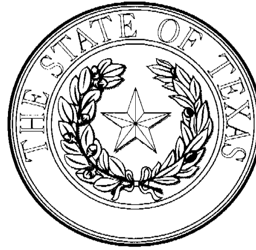
Opinion issued July 28, 2022



In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00517-CV

CITY OF HOUSTON, Appellant

V.

MAGDALENA VILLAFUERTE AND JAVIER ROQUE VILLAFUERTE, Appellees

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On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2021-16655

MEMORANDUM OPINION

The City of Houston appeals the trial court's denial of its summary-judgment motion. The City argues that the appellees, Javier and Magdalena Villafuerte, did not establish that they provided the required notice to waive the City's governmental

immunity under the Texas Tort Claims Act and, because governmental immunity had not been waived, the trial court did not have subject-matter jurisdiction over the Villafuertes' personal-injury claims. We agree with the City and therefore reverse the trial court's order denying summary judgment and render judgment dismissing the Villafuertes' personal-injury claims for lack of subject-matter jurisdiction.

BACKGROUND

In March of 2019, a City employee was driving an ambulance when he rear-ended the car in front of him, which caused a four-car pileup including the car the Villafuertes were driving. Following the car accident, a City police officer from the crash investigation unit arrived to investigate the scene. He wrote in the police report that the ambulance driver failed to control his speed and struck the car in front of him; there were no injuries. Erol Saucedo-Ibarra, who is an EMT employed by the City's fire department and was riding in the passenger seat of the ambulance that caused the accident, was officially dispatched to the accident scene and spoke with the people involved in the accident. He claimed the Villafuertes told him after the accident that they were okay and declined medical evaluation. He also stated that Magdalena Villafuerte signed a refusal form declining medical transport to the hospital. The Villafuertes contend that when they spoke with Saucedo-Ibarra, they each told him they were experiencing pain.

The Villafuertes continued to experience pain from the car accident and, a month later, sought medical treatment.

Nearly four months after the car accident, the Villafuertes sent written notice of their claims for personal injury and property damage caused by the car accident to the City. The Villafuertes then filed this lawsuit, claiming damages resulting from the City's negligence.

The City moved for partial summary judgment as to the Villafuertes' personal-injury claims on jurisdictional grounds, arguing that the Villafuertes had not provided the notice required under the Texas Tort Claims Act to waive the City's governmental immunity, which deprived the trial court of jurisdiction. The trial court denied the motion, and the City now appeals.

DISCUSSION

The City contends that the trial court erred in denying its summary-judgment motion because the Villafuertes, as the claimants, bore the burden to establish the trial court's jurisdiction by either showing that they provided timely formal notice of their claims or that the City had actual notice of their claims. The City contends they did neither.

Appellate Jurisdiction

Generally, appeals may only be taken from final judgments or orders, but a party may appeal from an interlocutory order that "grants or denies a plea to the

jurisdiction by a governmental unit." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); *see Thomas v. Long*, 207 S.W.3d 334, 338 (Tex. 2006). Even though Section 51.014 only references a plea to the jurisdiction, it authorizes an interlocutory appeal from a trial court's ruling on a governmental unit's jurisdictional challenge, "whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise." *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 549 (Tex. 2019) (quoting *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004)). Here, the City moved for traditional summary judgment on jurisdictional issues, which entitles it to an interlocutory appeal. *See id.*; *Thomas*, 207 S.W.3d at 339–40.

Applicable Law and Standard of Review

A governmental unit is generally immune from suit for tort claims. *City of San Antonio v. Tenorio*, 543 S.W.3d 772, 775 (Tex. 2018). The Texas Tort Claims Act waives governmental immunity for property damage, personal injury, or death in certain limited circumstances, if the claimant gives notice as prescribed by the Act. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.101. A claimant must give a governmental unit notice within six months of the incident giving rise to a claim, and a claimant must also comply with any notice requirement a city has adopted by charter or ordinance. *See id.* § 101.101(a), (b). A claimant must either provide formal notice or show that the governmental unit had actual notice of the claim. *See id.* § 101.101(a), (c). Failure to provide the required notice within the appropriate time

period deprives the trial court of jurisdiction and requires the court to dismiss the case. *See* TEX. GOV'T CODE § 311.034 ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity."); *Worsdale v. City of Killeen*, 578 S.W.3d 57, 59 (Tex. 2019) (stating that notice under Tort Claims Act is "a jurisdictional prerequisite to suit").

Because the City's jurisdictional summary-judgment motion functions as a plea to the jurisdiction, we will treat it as such for the purpose of this appeal. *See City of El Paso v. Viel*, 523 S.W.3d 876, 882 (Tex. App.—El Paso 2017, no pet.). When a plea to the jurisdiction challenges only the pleadings or when the jurisdictional facts are undisputed, we review the trial court's ruling de novo and determine whether as a matter of law the pleader has alleged facts that affirmatively demonstrate the trial court's subject-matter jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The pleader bears the initial burden of alleging facts demonstrating the trial court's subject-matter jurisdiction. *Worsdale*, 578 S.W.3d at 66. But when a plea to the jurisdiction challenges jurisdictional facts, the trial court must resolve the disputed fact issues, as long as those facts do not implicate the merits of the case. *Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015) (per curiam). On appeal, the trial court's jurisdictional fact findings may be challenged for legal and factual sufficiency. *Univ. of Tex. v. Poindexter*, 306 S.W.3d 798, 806–07 (Tex. App.—Austin 2009, no pet.);

see City of Keller v. Wilson, 168 S.W.3d 802, 810 (Tex. 2005) (explaining standards of legal-sufficiency challenge). We must defer to the trial court's express or implied fact findings so long as they are supported by sufficient evidence. *Worsdale*, 578 S.W.3d at 66.

A. Formal notice

The City contends that the Villafuertes did not timely provide the formal notice required by Section 101.101. *See* TEX. CIV. PRAC. & REM. CODE § 101.101(a), (b). Although the Villafuertes provided formal notice, the City argues that they provided it more than 90 days after they sustained their injuries, which does not comply with the City's charter requirement.

1. Applicable law

Section 101.101(a) of the Tort Claims Act provides that a governmental unit is "entitled to receive notice of a claim against it . . . not later than six months after the day that the incident giving rise to the claim occurred." *Id.* § 101.101(a). This formal notice "must reasonably describe: (1) the damage or injury claimed; (2) the time and place of the incident; and (3) the incident." *Id.*

Although the Act states that a claimant must provide formal notice within six months of his injury, it also provides that a city can establish a different notice period in its charter. *See id.* § 101.101(b) ("A city's charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and

approved.”). The City’s charter establishes a 90-day deadline to provide notice of a claim for damages for personal injuries. CITY OF HOUSTON CHARTER, art. IX, § 11.

2. Analysis

The dates are undisputed: the accident occurred on March 22, 2019, and the Villafuertes sent formal notice to the City’s legal department on July 9, 2019, more than 90 days after the accident occurred. When the relevant facts are undisputed, the jurisdictional challenge is a question of law. *See Miranda*, 133 S.W.3d at 226.

The Villafuertes contend that their formal notice complied with the City’s charter because the charter’s wording indicates that a claimant only needs to provide notice within 90 days after becoming aware that his personal injuries require medical attention. The Villafuertes first sought medical attention for their injuries on April 25, 2019, and so, they argue, they provided formal notice to the City only 74 days after they sought medical attention.

We do not agree with the Villafuertes’ reading of the city charter. The charter states that before the City can be liable for personal-injury damages, the injured person must give formal notice of the injury “within ninety days after the [injury] has been sustained.” CITY OF HOUSTON CHARTER, art. IX, § 11. We construe a city charter provision “according to the rules governing the interpretation of statutes generally” and “look first to the plain and common meaning of the [charter]’s words.” *City of Houston v. Todd*, 41 S.W.3d 289, 297–98 (Tex. App.—Houston [1st

Dist.] 2001, pet. denied). Here, the plain meaning of the charter is clear: a claimant must notify the City within 90 days after the claimant sustains an injury before the City can be liable for the injury. To sustain means to suffer or undergo. *Sustain*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sustain (last visited May 13, 2022). There is simply no support for the notion that a claimant does not suffer or undergo an injury until he seeks medical treatment for it. The Villafuertes argue that the difference in language between the Tort Claims Act and the City's charter implies a different meaning: whereas the Act requires notice of injury "not later than six months after the day that the incident giving rise to the claim *occurred*," the City's charter requires notice of injury "within ninety days after the [injury] *has been sustained*." TEX. CIV. PRAC. & REM. CODE § 101.101(a) (emphasis added); CITY OF HOUSTON CHARTER, art. IX, § 11 (emphasis added). Although the language is different, this is a difference without a distinction. Both the Act and the City's charter require notice within a certain period of time after the incident or injury occur, not after the injury is first treated. Therefore, the Villafuertes' argument that their notice was timely because it was sent within 90 days after they sought treatment for their injuries is unavailing.

The relevant facts are undisputed: the Villafuertes did not send formal notice within 90 days after they sustained injuries on the date the accident occurred, and so their notice was not timely under the city charter. Thus, as a matter of law, the

Villafuertes failed to provide formal notice as required by Section 101.101 of the Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.101(a), (b); CITY OF HOUSTON CHARTER, art. IX, § 11; *Miranda*, 133 S.W.3d at 226. To the extent the trial court denied the City's jurisdictional summary-judgment motion on this basis, the trial court erred. The City's first point of error is sustained.

B. Actual notice

The Villafuertes' formal notice is not required to waive the City's immunity if they can show the City had actual notice of their personal-injury claims. The City argues that it did not have actual notice because, although the City was aware of the Villafuertes' property damage after the accident, it was not aware of their personal injuries. The City argues that neither the Villafuertes' statements to Saucedo-Ibarra, who was the EMT at the accident scene, nor the City's notice of their property damage were sufficient to give the City actual notice of their injuries.

1. Applicable law

The formal notice requirement of the Tort Claims Act does not apply if a governmental unit has actual notice of the death, injury, or property damage. TEX. CIV. PRAC. & REM. CODE § 101.101(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). Thus, the Villafuertes' lack of formal notice is excused if they can show the City had actual notice of their injuries. For a governmental unit to have actual notice under the Act, it must have the "same knowledge it is entitled to

receive" under the formal notice provision of the Act. *Tenorio*, 543 S.W.3d at 776. Thus, a governmental unit has actual notice under the Act only if it has subjective awareness of "(1) a death, injury, or property damage; (2) the governmental unit's alleged fault that produced or contributed to the death, injury, or property damage; and (3) the identity of the parties involved." *Id.*

A governmental unit's knowledge that death, injury, or property damage has occurred is not by itself sufficient to establish actual notice. *Id.* A governmental unit does not have actual notice just because it investigates an accident or because it should have known it might be at fault for the accident based on its investigation. *Id.*; *City of Dallas v. Carbajal*, 324 S.W.3d 537, 538 (Tex. 2010) (per curiam). But actual notice may be imputed to the governmental unit when an agent or representative of the governmental unit charged with a duty to investigate, gather facts, and report back on behalf of the governmental entity receives notice of the incident. *Guadalupe Blanco River Auth. v. Schneider*, 392 S.W.3d 321, 325 (Tex. App.—San Antonio 2012, no pet.); *see also Dinh v. Harris Cnty. Hosp. Dist.*, 896 S.W.2d 248, 253 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd w.o.j.).

2. Analysis

The City does not dispute that that it had subjective awareness of the Villafuertes' property damage, its own alleged fault, and the identity of the parties

involved. The only dispute is whether the City had subjective awareness of the Villafuertes' personal injuries.

The Villafuertes assert that the City had subjective awareness of their personal injuries for two reasons. First, the Villafuertes claim they told EMT Saucedo-Ibarra, a city employee, of their injuries at the accident scene. Second, the Villafuertes argue that the City's subjective awareness of their property damage was sufficient to confer awareness of their personal injuries.

a. Notice to city employee

The City claims that Saucedo-Ibarra was not a proper agent or representative of the City, and so even if the Villafuertes told him about their injuries after the accident, their statements do not constitute actual notice. The City disputes that the Villafuertes told Saucedo-Ibarra about their injuries, but even assuming they did, the Villafuertes have not alleged, and have not provided any evidence to show, that Saucedo-Ibarra was an agent or representative of the City charged with a duty to investigate and report to the City. *See Schneider*, 392 S.W.3d at 325; *Dinh*, 896 S.W.2d at 253. The Villafuertes have provided no other evidence that the City had subjective awareness of their personal injuries.

The disputed jurisdictional facts here, whether the Villafuertes told a proper agent or representative of the City about their injuries at the accident scene, do not implicate the merits of the case, whether the City is liable for the Villafuertes'

personal injuries. Therefore, the trial court was required to make the necessary fact findings to resolve the jurisdictional issue. *See Vernco Constr.*, 460 S.W.3d at 149. We must defer to the trial court's express or implied fact findings so long as they are supported by sufficient evidence. *Worsdale*, 578 S.W.3d at 66. But there is no evidence to support the trial court's implied finding that the Villafuertes told a proper agent or representative of the City about their injuries at the accident scene. The Villafuertes have provided no other evidence that the City had subjective awareness of their personal injuries. Thus, there is no evidence to support the trial court's implied finding that the City had actual notice through its agent or representative, and we must sustain the City's challenge. *See City of Keller*, 168 S.W.3d at 810 (reviewing court will sustain legal sufficiency challenge where record shows complete absence of vital fact). The trial court erred to the extent it denied the City's jurisdictional summary-judgment motion on this basis.

The Villafuertes rely on two cases to argue that when a claimant informs an EMT of his personal injury, and a city has subjective awareness of its fault in causing the injury, then the city has actual notice: *City of Dallas v. Mazzaro*, No. 05-20-00103-CV, 2020 WL 6866570 (Tex. App.—Dallas Nov. 23, 2020, no pet.) (mem. op.), and *City of Houston v. Miller*, No. 01-19-00450-CV, 2019 WL 7341666 (Tex. App.—Houston [1st Dist.] Dec. 31, 2019, no pet.) (mem. op.). However, neither case stands for that proposition. In *Mazzaro*, the claimant alleged that the city had actual

notice of her personal-injury claim because she told the paramedics at the scene of the accident that her injury was caused by an uneven city sidewalk, but the paramedics' reports did not indicate the city was at fault for causing the injury. *Mazzaro*, 2020 WL 6866570, at *4. The court concluded the city did not have actual notice because there was no evidence the city had awareness of its alleged fault. *See id.* at *5. In *Miller*, the claimant provided the EMS report of his accident that identified the cause of injury as a motorcycle accident caused by hitting a pothole on a city street. *Miller*, 2019 WL 7341666, at *2. This court determined that the claimant had not provided sufficient evidence to demonstrate the city had actual notice of its alleged fault in causing the injury because the EMS report did not indicate the city was responsible for causing his injuries. *Id.* at *5–6. Neither case suggested that if an EMT has knowledge of an injury and the city is at fault for causing the injury, then the city has actual notice, as the Villafuertes argue. Nor does either case decide whether, as a matter of law, an EMT is an agent or representative of a city.

The Villafuertes have not demonstrated that the City had actual notice of their personal injuries through their statements to Saucedo-Ibarra.

b. Notice of property damage

The Villafuertes also argued in response to the City's summary-judgment motion that the Act's notice statute only requires notice of either death, injury, *or*

property damage, and so the City's awareness of the Villafuertes' property damage was sufficient to confer notice of their personal injuries as well. The City does not dispute that it had actual notice of the Villafuertes' property damage resulting from the car accident; thus, the relevant facts are undisputed, and the jurisdictional challenge is a question of law. *See Miranda*, 133 S.W.3d at 226.

The Villafuertes argued that the police report for the car accident acknowledges the property damage, attributes fault for the accident to the City, and identifies the Villafuertes, thus meeting the requirements for actual notice for any claim from the Villafuertes of death, injury, or property damage. *See Tenorio*, 543 S.W.3d at 776 (governmental unit has actual notice if it has "subjective awareness" of "(1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved").

The City argued that actual notice of property damage is not sufficient notice of personal injury, essentially arguing that a claimant must provide notice of each type of claim under the Act.

The text of Section 101.101 of the Act supports the City's position. Subsection (a) requires the formal notice to "reasonably describe . . . the damage or injury claimed." TEX. CIV. PRAC. & REM. CODE § 101.101(a). Subsection (c) states that Subsection (a) "do[es] 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." *Id.* § 101.101(c). And to have actual notice, a governmental unit must have the "same knowledge it is entitled to receive under the [formal] notice provisions of the [Act]." *Tenorio*, 543 S.W.3d at 776. Because a governmental unit is entitled to a reasonable description of the damage or injury claimed, notice of one type of claim does not constitute notice of another, different claim.

The Amarillo Court of Appeals reached the same conclusion in *Oswalt v. Hale County*, No. 07-21-00050-CV, 2022 WL 93613, at *3 (Tex. App.—Amarillo Jan. 10, 2022, no pet.) (mem. op.).[1] The court explained that, even though knowledge of an accident that caused property damage might lead a governmental unit to inquire further to determine if any person in the accident also suffered a personal injury, the Supreme Court has expressly rejected a duty of further inquiry in assessing actual notice. *Id.* at *4 (citing *City of San Antonio v. Cervantes*, 521 S.W.3d 390, 396 (Tex. App.—San Antonio 2017, no pet.) (citing *Tex. Dep't of Crim. Just. v. Simons*, 140

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[1] The court concluded: "[A]ctual notice of a claim for property damage does not equate to actual notice of personal injury." *Oswalt*, 2022 WL 93613, at *3. In doing so, the *Oswalt* court expressly disagreed with *City of Wichita Falls v. Jenkins*, 307 S.W.3d 854, 861 (Tex. App.—Fort Worth 2010, pet. denied). The *Jenkins* court, in dicta, noted it would have concluded the city had actual notice of the claimant's personal injuries because "a City representative had notice that a City-owned vehicle was at fault in an accident that caused at least $1,000 of vehicle damage and also knew the identities of all the persons involved in the accident." *Jenkins*, 307 S.W.3d at 861.

S.W.3d 338, 346–47 (Tex. 2004), *superseded by statute on other grounds as stated in Worsdale*, 578 S.W.3d at 74 n.113 (noting that legislature altered the holding in *Simons* that Section 101.101 is not jurisdictional)));[2] *see also City of San Antonio v. Johnson*, 140 S.W.3d 350, 351 (Tex. 2004) (per curiam) (rejecting notion that governmental unit has actual notice when it could ascertain its liability from incident either by further investigating or because of its obvious role in contributing to incident). The court in *Oswalt* also acknowledged that its conclusion was "guided by the rule of statutory construction that statutory waivers of sovereign immunity must be construed narrowly." *Id.* (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008)). Additionally, the court's conclusion "furthers the purposes of the notice requirement by allowing the governmental unit to more accurately assess its potential financial exposure to claims," noting the differences in terms of financial exposure between claims for property damage and personal injury. *Id.*

Thus, the City's awareness of the Villafuertes' property damage was not sufficient notice of their personal injuries because the City was entitled to notice of the specific claims against it and had no duty to further investigate the Villafuertes'

[2] "It is not enough [to establish actual notice] that a governmental unit should have investigated an incident as a prudent person would have, or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault." *Simons*, 140 S.W.3d at 347–48.

property damage claims to determine if it might have been at fault for other damages. *See* TEX. CIV. PRAC. & REM. CODE § 101.101(a); *Tenorio*, 543 S.W.3d at 776; *see also Oswalt*, 2022 WL 93613, at *4. Therefore, the Villafuertes have not demonstrated that the City had actual notice of their personal injuries through its notice of their property-damage claims.

Because the Villafuertes have not demonstrated that the City had actual notice of their personal-injury claims through Saucedo-Ibarra or through notice of their property-damage claims, the City's second point of error is sustained.

CONCLUSION

The Villafuertes have not established that the City either received timely formal notice or had actual notice of their personal-injury claims, and so they did not meet their burden to establish the trial court's jurisdiction over these claims. The trial court erred in denying the City's motion for summary judgment challenging jurisdiction.

We reverse the trial court's order denying the City's motion for summary judgment and render judgment dismissing the Villafuertes' personal-injury claims for lack of subject-matter jurisdiction.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.