No. 01-22-00479-CV
Court of Appeals of Texas, First District

Wheeler v. Law Office of Frank Powell & Frank C. Powell

Decided Aug 29, 2023

01-22-00479-CV

08-29-2023

MICHAEL WHEELER, RONALD RAYMAKER, JON FLETCHER, JOHN ESCOTO, KATHERINE REYER, WILLIAM FEREBEE, JACOB REUVERS, AND DEBORAH PILCHER, Appellants v. LAW OFFICE OF FRANK POWELL AND FRANK C. POWELL, Appellees

Richard Hightower Justice.

On Appeal from the 61st District Court Harris County, Texas Trial Court Case No. 2022-14468

Panel consists of Justices Hightower, Rivas-Molloy, and Farris.

MEMORANDUM OPINION

Richard Hightower Justice.

Appellants Michael Wheeler, Ronald Raymaker, Jon Fletcher, John Escoto, Katherine Reyer, William Ferebee, Jacob Reuvers, and Deborah Pilcher- employees of the City of Shenandoah-sought dismissal, pursuant to the
2 Texas Tort *2 Claims Act, of the defamation suit filed against them by appellees Law Office of Frank Powell and Frank C. Powell.[1] The trial court signed an order denying the motion, and appellants filed this interlocutory appeal challenging the order. Because Powell's live pleading affirmatively negated subject-matter jurisdiction over the claims against all of the governmental employees, except for employee Deborah Pilcher-for whom the pleading neither negated nor demonstrated jurisdiction-we reverse the trial court's order denying the motion. We remand the libel per se claim against Pilcher to the trial court to provide an opportunity for amendment of Powell's petition, and we render judgment dismissing the claims against all other appellants.

[1] We refer to Frank C. Powell and his firm, at times, singularly as Powell. We note that Powell did not indicate whether his law firm had a corporate form or whether it was a sole proprietorship. "A sole proprietorship does not have a separate legal existence distinct from the operator of the business." *See Garcia v. Shell Oil Co.*, 355 S.W.3d 768, 778 (Tex. App.-Houston [1st Dist.] 2011, no pet.); *see also Horie v. Law Offices of Art Dula*, 560 S.W.3d 425, 434 (Tex. App.-Houston [14th Dist.] 2018, no pet.) ("[T]he assumed name of a sole proprietorship is not a separate legal entity or even a different capacity of the individual sole proprietor."). Here, the record is not sufficiently developed to determine whether the law firm is a sole proprietorship-an issue that may be developed on remand.

Background

In his second amended petition-the live pleading in this case-Powell stated that he was an attorney who "practice[d] criminal appellate law" and "investigate[d] post-conviction cases." Powell alleged that, on January 26, 2022, he spoke at the City of Shenandoah's city council meeting. During the Citizen Forum portion of the

meeting, Powell "brought to the attention of the Mayor and Councilmen that *3 Shenandoah Police Department Lieutenant Jacob Reuvers had previously admitted to shoplifting and also executed a false affidavit in a post-conviction proceeding." Powell informed the council members and mayor that "the Chief of Police and the City Attorney were refusing to take a complaint against [Lieutenant] Reuvers."

As required by the Texas Open Meetings Act (TOMA), the City of Shenandoah (the City) published the agenda for the January 22 meeting. Powell pointed out that the agenda contained the following language under the heading "Council Inquiry":

> Pursuant to [TOMA] Sect. 551.042, the Mayor and Council Members may inquire about a subject not specifically listed on this Agenda. Responses are limited to a recitation of existing policy or a statement of specific factual information given in response to the inquiry. Any deliberation or decision shall be limited to a proposal to place the subject on the agenda of a future meeting.[2]

[2] Powell attached the agenda for the January 26, 2022 city council meeting to his original and first amended petitions as "Exhibit A." Even though the agenda does not appear as an attachment to his second amended petition, Powell references Exhibit A (the agenda) in his second amended petition.

According to Powell-during the Council Inquiry portion of the meeting- Wheeler, Fletcher, Raymaker, Escoto, Reyer, and Ferebee (the City Officials) responded to Powell's remarks about Lieutenant Reuvers, the City's police chief, and the city attorney.[3] Powell asserted that the City Officials "did not limit their *4 comments to a decision to place the subject on a future agenda" as required by TOMA and reflected in the meeting's agenda. Powell claimed that, instead, the City Officials "violated TOMA and spoke as individuals outside of their official capacities." Powell alleged that the City Officials "collectively and individually slandered Powell by telling the viewers [of the meeting] that Powell's statements were false, when, in fact, they are supported by credible evidence." He alleged that the City Officials had, "via a live stream on YouTube, told the public that Plaintiff Powell was not being truthful in his comments [related to Lieutenant Reuvers] and engaged in an all-out slanderous character assassination" of him.

[3] While Powell did not identify the job titles of Wheeler, Fletcher, Raymaker, Escoto, Reyer, and Ferebee, the allegations in Powell's petition, when read together, indicate that those individuals include the City of Shenandoah's mayor and city council members, as indicated by the language Powell quoted from the agenda. We note that Powell also sued Ferebee in another suit: *Ferebee v. Law Office of Frank Powell*, No. 01-22-00681-CV, 2023 WL 4937501 (Tex. App.-Houston [1st Dist.] Aug. 3, 2023, no pet. h.) (mem. op.). There, Powell alleged that Ferebee was Shenandoah's city attorney. *Id.* at *1. But he does not make that allegation here. In that case, Powell asserted a defamation claim against Ferebee based on alleged statements Ferebee made in his role as city attorney during an April 2022 city council meeting. *See id.* at *4-5. We held that "Ferebee was entitled to dismissal from the suit [under Texas Tort Claims Act section 101.106(f)] because Powell's pleadings demonstrate[d] Ferebee was acting within the scope of his employment with the City when the alleged tort occurred . . . ." *Id.* at *6.

Powell also asserted that Lieutenant Reuvers "made slanderous comments at the meeting to third parties." Powell alleged that, "while in the lobby greeting people and providing security services," Lieutenant Reuvers "made comments to citizens who exited the meeting room stating that Plaintiff Powell's comments during the Citizen Forum were not true." He claimed that he overheard Lieutenant Reuvers's comments "before exiting the building."

Powell further alleged that "Deborah Pilcher, at approximately 8:00 p.m. on January 26, 2022, posted libelous comments directed toward [Powell]." He claimed that Pilcher's "libelous comments challenged the veracity of statements made at the January 26, 2022 City Council meeting and directly attacked [Powell's] integrity and

honesty." Powell stated that Pilcher was "employed as the City of Shenandoah's Communications Director" but asserted that she "was acting individually and not in her official capacity" when she posted the comments.

Powell sued the City Officials, Reuvers, and Pilcher (together, the City Defendants) in their individual capacities for defamation. Powell asserted slander per se claims against the City Officials and Lieutenant Reuvers, and he asserted a libel per se claim Pilcher. In addition to damages, Powell requested the City Officials and Lieutenant Reuvers to retract their allegedly slanderous statements made, respectively, during and after the meeting. He also requested Pilcher to retract her comments "on the same social media platforms that [her] libelous comments were made."

The City Defendants filed a motion to dismiss Powell's claims on the basis of immunity, arguing specifically that the claims must be dismissed pursuant to section 101.106(f) of the Texas Tort Claims Act (TTCA). The
6 City Defendants did not offer *6 evidence in support of the motion but instead asserted that Powell's claims must be dismissed based on the allegations in Powell's pleadings. The City Defendants asserted that, under section TTCA 101.106(f), they were entitled to immunity from Powell's suit in their individual capacities. They argued that Powell's claims should be dismissed because his pleadings demonstrated that they were acting within the general scope of their city employment when they made the statements forming the basis of his defamation claims.

Powell responded to the dismissal motion. He claimed that, while it "provides a limited waiver of immunity for tort suits against the government," the TTCA "does not apply to intentional torts" like defamation. Powell claimed, "Because the TTCA does not apply to intentional torts, § 101.106(f) does not apply." He also argued that section 101.106(f) did not apply because the City Defendants' actionable conduct was not within the scope of their employment with the City.

The City Defendants replied, pointing to caselaw holding that the TTCA applies to intentional torts for purposes of section 101.106(f). The City Defendants asserted that Powell's "own pleadings" showed that the defendants were acting within the scope of their respective employment with the City when they made the statements on which Powell based his defamation claims. In his sur-reply, Powell argued that the City Officials had acted outside that scope of their employment because their statements at the city council meeting violated
7 TOMA. *7

The trial court signed an order denying the City Defendants' motion to dismiss. The trial court also filed findings of fact and conclusions of law. The trial court found, inter alia, that the City Defendants were not acting in the scope of their employment when they made the alleged defamatory statements. For that reason, the trial court concluded that section 101.106(f) did not apply to Powell's claims against the City Defendants.

The City Defendants now appeal the order denying their motion to dismiss.

The City Defendants' Section 101.106(f) Motion to Dismiss

Raising one issue, the City Defendants contend that the trial court erred in denying their dismissal motion under TTCA section 101.106(f).

A. Applicable Legal Principles

1. TTCA's Election-of-Remedies Provision

Governmental immunity protects the state's political subdivisions, like cities, from suit and thus implicates a court's subject-matter jurisdiction. *See Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, 669 S.W.3d 178, 182 (Tex. 2023); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 & n.2 (Tex. 2008). The TTCA provides a limited waiver of immunity for certain suits against governmental entities and places a cap on recoverable damages. *See* Tex. Civ. Prac. & Rem. Code §§ 101.023, 101.025. *8

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The TTCA also contains an election-of-remedies provision intended to "force a plaintiff to decide at the outset whether [a governmental] employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable." *Garcia*, 253 S.W.3d at 657; *see* Tex. Civ. Prac. & Rem. Code § 101.106 ("Election of Remedies"). "[B]ecause an official-capacity suit against a public employee is merely another way of pleading an action against the governmental employer, on the employee's motion, [TTCA] section 101.106(f) compels an election that makes suit against the governmental employer the exclusive remedy for a public employee's conduct within the scope of employment." *Garza v. Harrison*, 574 S.W.3d 389, 399 (Tex. 2019) (footnote omitted). "In doing so, 'section 101.106's election scheme favors the expedient dismissal of governmental employees when suit should have been brought against the government.'" *Id.* (citation omitted).

In essence, section 101.106(f) prevents an employee from being sued for work-related torts and instead provides for a suit against the governmental employer:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the

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> governmental unit as defendant on or before the 30th day after the date the motion is filed.[4]

Tex. Civ. Prac. & Rem. Code § 101.106(f). In short, section 101.106(f) mandates dismissal when a suit against a governmental employee "(1) is based on conduct within the general scope of the employee's employment and (2) could have been brought under the [TTCA] against the governmental unit." *Garza*, 574 S.W.3d at 400 (internal quotation marks omitted).

[4] At no point did Powell amend his pleading to dismiss the City Defendants and name the City of Shenandoah as a defendant pursuant to section 101.106(f).

2. Standard of Review

A motion to dismiss filed pursuant to section 101.106(f)-which by its nature raises a claim of governmental immunity-challenges the trial court's subject-matter jurisdiction. *See Fryday v. Michaelski*, 541 S.W.3d 345, 348 (Tex. App.-Houston [14th Dist.] Dec. 7, 2017, pet. denied). A motion to dismiss for lack of jurisdiction is the "functional equivalent" of a plea to the jurisdiction. *Kosoco, Inc. v. Metro. Transit Auth. of Harris Cnty.*, No. 01-14-00515-CV, 2015 WL 4966880, at *3 (Tex. App.-Houston [1st Dist.] Aug. 20, 2015, no pet.) (mem. op.); *see Frick v. Jergins*, 657 S.W.3d 840, 844 (Tex. App.-El Paso 2022, no pet) (stating that government employee may raise immunity through plea to jurisdiction, which challenges court's authority to hear case). Thus, "when a defendant presents a motion to dismiss based on § 101.106(f), the rules governing immunity-

10 based pleas to the jurisdiction apply." *10 *Satander v. Seward*, No. 05-21-00911-CV, 2023 WL 4576015, at *2 (Tex. App.- Dallas July 18, 2023, no pet. h.) (mem. op.) (citing *Marino v. Lenoir*, 526 S.W.3d 403, 405 (Tex. 2017)).

A plea to the jurisdiction may challenge either the adequacy of a plaintiff's pleadings or the existence of jurisdictional facts to support a finding of subject-matter jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "[T]he burden is on the plaintiffs to allege facts affirmatively demonstrating the trial court's subject-matter jurisdiction over the case." *Fink v. Anderson*, 477 S.W.3d 460, 465 (Tex. App.-Houston [1st Dist.] 2015, no pet.). When, as here, a defendant challenges the pleadings alone, the trial court must construe the pleadings liberally in favor of the pleader, looking to the pleader's intent, and taking the pleader's allegations as true. *See Miranda*, 133 S.W.3d at 226, 228. If the pleading lacks sufficient facts to demonstrate the trial court's jurisdiction, but does not demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Dohlen v. City of San Antonio*, 643 S.W.3d 387, 393 (Tex. 2022) (citing *Miranda*, 133 S.W.3d at 226-27). But, when 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.*; *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835,
11 840 (Tex. 2007) ("[A] pleader must be given an opportunity to amend in *11 response to a plea to the jurisdiction only if it is possible to cure the pleading defect.").

Whether a party has met its burden of alleging sufficient facts that demonstrate a trial court's subject-matter jurisdiction is a question of law that we review de novo.[5] *Miranda*, 133 S.W.3d at 226; *see Fryday*, 541 S.W.3d at 348 ("A motion to dismiss filed by an employee of a governmental unit pursuant to [section] 101.106(f) is a challenge to the trial court's subject-matter jurisdiction, which we review de novo."). Likewise, we review matters of statutory construction under a de novo standard. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d
12 895, 899 (Tex. 2017). *12

5 In his brief, Powell asserts that the appeal fails because the City Defendants did not challenge certain findings of fact made by the trial court. The City Defendants respond that they were not required to challenge the findings because findings of fact were not appropriate in the instant dismissal proceeding. We agree with the City Defendants. When, as here, the determination of whether a trial court has jurisdiction is based on the pleadings and arguments of counsel, rather than on conflicting evidence, findings of fact and conclusions law serve no purpose. *See Awde v. Dabeit*, 938 S.W.2d 31, 33 (Tex. 1997) (explaining that "findings and conclusions as to the court's jurisdiction would not serve any purpose in the court of appeals" when dismissal was based on pleadings and arguments of counsel and not on sworn testimony); *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997) (noting that party is not entitled to findings of fact and conclusions of law when court renders judgment as matter of law, such as in dismissal for want of jurisdiction without evidentiary hearing); *Port Arthur Indep. Sch. Dist. v. Port Arthur Teachers Ass'n*, 990 S.W.2d 955, 957 (Tex. App.-Beaumont 1999, pet. denied) (holding that findings of fact and conclusions of law were inappropriate in case based on stipulated facts); *Timmons v. Luce*, 840 S.W.2d 582, 586 (Tex. App.-Tyler 1992, no writ) ("A court cannot make findings of fact solely from the record on file without hearing evidence, and findings so made would be without effect.").

B. Appellate Jurisdiction

Before addressing the merits of the appeal, we first address Powell's contention that the appeal should be dismissed for lack of jurisdiction. The City Defendants assert that Texas Civil Practice and Remedies Code section 51.014(a)(5) provides this Court with jurisdiction to determine whether the trial court erred in signing the order denying their section 101.106(f) motion to dismiss. In his brief, Powell contends that section 51.014(a)(5) does not provide jurisdiction. We agree with the City Defendants.

Section 51.014(a)(5) permits an interlocutory appeal of the denial of summary judgment based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state. Tex. Civ. Prac. & Rem. Code § 51.014(a)(5). Contrary to Powell's position, it is not determinative that the City Defendants sought dismissal of Powell's claims in a motion to dismiss rather than in a motion for summary judgment, as referenced in section 51.014(a)(5). The Supreme Court of Texas has held that "an appeal may be taken from orders denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used." *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 301 (Tex. 2011).

Here, the only basis for dismissal asserted by the City Defendants in their motion was section 101.106(f). *See*
13 Tex. Civ. Prac. & Rem. Code § 101.106(f). By *13 invoking that provision, the City Defendants raised the issue of their immunity. *See Franka v. Velasquez*, 332 S.W.3d 367, 371 n.9 (Tex. 2011); *Deleon v. Villareal*, No. 02-19-00133-CV, 2020 WL 98142, at *2 (Tex. App.-Fort Worth Jan. 9, 2020, pet. denied) (mem. op.) ("A governmental employee's motion to dismiss under Section 101.106(f) of the Tort Claims Act is a claim of governmental immunity."). Thus, even though this appeal arises from a dismissal motion and not a summary-judgment motion, we hold that we have appellate jurisdiction over the trial court's order denying the motion.[6] *See Graham*, 347 S.W.3d at 301; *see also Ferebee v. Law Office of Frank Powell*, No. 01-22-00681-CV, 2023
14 WL 4937501, at *3 (Tex. App.-Houston [1st Dist.] Aug. 3, 2023, no pet. h.) (mem. op.) (holding section *14 51.014(a)(5) authorized appeal from order denying city attorney's motion to dismiss under section 101.106(f)); *City of Webster v. Myers*, 360 S.W.3d 51, 55 (Tex. App.-Houston [1st Dist.] 2011, pet. denied) (concluding section 51.014(a)(5) authorized appeal from denial of city's motion to dismiss under TTCA's election-of-remedies provision).

6 In his brief, Powell also asserts that the appeal should be dismissed because it is not "ripe." To support this assertion, Powell contends that the City Defendants misstate the trial court's findings of fact regarding whether the City Defendants were acting in the scope of their employment when they made the alleged defamatory statements. Powell asserts that, until the trial court makes the findings that the City Defendants purport were made, the appeal is not "ripe." We note that, as discussed *supra* in footnote 5, the trial court's filing of findings of fact in the instant dismissal proceeding was not appropriate. Thus, to the extent that the City Defendants misstated the findings, it has no effect on the disposition of the appeal. Moreover, we note that reference to whether an appeal is "ripe" has been used by Texas courts to describe whether the judgment or order being challenged is appealable. *See, e.g.*, *Blalock v. Woody*, No. 07-20-00307-CV, 2021 WL 1881035, at *1 (Tex. App.- Amarillo May 10, 2021, no pet.) (mem. op.) (discussing "when an order entered in a probate is ripe for appeal," meaning when it is appealable); *Allison v. Gulf Liquid Fertilizer Co*., 353 S.W.2d 512, 514 (Tex. App.-Fort Worth 1962, no writ) ("The case has never become ripe for an appeal in that the judgment purportedly rendered on appellee's suit on sworn account is interlocutory only, and not a final and appealable judgment . . . ."). As discussed *supra*, the order being challenged here is an appealable interlocutory order. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(5). Thus, the order is "ripe" for appeal.

We note that, before filing his brief, Powell filed a motion to dismiss the appeal for lack of jurisdiction. After the motion was denied, Powell filed a "Motion for Rehearing on [Powell's] Motion to Dismiss," which remains pending.[7] In the rehearing motion, Powell quotes the following passage from *Graham*:

7 As permitted by the Texas Rules of Appellate Procedure, Powell's motion to dismiss the appeal was denied by a single justice of this Court. *See* Tex. R. App. P. 10.4(a). Because the appeal is now under submission to a panel of this Court, and Powell raises the issue of this Court's jurisdiction in his brief, the disposition of the rehearing motion is determined by the panel.

> In some instances, one procedural vehicle may be more appropriate or may be necessary for a proper presentation of the issue. For example, if Graham disputed that the Doctors were employed by the Hospital, a summary resolution, if possible, might require a motion for summary judgment. But Graham does not dispute that the Doctors were Hospital employees, that they were acting in course of their employment with the Hospital, or raise any other factual issue regarding the application of section 101.106(e).

347 S.W.3d at 301.

Powell relies on this passage to assert that, because the parties here (unlike in *Graham*) dispute whether the
15 City Defendants were acting within the scope of their *15 employment when the alleged tortious acts occurred, the City Defendants were required to seek dismissal based on immunity in a motion for summary judgment, not in a motion to dismiss. He contends that, because the City Defendants did not seek dismissal in a motion for summary judgment, *Graham's* holding-that "an appeal may be taken from orders denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used"-does not apply. *See id.* Powell asserts that, as a result, section 51.014(a)(5) does not provide jurisdiction over this appeal. Because Powell misreads *Graham*, we disagree.

In the above-quoted passage, the supreme court was illustrating why different types of procedural vehicles, and not only motions for summary judgment, may be used to challenge a trial court's jurisdiction based on an assertion of immunity. The court was not delineating the circumstance under which a motion for summary judgment must be used for section 51.014(a)(5) to provide appellate jurisdiction over a trial court's order denying an assertion of immunity. To the contrary, *Graham's* main point was that the type of procedural vehicle used does not matter if the order being appealed denies an assertion of immunity. *See id.* As discussed, because the City Defendants' motion sought dismissal based on immunity, the order denying the motion is appealable under section 51.014(a)(5). Accordingly, we deny Powell's motion for rehearing of his motion to dismiss the
16 appeal. *16

C. Entitlement to Dismissal

On appeal, the City Defendants argue that they were entitled to dismissal under section 101.106(f) because Powell's pleadings demonstrated that they were acting within the scope of their governmental employment and because the suit could have been brought against the City under the TTCA. *See Garza*, 574 S.W.3d at 400.

1. Claims "Could Have Been Brought" under the TTCA

We begin by addressing whether Powell's defamation suit could have been brought against the City under the TTCA. A claim can be brought under the TTCA if the claim "is in tort and not under another statute that independently waives immunity." *See Franka*, 332 S.W.3d at 381. In the trial court, Powell asserted that he could not have brought his slander and libel claims against the City because those claims are intentional torts for which the TTCA does not waive immunity from suit.

While Powell was correct that the TTCA does not waive immunity for claims arising from intentional torts, *see* Tex. Civ. Prac. & Rem. Code § 101.057(2), the supreme court has held that, for section 101.106(f) purposes, a suit "could have been brought" under the TTCA against the government regardless of whether the TTCA waives immunity from suit, *Franka*, 332 S.W.3d at 375; *see Frick*, 657 S.W.3d at 848 (citing *Franka* for proposition that "if-it-could-have-been-brought" requirement does not refer to only those tort claims for which TTCA waives immunity). "The immunity issue need not be determined until the governmental unit is in the suit and *17 the issue can be fully addressed." *Franka*, 332 S.W.3d at 381. As the supreme court stated, "

17 [b]ecause the [TTCA] is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit [or one of its employees], whether [they are] sued alone or together with [their] employees, are assumed to be 'under [the TTCA]' for purposes of [section] 101.106." *Id.* at 378. The only exception to this general rule occurs when a suit is brought against a governmental employee pursuant to a statute that independently waives immunity instead of based on a tort. *See Garcia*, 253 S.W.3d at 659 ("Claims against [a governmental employee] brought pursuant to waivers of sovereign immunity that exist apart from the [TTCA] are not brought 'under [the TTCA].'").

Here, Powell's defamation claims against the City Defendants sound in tort, and no other statute independently waives immunity for the claims. Thus, we conclude that, for purposes of section 101.106(f), Powell's slander and libel claims "could have been brought" against the City. *See Frick*, 657 S.W.3d at 848 (holding that appellant's libel and malicious-prosecution claims were tort claims that could have been asserted against appellee's governmental employer and that "just because the TTCA does not waive immunity for a specific
18 claim does not mean that such a claim was not brought under the TTCA"). *18

2. General Scope of Employment

We next address whether the suit was based on conduct within the City Defendants' general scope of employment. TTCA section 101.001(5) defines "scope of employment" as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority."[8] Tex. Civ. Prac. & Rem. Code § 101.001(5). Employees are not required to prove their subjective intent behind an allegedly tortious act to be dismissed from a suit under the election-of-remedies provision; instead, the analysis is fundamentally objective: "Is there a connection between the employee's job duties and the alleged tortious conduct?" *Laverie v. Wetherbe*, 517 S.W.3d 748, 753 (Tex. 2017). "Simply stated, a governmental employee is discharging generally assigned job duties if the employee was doing his job at the time of the alleged tort." *Garza*, 574 S.W.3d at 401.

[8] The parties do not dispute that the City Defendants were employees of the City, a governmental unit.

a. The City Officials and Lieutenant Reuvers

Powell's defamation claims against the City Officials were based on his allegations that, during the Council Inquiry portion of the city council meeting, the City Officials falsely stated that Powell's remarks about
19 Lieutenant Reuvers, the chief of police, and the city attorney were not true. In his pleadings, Powell alleged *19 that the City Officials were not acting within the scope of their employment when they made the statements because their comments violated TOMA section 551.042.

TOMA requires that "[a] governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body."[9] Tex. Gov't Code § 551.041. Section 551.042, relied on by Powell, contains an exemption to the notice requirement:

[9] TOMA defines "governmental body" to mean, inter alia, "a municipal governing body." *See* Tex. Gov't Code § 551.001(3)(C).

> (a)If, at a meeting of a governmental body, a member of the public or of the governmental body inquires about a subject for which notice has not been given as required by this subchapter, the notice provisions of this subchapter do not apply to:
>
> (1) a statement of specific factual information given in response to the inquiry; or

(2) a recitation of existing policy in response to the inquiry.

(b) Any deliberation of or decision about the subject of the inquiry shall be limited to a proposal to place the subject on the agenda for a subsequent meeting.

Id. § 551.042.

"TOMA provides this exemption because 'public comment sessions provide an opportunity for citizens to speak their minds on an unlimited variety of subjects' and a governmental body cannot be expected 'to divine or
20 foresee the myriad of matters its constituents wish to bring to its attention.'" *Stratta v. Roe*, *20 961 F.3d 340, 362 (5th Cir. 2020) (quoting Att'y Gen. Op. No. JC-169, at 4 (2000)). Section 551.042 allows a governmental body to make a limited response to an inquiry about a subject not included on the posted notice. *See Hays Cnty. Water Planning P'ship v. Hays Cnty.*, 41 S.W.3d 174, 181 (Tex. App.-Austin 2001, pet. denied). The statute "provides an outlet for a governmental body to address the public's concerns without violating the notice provision of § 551.041: instead, it may place the subject on the agenda for a future meeting." *Stratta*, 961 F.3d at 362 (citing Tex. Gov't Code § 551.042).

Powell asserts that the City Officials were not acting within the scope of their governmental employment when they made the alleged defamatory comments during the Council Inquiry because the complained-of comments exceeded the response to Powell's comments permitted by section 551.042. Powell alleged that section 551.042 limited the City Officials' response to placing the matter on a future agenda, and the responsive comments exceeded that limitation.

Even if we were to assume that the City Officials' comments exceeded the parameters of section 551.042, that does not mean that the City Officials were not "doing their job" when they made the comments. To the contrary, the City Officials would not have been subject to TOMA unless they were acting in the course of their duties as members of a governmental body when they made the allegedly defamatory comments. *See* Tex.
21 Gov't Code § 551.042. In other words, subsumed in Powell's *21 allegations that the City Officials violated TOMA by exceeding section 551.042's limitation on the type of comments permitted during the Council Inquiry is the recognition that they were acting in the course of their governmental employment when they made the complained-of comments. *See id*.

As this Court has recognized, "an act may still be within the scope of the employee's duties even if the specific act that forms the basis of the civil suit was wrongly or negligently performed, so long as the action was one related to the performance of his job." *Hopkins v. Strickland*, No. 01-12-00315-CV, 2013 WL 1183302, at *3 (Tex. App.-Houston [1st Dist.] Mar. 21, 2013, no pet.) (mem. op.). Here, at most, exceeding the parameters of section 551.042 would indicate that the City Officials had not performed their jobs well because they did not comply with section 551.041's notice provision before addressing an off-agenda subject. *See Laverie*, 517 S.W.3d at 755 ("The fundamental inquiry . . . is not whether [the employee] did her job well or poorly, . . . but simply whether she was doing her job."). But the complained-of conduct would not indicate that the City Officials were acting outside the general scope of their job duties.

Powell points out that "[c]onduct falls outside the scope of employment when it occurs 'within an independent course of conduct not intended by the employee to serve *any* purposes of the employer.'" *Garza*, 574 S.W.3d at
22 400 (quoting *Alexander v. Walker*, 435 S.W.3d 789, 792 (Tex. 2014)). And "[a]n employee who deviates *22 from the general nature of his employment to engage in unauthorized conduct is also not acting within the scope of employment." *Ferebee*, 2023 WL 4937501 at *2 (citing *Zarzana v. Ashley*, 218 S.W.3d 152, 160 (Tex.

App.-Houston [14th Dist.] 2007, pet. struck) (concluding that employee's conduct of selling counterfeit car inspection stickers was not within scope of employment because employer did not conduct inspections or sell car inspection stickers)).

Powell asserts that the City Officials deviated from their job duties by addressing the veracity of Powell's statements about Lieutenant Reuvers, the city attorney, and City's police chief. Powell claims that this was an independent course of conduct that did not serve any purpose of the City. But, as mentioned, Powell's allegations demonstrate that the City Officials were performing their job duties by responding to, during the Council Inquiry, Powell's comments regarding the alleged wrong-doing of city employees. *See Garza*, 574 S.W.3d at 401 ("[A] governmental employee is discharging generally assigned job duties if the employee was doing his job at the time of the alleged tort."). In responding to Powell's allegations, the City Officials' comments served a purpose of the City by addressing serious allegations against the City's employees.

Powell complained that the City Officials' comments about him addressed an off-agenda matter for which public notice had not been given as required by TOMA. But Powell did not identify a separate course of
23 conduct by the City Officials; that *23 is, he did not allege that the City Officials ceased acting in their respective official roles during the meeting to engage in some other type of conduct that deviated from the general nature of their job duties. *See Ferebee*, 2023 WL 4937501, at *4 (concluding that city attorney, who Powell also sued in this case, was performing his job duties when, at April 2022 city council meeting, he updated city council and mayor about pending litigation involving Powell, even though city attorney allegedly "strayed off topic" and made personal comments about Powell).

"Conduct that serves any purpose of the employer is within the scope of employment even if the conduct escalates beyond that assigned or permitted." *Fink*, 477 S.W.3d at 466. Here, because it served a purpose of the City, the City Officials' complained-of conduct was an escalation of, rather than a deviation from, the City Officials' job duties. *See id.*; *see also Ferebee*, 2023 WL 4937501, at *4 (concluding that city attorney's comments about Powell "were an escalation of, rather than a deviation from, his job duties as city attorney").

Returning to the question-"Is there a connection between the [the City Officials'] job duties and the alleged tortious conduct?"-we answer in the affirmative. *See Laverie*, 517 S.W.3d at 753. We conclude that, based on the allegations in Powell's pleadings, the City Officials acted within the general scope of their employment in commenting on the veracity of Powell's statements. *See Ferebee*, 2023 WL 4937501, at *4-5; *Elias v. Griffith*,
24 *24 No. 01-17-00333-CV, 2018 WL 3233587, at *9 (Tex. App.-Houston [1st Dist.] July 3, 2018, no pet.) (mem. op.) (concluding city employees who allegedly defamed plaintiff while giving city council update were acting within scope of employment); *Melton v. Farrow*, No. 03-13-00542-CV, 2015 WL 681491, at *3 (Tex. App.-Austin Feb. 10, 2015, pet. denied) (mem. op.) (concluding board members who allegedly defamed plaintiff in board meeting were acting within scope of employment); *Hopkins*, 2013 WL 1183302, at *3-4 (holding that mayor was acting within general scope of his duties when he made allegedly defamatory statements about city's police chief to mayor of another city and to district attorney's office).

Similarly, we conclude that, based on Powell's pleadings, there was a connection between Lieutenant Reuvers's job duties and his alleged tortious conduct. Powell based his defamation claim against Lieutenant Reuvers on his allegation that Lieutenant Reuvers commented "to citizens who exited the meeting room" that Powell's "comments during the Citizen Forum were not true." Powell alleged that Lieutenant Reuvers made his comment "while [Lieutenant Reuvers was] in the lobby greeting people and providing security services."

As a peace officer,[10] Lieutenant Reuvers had a duty "to preserve the peace within [his] jurisdiction." *See* Tex. Code Crim. Proc. art. 2.13(a). Providing *25 security services for the city council meeting and interacting with the attendees is in keeping with that general duty. Thus, based on the allegations in Powell's pleadings, Lieutenant Reuvers committed the alleged tort of defamation in the course of discharging his duties. As a result, the connection between Lieutenant Reuvers's job duties and the allegedly defamatory statement placed the statement within the general scope of Lieutenant Reuvers's employment with the City.[11] *See Alexander*, 435 S.W.3d at 792 (holding that, based on allegations in plaintiff's petition, claims for assault, conspiracy, slander, false arrest, false imprisonment, and malicious prosecution involved conduct within police officers' scope of employment because allegedly improper conduct occurred in course of arresting plaintiff).

10 The term "peace officers" includes city police officers like Lieutenant Reuvers. *See* Tex. Code Crim. Proc. art. 2.12(3) (providing that "police officers of an incorporated city" are "peace officers").

11 Powell argues that section 101.106(f) does not apply to any of his claims because he sued the City Defendants individually. "This argument is misplaced because the capacity in which the plaintiff sues the defendant is not determinative." *Cathcart v. Jones*, No. 05-18-01175-CV, 2020 WL 2214105, at *7 (Tex. App.-Dallas May 7, 2020, pet. denied) (mem. op.). Section 101.106(f) "was intended to 'foreclose a suit against a government employee in his individual capacity if he was acting within the scope of his employment.'" *Id.* (quoting *Franka v. Velasquez*, 332 S.W.3d 367, 381 (Tex. 2011)); *see Hamilton v. Pechacek*, No. 02-12-00383-CV, 2014 WL 1096018, at *5 (Tex. App.-Fort Worth Mar. 20, 2014, no pet.) (mem. op.) (holding section 101.106(f) applied, even though claims were asserted against state employee individually, because employee's actions were in scope of his employment and could have been brought against governmental unit).

In sum, given Powell's allegations, we conclude that (1) the defamation claims against the City Officials and Lieutenant Reuvers were based on conduct within the general scope of their governmental employment and (2) for section *26 101.106(f) purposes, the defamation claims could have been brought against the City under the TTCA. Accordingly, Powell's claims against the City Officials and Lieutenant Reuvers are considered to be against them in their official capacities only, not their individual capacities. *See* Tex. Civ. Prac. & Rem. Code § 101.106(f); *Garza*, 574 S.W.3d at 399-400.

We hold that the trial court erred by denying the motion to dismiss with respect to the slander per se claims against the City Officials and Lieutenant Reuvers. Because Powell's allegations in his pleadings established that section 101.106(f) applied to Powell's claims against the City Officials and Lieutenant Reuvers- thereby affirmatively negating the trial court's jurisdiction over the those claims- Powell is not entitled to a remand to replead those claims. *See Ferebee*, 2023 WL 4937501, at *6 (holding that, "[b]ecause Powell's pleadings affirmatively negate[d] jurisdiction, [this Court was permitted to] dismiss [Powell's] claims against Ferebee without allowing [him] an opportunity to replead"); *Manley v. Wise*, No. 03-21-00120-CV, 2022 WL 548266, at *5 (Tex. App.-Austin Feb. 24, 2022, no pet.) (mem. op.) (holding that plaintiff was not entitled to replead because his pleadings "conclusively establish[ed]" connection between defendant governmental employees' job duties and their alleged tortious conduct); *see also Miranda*, 133 S.W.3d at 227 (stating that, when pleadings affirmatively negate jurisdiction, "plea *27 to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend").

b. Deborah Pilcher

Powell's libel per se claim against Pilcher was based on allegations that, "at approximately 8:00 p.m. on January 26, 2022," Pilcher "posted libelous comments directed toward [Powell]." Powell alleged that "Pilcher's libelous comments challenged the veracity of [his] statements made at the January 26, 2022 City Council

meeting and directly attacked [Powell's] integrity and honesty." Other than identifying Pilcher's job title as the City's "communications director," Powell's petition does not indicate what Pilcher's job duties are. Nor does the pleading state where Pilcher "posted" her comments. Powell's petition requested Pilcher to retract her comments "on the same social media platforms that the libelous comments were made," but the pleading did not identify the social media platforms.

In his response to the City Defendants' motion to dismiss, Powell asserted that Pilcher made the alleged defamatory statement on her personal Facebook page, but Powell did not amend his petition to reflect the allegation. As we have recognized, "an employee's conduct is 'within the scope of employment,' even if done in part to serve the purposes of the employee or a third person." *Anderson v. Bessman*, 365 S.W.3d 119, 125-26 (Tex. App.-Houston [1st Dist.] 2011, no pet.). And, "[i]f the purpose of serving the employer's business
28 motivates the employee, [her] acts are *28 within the scope of employment." *Id.* at 126. Thus, even considering the allegation that Powell made the posting on her personal social media page, without more information about Pilcher's job duties and the circumstances of the posting, a connection could possibly exist between the complained-of statements and Pilcher's job duties. *See id.*

Because the allegations in Powell's petition did not affirmatively demonstrate that Pilcher's complained-of statements were not made within the general scope of her governmental employment, we hold that the trial court erred when it denied the motion to dismiss with respect to Powell's libel claim against Pilcher. *See Vestal v. Pistikopoulos*, No. 10-16-00034-CV, 2016 WL 4045081, at *5 (Tex. App.-Waco July 27, 2016, no pet.) (mem. op.) (holding that trial court erred in denying governmental employee's plea to the jurisdiction based on section 101.106(f) because plaintiff's petition was unclear whether employee's statements were made within scope of employee's employment). Nevertheless, because the allegations neither affirmatively demonstrate nor negate the trial court's jurisdiction over Powell's claim against Pilcher, Powell should be given an opportunity to amend his pleading with respect to that claim. *See id.*; *see also Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 559 (Tex. 2016) ("[T]he right to amend typically arises when the pleadings fail to allege enough jurisdictional facts to demonstrate the trial court's jurisdiction."); *Miranda*, 133 S.W.3d at 226-27 ("If the
29 pleadings do not *29 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 plaintiffs should be afforded the opportunity to amend.").

We sustain the City Defendants' sole issue.

Conclusion

We reverse the trial court's order denying the City Defendants' motion to dismiss. We render judgment dismissing Powell's slander per se claims against the City Officials and Lieutenant Reuvers. We remand the remainder of the cause to the trial court to permit Powell to replead the libel per se claim against Pilcher in order to provide sufficient allegations to affirmatively demonstrate the trial court's subject-matter jurisdiction over that claim.