NUMBER 13-21-00392-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

CLAYTON RICHTER, DOROTHY RICHTER, AND JONATHAN RICHTER **Appellants,**

v.

CITY OF WAELDER, TEXAS, **Appellee.**

On appeal from the 25th District Court of Gonzales County, Texas.

MEMORANDUM OPINION

Before Justices Tijerina, Silva, and Peña
Memorandum Opinion by Justice Tijerina

Appellants/cross-appellees Clayton Richter, Dorothy Richter, and Jonathan Richter sued appellee/cross-appellant the City of Waelder (the City) asserting an inverse condemnation claim against the City for repeated flooding of their property. The trial court granted the City's plea to the jurisdiction in a bill of review proceeding. The Richters

appeal the trial court's granting of the City's plea to the jurisdiction. In a cross-appeal, the City asserts the trial court erred in granting the Richters' bill of review. We reverse and render.

I. BACKGROUND & PROCEDURAL HISTORY

A. Original Plea to the Jurisdiction

The Richters own property within the City, and the City owns and operates an underground water pipeline extending across the Richters' property. Over the course of several years, the pipeline has sustained various leaks, resulting in the flooding of the Richters' property. The City has responded to and repaired each leak, which occurred in April 2015, July 2016, January 2017, and October 2018.

On October 9, 2018, the Richters sued the City raising claims of inverse condemnation, nuisance, trespass, and negligence. In their live petition, the Richters asserted the City continuously made repairs to the pipeline, knowing that the repairs would not stop the flooding of their property. The Richters asserted the flooding of their property rendered portions of their property useless as it is covered in several feet of standing water. As a result, the Richters alleged that the City has physically invaded their property and unreasonably interfered with their right to use and enjoy their property.

The City responded asserting that the Richters did not assert a valid takings claim because "[a]wareness of possible damage is not evidence of intent," and the City's failure to prevent future property damage is not evidence of an intent to cause property damage. The Richters responded claiming that the City "no longer acts with knowledge that there is [a] possibility of harm" to their property but "with knowledge that there is a great

probability of harm" to their property. According to the City, the Richters "fail[ed] to allege that the City knew that specific property damage was substantially certain to result or [was] necessarily consequential from its continued repair of the water pipeline."

On October 31, 2019, the trial court held a hearing on the City's plea to the jurisdiction. On November 4, 2019, the trial court granted the City's plea to the jurisdiction. The Richters claimed they received notice of this ruling after the deadline for the filing of an appeal had passed, and the City does not dispute this.

B. Original Bill of Review

Thereafter, the Richters filed a bill of review on February 13, 2020, in a separate cause number, complaining that they were not provided notice of the trial court's granting of the City's plea, which prevented them from appealing the original cause through no fault of their own. The parties filed competing motions for summary judgment. On September 3, 2020, the trial court held a hearing on the competing motions for summary judgment. The trial court granted the Richters' motion for summary judgment and petition for bill of review. The trial court denied the City's motion for summary judgment and vacated its granting of the City's plea to the jurisdiction in the original cause.

C. First Appeal

Subsequently, the City filed a second plea to the jurisdiction in the original cause, which the trial court granted. The trial court also dismissed the Richters' claims against the City.

The Richters appealed the trial court's granting of the City's second plea to the jurisdiction. The City appealed the trial court's granting of the Richters' bill of review vacating its original plea to the jurisdiction.

On appeal, this Court vacated the trial court's granting of the City's second plea to the jurisdiction in the original cause and dismissed both appeals for lack of jurisdiction. *See Richter v. City of Waelder*, Nos. 13-20-00494-CV & 13-20-00495-CV, 2021 WL 3555984, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 12, 2021, no pet.) (mem. op.). This Court determined that the order entered in the bill of review did not determine the underlying merits, and the order granting the City's second plea to the jurisdiction in the original case was void because the trial court entered it when its plenary power had expired. *See id.* at *2. We further noted that "[o]ur resolution of this appeal should not be construed as a final determination of the merits of the Richters' suit, which must still be decided in the bill of review cause." *Id.*

C. Remand

On September 16, 2021, the Richters filed an unopposed motion for entry of judgment on the merits in the new cause, requesting that the trial court enter a ruling. On October 13, 2021, the trial court entered a judgment granting the City's plea to the jurisdiction and dismissing all of the Ritchers' claims against the City with prejudice. This appeal followed.

II. BILL OF REVIEW

A bill of review is an equitable action brought to set aside a final judgment in a former suit that is otherwise no longer appealable or subject to the trial court's plenary

power. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *see* TEX. R. CIV. P. 329b(f) ("On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause[.]"). Courts do not readily grant equitable bills of review. *Valdez v. Hollenbeck*, 465 S.W.3d 217, 226 (Tex. 2015). To be successful, a bill of review complainant must allege and present prima facie proof of the following elements: (1) a meritorious claim or defense to the cause of action alleged to support the prior judgment, (2) which the complainant was prevented from making by official mistake or by the opposing party's fraud, accident, or wrongful act, (3) unmixed with any fault or negligence by the complainant. *Valdez*, 465 S.W.3d at 226; *King Ranch*, 118 S.W.3d at 752. This petition must allege these facts factually and with particularity. *Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979). The petitioner must present prima facie proof supporting the bill of review allegations. *Id.*

"A prima-facie showing is met if the bill of review petitioner would be entitled to judgment granting the bill if no evidence to the contrary were offered." *State v. Navarrette*, 656 S.W.3d 681, 691 (Tex. App.—El Paso 2022, no pet.). "Prima facie proof may be comprised of documents, answers to interrogatories, admissions, and affidavits on file along with such other evidence that the trial court may receive in its discretion." *Baker*, 582 S.W.2d at 409. The bill of review defendant may respond with proof showing the bill-of-review complainant's defense is barred as a matter of law, but factual disputes are resolved in favor of the petitioner for the purposes of this pretrial determination, which is a legal question. *Id.* "If the court determines that the bill-of-review complainant has not . . . presented prima facie evidence of a meritorious defense," then "the proceeding

terminates[,] and the trial court must dismiss the case." *Navarrette*, 656 S.W.3d. at 691. If, however, the trial court finds that the bill-of-review complainant has presented prima facie evidence "of a meritorious defense to the prior judgment," then "the court will conduct a trial on the bill of review." *Id.*

III. MERITORIOUS DEFENSE

The Richters argue that the trial court erred in granting the City's plea to the jurisdiction in the bill of review. The City argues the trial court erred in granting the Richters' bill of review, asserting the Richters do not have a meritorious claim because the City's plea to the jurisdiction was properly granted. *See In re Estrada*, 492 S.W.3d 42, 46 (Tex. App.—Corpus Christi–Edinburg 2016, orig. proceeding.) ("An order granting a bill of review is not subject to interlocutory appeal[] but may instead be reviewed on appeal from a final judgment."). The City's plea to the jurisdiction in the original suit was based on the City's assertion that the Richters did not file a valid takings claim. Because it is dispositive, we determine whether the Richters filed a valid takings claim, such that they presented prima facie proof of a meritorious defense in the bill of review proceeding. *See* TEX. R. APP. P. 47.1.

A. Plea to the Jurisdiction

"A city enjoys governmental immunity from suit for actions undertaken in the exercise of its governmental functions." *City of Dallas v. Zetterlund*, 261 S.W.3d 824, 827 (Tex. App.—Dallas 2008, no pet.). Governmental immunity defeats the trial court's subject-matter jurisdiction and thus is properly asserted in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004); *City of Dallas*

v. Blanton, 200 S.W.3d 266, 271 (Tex. App.—Dallas 2006, no pet.). We review the trial court's ruling on a plea to the jurisdiction de novo. *Miranda*, 133 S.W.3d at 228 (citation omitted). When, as here, a jurisdictional plea challenges the pleadings, we determine if the plaintiff has alleged facts affirmatively demonstrating subject-matter jurisdiction. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). In doing so, "[w]e construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent." *Miranda*, 133 S.W.3d at 226.

B. Inverse Condemnation

The City's immunity may be waived by the takings clause of the Texas Constitution: "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." TEX. CONST. art. I, § 17. "If a governmental entity takes, damages, or destroys property for public use without process or proper condemnation proceedings, governmental immunity is waived, and an action for inverse condemnation will lie." *Zetterlund*, 261 S.W.3d at 828. "To establish the claim, the claimant must prove: (1) a governmental entity intentionally performed certain acts (2) that resulted in a taking or damaging of property (3) for public use." *Id.* "When damage is merely the accidental result of the government's act, there is no public benefit[,] and the property cannot be said to be taken or damaged for public use." *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 (Tex. 2004) (internal quotations and emphasis omitted).

"A governmental entity is substantially certain that its actions will damage property only when the damage is 'necessarily an incident to, or necessarily a consequential result

of the [entity's] action.'" *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009) (citing *Jennings*, 142 S.W.3d at 314). "The government's knowledge must be determined as of the time it acted, not with benefit of hindsight." *Id.* "Evidence of the governmental entity's failure to avoid preventable damage may be evidence of negligence, but it is not necessarily evidence of the entity's intent to damage the plaintiff's property." *San Antonio Water Sys. v. Overby*, 429 S.W.3d 716, 720 (Tex. App.—San Antonio 2014, no pet.).

C. Discussion

The City only challenges whether the Richters made a prima-facie showing that they had a meritorious defense to the City's plea the jurisdiction. In their bill of review, the Richters relied on their allegations in their first amended petition, alleging they met the pleading standards of an inverse condemnation claim. Specifically, the Richters alleged: the City "engaged in a continuous pattern of making repairs with knowledge that [the City] will not stop the pipeline from leaking"; the City "engaged in this course of conduct intentionally and with knowledge" that its conduct will result in "flooded and unusable" property; the City "has caused a physical invasion of" their property and "interfered with" their "right to use and enjoy" their property. But even when we view the pleadings in favor of the Richters, as we must, we conclude that they have failed to bring an inverse condemnation claim as that term is defined. *See Miranda*, 133 S.W.3d at 226.

In *Pollock*, the plaintiffs argued that the City knew its management of a landfill was damaging the plaintiffs' property or knew "at least that damage to their property was a necessary result." 284 S.W.3d at 821. The supreme court stated that "the government must act intentionally," and, in *Pollock*, the evidence was "all to the contrary" because

"[w]henever the City was aware that gas was migrating from the landfill, it took steps to prevent damage." *Id.* at 820–21. Although "those efforts were inadequate" and "the City was negligent," the Court held that "there [was] no evidence that the City knew that the Pollocks' property was being damaged or that damage was a necessary consequence." *Id.* at 821. The Court explained that a "governmental entity's awareness of the mere possibility of damage is no evidence of intent." *Id.* ("The City's negligent failure to prevent landfill gas migration . . . is no evidence that it intended to damage the Pollocks' property.").

In *Overby*, the plaintiffs pleaded that the City knew the manner in which it graded and maintained an alley would result in the flooding of the plaintiffs' property during heavy rains. 429 S.W.3d at 720–21. The appellate court stated that evidence of the City's knowledge "that the alley's grade could cause water from the alley to flow onto the [plaintiffs'] property during a heavy rain—is no evidence of [the City's] intent to damage their property." *Id.* at 721. Therefore, there was no waiver of immunity under the takings clause because there was no evidence of the requisite intent. *See id.*; *Bell v. City of Dallas*, 146 S.W.3d 819, 825 (Tex. App.—Dallas 2004, no pet.) (providing that "the City's failure to maintain and repair damage caused by faulty pipes" may be evidence of negligence but not evidence of intent).

Here, it is undisputed that each time there was a new leak in the City's pipeline, the City took measures to repair that leak. In fact, in the Richters' bill of review, the Richters relied on the City's receipt slips, demonstrating that the City took remedial actions to repair any new leaks. *See Pollock*, 284 S.W.3d at 821 (providing that remedial

actions taken by a governmental entity is "contrary" to the intentional conduct element of a plaintiff's takings claim); *see also Port of Corpus Christi, LP v. Port of Corpus Christi Auth. of Nueces Cnty.*, No. 13-19-00304-CV, 2021 WL 499067, at *6 (Tex. App.—Corpus Christi–Edinburg Feb. 11, 2021, no pet.) (mem. op.) (setting out that the Port Authority took affirmative steps to prevent any damage from occurring and therefore did not act intentionally even though it was aware that "some form of damage" may result). Like in *Pollock*, the allegations and evidence relied upon by the Richters demonstrate that the City made efforts to repair the pipeline, which is "contrary" to the requisite intent. *See* 284 S.W.3d at 821. The damage the Richters claim—the flooding of their property—is neither necessarily incident to nor a consequential result of the maintenance of a pipeline. *See id.* Consequently, there is no evidence that the City intended to damage the Richters' property. *See id.* Accordingly, the Richters' pleadings affirmatively negate a valid takings claim. Because the Richters did not present prima facie evidence of a meritorious defense, "the proceeding terminates[,] and the trial court must dismiss the case." *See Navarrette*, 656 S.W.3d at 691.

D. No Opportunity to Replead

Alternatively, the Richters argue that they should be given an opportunity to replead their claim to allege facts sufficient to invoke jurisdiction. However, "[t]his opportunity is available when a jurisdictional challenge is based on a deficiency in plaintiff's pleading but the pleading 'does not affirmatively demonstrate incurable defects in jurisdiction.'" *Id.* at 696 (citing *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002)). If the pleadings affirmatively negate the existence of jurisdiction or if the

undisputed facts establish a lack of jurisdiction, then the opportunity to replead should not be afforded. *See id.*; *see also Miranda*, 133 S.W.3d at 227. Because the Richter's pleadings affirmatively negate jurisdiction, the Richters are not entitled to an opportunity to replead. *See Navarrette*, 656 S.W.3d at 696. We sustain the City's issue in its cross-appeal, and we overrule the Richters' issue.

IV. CONCLUSION

We reverse the judgment of the trial court granting the bill of review, and we render judgment denying the Richter's petition for a bill of review. *See Baker*, 582 S.W.2d at 409 ("[O]nly one final judgment may be rendered in a bill of review proceeding either granting or denying the requested relief.").

JAIME TIJERINA
Justice

Delivered and filed on the
31st day of August, 2023.