NUMBER 13-17-00290-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

CITY OF EDINBURG, **Appellant,**

v.

GNJ REALTY INVESTMENTS LLC, **Appellee.**

On appeal from the 398th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Hinojosa
Memorandum Opinion by Justice Hinojosa

In the trial court, appellee GNJ Realty Investments LLC (GNJ Realty) asserted a negligence claim against appellant the City of Edinburg (the City) for monetary relief from damage sustained when a motor-driven lift pump, which is part of the City's sewer system, allegedly malfunctioned and caused sewer water to back up into a building GNJ Realty owned. The City challenged the existence of jurisdictional facts—namely that the lift

pump was the cause of the flooding—through a plea to the jurisdiction, which sought dismissal of GNJ Realty's claim. The trial court denied the City's plea to the jurisdiction, and the City seeks interlocutory review. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West, Westlaw through 2017 1st C.S.). In one issue, the City contends that there is no fact question regarding jurisdiction because the lift pump did not cause the water to back up into GNJ Realty's building. We reverse the trial court's order and render judgment dismissing GNJ Realty's claim against the City.

I. BACKGROUND

GNJ Realty leases a building on Jackson Road in Edinburg, Texas, to RGV Footcare. On Sunday, February 2, 2014, Nancy Cavazos, an RGV Footcare employee, discovered standing water in nearly every room of its 10,000-square foot office space. Cavazos immediately contacted a plumber after discovering the water. The following day, Cavazos called the City's utility administration department, and she spoke to Monica Perez, an administrative assistant. Perez, in affidavit testimony, recalled that Cavazos represented the water backing up into RGV Footcare was just "clear water."

A daily report from crew number 709 of the City's utility department for February 3, 2014 provides:

> Customer Name: Nanc[y] Cavazos Water Tap # _____ Meter # _____
>
> Address/Location: 4811 S. Jackson Subdivision/Lot # _____
>
> Job Performed: Jet about 200 ft. could not get it unclog [sic] we are 704 came to help us out. 709 is going back out there with the Big Vactor. [T]alk to the c[u]stomer
>
> Customer Side: [ ] City Side: [X] WGT: [ ] Yes [ ] No

Approximate gallons loss/overflow: ___ Sewer Backup: [X] Yes [ ] No

Arrived: 10:00 Left: 11:39 AM

Ramiro Garcia, the wastewater supervisor for the City, testified at a deposition that he personally inspected the manhole that provided sewer service to the building. Garcia did not observe any evidence that would have caused the back up of water RGV Footcare experienced. In Garcia's deposition, he reviewed the February 3, 2014 daily report from crew number 709 and testified:

> Q. Can you explain why there was a—why it says that there's a city[-] side issue?
>
> A. Yes, sir. When—when operators see any water in the system, they refer "city side" and continue to do maintenance to unclog any debris that might in the future obstruct the sewer to move.
>
> Q. Does this mean that the city problem—or the problem in the sewer—in the sewer caused the damage in RGV Footcare?
>
> A. No, sir.
>
> Q. What was the city issue—the issue on the city side on February 3, 2014?
>
> A. It was just the lines were not flowing properly. But that doesn't mean that it's—that it's—that it's going to back up any residents around the area. That means it was just flowing but not exactly the right—the right way it should flow. It was—it was—it was running slowly, but with that, like I said, when we—whenever we see that, that means that there's—there's debris, sand, you know, rags, and that can cause the line that flows slowly to slow the sewer and—and that can cause—in the future that can cause a clog on the line and then will back up all the—all the system.
>
> So that's why we do maintenance. Whenever we get a call, we do maintenance, and we—that's why it's written here that it's city side, so we can do maintenance on the line, but that doesn't—this is—this does not—does not cause any—or the building to back up at [the] building.

Garcia explained that, in most cases, gravity is enough to keep sewage moving through drain pipes, but where gravity is inadequate, the City used "lift stations" with motor-driven pumps to propel the waste. Referring to maps showing RGV Footcare's neighborhood, Garcia opined that its neighborhood is serviced by Lift Station 30 and that RGV Footcare is located at the highest point serviced by Lift Station 30. Garcia further opined that if Lift Station 30 was not working, he would expect to be alerted by the lift station supervisor regarding a "high-level alarm." He would also expect for the City to receive complaints from the residents whose sewer lines poured into Lift Station 30 because their customer-side sewer lines were overflowing, and manholes, particularly the one behind RGV Footcare, would be overflowing. None of those symptoms were present according to Garcia.

According to GNJ Realty's petition:

> The City [] acknowledged that the water damage in [GNJ Realty's] building was caused by a malfunction of motor-driven equipment at a nearby lift station, which, in turn, caused a clog in the City's main sewer line. Nevertheless, the City of Edinburg also failed and refused to address the damages to [GNJ Realty's] property.

As part of GNJ Realty's negligence claim, it alleged that the City owed it a duty to use reasonable care in servicing, maintaining and operating the motor-driven equipment at the lift station to ensure that it would not malfunction.[1]

The City sought dismissal of GNJ Realty's negligence claim in a plea to the jurisdiction, and it attached, among other things, affidavits from Perez and Garcia, a map

[1] GNJ Realty has also sued State Auto Insurance Company (State Auto) for breach of contract and alleged violations of the Texas Insurance Code. State Auto is not a party to this interlocutory appeal.

depicting Lift Station 30's service area, and records relating to Lift Station 30. GNJ Realty responded, and it attached, among other things, excerpts from Garcia's deposition, the February 3, 2014 daily report from crew number 709, and an equipment data form for Lift Station 30. The City replied and attached additional excerpts from Garcia's deposition. The trial court denied the City's plea to the jurisdiction, and this interlocutory appeal followed.

II. DISCUSSION

In the City's sole issue, it contends that there is no fact question regarding jurisdiction because the lift pump did not cause the water to back up into RGV Footcare. GNJ Realty points to four pieces of evidence that, according to it, connects the lift pump with the flooding that its premises experienced.

A. Standard of Review

A plea to the jurisdiction is a dilatory plea that seeks to dismiss a cause for lack of subject-matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Immunity from suit defeats a trial court's subject-matter jurisdiction and, thus, is properly asserted in a plea to the jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). We review the trial judge's ruling denying a jurisdictional plea based on governmental immunity de novo. *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

A plea to the jurisdiction may challenge either the pleadings or the existence of jurisdictional facts. *Miranda*, 133 S.W.3d at 226–27. If a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted

by the parties when necessary to resolve the jurisdictional issues that have been raised. *Id*. at 227. 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. *Id*. at 228.

B. Applicable Law

Governmental immunity protects political subdivisions of the State, including cities, from lawsuits for money damages unless immunity has been waived. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). The Texas Tort Claims Act (TTCA) provides a limited waiver of immunity for property damage that is proximately caused by the negligence of an employee acting within the scope of his employment if (i) the damage "arises from the operation or use of a motor-driven vehicle or motor-driven equipment" and (ii) "the employee would be personally liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1) (West, Westlaw through 2017 1st C.S.). The City's arguments focus on subsection (i) regarding motor-driven equipment.

The supreme court has repeatedly clarified that the phrase "arises from" requires a nexus between the operation or use of the motor-driven equipment and the plaintiff's personal injuries and property damage. *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 543 (Tex. 2003); *LeLeaux v. Hamshire–Fannett ISD*, 835 S.W.2d 49, 51 (Tex. 1992). This nexus requires more than mere involvement of property; the equipment's operation or use must have actually caused the injury. *Whitley*, 104 S.W.3d at 543. Thus, the operation or use of a motor equipment "does not cause injury if it does

no more than furnish the condition that makes the injury possible." *Id*. (quoting *Dallas Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998)).

As for the terms "operation" and "use," we define them according to their ordinary meanings. *See Mount Pleasant ISD v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989) (defining for purposes of motor-vehicle exception "operation" to mean "a doing or performing of a practical work" and "use" to mean "to put or bring into action or service; to employ for or apply to a given purpose").

C. Analysis

The City attached, among other things, affidavits from Garcia and Arturo Martinez, director of utilities at the City. In Martinez's affidavit, he avers:

> After reviewing the logs and daily logs for lift station #30 which is the lift station attached to the sewer lines that ultimately connects [sic] to the premises located at 4811 S. Jackson Road, Edinburg, Texas, I have determined and made the conclusion that lift station #30 had been operating properly. Lift station #30 was operating properly prior to and throughout the months of December 2013, January 2014 and February 2014 and continues to operate properly without any malfunction as of the date of this Affidavit.

In Garcia's affidavit, he avers:

> On or about February 3, 2014, while working for the City of Edinburg, I was notified of a complaint at a business medical clinic located at 4811 S. Jackson Road, Edinburg, Texas, that the premises was experiencing plumbing problems which had resulted in a sewer back-up. I dispatched a crew to the location and was informed that the premises owner had already hired a private plumber who had already fixed the plumbing problem and that the premises owner had also hired a separate company to clean up the premises and that the water had already been removed. The City of Edinburg crew then performed a standard courtesy procedure preventative maintenance to the lines owned by the City of Edinburg that connect to the premises in question and it was determined that the City of Edinburg sewage line was free flowing and that there was no back-up in the lines. Further, I have also reviewed all of the daily logs pertaining to lift station #30

which indicate that it had been and was operating properly.

In GNJ Realty's response to the City's plea to the jurisdiction, it contended that four pieces of evidence linked a malfunction of the motor-driven pump in Lift Station 30 with the backup of water into its building.[2]

First, GNJ Realty points to the City's response to one of its interrogatories, both of which provide:

> INTERROGATORY []: Please state whether the City of Edinburg lift station that services Plaintiff's property is motor driven.
>
> RESPONSE: Lift station #30[,] which is also the lift station for Doctors Hospital at Renaissance and a number businesses and residential properties[,] is considered motor[-]driven equipment.

Second, GNJ Realty highlights part of Garcia's deposition testimony that provides:

> Q: If this lift station—in your—since you've been at the city, do you know of any situation where this lift station failed or something went wrong, something malfunctioned, however you want to call it, had a mechanical breakdown?
>
> A: Yes. But it was just like normal, normal—you know, like a partially plugged pump, which is—
>
> Q: Okay.

[2] GNJ Realty further contended that these four pieces of evidence "overwhelm[ed]" the City's "conclusory affidavits." In the City's reply, it attached excerpts of deposition testimony that Garcia provided after its plea to the jurisdiction was filed. The order denying the plea to the jurisdiction provides that the trial court considered "the pleadings, the motion, the response, [and] the evidence on file" and that it took "judicial notice of the file." Thus, even if Martinez's and Garcia's affidavits contained conclusory testimony, the trial court nevertheless considered Garcia's subsequent deposition testimony. *Compare Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004) (acknowledging that the procedure for a plea to the jurisdiction when evidence has been submitted to the trial court generally mirrors that of a traditional motion for summary judgment), *with* TEX. R. CIV. P. 166a(f) ("The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."). As recounted above, Garcia's deposition testimony explains what he would expect if Lift Station 30 were not working—including a back up of water in the neighborhood serviced by Lift Station 30—and how he observed none of those circumstances.

A: —that means—when it's a partially plugged, that means it is pumping, but it has rags in the impeller, so it's pumping less water.

Q: Okay. So an example—an example of—in your time as supervisor of that division of when Lift Station 30 was not operating as intended—was when a pump got clogged? Is that right?

A: Correct.

Q: So is that when the motor-driven equipment stopped working correctly? Is that right?

A: Well, not stopped. It just keeps going, but it's not pumping enough water—

Q: Okay. It's not—the motor-driven equipment, which is the pump, is not working as intended. Right?

A: Correct.

. . .

Q: And the lift station file would say like clog or something in the pump and that would indicate what you are talking about?

A: Correct.

. . .

Q: All right. And again, we talked about how a clog would indicate a mechanical disruption or that the pump was operating at lower capacity than designed, correct?

A: Correct.

Q: Okay. And you also indicated that this would—this would also indicate where, if there was an electrical short or electrical problem, that that caused the mechanical equipment to work at less than designed capacity and would cause a problem, [c]orrect?

A: Correct.

Third, GNJ Realty references the February 3, 2014 daily report from crew number 709,

detailed above. Fourth, it references an equipment data form for Lift Station 30 that states, "2-4-14 the East pump shorted out, took to Odessa to check."[3]

None of the evidence referenced by GNJ Realty links the motor-driven pump at Lift Station 30 to the back up of water that was experienced at RGV Footcare. *See Whitley*, 104 S.W.3d at 543 (providing that the nexus requires more than mere involvement of property); *see also City of Colony v. Rygh*, No. 02-17-00080-CV, 2017 WL 6377435, at *3–5 (Tex. App.—Fort Worth Dec. 14, 2017, no pet.) (mem. op.) (holding that there was insufficient evidence to link the use of pressurized water from a "Vac truck" to unclog a sewer drain with the back up of sewage that certain residents experienced). Garcia's deposition testimony that GNJ Realty references is to a hypothetical pump that is partially clogged. The trial court was not presented with any evidence that any of the pumps at Lift Station 30 were clogged—fully or partially—on February 3, 2014. Moreover, that a pump "shorted out" the day after RGV Footcare experienced the water back up is alone not evidence that it was malfunctioning the day before. At most, Garcia admitted that the sewer line providing service to RGV Footcare had a partial clog somewhere along the way to Lift Station 30.

The jurisdictional evidence constitutes no evidence that the property damage sustained at RGV Footcare arises from the City's use of a motor-driven pump at Lift Station 30. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A); *Whitley*, 104 S.W.3d at 543. The trial court therefore erred by denying the City's jurisdictional plea challenging GNJ Realty's claim that the City's negligent use of a motor-driven pump at Lift Station 30

[3] Garcia testified that Odessa is an authorized dealer and servicer of pumps.

caused water to back up into RGV Footcare. The City's sole issue is sustained.

III. Conclusion

The order denying the City's plea to the jurisdiction is reversed and a dismissal of GNJ Realty's lawsuit against the City is rendered.

LETICIA HINOJOSA
Justice

Delivered and filed the
7th day of June, 2018.