Opinion Issued August 14, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00836-CV

AUTRY GARRETT, INDIVIDUALLY AND AS NEXT FRIEND OF JASMINE, DEVIN, AND SHANAE GARRETT, MINOR CHILDREN, Appellant

V.

HARRIS COUNTY HOSPITAL DISTRICT, Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 2006-08198

MEMORANDUM OPINION

Appellant, Autry Garrett, appeals from a judgment of dismissal rendered

upon the granting of a plea to the jurisdiction made by appellee, Harris County Hospital District ("HCHD"). Garrett contends that the trial court erred in granting HCHD's plea to the jurisdiction because they timely provided HCHD notice of their claim as required by the Texas Tort Claims Act (TTCA). We affirm.

Background

On October 3, 2003, Garrett, who was pregnant, went to Lyndon B. Johnson General Hospital ("LBJ"), a facility owned and operated by HCHD, for routine obstetrical care. At the initial visit, Dr. Riggs discovered a mass in her left breast and ordered an ultrasound. On October 6, the hospital performed the ultrasound and detected a possibly malignant mass. On October 15, Garrett went to LBJ breast clinic for evaluation by Dr. Robinson, who scheduled a needle biopsy on November 25. Dr. Bonner performed the needle biopsy and received the results, indicating a malignant tumor, on December 1, 2003. Garrett alleges that neither Dr. Bonner, nor any other person at LBJ, telephoned her or mailed her the results of her biopsy. Garrett did not keep a follow-up appointment scheduled for December 10, 2003.

Garrett instead had transferred her care outside LBJ to Dr. Ortega, another OB/GYN. She had her first appointment with Ortega on November 13, 2003, during which he too noted the mass in Garrett's left breast. At her follow-up appointment on January 15, 2004, Ortega indicated that he would obtain her biopsy

report from LBJ, but never did so. Garrett had two further appointments with Ortega following the delivery of her baby on April 23, 2004.

On July 11, 2005, Garrett arrived at the LBJ emergency room complaining of pain in her breast, at which time she learned that the biopsy revealed ductal carcinoma. The LBJ oncology clinic evaluated Garrett and determined that the breast cancer had metastasized and spread to her lumbar spine and the lymph nodes in her chest.

On August 3, 2005, Garrett's attorney sent letters to the LBJ administrator, Harris County Judge Eckels, Harris County Commissioners, and The University of Texas Health Science Center at Houston notifying them of the pending claim. Garrett filed suit on February 7, 2006. HCHD filed a plea to the jurisdiction and a supplement to it, contending that Garrett's notice was untimely filed because the Tort Claims Act requires notice of the claim within six months of the date of the occurrence, and HCHD's failure to report the results occurred in December 2003. The trial court granted HCHD's plea to the jurisdiction and dismissed the case.

Plea to the Jurisdiction

Garrett contends that the trial court erred in determining that her claim against HCHD is barred for failing to provide the County with timely notice of the claim. She asserts that her claim against HCHD did not accrue until Garrett discovered her biopsy results in July 2005 instead of the date that HCHD received

the results and failed to promptly report them—December 2003. Alternatively, Garrett contends that the discovery rule should apply to the TTCA's notice requirement, and thus, we should equitably toll the notice period until Garrett learned of the biopsy results and HCHD's alleged negligence. We note that Garrett did not contend in the trial court and does not contend on appeal that HCHD had actual notice of the claim. *Cf. Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (holding that hospital did not have actual notice of claim even if death occurred and thus, statute of limitations had run).

Standard of Review

The question of subject-matter jurisdiction is a legal issue, and thus we review the trial court's ruling under a de novo standard. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). The pleader must allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Tex. Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). A reference to, or recitation of, provisions of the TTCA in pleadings does not confer jurisdiction on the trial court unless the facts alleged demonstrate a claim that falls within the act's scope. *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). We consider the pleadings and any proffered evidence to resolve the jurisdictional issues raised. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). If the evidence as to jurisdictional facts is undisputed, then whether

that evidence establishes a trial court's jurisdiction is a question of law. *Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction; the fact issue must be resolved by the fact finder. *See id.* at 227–28. When reviewing a plea to the jurisdiction in a case in which the plaintiff meets the TTCA's pleading requirements but the government has submitted evidence in support of the plea, we take as true all evidence favorable to the plaintiff and indulge every reasonable inference in the plaintiff's favor. *Id.* at 228.

Texas Tort Claims Act—Notice Requirement

To overcome the shield of governmental immunity, a plaintiff must comply with the TTCA's notice requirements, found in Texas Civil Practice and Remedies Code section 101.101, as follows:

> (a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:
>
> (1) the damage or injury claimed;
> (2) the time and place of the incident; and
> (3) the incident.
>
> . . . .
>
> (c) The notice requirements provided or ratified and approved by Subsections (a) and (b) do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received

some injury, or that the claimant's property has been damaged.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (Vernon 2005). Mere notice that an incident has occurred is not enough to establish actual notice. *Cathey v. Booth*, 900 S.W.2d 339, 340 (Tex. 1995); *Garcia v. Texas Dep't of Criminal Justice*, 902 S.W.2d 728, 730–31 (Tex. App.—Houston [14th Dist.] 1995, no writ). The notice requirement ensures prompt reporting of claims to enable the government to investigate while facts are fresh and conditions remain substantially the same. *City of Houston v. Torres*, 621 S.W.2d 588, 591 (Tex. 1981); *see also Dinh v. Harris County Hosp. Dist.*, 896 S.W.2d 248, 251 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd w.o.j.); *Parrish v. Brooks*, 856 S.W.2d 522, 525 (Tex. App.—Texarkana 1993, writ ref'd). The failure to give notice under section 101.101 requires that the trial court dismiss a suit under the TTCA for lack of jurisdiction because the Texas legislature has determined that the TTCA's notice requirement is jurisdictional in nature. TEX. GOV'T CODE ANN. § 311.034 (Vernon 2005) ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.").

Analysis

Garrett notified the HCHD of her claim on August 3, 2005. In order for her notice to be timely, the event giving rise to the HCHD's liability thus must have occurred on or after February 3, 2005. Garrett asserts that HCHD's failure to

communicate the results of the biopsy to Garrett constitutes a continuing tort, and thus they meet the six-month requirement. Alternatively, Garrett contends that her cause of action occurred in July 2005 "when Autrey first learned she had a life-threatening disease that had gone untreated." In essence, Garrett asks either that we extend the accrual date of her claim to July 2005 or we apply an equitable discovery rule to the TTCA's notice provision.

Accrual Date

HCHD breached its duty to disclose Garrett's biopsy results by failing to communicate the results reasonably promptly after obtaining them. *See Rowntree v. Hunsucker*, 833 S.W.2d 103, 108 (Tex. 1992) (holding that doctor could have breached duty to perform proper examinations only on those occasions when he had opportunity to perform such examinations); *see also Bala v. Maxwell*, 909 S.W.2d 889, 892 (Tex. 1995) (holding that physician's "negligent failure to conduct follow-up procedures" occurs only "in connection with the [last] examination"); *Shah v. Moss*, 67 S.W.3d 836, 844–45 (Tex. 2001) (holding that when physician negligently fails to provide weekly or monthly follow-up treatment, breach of duty imposed by standard of care occurs on last date physician actually saw patient); *Gross v. Kahanek*, 3 S.W.3d 518, 521 (Tex. 1999) (because appellant doctor was no longer authorizing refills of appellee's prescription as of September 1992 and was therefore no longer responsible for monitoring her blood

levels, appellant's course of treatment with appellee ended in September 1992, even though appellee continued to take same prescription, now being authorized by a different doctor). It was HCHD's alleged failure to promptly communicate the biopsy results that caused Garrett's injury. Thus, we hold that Garrett's cause of action accrued in December 2003 or early 2004, well before February 3, 2005, the earliest date by which her actual notice of claim would have been timely under the TTCA.

Discovery Rule

Garrett contends that she could not possibly have discovered the failure to communicate her diagnosis to her until much later. The TTCA, however, does not provide a discovery rule to extend the limitations period. The courts that have considered imposing a discovery rule have ultimately determined that the language of section 101.101 precludes it. *See Univ. of Tex. Med. Branch at Galveston v. Greenhouse*, 889 S.W.2d 427, 429 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (op. on reh'g) ("While we believe it is remarkably unfair to deprive Greenhouse of her right of recourse against UTMB because she was unable, through no fault of her own, to comply with the notice requirements, we must agree with UTMB that the trial court erred in applying the discovery rule."); *see also Putthoff v. Ancrum*, 934 S.W.2d 164, 174 (Tex. App.—Fort Worth 1996, writ denied) (holding that the discovery rule does not apply to claims made under the

TTCA); *Streetman v. Univ. of Tex. Health Science Center at San Antonio*, 952 S.W.2d 53, 56 (Tex. App.—San Antonio 1997, writ denied) (same). We follow our court's holding in *Greenhouse* and hold that the discovery rule does not apply to the TTCA notice requirement. *See Greenhouse*, 889 S.W.2d at 429 (holding that the trial court erred in applying the discovery rule); *see also Putthoff*, 934 S.W.2d at 174.

Conclusion

The trial court did not err in granting HCHD's plea to the jurisdiction based on untimely notice. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Taft, Jennings, and Bland.