TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00261-CV

City of Austin and Austin Energy, Appellants

v.

Nicole Vykoukal and Eliezer Perez, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT
NO. D-1-GN-15-000533, HONORABLE TIM SULAK, JUDGE PRESIDING

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

Nicole Vykoukal and Eliezer Perez brought suit against the City of Austin and Austin Energy (jointly, the City) pursuant to the Texas Tort Claims Act (TTCA) for personal injury damages sustained in a motor vehicle accident caused by an alleged special defect. *See* Tex. Civ. Prac. & Rem. Code §§ 101.001–.109. In this interlocutory appeal, the City challenges the trial court's denial of its Plea to the Jurisdiction and Motion for Summary Judgment based on governmental immunity. *See id.* § 51.014(a)(8). For the reasons that follow, we reverse the trial court's order and dismiss Vykoukal's and Perez's claims for lack of jurisdiction.

BACKGROUND

Vykoukal and Perez were riding their bicycles in the bike lane westbound on Rosewood Avenue in Austin, Texas, during the middle of the day. As they approached the intersection of Rosewood Avenue and Bedford, not far from where a right turn lane begins, they

came across a portion of the bike lane that was partially encroached upon by overgrown vegetation on the property of the homeowners at 2500 Rosewood Avenue. They stopped in the bike lane in the shade provided by the overgrown vegetation to have a drink of water. Shortly after they stopped, a westbound driver approached, left the portion of the road designated for automobile travel, drove across the solid white line into the bike lane, and struck Vykoukal and Perez, who were seriously injured and taken to the hospital by ambulance.[1] According to Vykoukal and Perez, the driver told investigating police officers that she had not seen Vykoukal and Perez and did "not know if the sun was in her face or what." One of the officers replied, "But it's 11:30 . . . and the sun rises in the east."

Vykoukal and Perez sued the City alleging that the overgrown vegetation constituted a special defect and that the City had breached its duty to maintain the right of way and keep it free of obstruction.[2] The City filed a Plea to the Jurisdiction and Motion for Summary Judgment, arguing that it retained its immunity because the overgrown vegetation was not a special defect and that Vykoukal and Perez could not amend their pleadings to establish a premises defect.[3] The City attached evidence to its motion, including excerpts from the depositions of Vykoukal and Perez and photographs of the scene of the accident. Vykoukal and Perez filed a response and also presented evidence, including an affidavit of Vykoukal, photographs of the scene, and the police report and

---

[1] Vykoukal and Perez settled with the driver before this suit was filed.

[2] Vykoukal and Perez also sued the homeowners, who are not a part of this interlocutory appeal.

[3] In the alternative, the City also asserted that its motion for summary judgment should be granted because the evidence negated Vykoukal's and Perez's cause of action as a matter of law.

dash cam video.[4] Following a hearing, the trial court denied the City's Plea to the Jurisdiction and Motion for Summary Judgment, and this appeal followed.

STANDARD OF REVIEW AND APPLICABLE LAW

We review a trial court's ruling on a plea questioning the trial court's subject matter jurisdiction de novo. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226, 228 (Tex. 2004). We focus first on the plaintiff's petition to determine whether the facts that were pled affirmatively demonstrate that subject matter jurisdiction exists. *Id.* at 226. We construe the pleadings liberally in favor of the plaintiff. *Id.* If a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Id.* at 227 (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)).

When evidence is submitted that implicates the merits of the case, as is the case here, our standard of review generally mirrors the summary judgment standard under Texas Rule of Civil Procedure 166a(c). *Id.* at 227–28; *see* Tex. R. Civ. P. 166a(c). The burden is on the governmental unit to present evidence to support its plea. *Miranda*, 133 S.W.3d at 228. If the governmental unit meets this burden, the burden shifts to the nonmovant to show that a disputed material fact exists regarding the jurisdictional issue. *Id.* We take as true all evidence that is favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.* If the evidence creates a fact issue as to jurisdiction, the trial court cannot grant the plea to the

[4] Although the clerk's record contains a cover sheet labeled "Exhibit 7 (Video – APD Dash Cam), the appellate record does not include the dash cam video.

jurisdiction, and the fact issue must be resolved by the fact finder at trial. *Id.* at 227–28; *University of Tex. v. Poindexter*, 306 S.W.3d 798, 807 (Tex. App.—Austin 2009, no pet.). On the other hand, if the undisputed evidence establishes that there is no jurisdiction or fails to raise a fact issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 228; *Poindexter*, 306 S.W.3d at 807.

Governmental immunity deprives a trial court of subject matter jurisdiction in suits against political subdivisions of the state, including cities, unless the political subdivision consents to suit and is therefore properly asserted in a plea to the jurisdiction. *Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756, 759 n.4 (Tex. 2011) (per curiam) (distinguishing between sovereign immunity, which protects State and its divisions from suit and liability, and governmental immunity, which affords like protection to political subdivisions, including counties, cities, and school districts); *Miranda*, 133 S.W.3d at 225–26. The TTCA provides a limited waiver of immunity for two categories of claims that allege dangerous conditions on real property—"premises defects" and "special defects." *See* Tex. Civ. Prac. & Rem. Code §§ 101.022(a) (providing for governmental unit's liability for premises defects), (b) (providing for governmental unit's liability for special defects), .025 (waiving sovereign immunity to suit "to the extent of liability created by this chapter" and allowing person with claim under TTCA to sue governmental unit for damages); *University of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 115–16 (Tex. 2010) (per curiam). "'Premises defects' may be defined generally as defects or dangerous conditions arising from conditions of a premises. 'Special defects' are a subset of premises defects and include conditions such as excavations or obstructions on highways, roads, or streets."

University of Tex. at Austin v. Sampson, 488 S.W.3d 332, 338–39 (Tex. App.—Austin 2014), *aff'd*, 500 S.W.3d 380 (Tex. 2016) (internal citations and quotations omitted).

Under Texas law, whether the complained-of condition is classified as a premises defect or a special defect determines the entrant's status and, in turn, the duty of care owed to the entrant by the governmental unit. *See* Tex. Civ. Prac. & Rem. Code § 101.022; *City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008) (per curiam). If the claim arises from a special defect, the governmental unit owes the claimant the same duty of care that a private landowner owes an invitee. *See* Tex. Civ. Prac. & Rem. Code § 101.022(b); *Texas Dep't of Transp. v. Perches*, 388 S.W.3d 652, 654–55 (Tex. 2012) (per curiam) (citing *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992)). Under this standard, the governmental unit must use ordinary care to reduce or eliminate an unreasonable risk of harm which the governmental unit knew or should have known about. *Payne*, 838 S.W.2d at 237. If the condition alleged is a premises defect, the governmental unit owes the claimant only the duty of care that a private landowner would owe a licensee. *See* Tex. Civ. Prac. & Rem. Code § 101.022(a); *Perches*, 388 S.W.3d at 656. That duty would require the City here (1) not to injure the licensee by willful, wanton, or grossly negligent conduct, and (2) to use ordinary care to warn of or make reasonably safe a dangerous condition of which the City was aware and the licensee was not. *See Perches*, 388 S.W.3d at 656 (citing *Payne*, 838 S.W.2d at 237). Whether a condition is a premises defect or a special defect is a question of law, which we review de novo. *Texas Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009) (per curiam) (citing *Payne*, 838 S.W.2d at 238).

DISCUSSION

Special Defect

In its first issue, the City argues that it retained its governmental immunity because the overgrown vegetation is not a special defect.[5] Although the TTCA does not define special defect, the Texas Supreme Court has held that a special defect must be in the same class as an excavation or obstruction and that the class of special defects contemplated by the TTCA is narrow. *Perches*, 388 S.W.3d at 655 (citing *Hayes*, 327 S.W.3d at 116). Whether a condition is a special defect is determined on a case-by-case basis. *See Payne*, 838 S.W.2d at 238; *Wildermuth v. Parker Cty.*, 1 S.W.3d 705, 708 (Tex. App.—Fort Worth 1999, no pet.). We consider such factors as (1) the size of the condition, (2) whether the condition unexpectedly and physically impairs a vehicle's ability to travel on the road, (3) whether the condition presents some unusual quality apart from the ordinary course of events, and (4) whether the condition presents an unexpected and unusual danger to the ordinary users of the roadway. *Hayes*, 327 S.W.3d at 116. An ordinary user takes the "normal course of travel," which is on the actual roadway. *See id.* at 116–17 (citing *Denton Cty. v. Beynon*, 283 S.W.3d 329, 332 (Tex. 2009)).

---

[5] Initially, the City argues that Vykoukal and Perez base their special defect theory on only the *assumption* that the overgrown vegetation obscured the driver's view, and that there is no evidence to support such an assumption. Vykoukal and Perez contend that the evidence shows that it was not possible for the sun to have been in the driver's eyes and that the vegetation was the only possible obstruction of the driver's view. Taking as true all evidence favorable to Vykoukal and Perez, and indulging every reasonable inference and resolving any doubts in their favor, we conclude that, at a minimum, there was a fact issue as to whether the vegetation was the reason the driver did not see Vykoukal and Perez. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). We nonetheless conclude that the vegetation did not constitute a special defect for the reasons explained below.

Here, the parties join issue on whom we should assess as the ordinary user in determining whether the overgrown vegetation was a special defect. The City argues that it is the driver, while Vykoukal and Perez urge that they should be considered ordinary users of the bike lane. However, resolution of this difference is not necessary to our disposition because we conclude that the overgrown vegetation was not a special defect from either perspective. The driver did not take the ordinary course of travel; rather, she left the lane designated for motor vehicles, crossed the solid white line, and drove into the bike lane where the overgrown vegetation was located. Thus, she was not an ordinary user. *See Perches*, 388 S.W.3d at 656 (concluding that driver who missed turn and hit guardrail was not ordinary user); *Hayes*, 327 S.W.3d at 116–17 (holding that driver who did not turn back and take alternate route when barricade alerted him that road was closed was not ordinary user); *Beynon*, 283 S.W.3d at 332 (concluding that motorist who left road and struck floodgate arm three feet off roadway was not ordinary user); *Davis v. Comal Cty. Comm'rs Court*, No. 03-11-00414-CV, 2012 Tex. App. LEXIS 5719, at *9 (Tex. App.—Austin July 13, 2012, no pet.) (mem. op.) (holding that driver who lost control of car and left road did not take normal course of travel and was not ordinary user); *see also City of McAllen v. De La Garza*, 898 S.W.2d 809, 810–12 (Tex. 1995) (holding that city owed no duty to intoxicated driver who left roadway and deviated from ordinary course of travel). Thus, when viewed from the perspective of the driver as an ordinary user, the overgrown vegetation was not a special defect. *See Hayes*, 327 S.W.3d at 116.

Viewed from the other perspective, even assuming that Vykoukal and Perez were ordinary users of the bike lane when they stopped in the bike lane to drink water, the evidence showed that the vegetation neither posed an unusual and unexpected danger nor impeded their travel

in the bike lane. In their depositions, Vykoukal and Perez testified that they were aware of the vegetation prior to the accident, having ridden their bicycles and walked their dogs on that route multiple times in the past, and that they made a conscious decision to stop in the shade of the vegetation to drink water. Further, the photographic evidence showed that the overgrown bushes were clearly visible from some distance. Perez also testified that he was able to pass the bushes while traveling in the bike lane without crossing into the lane designated for motor vehicles, and Vykoukal testified that she did not remember ever having to leave the bike lane to circumvent the vegetation while riding her bicycle. Thus, the overgrown vegetation did not constitute a special defect when analyzed from the perspective of Vykoukal and Perez as ordinary users. *See id.* at 116 (holding that whether condition unexpectedly and physically impairs ability to travel on road and whether condition presents unexpected and unusual danger to ordinary users of roadway are factors in determining special defect); *City of Grapevine v. Roberts*, 946 S.W.2d 841, 843 (Tex. 1997) (per curiam) (holding that cracked and crumbling sidewalk step was not special defect where "essential structure" of steps was not impaired); *Texas Dep't of Transp. v. Womac*, No. 13-11-00460-CV, 2012 Tex. App. LEXIS 8581, at *8–9 (Tex. App.—Corpus Christi Oct. 11, 2012, no pet.) (mem. op.) (concluding that relatively small sunken area in sidewalk that did not impair bicyclist's ability to travel in bike lane did not constitute special defect); *City of Galveston v. Albright*, No. 14-04-00072-CV, 2004 Tex. App. LEXIS 9693, at *12 (Tex. App.—Houston [14th Dist.] Nov. 2, 2004, no pet.) (mem. op.) (holding that "open and obvious nature of the drainage block serve[d] to defeat the 'unexpected and unusual requirement' for a special defect"); *Wildermuth*, 1 S.W.3d at 708 (holding that small trees and brush growing along roadside that were not unexpected

or unusual and were open, obvious, and predictable could not constitute special defect as matter of law); *Sipes v. Texas Dep't of Transp.*, 949 S.W.2d 516, 521 (Tex. App.—Texarkana 1997, writ denied) (concluding that open and obvious nature of vegetation, of which plaintiff testified she had actual knowledge, demonstrated plaintiff's failure to fulfill unexpected and unusual requirement for special defect). Therefore, we conclude that the overgrown vegetation in or above the bike lane did not constitute a special defect as a matter of law and that section 101.022(b) of the TTCA does not waive the City's immunity from suit. We sustain the City's first issue.

Premises Defect

In its second issue, the City argues that Vykoukal and Perez should not be given the opportunity to amend their pleadings to allege a regular premises defect because the evidence conclusively negates at least one element of a premises defect claim as a matter of law. *See Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007) (noting that pleader must be given opportunity to amend in response to plea to jurisdiction only when it is possible to cure pleading defect). To establish a waiver of immunity for a premises defect claim under section 101.022(a), a claimant must show that the landowner failed to either (1) use ordinary care to warn the licensee of a condition that presented an unreasonable risk of harm of which the landowner is actually aware and the licensee is not, or (2) make the condition reasonably safe. *Hayes*, 327 S.W.3d at 117. The City argues that the undisputed evidence conclusively establishes that Vykoukal and Perez were aware of the overgrown vegetation, negating jurisdiction based on a premises defect.[6] We agree.

[6] Vykoukal and Perez argue that the evidence established the City's actual knowledge of the dangerous condition of the overgrown vegetation but do not address the issue of their knowledge.

As noted above, Vykoukal and Perez testified that they had prior knowledge of the overgrown vegetation because they had ridden their bikes and walked their dogs in the bike lane past the vegetation. In addition, the vegetation was visible from some distance, and they made a conscious decision to stop in its shade. Thus, as a matter of law, they cannot prove the required element of a premises defect claim that they lacked knowledge of the alleged dangerous condition. *See id.*; *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 709 (Tex. 2003) (per curiam) ("If the licensee has the same knowledge about the dangerous condition as the licensor, then no duty to the licensee exists."); *Osadchy v. Southern Methodist Univ.*, 232 S.W.3d 844, 852 (Tex. App.—Dallas 2007, pet. denied) ("'[A] licensee is not entitled to expect that the possessor [of land] will warn him of conditions that are perceptible to him, or the existence of which can be inferred from facts within his present or past knowledge.'") (quoting *Miller*, 102 S.W.3d at 709).

Further, the first element of a premises defect claim also requires that there be an unreasonable risk of harm. *See Hayes*, 327 S.W.3d at 117; *Payne*, 838 S.W.2d at 237. The determination of whether a particular condition poses an unreasonable risk of harm is fact specific. *See Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 342 (Tex. App.—Austin 2000, pet. denied), *superseded by statute on other grounds*, Tex. Fin. Code § 304.102. "Texas courts have consistently held that, as a matter of law, naturally occurring conditions that are open and obvious do not create an unreasonable risk of harm for purposes of premises liability." *City of Hous. v. Cogburn*, No. 01-11-00318-CV, 2014 Tex. App. LEXIS 4722, at *9–13 (Tex. App.—Houston [1st Dist.] May 1, 2014, no pet.) (mem. op.) (listing cases and holding that exposed tree roots near parking meter were open and obvious naturally occurring condition that, as matter of law, could not

create unreasonable risk of harm); *accord Lee v. K & N Mgmt., Inc.*, No. 03-15-00243-CV, 2015 Tex. App. LEXIS 12581, at *2, 7–10 (Tex. App.—Austin Dec. 11, 2015, no pet.) (mem. op.) (concluding that plant extending over edge of flowerbed, in well-lighted area, and visible from twenty-five feet away did not pose unreasonable risk of harm); *Davis*, 2012 Tex. App. LEXIS 5719, at *13 (holding that existence of tree alongside roadway was not, as matter of law, condition that posed unreasonable risk of harm); *Wong v. Tenet Hosps. Ltd.*, 181 S.W.3d 532, 539 (Tex. App.—El Paso 2005, no pet.) (holding that one-foot high "distressed shrub" located in row of other shrubs between curb and sidewalk did not poise unreasonable risk of harm as matter of law). Thus, the open and obvious, naturally occurring overgrown vegetation of which Vykoukal and Perez were actually aware did not, as a matter of law, constitute a condition that posed an unreasonable risk of harm. We therefore conclude that Vykoukal and Perez have failed to establish a premises defect claim. We sustain the City's second issue.

CONCLUSION

Having sustained the City's issues, we reverse the trial court's order denying the City's plea to the jurisdiction and dismiss Vykoukal's and Perez's claims against the City for lack of subject matter jurisdiction.

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Reversed and Dismissed

Filed: May 10, 2017