NUMBER 13-22-00528-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

THE CITY OF HUNTSVILLE, **Appellant,**

v.

BRONWYN VALENTINE AND DAVID VALENTINE, **Appellees.**

On appeal from the 278th District Court of Walker County, Texas.

MEMORANDUM OPINION

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

In this case involving property damage from stormwater runoff, appellees Bronwyn and David Valentine sued the City of Huntsville, among others, alleging that the City negligently issued a building permit to an adjacent landowner by failing to properly assess

how the new construction would adversely affect their property. The Valentines also claimed the City was negligent in failing to adequately regulate the construction once it became aware of the ongoing damage to their property. By a single issue, the City contends that the Valentines have failed to state a claim under the Texas Tort Claims Act (TTCA), and therefore, the trial court erred when it denied the City's plea to the jurisdiction. We reverse and render judgment dismissing the claims against the City for want of jurisdiction.[1]

I. BACKGROUND

According to the Valentines' petition, the William D. Fritsch and Nan R. Fritsch Trust purchased an undeveloped lot in their neighborhood and employed Fritsch Construction LLC to build a residential home on the property. On November 11, 2020, the City issued a "Building Residential Permit" for the property.

The lot had to be cleared before construction could begin, and after the trees were removed, the Valentines began noticing excessive runoff flowing from the Fritsch property onto their property. The Valentines contacted Lloyd Miller, a City official, and after he documented the runoff issue, the City issued a stop work order for the construction on the Fritsch property.

However, on January 9, 2022, the Valentines "woke up to red clay and water in every room of their home due to the runoff from the [Fritsch] property." Miller returned to the Valentines' property, and the City "issued another stop work [o]rder." Nevertheless,

[1] This appeal was transferred to this Court from the Tenth Court of Appeals in Waco by order of the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 73.001. Accordingly, we "must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if [our] decision otherwise would have been inconsistent with the precedent of the transferor court." TEX. R. APP. P. 41.3.

the Valentines noticed that work resumed the following day, and Miller informed them that the City had given the construction company permission to install a proper drainage system. Approximately one week later, Miller inspected the Fritsch property, and seeing "no evidence of the drainage system being installed," the City apparently ordered work to stop again.

Although work resumed on February 5, 2022, the Valentines claim that no drainage system was ever installed. Miller subsequently assured them that the City was requiring the construction company "to regrade the elevation because it was originally graded incorrectly, [to] reinforce the foundation[,] and to redirect the water[]flow to the street."

The Valentines sued the property owner, the construction company, and the City. As to the City, the Valentines alleged the City was negligent in the permitting process by failing "to take affirmative action to control or avoid" the runoff created by the new construction. Specifically, the Valentines complained that the City failed to: (1) properly assess how removing vegetation and constructing a new building on the Fritsch property would adversely affect surrounding property owners; (2) "assure the building site was properly graded"; and (3) "assure proper remedies were made before allowing work to resume."

The City filed a plea to the jurisdiction invoking governmental immunity and challenging the Valentines' pleadings for failing to state a claim that falls within the TTCA's limited waiver of immunity. The Valentines filed a response arguing that, under § 101.0215 of the TTCA, the Legislature has generally waived governmental immunity for damages arising from a municipality's performance of governmental functions, including

building codes and inspection; zoning, planning, and plat approval; and engineering functions. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(28)–(30). The trial court denied the plea, and this interlocutory appeal ensued. *See id.* § 51.014(a)(8).

II. STANDARD OF REVIEW & APPLICABLE LAW

Subject matter jurisdiction is essential to a court's authority to decide a case. *In re Abbott*, 601 S.W.3d 802, 807 (Tex. 2020) (orig. proceeding) (per curiam) (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993)). Whether a trial court has subject matter jurisdiction is a question of law we review de novo. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016).

Sovereign immunity is a common-law doctrine that protects the State and its agencies from lawsuits for money damages. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008). The doctrine "encompasses immunity from suit, which bars a suit unless the state has consented, and immunity from liability, which protects the state from judgments even if it has consented to the suit." *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Governmental immunity offers the same protections for the State's political subdivisions, including its cities. *Dohlen v. City of San Antonio*, 643 S.W.3d 387, 392 (Tex. 2022). If a governmental entity is immune from the plaintiff's suit, then the trial court cannot exercise subject-matter jurisdiction over the claim. *Reata Const.*, 197 S.W.3d at 374.

Because it is the plaintiff's initial burden to plead facts that affirmatively demonstrate the trial court's subject matter jurisdiction, a plaintiff suing a governmental entity must allege either a valid waiver to immunity or some exception. *See Dall. Area*

Rapid Transit v. Whitley, 104 S.W.3d 540, 542 (Tex. 2003). Whether a plaintiff has satisfied this pleading threshold is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We construe the pleadings liberally and look to the plaintiff's intent. *Id.* If the pleadings are deficient but do not demonstrate an incurable defect, then the issue is one of pleading sufficiency, and the plaintiff should be afforded the opportunity to amend their pleadings. *Id.* at 226–27. Conversely, if it becomes clear that the plaintiff cannot allege a viable waiver of immunity, then the suit should simply be dismissed. *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007).

When a plaintiff brings a tort claim against a municipality, the first question to answer is whether the municipality was performing a proprietary or governmental function when the allegedly negligent conduct occurred. *Carrasco v. City of El Paso*, 625 S.W.3d 189, 195 (Tex. App.—El Paso 2021, no pet.); *Baker v. City of Robinson*, 305 S.W.3d 783, 789 (Tex. App.—Waco 2009, pet. denied); *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 730 (Tex. App.—Corpus Christi–Edinburg 1994, writ denied). Proprietary functions "are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality." TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(b) (including non-exclusive list of three proprietary functions). Governmental functions "are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public." *Id.* § 101.0215(a) (including non-exclusive list of thirty-six governmental functions).

This distinction is significant because municipalities are not immune from tort claims that arise from their performance of proprietary functions. *Wasson Ints., Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430, 434 (Tex. 2016) ("Like *ultra vires* acts, acts performed as part of a city's proprietary function do not implicate the state's immunity for the simple reason that they are not performed under the authority, or for the benefit, of the sovereign."). On the other hand, if the municipality was performing a governmental function, as alleged here, then the municipality is generally immune from tort claims unless a waiver under the TTCA applies. *See id.* at 430; TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a) (providing that "immunity to suit is waived and abolished to the extent of liability created by" the TTCA). Simply put, "if the function is governmental, we determine whether immunity is waived under the [TTCA]." *Baker*, 305 S.W.3d at 789.

Under the TTCA, a municipality performing governmental functions is only liable for property damage caused by the negligent conduct of its employees if such damage "arises from the operation or use of a motor-driven vehicle or motor-driven equipment." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A); *see City of Mission v. Cantu*, 89 S.W.3d 795, 802 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.) ("Section 101.0215 does not itself operate as an independent waiver of sovereign immunity but, rather, brings certain municipal functions, which would normally be clothed with sovereign immunity, within the purview of the [TTCA], thus subjecting municipalities to liability for claims arising from such functions if the claims fall within the areas of liability provided by section 101.021 of the Act."). Consequently, claims for property damage based on a municipality's governmental functions that do not fit within the confines of § 101.021(1)

are barred by immunity. *Carrasco*, 625 S.W.3d at 195; *Retzlaff v. Tex. Dep't of Crim. Just.*, 135 S.W.3d 731, 743 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("The TTCA, as it is interpreted by this Court, does not provide for recovery of property damage or loss except in those instances in which such loss results from the operation and use of a motor-driven vehicle or motor-driven equipment."); *see also Harrell v. Majefski*, No. 13-19-00566-CV, 2020 WL 3786246, at *3 (Tex. App.—Corpus Christi–Edinburg July 2, 2020, no pet.) (mem. op.) (holding governmental entity immune from inmate's claim for property damage because allegation that government employee "negligently destroyed his legal materials with water" did not arise from the operation or use of a motor-driven vehicle or motor-driven equipment); *Tex. Dep't of Transp. v. Jones*, No. 18-98-236-CV, 2000 WL 35729214, at *4 (Tex. App.—Corpus Christi–Edinburg Aug. 10, 2000, no pet.) (op. on remand, not designated for publication) ("Since Jones has only alleged property damage, he is limited to pleading and proving waiver under section 101.021(1).").

III. ANALYSIS[2]

In response to the City's plea, the Valentines acknowledged that their claim for property damage was premised on the City's negligent performance of three governmental functions—building codes and inspection; zoning, planning, and plat approval; and engineering functions. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(28)–(30). Therefore, contrary to the Valentines' assertion in the trial court, their claim for property damage against the City can only proceed if their property damage was caused by a City employee's negligent "operation or use of a motor-driven vehicle or

[2] The Valentines have not filed a brief to aid us in the disposition of this appeal.

motor-driven equipment." *Id.* § 101.021(1)(A); *see Baker*, 305 S.W.3d at 789; *Retzlaff*, 135 S.W.3d at 743; *see also Jones*, 2000 WL 35729214, at *4.

The Valentines have alleged that City officials issued the building permit without exercising ordinary care, and once work began, those officials failed to reasonably exercise the City's police power to regulate the construction. Because these complained-of acts and omissions do not involve the "operation or use of a motor-driven vehicle or motor-driven equipment," they do not fall within the statutory waiver, and the Valentines have failed to state a viable claim against the City. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A); *Baker*, 305 S.W.3d at 789. Accordingly, the trial court erred when it denied the City's plea, and the City's issue is sustained.

IV. CONCLUSION

We reverse the trial court's order denying the City's plea and render judgment dismissing the Valentines' claims against the City for want of jurisdiction.

GINA M. BENAVIDES
Justice

Delivered and filed on the
17th day of August, 2023.