



NUMBER 13-19-00389-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

**YOLANDA TAMEZ AND DAVID MEDINA,
INDIVIDUALLY AND D/B/A SILVER
OUTPOST GAME ROOM,**

Appellants,

v.

WILLACY COUNTY,

Appellee.

**On appeal from the 197th District Court
of Willacy County, Texas.**

NUMBER 13-19-00396-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

**ABRAM ALVAREZ AND LEONEL
OLIVAREZ, INDIVIDUALLY AND
D/B/A LA VICTORIA GAME ROOM,**

Appellants,

v.

WILLACY COUNTY,

Appellee.

**On appeal from the 197th District Court
of Willacy County, Texas.**

NUMBER 13-19-00397-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

**YOLANDA TAMEZ AND DAVID MEDINA,
INDIVIDUALLY AND D/B/A SILVER
EXPRESS GAME ROOM,**

Appellants,

v.

WILLACY COUNTY,

Appellee.

**On appeal from the 197th District Court
of Willacy County, Texas.**

NUMBER 13-19-00399-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

**LUIS DANIEL RODRIGUEZ AND DAVID
MEDINA, INDIVIDUALLY AND D/B/A
SILVER STAR GAME ROOM,**

Appellants,

v.

WILLACY COUNTY,

Appellee.

**On appeal from the 197th District Court
of Willacy County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Chief Justice Contreras**

Under four unrelated appellate causes, the separate groups of owners of four game rooms (collectively appellants) present the same argument challenging the trial court's grant of appellee Willacy County's plea to the jurisdiction over their claims for business disparagement.¹ Although no motion to consolidate these appeals has been

¹ Yolanda Tamez and David Medina, individually and d/b/a Silver Outpost Game Room, are the appellants in appellate cause number 13-19-00389-CV. Abram Alvarez and Leonel Olivarez, individually and d/b/a La Victoria Game Room, are the appellants in appellate cause number 13-19-00396-CV. Yolanda Tamez and David Medina, individually and d/b/a Silver Express Game Room, are the appellants in appellate

filed, because our analysis and disposition is the same under each appellate cause, we issue a single memorandum opinion herein disposing of all four causes in the interest of judicial economy. By one issue, each group of appellants argues that the trial court erred when it granted the plea. We affirm.

I. BACKGROUND

Each of the four groups of appellants owns and operates a game room in Willacy County. In 2018, Willacy County passed ordinance 1915 to regulate game rooms. See TEX. LOC. GOV'T CODE ANN. § 234.133 (providing that “the commissioners court of a county may regulate the operation of game rooms”). Under the ordinance, game room owners were required to apply for a permit and list all the owners of the business.² The ordinance provides that a person operating a game room without a permit “shall be assessed a civil penalty of \$10,000.00 per violation, with each day a violation occurs or continues to occur being considered a separate violation.” See *id.* § 234.137 (providing that a person who violates “a regulation adopted under [§] 234.133 is liable to the county for a civil penalty of not more than \$10,000 for each violation”).

cause number 13-19-00397-CV. Luis Daniel Rodriguez and David Medina, individually and d/b/a Silver Star Game Room, are the appellants in appellate cause number 13-19-00399-CV.

² The ordinance defines a “game room owner” as a person who:

(1) has an ownership interest in, or receives the profits from, a game room or an amusement redemption machine located in a game room; (2) is a partner, director, or officer of a business, company, or corporation that has an ownership interest in a game room or in an amusement redemption machine located in a game room; (3) is a shareholder that holds more than ten (10) percent of the outstanding shares of a business, company, or corporation that has an ownership interest in a game room or in an amusement redemption machine located in a game room; (4) has been issued by the county clerk an assumed name certificate for a business that owns a game room or an amusement redemption machine located in a game room; (5) signs a lease for a game room; (6) opens an account for utilities for a game room; (7) receives a certificate of occupancy or certificate of compliance for a game room; (8) pays for advertising for a game room; or (9) signs an alarm permit for a game room.

Each group of appellants submitted a sworn application for a permit, but each group respectively failed to disclose an owner of the game room in their application. The Willacy County Sheriff's Office—the agency tasked with processing the permit applications—denied their respective applications for failure to disclose the omitted owners. Each group of appellants sought review in an administrative hearing and to amend their permit application to include the omitted owner. Their administrative appeals were denied.

Each group of appellants then filed suit in district court against Willacy County. In their live petitions, each group of appellants asserted claims for business disparagement, exemplary damages, injunctive relief, declaratory relief, wrongful denial of their application, and due process violations under the Texas and United States Constitutions. Willacy County filed a general denial, a counterclaim, and a plea to the jurisdiction in each separate suit. After separate hearings on each lawsuit, the trial court granted Willacy County's pleas in each of the lawsuits as to appellants' claims "for business disparagement and the claim for exemplary damages."³ These interlocutory appeals followed. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (providing for interlocutory appeal from a trial court's order on a plea to the jurisdiction).

II. DISCUSSION

By their sole issue, appellants argue that Willacy County waived its sovereign immunity when it filed counterclaims seeking civil penalties.

³ Trial cause number 2018-CV-0314-A gave rise to appellate cause number 13-19-00389-CV; trial cause number 2018-CV-0313-A gave rise to appellate cause number 13-19-00396-CV; trial cause number 2018-CV-0315-A gave rise to appellate cause number 13-19-00397-CV; and trial cause number 2018-CV-0316-A gave rise to appellate cause number 13-19-00399-CV.

A. Standard of Review

A plea to the jurisdiction is a dilatory plea used 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). The plea challenges the trial court's subject matter jurisdiction. *Id.* Whether a trial court has subject matter jurisdiction and whether the pleader has alleged facts that affirmatively demonstrate the trial court's subject matter jurisdiction are questions of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); see *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632 (Tex. 2015). The plaintiff has the burden to allege facts that affirmatively demonstrate the trial court's jurisdiction to hear a case. *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002). We construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 927 (Tex. 2015) (per curiam). If the pleadings generate a fact question regarding the jurisdictional issue, then a court cannot sustain the plea to the jurisdiction. *Ryder*, 453 S.W.3d at 927. If jurisdictional facts are disputed, then we consider any evidence submitted by the parties to the trial court. *Blue*, 34 S.W.3d at 555.

B. Applicable Law

Governmental units, including counties, are immune from suit unless the State consents. See *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 763 (Tex. 2018); *Cameron County v. Ortega*, 291 S.W.3d 495, 497–98 (Tex. App.—Corpus Christi—Edinburg 2009, no pet.). Governmental immunity encompasses both immunity from liability and immunity from suit. *Miranda*, 133 S.W.3d at 224. Immunity from suit defeats subject matter jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); see *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). The Texas

Tort Claims Act (TTCA) waives this governmental immunity for certain negligent conduct, but not for intentional torts. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021, 101.022, 101.025, 101.057(2); *City of Watauga v. Gordon*, 434 S.W.3d 586, 594 (Tex. 2014); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008).

C. Analysis

Here, each group of appellants brought suit against Willacy County for business disparagement seeking exemplary damages. However, Willacy County is a governmental entity, see *Ortega*, 291 S.W.3d at 497–98, and business disparagement is an intentional tort.⁴ *Richardson Hosp. Auth. v. Duru*, 387 S.W.3d 109, 112 (Tex. App.—Dallas 2012, no pet.); see *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003). Because business disparagement is an intentional tort, the TTCA does not waive Willacy County’s sovereign immunity to that claim. See *City of Watauga*, 434 S.W.3d at 594; *Duru*, 387 S.W.3d at 112; *Ortega*, 291 S.W.3d at 498; see also TEX. CIV. PRAC. & REM. CODE ANN. § 101.024 (providing that the TTCA “does not authorize exemplary damages”).

Appellants argue that Willacy County waived its immunity when it filed counterclaims seeking civil penalties and injunctive relief. We disagree.

A governmental entity’s immunity is subject to certain boundaries. See *Nazari v. State*, 561 S.W.3d 495, 501 (Tex. 2018); *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006) (op. on reh’g). One such boundary is that a governmental entity simply does not have immunity from suit for claims against it that are germane to, connected with, and properly defensive to affirmative claims made by the entity, to the

⁴ To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without a privilege, and (4) the disparaging information resulted in special damages to the plaintiff. *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003). A business disparagement claim is similar in many aspects to a defamation action. *Id.* The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests. *Id.*

extent that the claims against the entity offset the entity's own claims. *Nazari*, 561 S.W.3d at 501; *City of Dallas v. Albert*, 354 S.W.3d 368, 372 (Tex. 2011); *Reata*, 197 S.W.3d at 376–77. “This is not because the governmental entity ‘waives’ its immunity by filing a claim for affirmative relief.” *Nazari*, 561 S.W.3d at 501. “Instead, the scope of governmental immunity simply does not reach the defensive counterclaims to the extent that any recovery on the counterclaims serves as an ‘offset’ against the government’s recovery.” *Id.* at 502. Where a governmental entity “voluntarily files a suit and submits its rights for judicial determination, it will be bound thereby, and the defense will be entitled to plead and prove all matters properly defensive.” *Id.* at 504; see *Reata*, 197 S.W.3d at 375 (noting that once “a governmental entity interjects itself into or chooses to engage litigation to assert affirmative claims for monetary damages, the entity will presumably have made a decision to expend resources to pay litigation costs”).

However, the fact that the governmental entity “seeks a transfer of funds is not sufficient to place it beyond the protections that immunity from suit affords.” *Nazari*, 561 S.W.3d at 507. This is because “money is at issue in many more of the state’s actions than those in which it seeks damages.” *Id.* For example, a state may seek penalties in a lawsuit against a citizen. See *id.* The citizen may not seek a penalty against the State; therefore, in order to offset the penalty imposed by the State, the citizen must allege some other non-penal source of the State’s liability—for example, pursuant to a tort or a contract. See *id.* But in that situation, one claim “has no connection with the other, and the two claims are entirely independent of each other.” *Id.*; see *State v. Humble Oil & Refining Co.*, 169 S.W.2d 707, 710 (Tex. 1943).⁵ Therefore, Willacy County’s

⁵ For example, a claim germane to and attached to a state’s claim to impose penalties does not include a claim seeking to offset the potential penalty. *Nazari v. State*, 561 S.W.3d 495, 507 (Tex. 2018). “When the state seeks to sanction primary conduct, a properly defensive response is that the conduct never

counterclaim to recover civil penalties did not waive its immunity over appellants' business disparagement claim. *See Nazari*, 561 S.W.3d at 501.

Willacy County also filed a claim for injunctive relief seeking to enjoin each group of appellants from operating their respective game room due to the fact that they did not have a permit. This likewise does not waive the county's immunity because it is not an affirmative claim for monetary recovery. *See id.* at 501–02; *Reata*, 197 S.W.3d at 376–77. Furthermore, appellants' claims for business disparagement are not germane to, connected to, or properly defensive to the county's injunctive claims seeking to prevent the operation of the game rooms. *See Nazari*, 561 S.W.3d at 501.

We overrule appellants' sole issue.

III. CONCLUSION

We affirm the trial court's judgments.

DORI CONTRERAS
Chief Justice

Delivered and filed the
21st day of May, 2020.

occurred, or that it occurred to some lesser degree than the state alleges—not that the state cannot collect the penalty because the state itself owes some other, non-penal sum." *Id.*