In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00090-CV

TEXAS DEPARTMENT OF TRANSPORTATION, Appellant

V.

HALEY BROWN, Appellee

On Appeal from the 62nd District Court
Lamar County, Texas
Trial Court No. 82395

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

This interlocutory appeal arises from the denial of the Texas Department of Transportation's (TxDoT's) plea to the jurisdiction regarding Haley Brown's claims for personal injury from an accident occurring March 16, 2012.[1] Because (1) no evidence creates a fact issue whether Brown gave timely formal notice of the claim and (2) no evidence creates a fact issue whether TxDoT had timely actual notice of Brown's claim, we reverse the trial court's order denying the plea to the jurisdiction and render judgment dismissing Brown's claims for lack of subject-matter jurisdiction.

Brown was driving in a construction zone on U.S. Highway 82 when she "collided with an unmarked, un-barricaded construction machine that was parked in the right hand lane of the highway." She claimed that the barricade drums that were placed on the highway "between two lanes" failed to indicate which lane was closed. Brown sued TxDoT contractors, RK Hall Construction, LTD., RKH Capital, LLC, and Stacy Lyon d/b/a Lyon Barricade & Construction (collectively the Contractors), for negligence in causing her serious injury. The Contractors designated TxDoT as a responsible third party. On November 18, 2013, Brown amended her petition to include TxDoT as a party to the suit.

Brown alleged that TxDoT's governmental immunity was waived under the Texas Tort Claims Act (TTCA). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011). The TTCA requires pre-suit notice. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (West 2011); TEX.

[1]TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West Supp. 2015) (allowing an appeal from an interlocutory order denying a plea to the jurisdiction by a governmental unit).

GOV'T CODE ANN. § 311.034 (West 2013) ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity."). Brown's petition did not allege that she had provided TxDoT with any pre-suit notice, although she did claim, under Rule 54 of the Texas Rules of Civil Procedure, that all conditions precedent were met. *See* TEX. R. CIV. P. 54.

TxDoT's verified answer to Brown's lawsuit raised governmental immunity under the TTCA, alleged that Brown failed to provide notice of her claim within six months from the date of the accident as required to confer subject-matter jurisdiction under Section 101.101(a) of the Texas Civil Practice and Remedies Code, and denied that Brown had met all conditions precedent before filing suit. In her verification, Laura Joy, Director of the Worker's Compensation, Tort, and Liability Section (Section) of TxDoT, swore that her Section receives notices of claims and "that no written notice of claim ha[d] ever been received by [her] Section for the subject accident." TxDoT later filed a plea to the jurisdiction, which attached Joy's verification and argued that the trial court lacked subject-matter jurisdiction because Brown failed to provide the required notice under the TTCA.[2]

In response to TxDoT's plea, Brown argued that TxDoT had formal and actual notice of the claims. She attached the following summary judgment evidence:

- Her own affidavit, which described her version of the accident, but failed to address the question of whether she provided TxDoT with pre-suit notice.

[2]The Contractors filed no-evidence motions for summary judgment, which the trial court granted. The trial court severed the resulting take-nothing judgment against Brown from her claims against TxDoT. The Contractors are not parties to this appeal.

- TxDoT's responses to requests for production, which stated that TxDoT had no communications from Brown.
- A September 20, 2013, email from attorney Blair Partlow, attorney for RK Hall Construction, LTD., and RKH Capital, LLC, to Henley attaching an opinion from the Texas Attorney General regarding "TxDoT's request to withhold documents from Open Records request," with the notation "Maybe Ed will be able to come through with the brief that got a similar finding overturned in another case."[3]
- An August 5, 2013, letter opinion from the Attorney General's office (Letter Opinion) advising TxDoT how to respond to the request for information that it received "pertaining to State Project No. 2011," which involved U.S. Highway 82. The Letter Opinion recited that TxDoT "provide[d] documentation showing, that before TxDoT's receipt of the request for information, TxDoT received a notice of claim letter alleging that TxDoT's negligence regarding the project at issue resulted in a motor vehicle accident" and stated, "We understand the notice is in compliance with the TTCA."
- An incident detail report authored by Chad Stone, an employee of RK Hall Construction, LTD., stating that he had spoken to TxDoT inspector, Cody Reeves, about the incident around March 17, 2012.
- A March 19, 2012, email from Stone to several recipients informing them of the accident and of the substance of his report.
- The responding officer's police report stating that Brown was "under the influence of alcohol at the time of the crash."
- Reeves' deposition, which confirmed that he was a TxDoT employee and that he told a TxDoT area engineer about the accident soon after it happened.

On September 15, 2015, TxDoT replied to Brown's response to its plea to the jurisdiction. The response listed several objections to Brown's evidence and argued that the Letter Opinion should be disregarded because Brown did not show that it was related to her accident. Among other documents, TxDoT attached: (1) a December 30, 2011, accident report describing Servette Marcy's accident on Highway 82; (2) a May 30, 2013, open records request by Keith Cornwell,[4]

[3]W. Edward Carlton was counsel for Stacy Lyon d/b/a Lyon Barricade & Construction.

[4]Cornwell's request sought documents regarding "State Project No. 2011," including "[a]ny accident reports . . . which occurred on or near US 82," and "[a]ny correspondence and communications between TxDoT and RK Hall Construction, Ltd. regarding State Project No. 2011."

(3) a TxDoT June 12, 2013, internal memorandum discussing Cornwell's request and stating that "[a]lthough litigation is not pending at this time, TxDoT reasonably anticipates litigation" because it had received a notice of claim from Servette Marcy on December 30, 2011;[5] (4) Marcy's written statement of the events of her accident, (5) an email to Cornwell informing him that TxDoT had asked the Attorney General for an opinion on how to respond to the request, and (6) a TxDoT August 7, 2013, legal memorandum with the subject line "Request of Keith Cornwell, Dated May 30, 2013," that advised of the Letter Opinion. Thus, TxDoT established that the Letter Opinion that Brown attached in support of her claim that she had sent pre-suit notice was actually related to another accident.

Brown promptly filed an objection to the documents attached to TxDoT's reply on the ground that they were not timely filed since the summary judgment hearing was scheduled for September 17, 2015. *See* TEX. R. CIV. P. 166a(d). Although it did not enter a written order, the trial court orally denied Brown's objections with respect to the plea to the jurisdiction. After reviewing the evidence, the trial court denied TxDoT's plea to the jurisdiction, and this appeal followed.

In a single issue, TxDoT argues that the trial court erred in denying its plea to the jurisdiction because Brown did not give TxDoT timely formal notice of her claim and it did not have actual notice of Brown's claim before suit was filed. TxDoT asserts that the absence of timely notice is an incurable jurisdictional defect. *See* TEX. GOV'T CODE ANN. § 311.034

[5]This memorandum also stated that Cornwell was "seeking all reports and information regarding a crash on or about March 16, 2012, involving a vehicle driven by Haley Brown which collided with equipment owned by RK Hall Construction."

("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity."). We agree.

A plea to the jurisdiction challenges a trial court's subject-matter jurisdiction. *City of Dallas v. Carbajal*, 324 S.W.3d 537, 538 (Tex. 2010) (per curiam). "We review de novo the question of whether the trial court had subject-matter jurisdiction." *Tex. Dep't of Transp. v. Ingram*, 412 S.W.3d 129, 134 (Tex. App.—Texarkana 2013, no pet.) (citing *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex. 2002)); *see State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007). "The plaintiff bears the initial burden to allege facts affirmatively demonstrating the trial court's jurisdiction to hear a case." *Ingram*, 412 S.W.3d at 134 (citing Tex. *Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004); *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002) (per curiam)). Generally, a "plea should be decided without delving into the merits of the case," but the claims sometimes provide context to evaluate the plea. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *Ingram*, 412 S.W.3d at 134.

In a plea to the jurisdiction, a defendant may challenge either the plaintiff's pleadings or the existence of jurisdictional facts. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In this case, TxDoT challenged the existence of jurisdictional facts. "In cases such as this one, 'disputed evidence of jurisdictional facts that also implicate the merits of the case may require resolution by the finder of fact.'" *Ingram*, 412 S.W.3d at 134 (quoting *Miranda*, 133 S.W.3d at 226). "If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact-

finder." *Miranda*, 133 S.W.3d at 227–28. But, if there is only undisputed evidence or evidence that fails to raise a fact question on the jurisdictional issue, the plea to the jurisdiction should be decided as a matter of law. *Miranda*, 133 S.W.3d at 228 (standard is similar to no-evidence motion for summary judgment); *Ingram*, 412 S.W.3d at 134. Our evaluation of evidence should accept as true any evidence favoring the nonmovant. *Miranda*, 133 S.W.3d at 228.

Unless the State consents to suit, sovereign immunity denies subject-matter jurisdiction to the trial court. *Id.* at 224; *Ingram*, 412 S.W.3d at 134. The TTCA requires a plaintiff to timely notify a governmental unit of a claim in order to invoke a waiver of sovereign immunity under that statute. TEX. CIV. PRAC. & REM. CODE ANN. § 101.101. The notice provision requires this:

> (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.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a).

The purpose of the notice requirement is to ensure prompt reporting of claims to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial. *Tex. Dep't Criminal Justice v. Simons*, 140 S.W.3d 338, 344 (Tex. 2004); *Fox v. State*, 418 S.W.3d 365, 371 (Tex. App.—Texarkana 2013, no pet.). The failure to give the required timely notice deprives the trial court of subject-matter jurisdiction. *Carbajal*,

324 S.W.3d at 537–38; *Gaskin v. Titus Cnty. Hosp. Dist.*, 978 S.W.2d 178, 181 (Tex. App.—Texarkana 1998, pet. denied) (without timely notice, claim barred).

The two methods of accomplishing notice are formal written notice and actual notice. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a), (c). As we explain below, there is no evidence that Brown provided either.[6]

(1) No Evidence Creates a Fact Issue on Whether Brown Gave Timely Formal Notice of the Claim

To have received timely formal notice, TxDoT was entitled to written notification of a claim against it not later than six months after the day that the incident giving rise to the claim occurred. TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a). "The notice must reasonably describe: (1) the damage or injury claimed; (2) the time and place of the incident; and (3) the incident." *Id*. Formal notice must be submitted in writing. *Cathey v. Booth*, 900 S.W.2d 339, 340 (Tex. 1995) (per curiam).

Here, Brown's accident occurred March 16, 2012. Brown's formal notice was due to TxDoT by September 2012. Brown relies on the 2013 Letter Opinion to meet her burden to demonstrate that she sent pre-suit notice pursuant to the TTCA's requirements. However, although the Attorney General's letter referenced U.S. Highway 82, it did not reference Brown or indicate

[6]Brown raises a cross-point that argues that the trial court erred in allowing TxDoT's late-filed evidence establishing that the Letter Opinion was related to another accident. Because Brown's contention did not "seek to alter the trial court's judgment, but present an additional, alternative ground in support of the trial court's decision to affirm the [trial court's] order," we may consider the cross-point even though Brown did not file a separate notice of appeal. *Helton v. R.R. Comm'n of Tex.*, 126 S.W.3d 111, 120 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *see Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc*., 219 S.W.3d 563, 574 (Tex. App.—Austin 2007, pet. denied) (citing TEX. R. APP. P. 25.1). Here, we need not address Brown's cross-point because we choose to analyze the question of whether Brown provided formal or actual notice by referring only to the evidence filed before TxDoT filed its reply brief. In other words, even if we were to determine that the trial court erred in considering the evidence TxDoT attached to its reply brief, the result would be the same.

that the request for information involved her in any way. Thus, Brown did not meet her initial burden to show that the trial court had subject matter jurisdiction over her claims against TxDoT.

Brown argues that the Letter Opinion and the 2013 email from Partlow to Henley created a fact-issue as to whether TxDoT received formal notice of Brown's claims. We disagree. The 2013 email from Partlow to Henley does not mention when Brown sent formal notice to TxDoT, if ever. Although the burden never shifted to TxDoT on the issue of subject-matter jurisdiction, TxDoT's responses to requests for production set out undisputed evidence that it had no communications from Brown, and Joy's affidavit swore that TxDoT did not receive formal notice of Brown's claims.

Simply put, the evidence did not create a fact-issue as to whether Brown provided timely formal notice of her claims to TxDoT. Thus, unless TxDoT had timely actual notice of Brown's claims, its plea to the jurisdiction was meritorious.

(2) No Evidence Creates a Fact Issue on Whether TxDoT Had Timely Actual Notice of Brown's Claim

The TTCA provides an exception to the written notice requirement when the governmental unit has "actual notice that . . . the claimant has received some injury." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c). "Whether a governmental unit has actual notice of a tort claim is typically a question of fact best decided by the jury." *Gaskin*, 978 S.W.2d at 181. "However, the evidence must be of sufficient probative force to raise a fact issue." *Id.* (judgment may be proper where no evidence of actual notice exists to raise a genuine issue of fact).

For a governmental unit to have such actual knowledge, it must have "knowledge 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." *Cathey*, 900 S.W.2d at 341. The Texas Supreme Court later clarified the meaning of the second requirement:

> What we intended in *Cathey* by the second requirement for actual notice was that a governmental unit have knowledge that amounts to the same notice to which it is entitled by section 101.101(a). That includes subjective awareness of its fault, as ultimately alleged by the claimant, in producing or contributing to the claimed injury. We observed that, if a governmental unit had this awareness of fault, along with the other information to which it was entitled under section 101.101(a), then requiring formal, written notice in addition would do nothing to further the statutory purposes of information gathering, settling claims, and preparing for trial.

Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia, 324 S.W.3d 544, 548–49 (Tex. 2010) (citations omitted). "Fault, as it pertains to actual notice, is not synonymous with liability; rather, it implies responsibility for the injury claimed." *Id.* at 550.

Brown argues that TxDoT had actual notice because it had (1) the accident report, (2) Stone's incident report, (3) notice of the accident through a TxDoT area engineer, and (4) the 2013 Letter Opinion. We have already explained why the Letter Opinion constituted no evidence of timely notice. Thus, we analyze whether TxDoT had actual notice of Brown's claims through its receipt of the remaining information.

"Accident reports are often insufficient to provide actual notice under the Tort Claims Act." *City of Houston v. McGowen*, No. 14-13-00415-CV, 2014 WL 2039856, at *6 (Tex. App.—Houston [14th Dist.] May 15, 2014, no pet.) (mem. op.) (citing *Carbajal*, 324 S.W.3d at 538–39 (holding a police report did not provide the city with actual notice of a motorist's claim); *Rojas v. Cnty. of El Paso*, 408 S.W.3d 535, 541–42 (Tex. App.—El Paso 2013, no pet.) (Act's notice requirements not met, though accident report contained some information required of formal

written notice, because no evidence of county's subjective awareness of its fault for appellants' injuries). Further, merely investigating an accident does not provide a governmental unit with subjective awareness of its fault. *Id.* at 541.

The accident report in this case states that the accident occurred because Brown was operating a vehicle at night while drunk. The report also contemplates her arrest for DWI. Stone's incident report also stated that Brown was inebriated when she "drove behind barrels in closed lanes and struck [a] company owned Shuttle Buggy." According to this report, the responding police officer stated that Brown had been drinking, that "[t]here was one COORS Light beer in her front seat cup holder and several unopened cans in the Coor[s] Light box that had been sitting in the back seat," and that he "was concerned that [Brown] would be charged with DWI." Reeves testified that he informed a TxDoT employee about the accident, but nothing suggests that TxDoT had awareness that it might be considered at fault in causing or contributing to the accident.

Here, no summary judgment evidence raised a fact question as to TxDoT's subjective awareness of its alleged fault in Brown's accident. In fact, the information received by TxDoT suggested only that Brown caused the accident. Thus, Brown failed to provide any evidence showing that TxDoT had actual notice of her claims within six months of the date of the accident.

Because Brown failed to bring forth any evidence showing that TxDoT had formal or actual notice of her claims against it, TxDoT's governmental immunity was not waived under the TTCA. Accordingly, the trial court was without subject-matter jurisdiction to hear the dispute and was required to grant TxDoT's plea to the jurisdiction. Therefore, we reverse the denial of the plea to

the jurisdiction and render judgment dismissing Brown's claims against TxDoT for lack of subject-matter jurisdiction.

Josh R. Morriss, III
Chief Justice

Date Submitted: February 23, 2016
Date Decided: March 22, 2016