretionary decisions while those that do not involve these concerns are operational- or maintenance-level decisions. *Compare, e.g.*, *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 754 (Tex. 1995) (affirming trial court's exclusion of evidence pertaining to jail's discretionary policy decisions, including evidence of allegedly inadequate suicide-prevention and CPR training, lack of video cameras, and jailer's practice of isolating inmates); *Chambers*, 883 S.W.2d at 654 (police officer's decision to engage in high-speed chase was discretionary), *with McClure v. Reed*, 997 S.W.2d 753, 755-56 (Tex. App.—Tyler 1999, no pet.)

(decision to use flagman to direct traffic at construction site was discretionary policy-making, but flagman did not enjoy immunity while directing traffic because he was implementing policy); *Bennett v. Tarrant Cty. Water Control & Improvement Dist. No. One*, 894 S.W.2d 441, 452 (Tex. App.—Fort Worth 1995, writ denied) (decision to release water from spillway was discretionary policy formulation while "subordinate decision of determining the volume of outflow constitut[ed] policy implementation" at nondiscretionary, operational level). In addition, this Court has previously noted that applying the federal analysis of whether a decision implicates social, economic, or political policy strengthened our conclusion that the design of a highway's cross-slope and an engineer's decision not to deviate from that design were "precisely the type of highway-design, policy-level decision[s] to which courts apply the discretionary-function exception." *Texas Dep't of Transp. v. Hathorn*, No. 03-11-00011-CV, 2012 WL 2989235, at *8 & n.8 (Tex. App.—Austin July 19, 2012, no pet.) (mem. op.).

Even assuming that the City did have "a stated policy of eliminating or controlling identified hazards" and that the City had identified the area where the incident happened as a safety hazard, as the appellees allege, it does not necessarily follow that the City's failure to address this particular hazard was negligent policy implementation for which immunity is waived. The policy that the appellees describe does not mandate the construction of a guardrail or barrier with sufficient precision to make that action nondiscretionary under Texas Supreme Court precedent.[6] *See*

[6] The 2014 Parks and Recreation Department Safety Audit Report, which was submitted by appellees with their response to the City's plea to the jurisdiction, describes the incident at issue in this case as well as a prior incident and notes, "It is unclear when a decision will be made regarding safety at the location."

Rodriguez, 985 S.W.2d at 85; *Chambers*, 883 S.W.2d at 654. Rather, it requires the City to balance social and economic concerns and devise a plan to address each specific identified hazard. This demands a level of judgment beyond what was required of the university when it decided to activate its sprinkler in *Flynn*, the flagman when he directed traffic in *McClure*, and the water district when it determined how much water to release pursuant to pre-established parameters in *Bennett*. *See Flynn*, 228 S.W.3d at 657; *McClure*, 997 S.W.2d at 755-56; *Bennett*, 894 S.W.2d at 441. The appellees' contention that the City had decided to address the hazard by building a guardrail or barrier but delayed doing so because of the cost involved is ultimately a complaint about how the City chose to allocate its resources. This economically motivated decision is the type of policy formulation and balancing of interests that the discretionary-powers exception is meant to protect. *See Gaubert*, 499 U.S. at 323-25; *Flynn*, 228 S.W.3d at 662 (Hecht, J., concurring); *see also City of Grapevine v. Sipes*, 195 S.W.3d 689, 694 (Tex. 2006).

In *Sipes*, the Texas Supreme Court construed a section of the Texas Tort Claims Act providing for certain exceptions to immunity related to "Traffic and Road Control Devices." 195 S.W.3d at 692. The City of Grapevine had decided to install a temporary traffic signal at an intersection when the intersection became a frequent accident site during construction of a road-expansion project. *Id.* at 690-91. The accident at issue in the case happened between the time the City of Grapevine had planned to begin installation and when the signal was actually installed almost a month later. *Id.* at 691. When construing the statute to determine whether a city's alleged failure to timely install the traffic signal after a decision had been made to install one constituted the "absence" of a traffic light under Section 101.060 of the Act, the supreme court explained:

> *When* the City first installs a traffic signal is no less discretionary than *whether* to install it. The timing of implementation could be affected by the governmental unit's balancing of funding priorities, scheduling, traffic patterns, or other matters; to impose liability for the failure to timely implement a discretionary decision could penalize a governmental unit for engaging in prudent planning and paralyze it from making safety-related decisions. This sort of planning and execution is precisely the type of discretionary act for which the TTCA retains immunity.

Id. at 694 (citing *Texas Dep't of Transp. v. Garza*, 70 S.W.3d 802, 807 (Tex. 2002), in support of the proposition that the Legislature intended only a limited waiver of immunity in the Act).

The appellees' underlying factual allegations do not assert that the hazard at issue arose from anything other than the design of West Cesar Chavez Street and its proximity to the hike-and-bike trail. Specifically, they complain that there is a sharp turn on the road within feet of the hike-and-bike trail but no guardrail or barrier to protect trail patrons from vehicles that might veer off of the road and onto the trail. However, Texas courts have consistently held that the design of public works and installation of safety features is discretionary and, consequently, immune from suit under Section 101.056. *E.g.*, *Texas Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002) (per curiam) ("[T]he median's slope and lack of safety features, such as barriers or guardrails, reflect discretionary decisions for which [the Texas Department of Transportation] retains immunity under the Act's discretionary-function exception."); *Miguel*, 2 S.W.3d at 250 (State was immune from suit for using barrels to warn of missing guardrail because "[d]ecisions about highway design and about what type of safety features to install are discretionary policy decisions"); *Rodriguez*, 985 S.W.2d at 86 (detour design was discretionary act); *Wenzel*, 852 S.W.2d at 98 (decision not to

install barricade or warning sign was discretionary); *Hathorn*, 2012 WL 2989235, at *9 (highway's allegedly dangerous cross-slope was discretionary design decision).

The appellees asserted in their petition that the City negligently implemented its alleged policy of eliminating or controlling identified hazards because the Parks and Recreation Department had "called for and supported the construction of a guardrail or a barrier" at the location of the incident, but none had ever been installed. The appellees contend that the City's delay in addressing the identified safety hazard constitutes negligent implementation of the alleged City policy. To the extent that the appellees allege that the City failed to install a guardrail or barrier, decided not to install a guardrail or barrier, or failed to decide to install a guardrail or barrier, these are all discretionary acts or decisions for which the Act explicitly retains immunity. *See* Tex. Civ. Prac. & Rem. Code § 101.056; *see also Ramirez*, 74 S.W.3d at 866-67 (decision not to include safety features like barriers or guardrails or failure to make decision to include safety features are discretionary acts); *Stanford v. State Dep't of Highways & Pub. Transp.*, 635 S.W.2d 581, 582 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (failure to add guardrails to existing overpass was discretionary because "construction of guardrails on an existing overpass is similar to changing the design of the overpass" and design change is not nondiscretionary duty of maintenance). The appellees seek to avoid application of the discretionary-powers exception by arguing that the City affirmatively decided to correct the identified hazard, but then delayed in doing so—an act that they contend is not covered by the exception.

However, even when a governmental entity has decided to change the design of a public work but has not yet implemented that change, immunity does not vanish. *See, e.g.*, *Sipes*,

195 S.W.3d at 695 (explaining that because initial decision about whether to install traffic signal was a discretionary decision for which immunity is retained, "[i]t makes little sense to waive immunity for a governmental unit that decides to install a signal and is endeavoring to do so"); *Burnett v. Texas Highway Dep't*, 694 S.W.2d 210, 212 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (failure to upgrade median barrier was discretionary when highway department had already made plans to upgrade but had not yet implemented those plans). As the court explained in *Burnett*, the decision to change the design of a public work is a discretionary matter that "is exempted from liability" under Section 101.056(1), which provides that the Act's waiver of immunity does not apply to a governmental unit's failure to perform an act that it is not required by law to perform. *Burnett*, 694 S.W.2d at 212 (applying prior version of Act). Consequently, we must conclude that the appellees' liability theory only implicates discretionary decisions for which the City retains sovereign immunity. We are sympathetic to the appellees' loss and injury, but we are constrained by existing precedent concerning the City's immunity.

CONCLUSION

The appellees' amended pleadings affirmatively negate the existence of jurisdiction because their claims are based on the City's discretionary actions for which the City is immune from suit under Section 101.056 of the Texas Tort Claims Act. We therefore reverse the district court's order denying the plea to the jurisdiction and render judgment dismissing this case. *See Miranda*, 133 S.W.3d at 227 (court may grant plea to jurisdiction without affording plaintiff opportunity to amend if pleadings affirmatively negate jurisdiction).

Cindy Olson Bourland, Justice

Before Justices Puryear, Goodwin, and Bourland

Reversed and Dismissed for Want of Jurisdiction on Motion for Rehearing

Filed: May 5, 2017