



governmental immunity. The trial court ruled that the plaintiffs' pleadings fail to state a claim under the Act, and granted the defendants' pleas to the jurisdiction. The court of appeals reversed, holding that the pleadings and evidence established a premises defect for which immunity was waived. \_\_\_ S.W.3d \_\_\_. We must decide whether the plaintiffs' pleadings, together with pertinent jurisdictional evidence, are sufficient to raise a premises-defect claim within the Act's immunity waiver.

The defendants argue that the failed lighting cannot under any circumstances constitute a premises defect because the resulting darkness was open and obvious, and not an unreasonably dangerous condition. But whether or not that ultimately proves to be the case, we hold that the pleadings and jurisdictional evidence do not affirmatively negate the existence of an unreasonably dangerous condition. Thus, the trial court should not have dismissed the plaintiffs' claims on this basis. The plaintiffs' pleadings do fail, however, to allege another necessary premises-defect element — that the plaintiffs did not actually know of the dangerous condition. Because the plaintiffs must be afforded an opportunity to amend to remedy this omission, we affirm the court of appeals' judgment reversing and remanding the case to the trial court.

## **I. Background**

This case arises from an auto accident that occurred on the Queen Isabella Causeway, which is the only bridge connecting South Padre Island to the Texas mainland. Nolan Brown was crossing the causeway at about 3:00 a.m., traveling east toward South Padre, when he lost control of his truck. Brown's truck struck the concrete median that separates the two east-bound lanes from the two west-bound lanes, skidded, and turned over on its side. When it came to rest, Brown's passenger exited the vehicle through the sunroof. While Brown was attempting the same escape, an oncoming car driven by

Hector Mucio Martinez crashed into Brown's truck. Brown died at the scene.

The record indicates that the causeway curves, has narrow shoulders, and rises approximately 109 feet above the bay. Once drivers enter the causeway, a concrete median prevents them from turning around. When the accident in this case occurred, a block of streetlights on the causeway's eastern section was not functioning. The first part of the bridge was illuminated for traffic heading toward South Padre Island, but there was no illumination at the accidents' scene.

The State owns the causeway and its streetlight system. However, Cameron County assumed certain maintenance responsibilities over the causeway's streetlight system under an agreement with the Texas Department of Transportation ("TxDOT").<sup>1</sup> Correspondence between TxDOT and the County shows that maintaining the causeway's streetlights had been a problem since at least 1995. In November of that year, Kenneth Conway, a county park-system director, wrote to TxDOT's district engineer that thirty causeway streetlights were not functioning and presented a "serious safety hazard." In an April 1996 letter to TxDOT, Conway wrote that "inconsistent lighting on the causeway presents a safety hazard to the traveling public, particularly motorists who may be stranded in poorly lit sections." By August 1996, over thirty streetlights had failed, and the record indicates that at least that many were not functioning a month later when the accidents occurred.

Brown's survivors sued TxDOT, the County, the contractor the County hired to repair the streetlights, and Martinez. The plaintiffs alleged that Brown was stranded in a poorly lit section of the

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<sup>1</sup> Among themselves, TxDOT and the County disputed their respective responsibilities under the maintenance agreement. The lower courts did not consider this issue, nor do the parties raise it here.

causeway when he was fatally injured, and that defective wiring caused the streetlights to fail, creating an unreasonably dangerous condition. They alleged that the causeway's condition constituted a premises defect, a special defect, or a misuse of personal property, for which the Tort Claims Act waives governmental immunity. Brown's passenger intervened to seek recovery for his own injuries.

TxDOT and the County filed special exceptions and pleas to the jurisdiction, arguing that the plaintiffs' allegations failed to state claims within the Act's sovereign-immunity waiver. Specifically, the defendants argued that providing roadway illumination is a discretionary function, so that they owed no duty to ensure illumination on the causeway. Defendants further argued that there was no duty to warn motorists of the failed lighting because the defective condition, which they describe as "darkness," was open and obvious, and not an unreasonably dangerous condition as a matter of law.

In response, the plaintiffs acknowledged that the defendants had no initial duty to illuminate the causeway, but claimed that the decision to install streetlights gave rise to a nondiscretionary duty to maintain them. Plaintiffs further responded that, because the causeway entrance was illuminated, the sudden darkness from the block of failed lighting came upon drivers unexpectedly, thus leaving the question of the condition's open and obvious nature for the jury to consider.

After an evidentiary hearing, and without ruling on the defendants' special exceptions, the trial court granted the defendants' jurisdictional pleas, dismissed the claims against them, and severed them from the underlying claims against the contractor and Martinez. The court of appeals reversed the trial court's judgment, holding that (1) maintaining the causeway's streetlights was not a discretionary function exempt from the Tort Claims Act's immunity waiver, and (2) the plaintiffs' allegations and the pertinent jurisdictional

evidence were sufficient to raise a premises-defect claim under the Act. \_\_\_ S.W.3d \_\_\_. We granted review to consider whether the plaintiffs' claims fall within the Tort Claims Act's sovereign-immunity waiver.

## II. The Tort Claims Act

The State, its agencies, and subdivisions, such as counties, generally enjoy sovereign immunity from tort liability unless immunity has been waived. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.001(3)(A)-(B), 101.025; *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 611 (Tex. 2000). The Tort Claims Act expressly waives sovereign immunity in three general areas: “use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property.”<sup>2</sup> *Able*, 35 S.W.3d at 611 (quoting *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976)). But the Act does not waive immunity for discretionary decisions, such as whether and what type of safety features to provide. *See* TEX. CIV. PRAC. & REM. CODE § 101.056; *State v. San Miguel*, 2 S.W.3d 249, 251 (Tex. 1999).

The Act provides that a governmental unit is liable for injury and death caused by a condition of real property “if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.” TEX. CIV. PRAC. & REM. CODE § 101.021(2). With respect to ordinary premises defects, however, the Act specifically limits the governmental duty owed to a claimant to “the duty that a private person owes to a licensee on private property.” TEX. CIV. PRAC. & REM. CODE § 101.022(a). Thus, a

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<sup>2</sup> Although the plaintiffs alleged that the causeway's failed lighting constituted a premises defect, a special defect, and a misuse of tangible property, the court of appeals considered only their premises-defect claim. Here, too, the parties focus almost exclusively on that claim. Thus, we consider only whether the pleadings and jurisdictional evidence raise a premises-defect claim within the Act's sovereign-immunity waiver.

governmental unit may be liable for an ordinary premises defect only if a private person would be liable to a licensee under the same circumstances.

A licensee asserting a premises-defect claim generally must show, first, that the defendant possessed — that is, owned, occupied, or controlled — the premises where the injury occurred. *Wilson v. Texas Parks & Wildlife Dep't*, 8 S.W.3d 634, 635 (Tex. 1999) (per curiam denying petition for review) (citing *City of Denton v. Van Page*, 701 S.W.2d 831, 835 (Tex. 1986)). A property possessor must not injure a licensee by willful, wanton, or grossly negligent conduct, and must use ordinary care either to warn a licensee of a condition that presents an unreasonable risk of harm of which the possessor is actually aware and the licensee is not, or to make the condition reasonably safe. *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

Here, the plaintiffs have not alleged that the defendants injured them willfully or wantonly, or that they were grossly negligent. And although the defendants argue generally, as a policy matter, that the court of appeals' decision impinges upon governmental units' discretion in deciding whether and what kind of lighting to install along roadways, they do not challenge the court of appeals' holding that the plaintiffs' claims in this case are based upon the defendants' maintenance of the causeway lighting and thus do not concern discretionary acts. Accordingly, we consider only whether the plaintiffs' pleadings and jurisdictional evidence are sufficient to allow them to maintain a premises-defect claim within the Act's immunity waiver.

### **III. Standard of Review**

In deciding a plea to the jurisdiction, a court may not weigh the claims' merits but must consider

only the plaintiffs' pleadings and the evidence pertinent to the jurisdictional inquiry. *Texas Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554-55 (Tex. 2000).<sup>3</sup> When we consider a trial court's order on a plea to the jurisdiction, we construe the pleadings in the plaintiff's favor and look to the pleader's intent. See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Peek v. Equipment Serv. Co. of San Antonio*, 779 S.W.2d 802, 804-05 (Tex. 1989). When a plaintiff fails to plead facts that establish jurisdiction, but the petition does not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. See *Peek*, 779 S.W.2d at 804-05; *Texas Dep't of Corrections v. Herring*, 513 S.W.2d 6, 9-10 (Tex. 1974). On the other hand, 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. See *Peek*, 779 S.W.2d at 804-05.

#### IV. Discussion

Defendants argue that, for several reasons, the plaintiffs have either failed to allege or their pleadings effectively negate certain elements of a premises-defect claim within the Act's immunity waiver. First, the County contends that it neither owned nor exercised exclusive control over the causeway or its streetlight system, and therefore cannot be held liable for the alleged premises defect. Second, the County contends that the plaintiffs have not alleged a condition posing an unreasonable risk of harm because it was not

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<sup>3</sup> The County argues that the court of appeals erred in considering evidence outside of the pleadings in reviewing the pleas to the jurisdiction. Given our holdings in *Bland* and *White*, which the County does not cite, this argument has no merit. *Bland*, 34 S.W.3d at 554-55; *White*, 46 S.W.3d at 868.

foreseeable that Brown would lose control of his vehicle and then be struck by a motorist while attempting to exit the wreckage. Third, the defendants claim that any risk of harm presented by the alleged defect was not unreasonable when weighed against the burden that governmental entities would face if the defendants here could be held liable for the failed block of lighting. Fourth, the defendants characterize the alleged dangerous condition as “darkness at night,” and argue that this condition is so open and obvious that knowledge of the condition should be imputed to causeway motorists. Finally, the defendants contend that, even if knowledge of the dangerous condition cannot be imputed to the plaintiffs, the plaintiffs nevertheless failed to plead an element necessary to maintain their premises-defect claim, that is, that they did not actually know of the danger.

#### **A. Possession of the Premises**

The County argues that it cannot be subjected to a premises-liability claim within the Act’s immunity waiver because it neither owned nor exercised exclusive control over the causeway or its streetlight system. *See Wilson*, 8 S.W.3d at 635. But a premises-liability defendant may be held liable for a dangerous condition on the property if it “assum[ed] control over and responsibility for the premises,” even if it did not own or physically occupy the property. *Van Page*, 701 S.W.2d at 835; *see also Wilson*, 8 S.W.3d at 635. The relevant inquiry is whether the defendant assumed sufficient control over the part of the premises that presented the alleged danger so that the defendant had the responsibility to remedy it. *Cf. Van Page*, 701 S.W.2d at 833-34 (concluding that the city did not assume control over a storage building, which was on plaintiff’s lot and which housed the alleged dangerous condition). Here, the plaintiffs allege that the County “maintained the [causeway] pursuant to a contract with the State.” And it is undisputed

that the County assumed certain maintenance responsibilities over the causeway's streetlight system. Construing the pleadings in the plaintiffs' favor, we conclude that they adequately allege the first element of a premises-liability claim **S** that the County possessed the property. *See id.*

### **B. Foreseeability of Harm**

A condition poses an unreasonable risk of harm for premises-defect purposes when there is a "sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen." *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 754 (Tex. 1970) . The County contends that the pleaded condition did not pose an unreasonable risk of harm because a reasonably prudent person could not have foreseen that a driver such as Brown would lose control of his vehicle and then, while exiting the wreckage, be struck by another motorist. But foreseeability does not require that the exact sequence of events that produced an injury be foreseeable. *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996); *see also Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex. 1970) (stating that foreseeability prong of proximate cause does not "require that [defendants] anticipate just how injuries will grow out of [the] dangerous situation"). Instead, only the general danger must be foreseeable. *Walker*, 924 S.W.2d at 377. Here, focusing on the general danger and the causeway's particular characteristics, we cannot say that the plaintiffs failed to plead, or that their pleadings affirmatively negate, their premises-liability claim's unreasonable-risk-of-harm element. As the court of appeals observed, "the Causeway is more dangerous than an ordinary road" upon the complete failure of a large block of streetlights. \_\_\_ S.W.3d at \_\_\_. The causeway curves and ascends to an approximate height of 109 feet above the water, its shoulders are narrow, and concrete barriers prevent motorists who drive

onto it from turning around. We cannot say, as a matter of law, that it is unforeseeable that a significant and unexpected change in lighting at night on a narrow and curving causeway could impair a motorist's ability to avoid obstacles that lie ahead. While Brown's alleged lack of care may be an issue of comparative responsibility for the jury to decide, *see* TEX. CIV. PRAC. & REM CODE § 33.012, it does not render the subsequent harm in this case unforeseeable. Furthermore, we cannot determine from the pleadings and the limited jurisdictional evidence that Brown was in fact negligent in operating his vehicle.

Importantly, correspondence in the record reveals that the defendants themselves knew of the general danger that the causeway's numerous, nonfunctioning streetlights posed. Kenneth Conway, the County's park-system director, described the failed lighting as "a serious public safety issue" and "a serious safety hazard." In a letter to TxDOT, Conway specifically identified the danger posed to motorists "stranded in poorly lit sections" of the causeway. The general foreman of the contractor hired to repair the lights, too, recognized the danger. He wrote in a letter that the causeway's lighting system posed an "[e]xtreme hazard." Considering the pleaded facts and the record evidence, we cannot conclude that the events in question were not foreseeable.

### **C. Unreasonableness of Risk**

The defendants argue that conditions on the causeway did not present a risk of harm that was unreasonable when measured against the burden that governmental entities would face if the County and TxDOT could be held liable in this case. They contend that allowing the plaintiffs' claims to proceed will effectively require governmental entities to either light every stretch of public roadway or remove all lighting, because any unexpected illumination change might constitute a premises defect for which they may be held

liable. Governmental entities could face liability, they claim, for every streetlight that might flicker or go out. But our holding is not so broad. A governmental unit's sovereign immunity is not waived for failure to install lighting, which is a discretionary decision, or even for not repairing lighting that has been installed if an unreasonably dangerous condition is not thereby created. Our decision rests upon the causeway's unique characteristics and the nature of the particular dangerous condition alleged.

The County analogizes the dangerous condition alleged here to visual obstructions along roadways caused by overgrown vegetation. We have recognized that holding counties liable for failing to remove such obstructions could impose a significant burden on counties. *See Jezek v. City of Midland*, 605 S.W.2d 544, 546-47 (Tex. 1980). But the County misconstrues the plaintiffs' pleadings. Unlike *Jezek*, the condition alleged here is not simply a naturally occurring one that causes a visual obstruction, but rather a malfunctioning block of artificial lighting that the defendants failed to maintain, causing a sudden and unexpected change in driving conditions.

#### **D. Knowledge of the Condition**

Tort law has long recognized that a landowner has a privilege to "make use of the land for his own benefit, and according to his own desires." PROSSER & KEETON, PROSSER & KEETON ON TORTS § 57, at 386 (Lawyers' ed. 1984). The extent of that privilege, however, varies depending upon the character of the owner's consent to others' entry on the premises. *See* RESTATEMENT (SECOND) OF TORTS § 342 cmt. h. Because a licensee enters for his or her own purposes, "[h]e has no right to demand that the land be made safe for his reception, and he must in general . . . look out for himself." PROSSER & KEETON,

PROSSER & KEETON ON TORTS § 60, at 412 (Lawyers' ed. 1984). If a licensee is aware of a dangerous condition, he has all that he is entitled to expect, that is, an opportunity for an intelligent choice as to whether the advantage to be gained by coming on the land is sufficient to justify him in incurring the risks involved. RESTATEMENT (SECOND) OF TORTS § 342 cmt. 1. Thus, to establish liability for a premises defect, a licensee must prove that he or she did not actually know of the condition. *See Payne*, 838 S.W.2d at 237.

### **1. Imputed Knowledge**

Defendants contend that the dangerous condition here is nothing but “darkness at night,” which is so open and obvious that knowledge of the condition must be imputed to causeway users. This imputed knowledge, they claim, negates an essential element of the plaintiffs’ premises-defect claims. *See id.* But construing the plaintiffs’ allegations in favor of jurisdiction, as we must, the dangerous condition alleged is not merely “darkness” but a failed block of artificial lighting that caused a sudden, unexpected and significant transition from light to darkness. This condition may or may not have been open and obvious to ordinary users considering the causeway’s particular characteristics. Specifically, the record indicates that the causeway is narrow, curves, and rises high above the bay. A cement median barrier separates the two travel lanes in each direction and prevents drivers from turning back once embarking upon the bridge. Only a relatively narrow shoulder beside the traffic lanes is available to accommodate vehicles in emergency situations.

On the evening in question, the causeway was lit at the point of entry, but there was no illumination further along the causeway at the accident scene. The relevant inquiry is whether the lighting failure was

open and obvious to motorists entering the causeway, because that is the point at which they could choose to avoid the condition or otherwise protect themselves. *Cf. Harvey v. Seale*, 362 S.W.2d 310, 312 (Tex. 1962) (stating that a licensee “can remain off the premises if he does not wish to subject himself to the risk of injury” from an open and obvious condition). Construing the pleadings and the jurisdictional evidence in the plaintiffs’ favor, and considering the causeway’s particular characteristics, we cannot say that sudden darkness created by the failed lighting at the accident scene was a danger open and obvious to motorists entering the illuminated causeway so that knowledge of the condition should be imputed to them as a matter of law. Accordingly, we cannot conclude that the pleadings affirmatively negate the plaintiffs’ lack of actual knowledge.

## 2. Actual Knowledge

The defendants contend that, even if we cannot impute knowledge of the alleged dangerous condition from the pleadings, the plaintiffs failed to plead that they did not actually know of the condition.<sup>4</sup> The defendants contend that the trial court’s dismissal order should be upheld on this basis. We agree that the plaintiffs failed to allege this necessary premises-defect element. Moreover, we disagree with the court of appeals’ conclusion that we can infer this element from the pleadings. Nevertheless, the court of appeals did not err in reversing the trial court’s judgment and remanding, because the plaintiffs’ pleadings

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<sup>4</sup> At oral argument, plaintiffs suggested for the first time that the relevant inquiry is not whether Brown actually knew of the dangerous condition, but whether Martinez, the motorist who struck him, knew. While it is true that Martinez is also a licensee, the ultimate issue is whether the defendants acted reasonably toward Brown and his passenger. Thus, the proper focus is whether the plaintiffs themselves actually knew of the alleged dangerous condition.

do not affirmatively demonstrate an incurable jurisdictional defect, but merely a pleading deficiency. Because the trial court did not rule on the defendants' special exceptions and allow the plaintiffs an opportunity to amend their pleadings, omitting this element cannot support the trial court's judgment. *See Herring*, 513 S.W.2d at 9-10 (holding that when the allegations do not "affirmatively negate" a claim, dismissal for failure to state a claim is appropriate only when the plaintiff has been "given an opportunity to amend after special exceptions have been sustained"); *see also* 7 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 70.03[4][f] (stating that after a trial court sustains special exceptions, "the pleader must be given, as a matter of right, an opportunity to amend"). Accordingly, we affirm the court of appeals' judgment reversing and remanding the case, because the plaintiffs should be afforded an opportunity to amend their pleadings.

## **V. Conclusion**

We hold that, considering the causeway's particular characteristics, the large block of nonfunctioning streetlights, and the defendants' own knowledge of the danger to causeway users, the pleadings do not affirmatively negate the existence of an unreasonably dangerous condition. We conclude, however, that the plaintiffs failed to plead that they did not actually know of the dangerous condition, an element necessary to prove a premises-defect claim. Because this pleading defect is one for which the plaintiffs should be afforded an opportunity to amend, we affirm the court of appeals' judgment reversing the trial court's dismissal for lack of jurisdiction and remanding the case to the trial court.

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Harriet O'Neill  
Justice

OPINION DELIVERED: May 23, 2002