NUMBER 13-19-00063-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

BART BURNS, **Appellant,**

v.

SAN PATRICIO COUNTY
AND DONALD YOUNG, **Appellees.**

On appeal from the 343rd District Court
of San Patricio County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Longoria

Appellant Bart Burns argues on appeal that the trial court erred by granting appellee San Patricio County's (the County) plea to the jurisdiction and dismissing the case without allowing him to replead his claims. We affirm.

I. BACKGROUND

On June 26, 2017, Burns was involved in a crash when the aircraft he was piloting landed at T.P. McCampbell-Porter Airport (Airport), which is owned and operated by the County. As he touched down on the runway of the Airport, a vehicle towing a trailer passed in front of him causing a collision between his aircraft and the trailer.

Burns filed his original petition against the County and Donald Young[1], the operator of the vehicle, alleging negligence by both defendants. The County filed its plea to the jurisdiction and answer to Burns's petition, arguing that the trial court lacked subject matter jurisdiction over the cause of action because the County is protected by sovereign immunity. Prior to the hearing on the County's plea to the jurisdiction, the County filed a supplemental plea to the jurisdiction and motion to dismiss, to which Burns filed a response. Burns argued that the County's sovereign immunity was waived under the Texas Tort Claims Act (TTCA). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2). The County filed a reply to Burns's response.

The trial court held a hearing on the County's plea to the jurisdiction and motion to dismiss. After hearing testimony and being presented with evidence, the trial court granted the County's plea to the jurisdiction and motion to dismiss. This appeal followed.

II. PLEA TO THE JURISDICTION

Burns contends that the trial court erred in granting the County's plea to the jurisdiction and motion to dismiss because: (1) sovereign immunity was waived as properly raised in his petition; and (2) if his claim was "improperly or insufficiently pled," he should have been given the opportunity to replead.

A. Governmental Immunity

[1] Donald Young was not an employee of the County, nor was he operating a County vehicle. Young is not a party to this appeal.

The TTCA provides a limited waiver of governmental immunity and, unless waived, governmental immunity from suit deprives a trial court of subject matter jurisdiction in a suit against a governmental unit such as the County. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004) (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–.109). We review a trial court's ruling on subject-matter jurisdiction de novo. *Id*. at 226, 228. "A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). In most cases, a plea to the jurisdiction "should be decided without delving into the merits of the case." *Id*.; *see Jefferson County v. Farris*, 569 S.W.3d 814, 820 (Tex. App.—Houston [1st Dist.] 2018, pet. filed).

In reviewing a trial court's jurisdictional ruling, we construe the pleadings in the plaintiff's favor. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). A plaintiff bears the burden to allege facts affirmatively demonstrating the trial court's jurisdiction to hear the case. *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). We consider only the plaintiff's pleadings and evidence relevant to the jurisdictional inquiry. *Id*. We take as true all evidence favorable to the plaintiff and indulge every reasonable inference and resolve all doubts in his favor. *Miranda*, 133 S.W.3d at 228. "[T]his standard generally mirrors that of a summary judgment." *Id*. Thus, the burden is on the movant to present evidence establishing that the trial court lacks jurisdiction as a matter of law. *Id*. Thereafter, the burden shifts to the plaintiff to demonstrate that a disputed issue of material fact exists regarding the jurisdictional issue. *Id*. "If a fact issue exists, the trial court should deny the plea." *Mission Consol. Indep.*

Sch. Dist. v. Garcia, 372 S.W.3d 629, 635 (Tex. 2012). "But if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law." *Id*.

"If there is a gap in jurisdictional facts, the trial court is required to afford the plaintiff an opportunity to amend its pleadings." *Green Tree Servicing, LLC v. Woods*, 388 S.W.3d 785, 792 (Tex. App.—Houston [1st Dist.] 2012, no pet.). A trial court's subject-matter jurisdiction cannot be challenged in a no-evidence motion for summary judgment or by an allegation in a plea to the jurisdiction that the plaintiff has no evidence of a jurisdictional fact. *See id*. at 792–94.

1. Premises Defect Claim

Burns argues that the trial court erred by granting the County's plea to the jurisdiction because he pled a premises defect claim under § 101.021 of the TTCA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2). The TTCA waives a governmental entity's immunity for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." *Id*. "[I]f a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for use of the premises." *Id*. § 101.022(a). "The duty owed to a licensee requires that 'a landowner not injure a licensee by willful, wanton or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not.'" *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 391 (Tex. 2016) (quoting *State Dep't of Highways & Pub. Transp. v.*

Payne, 838 S.W.2d 235, 237 (Tex. 1992)). In the absence of willful, wanton, or grossly negligent conduct, a licensee must prove the following elements to establish the breach of duty owed to him:

> (1) a condition of the premises created an unreasonable risk of harm to the licensee; (2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition; (4) the owner failed to exercise ordinary care to protect the licensee from danger; (5) the owner's failure was a proximate cause of injury to the licensee.

Sampson, 500 S.W.3d at 391; *Payne*, 838 S.W.2d at 237; *Farris*, 569 S.W.3d at 822. When the governmental unit has actual knowledge of a dangerous condition and the licensee does not, the government must either warn the licensee or make the condition safe. *City of Denton v. Paper*, 376 S.W.3d 762, 766 (Tex. 2012) (citing *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974)).

The County argues that Burns did not plead a claim of premises defect, but rather pled only a claim for ordinary negligence. Burns's petition alleged that the County owned and operated the Airport where the collision happened. Burns further alleged that the County owed a duty to ensure that "no unnecessary risks were present at an active airfield . . . ." He stated that the County failed to train workers and failed to maintain a safe environment for airport activities. The petition alleged a cause of action for negligence and stated that the County's negligence resulted in "extensive physical injuries to [Burns] and damage to personal property." Within the petition, Burns stated that Young, who voluntarily removed hay from the airport, was inadequately trained and "allowed to roam an active runway without understanding the nature of his actions." Assuming without deciding that Burns's petition could be interpreted as pleading a

premises defect, we find that it does not establish the actual knowledge element required in a premises defect claim.

To prove the actual-knowledge element of a viable premises-defect claim, the licensee must show that at the time of the incident, the landowner knew about the dangerous condition. *See Paper*, 376 S.W.3d at 767 (citing *City of Corsicana v. Stewart*, 249 S.W.3d 412, 413–15 (Tex. 2008) (per curiam)). "Awareness of a potential problem is not actual knowledge of an existing danger." *Reyes v. City of Laredo*, 335 S.W.3d 605, 607 (Tex. 2010) (per curiam).

In his appellate brief, Burns alleges that the Airport manager, even though he was not there at the time of the accident, was aware that Young was on the property at times removing hay and Young's "unfettered access to the airport without training" created a premises defect because

> Defendant Young could have undertaken any number of activities that could have resulted in injury e.g. a fire caused by the tractor, without adequate training, could have caused damage to planes at the airport, smoke could cause visibility issues, a dog on the runway that Defendant Young brought with him could cause a crash, the firing of a gun to kill a rattlesnake could ricochet, or any number of other activities negligently undertaken by Young could have resulted in an injury in what is generally a controlled environment for safety considerations.

These hypothetical situations are insufficient to prove actual knowledge. *See City of Dallas v. Thompson*, 210 S.W.3d 601, 603 (Tex. 2006) (per curiam) ("[T]he actual knowledge required for liability is of the dangerous condition *at the time of the accident*, not merely of the possibility that a dangerous condition can develop over time.") (emphasis added). Accordingly, we reject Burns's argument that there was a waiver of the County's immunity because we find that the County had no actual knowledge of the

dangerous condition Burns alleges. The trial court did not err in granting the County's plea to the jurisdiction. *Id.*

Burns's first issue is overruled.

B. Inadequate Pleadings

When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Tex. Ass'n of Bus*., 852 S.W.2d at 446. 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 plaintiff should be afforded the opportunity to amend. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). 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*.; *Miranda*, 133 S.W.3d at 226–27.

Burns argues in one sentence that if the basis for granting the County's plea to the jurisdiction was "failure to adequately plead the basis of the waiver of immunity, and the defect is curable, Texas law provides that Plaintiff's [sic] should be afforded the opportunity to replead." *See Miranda*, 133 S.W.3d at 226–27. Burns does not make any suggestion as to how the jurisdictional defect could be cured, and we find that it cannot be cured. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). Here, the pleadings establish that there was no jurisdiction because the County did not have actual knowledge of the alleged premise defect, a necessary element to advance Burns's allegation that the County waived its sovereign immunity. *Sampson*, 500 S.W.3d at 391. Accordingly, remanding this case would serve no legitimate purpose because

merely pleading more facts in support of Burns's argument would not overcome the County's immunity from suit. *See Koseoglu*, 233 S.W.3d at 840. Therefore, the trial court did not err in failing to allow Burns the opportunity to amend his pleadings. *Miranda*, 133 S.W.3d at 226–27.

Burns's second issue is overruled.

III. CONCLUSION

The judgment of the trial court is affirmed.

NORA L. LONGORIA
Justice

Delivered and filed the
8th day of August, 2019.