In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00569-CV

PORTER MUNICIPAL UTILITY DISTRICT AND RONALD WAYNE LEE, Appellants

V.

KATRINA THORNTON MOORE, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 09-07-07353-CV

MEMORANDUM OPINION

Katrina Thornton Moore sued Porter Municipal Utility District and its employee Ronald Wayne Lee for negligence arising out of a motor vehicle accident. The defendants answered and filed a traditional and no-evidence motion for summary judgment. The trial court denied the motion, and the District and Lee filed this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(5),(8) (West 2008).

By statute, the claimant's provision of notice is a jurisdictional requirement in a suit against a governmental entity. *See id.* § 101.101 (West 2011); Tex. Gov't Code Ann.

§ 311.034 (West Supp. 2010); *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 324 S.W.3d 544, 548 (Tex. 2010). A party may bring an interlocutory appeal from a refusal to dismiss for want of jurisdiction. *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004).

In her response to the motion for summary judgment, Moore raised a fact issue on the issue of actual notice. We therefore affirm the trial court's order as to the District. Moore concedes that the claim against Lee must be dismissed. We reverse the trial court's order as to Lee.

REVIEW STANDARD

A movant for traditional summary judgment must establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). A no-evidence motion for summary judgment must be granted if, after adequate time for discovery, the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial, and the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006); *see* Tex. R. Civ. P. 166a(i). We consider the evidence in the light most favorable to the non-movant and resolve doubt in the non-movant's favor. *Urena*, 162 S.W.3d at 550 (citing *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985)). When a

material fact question is presented through evidence concerning a jurisdictional issue, the factfinder must resolve the fact question. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004).

NOTICE UNDER THE TEXAS TORT CLAIMS ACT

Under section 101.101, Moore was required to give notice of her claim to the District on or before January 30, 2008. Section 101.101 provides 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.
>
> (b) A city's charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and approved.
>
> (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. The Texas Supreme Court has construed this statute as entitling the governmental unit to formal, written notice of a claim within six months of the incident unless the governmental unit has actual notice. *Simons*, 140 S.W.3d at 339 (citing *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995)). Moore acknowledges she did not provide formal written notice by the deadline. She asserts the District had actual notice.

In *Cathey*, the Supreme Court explained that actual notice under section 101.101(c) requires knowledge of the parties' identities, knowledge by the governmental

unit of the claimant's injury, death, or property damage, and knowledge of the governmental unit's alleged fault that produced or contributed to the injury, death, or property damage. *Cathey*, 900 S.W.2d at 341; *see also Arancibia*, 324 S.W.3d 548-49. The Court has described the knowledge of fault as a defendant's '"subjective awareness of its fault, as ultimately alleged by the claimant, in producing or contributing to the claimed injury."' *Arancibia*, 324 S.W.3d at 549 (quoting *Simons*, 140 S.W.3d at 347). The Court has explained further that '"[w]hat we intended in *Cathey* . . . was that a governmental unit [must] have knowledge that amounts to the same notice to which it is entitled by section 101.101(a)."' *Arancibia*, 324 S.W.3d at 548-49 (quoting *Simons*, 140 S.W.3d at 347). The notice requirement's purpose is "to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial." *Cathey*, 900 S.W.2d at 341.

SUMMARY JUDGMENT EVIDENCE

The summary judgment evidence includes the depositions of Cathy Bate, Ronald Lee, and Jeffrey Kay. Lee, a District employee, testified he stopped at a stop sign. He stated that he looked both directions for any oncoming traffic, observed an oncoming car some distance away, and then pulled out on the highway to turn left. Lee explained that as he did so, the vehicle driven by Moore struck his vehicle "right behind the rear tire and bounced off [him] and hit a stop sign."

Cathy Bate, the "corporate representative" and office manager of the District, testified that she "oversee[s] the [District's] office." She works with all the engineers and the attorneys, and she runs the day-to-day operations of the office. Bate works with the District's Board of Directors, attends all the Board's meetings, and takes minutes. She testified the Board is responsible for insurance issues, and she is responsible for filling out insurance forms and reporting on accidents. She related that Lee, an employee of the District and the driver of the District's vehicle involved in the accident, called her while he was still at the scene and told her there had been an accident. Bate contacted the District's insurance agent, filled out a form on the accident for the insurance agent, and, at the agent's request, obtained a copy of the accident report from the sheriff's department. Bate also obtained repair quotes on the District's vehicle and sent them to the company that handled the claim.

Bate testified she reviewed the accident report:

> When I received the report from the sheriff's department on the accident and I read over it, there was no tickets received, and there was nothing indicating that there was any reason to investigate it any further. And this being the first accident that we had ever had, I didn't feel the necessity to investigate it any further, nor was I requested to do any other investigation.

Her testimony suggests that she had the authority to determine whether to investigate the accident further, and she saw no reason to do so.

Bate acknowledged, however, that the accident report indicated that Lee's failure to yield the right-of-way at the stop sign was a factor and condition that contributed to the accident. The car driven by Moore had to be towed away. Bate testified:

> [Plaintiff's Counsel]: You became aware after you reviewed the police report that the police officer -- the police officer's opinion was: Mr. Lee's conduct were the factors that contributed to the accident, correct?
>
> [Bate]: Correct.

Bate explained that after she reviewed the accident report and saw the officer's opinions, it crossed her mind that the District might have potential responsibility and liability for the wreck. However, she also testified she had no thought at all that the District might have some responsibility for any damages in the accident and did not have a subjective belief that the District was responsible for the accident. Bate explained that she did not do any investigation of any consequence, other than obtaining the accident report. She testified she reported the accident and submitted the accident report to the District's insurance carrier whose duty it was to investigate the accident. Bate maintained that it was not until the District was served with the lawsuit that she knew Moore was claiming the District was at fault.

NOTICE OF INJURY

The District argues that Moore never established that anyone with a duty to report to the District, or to investigate on its behalf, knew of Moore's alleged injuries. Jeffrey Kay, the District's field supervisor who drove to the accident scene, did not see any

evidence of injury to Moore. Lee testified he did not recall hearing Moore make any complaints at the accident scene, and she told him she was okay. However, according to Bate, Lee also told Bate that same day that Moore indicated she was going to go to the hospital to be checked out. In a statement given to the insurance adjuster after the accident, Lee indicated Moore left the accident scene after she stated "she had a twitching or something," and her family was going to take her to the hospital. At her deposition, Bate indicated she was not aware of the "twitching" claim. She testified:

> [Plaintiff's Counsel]: You had been told by Mr. Lee that Ms. Moore was going to go to the hospital.
>
> [Bate]: Correct.

The officer's accident report indicated Moore's airbag did not deploy and she was not injured.[1] Nevertheless, Bate knew that Moore went to the hospital right after the accident, and Bate understood medical bills would be incurred as a result of the accident.

NOTICE OF FAULT

The District also contends Moore did not establish that a representative of the District was subjectively aware of its fault. As noted in *Simons*, subjective awareness will often be proved by circumstantial evidence. *Simons*, 140 S.W.3d at 348.

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[1]Moore also attached to her response to the District's summary judgment motion certain letter correspondence, including correspondence from the District's insurance claims adjuster to Moore and to the law firm representing Moore, as well as correspondence from Moore's employer's workers' compensation carrier to the District's claims adjuster. The correspondence alludes to Moore's alleged injuries. In her deposition, Bate testified she had not seen any of this correspondence.

The District argues that Bate's "scant knowledge" of fault cannot be imputed to the District. As the District's "corporate representative" and the office manager, Bate was the District representative to the community and the person through whom the District dealt with the investigation of accidents. Bate stated in her affidavit that she is the person designated to receive notice of process and, should anyone choose to notify the District of a potential claim or complaint, she is the person who accepts the notice. Although Bate was not given the title of risk manager, actual notice may be imputed to a governmental unit through someone other than the risk management officer. *See Univ. of Tex. Health Science Ctr. at San Antonio v. Stevens*, 330 S.W.3d 335, 341 (Tex. App.—San Antonio 2010, no pet.) (citing *Simons*, 140 S.W.3d at 344, 347-48).

In *Simons*, the Texas Supreme Court explained the subjective-awareness-of-fault component of actual notice:

> It is not enough 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. If a governmental unit is not subjectively aware of its fault, it does not have the same incentive to gather information that the statute is designed to provide, even when it would not be unreasonable to believe that the governmental unit was at fault.

Simons, 140 S.W.3d at 347-48. The officer's report indicated that Lee's failure to yield the right-of-way at the stop sign was a factor contributing to the accident. Bate explained that although she considered the possibility of the District's liability as a result of the accident report, she concluded that the officer's failure to issue a citation meant the

District had no liability. "'[F]ault' as required under *Simons* is not fault as defined by *the defendant*, but rather 'as' ultimately alleged by *the claimant*.'" *Arancibia*, 324 S.W.3d at 550 (emphasis in original). Moore alleged that Lee was negligent in failing to yield the right-of-way. Bate's testimony demonstrates she considered the fault factor indicated in the report.

In *City of Dallas v. Carbajal*, 324 S.W.3d 537, 539 (Tex. 2010), the Supreme Court held that a police report -- showing that barricades were missing on a roadway -- was not evidence of a governmental unit's subjective awareness of its fault after an accident, because a private contractor or another governmental entity could have been responsible for the missing barricades. The police report here references Lee's conduct.

In *Arancibia*, Dr. Watson, an assistant professor of surgery at Texas Southwestern Medical Center, was present during the patient's surgery performed by two resident physicians. *Arancibia*, 324 S.W.3d at 546, 549. Watson reported to his supervisor that there had been a "'terrible outcome with a Surgery A patient.'" *Id.* at 549. Watson's supervisor found that a "'technical error'" during the hernia operation resulted in a "'through-and-through small bowel injury[,]'" and that "'[c]linical management contributed to' Arancibia's death." *Id.* The supervisor also stated that "'[a]lthough unfortunate, this is a recognized complication of laparoscopic hernia surgery[,]'" and "'[n]o standard of care issues were identified upon review.'" *Id.* The Texas Supreme Court indicated that although Dr. Watson's supervisor determined that there were no

standard-of-care violations, he nonetheless noted that a '"technical error"' was made, that clinical management contributed to Arancibia's death, and the care '"was not necessarily consistent with established standards.'" *Id*. The Court concluded that this record showed that Southwestern was subjectively aware of its fault. *Id*.

Similarly, Bate had knowledge that an accident had occurred and that Lee's failure to yield the right-of-way at the stop sign was identified by the officer as a factor contributing to the accident. Bate testified she considered the possibility of liability but, like the supervisor in *Arancibia*, Bate in effect concluded there must be no liability. She applied her own understanding of the law to the report. The fact that her legal interpretation may be incorrect does not negate her knowledge of the existence of a police report ascribing fault to Lee.

CONCLUSION

Moore presented evidence indicating Porter Municipal Utility District knew that Lee had been involved in a car accident resulting from his failure to yield the right-of-way, that the other car was damaged, and that the driver of the other car had been taken to the hospital. Through summary judgment evidence, Moore raised a fact issue precluding summary judgment on actual notice to Porter MUD under section 101.101(c). We overrule issues one and two.

We need not address issue three, which presents error in the alleged imputation of the insurer's knowledge to the District. Even if issue three is resolved in the District's

favor, Moore raised a fact issue on actual notice through other evidence in the record. We affirm the trial court's order denying Porter Municipal Utility District's motion for summary judgment.

Moore concedes that Ronald Wayne Lee is not a proper party to this lawsuit. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.106 (West 2011). We reverse the trial court's order as to Lee, and render judgment dismissing the claim against Lee.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART.

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DAVID GAULTNEY
Justice

Submitted on July 29, 2011
Opinion Delivered September 29, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.