NO. 12-16-00002-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, APPELLANT	***§***	***APPEAL FROM THE 349TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
GARY HETZLER, APPELLEE	***§***	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

Texas Department of Criminal Justice (TDCJ) appeals the trial court's order denying its motion for summary judgment. In one issue, TDCJ argues that the trial court erred in denying its motion because it demonstrated as a matter of law that it was entitled to sovereign immunity. We affirm.

BACKGROUND

Hetzler is an inmate incarcerated at a TDCJ facility. He filed the instant suit in July 2012. In his petition, Hetzler alleges that on April 14, 2012, he was working in a TDCJ food service kitchen as a cook. At that time, he was pouring gravy into a steel insert at the steam kettle in the kitchen. According to Hetzler's pleadings, when he picked up the insert and turned, his foot slipped on the edge of a hole in the floor next to a drain. As he slipped, gravy splashed on his left arm, causing him to drop the steel insert. When the insert fell, it splashed gravy on his face and thumb, burning them. Heltzer alleged that TDCJ's employees were grossly negligent in ordering him to work around this hole in the floor.

Hetzler filed two grievances prior to filing suit. In his Step One grievance, he states that he is not the first person burned due to these conditions. In his Step Two grievance, he states that there is a hole in the floor by the steam kettle and "you can see rebar and chunks missing."

Furthermore, Hetzler's TDCJ Housing/Job Assignment History indicates that he had been assigned to work in the kitchen beginning on January 5, 2012. He is listed on the job turnout roster as a "kitchen helper 2nd" on February 21, 2012, March 1, 2012, March 2, 2012, March 6, 2012, and March 7, 2012. Furthermore, on March 28, 2012, April 2, 2012, and April 13, 2012, Hetzler is listed on the job turnout roster as "cook 2nd."

The work orders for the kitchen indicate that work began to repair the tiles in front of the steam kettles and the drain pipes on or about June 2, 2011. The work orders specify that there is a need to repair the flooring in front of the steam kettles because tiles are coming loose from the floor. The repairs involved demolition of the kitchen area and were ongoing at the time of Hetzler's injury.

In May 2015, the parties filed competing motions for summary judgment and responses.[1] Ultimately, the trial court denied both Hetzler's and TDCJ's motions, and TDCJ filed this interlocutory appeal.[2]

SOVEREIGN IMMUNITY

In its sole issue, TDCJ argues that the trial court erred in denying its motion for summary judgment because it proved as a matter of law that it was entitled to sovereign immunity.

Standard of Review

The movant for traditional summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); ***Nixon v. Mr. Prop. Mgmt. Co.***, 690 S.W.2d 546, 548 (Tex. 1985). A defendant who conclusively negates at least one essential element of the nonmovant's cause of action is entitled to summary judgment as to that cause of action. *See* ***Randall's Food Mkts., Inc. v. Johnson***, 891 S.W.2d 640, 644 (Tex. 1995). Likewise, a defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment. ***Id.*** Once the movant has established a right to summary judgment, the nonmovant has the burden to respond to the motion and present to the trial court any issues that would preclude summary judgment. *See* ***City***

[1] Appellant's petition, his grievances, the TDCJ Housing/Job Assignment History, and the kitchen work orders are part of the summary judgment record.

[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (West Supp. 2016).

of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678–79 (Tex. 1979). The only question is whether an issue of material fact is presented. *See* TEX. R. CIV. P. 166a(c).

Moreover, when a party contends that summary judgment is improper because of an affirmative defense, it must do more than merely plead that defense. ***Bans Props., L.L.C. v. Hous. Auth. of City of Odessa***, 327 S.W.3d 310, 313 (Tex. App.–Eastland 2010, no pet.). An affirmative defense will prevent the granting of a summary judgment only if the defendant supports each element of the affirmative defense by summary judgment evidence. ***Id.***; ***Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.***, 106 S.W.3d 118, 124 (Tex. App.–Houston [1st Dist.] 2002, pet. denied). This requires evidence sufficient to establish at least a fact question on each element. ***Bans Props.***, 327 S.W.3d at 313.

Texas Tort Claims Act and Premises Defects

Sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless that state consents to suit. ***Doyal v. Tex. Dep't of Criminal Justice-Inst. Div.***, 276 S.W.3d 530, 533 (Tex. App.–Waco 2008, no pet.). The Texas Tort Claims Act (the Act) provides a limited waiver of sovereign immunity and allows suits against governmental units only in certain narrow circumstances. ***Id.*** (citing ***Tex. Dep't of Criminal Justice v. Miller***, 51 S.W.3d 583, 587 (Tex. 2001)). We look to the terms of the Act to determine the scope of the waiver and then consider the particular facts of the case before us to determine whether the case comes within that scope. ***Doyal***, 276 S.W.3d at 533.

The Act provides governmental liability for personal injuries caused by a condition of real property if the governmental unit would, were it a private person, be liable under Texas law. *See* ***City of Grapevine v. Roberts***, 946 S.W.2d 841, 843 (Tex. 1997); *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021, 101.022, 101.025 (West 2011). The Act provides different standards of care depending on whether the claim arises from an ordinary premise defect or a special defect. ***Roberts***, 946 S.W.2d at 843; *see* TEX. CIV. PRAC. & REM. CODE ANN. §101.022. If the condition causing the injury was an ordinary premise defect, the governmental entity owes the claimant the same duty that a private landowner owes a licensee. ***Cobb v. Tex. Dep't of Criminal Justice***, 965 S.W.2d 59, 62 (Tex. App.–Houston [1st Dist.] 1998, no pet.); *see* ***Roberts***, 946 S.W.2d at 843; *see also* TEX. CIV. PRAC. & REM. CODE ANN. §101.022(a). The duty a landowner owes a licensee is not to injure the licensee through willful, wanton, or grossly

negligent conduct. ***State Dep't of Highways v. Payne***, 838 S.W.2d 235, 237 (Tex. 1992). However, if the landowner has knowledge of a dangerous condition and the licensee does not, the landowner has a duty either to warn the licensee or to make the condition reasonably safe. ***Id.***; *see also* ***Cty. of Cameron v. Brown***, 80 S.W.3d 549, 561 (Tex. 2002).

Because the Act does not define the words "premises defect," the courts look to the ordinary meaning of the words. ***Cobb***, 965 S.W.2d at 62; ***Billstrom v. Mem'l Med. Ctr.***, 598 S.W.2d 642, 646 (Tex. Civ. App.–Corpus Christi 1980, no writ). "Premises" is defined as a building, its parts, grounds, and appurtenances. ***Cobb***, 965 S.W.2d at 62. A "defect" is defined as an imperfection, shortcoming, or "want of something necessary for completion." ***Id.***

We conclude that the cause of the Hetzler's injury, the slippery kitchen floor with missing floor tiles, was a premises defect. *See* ***id.*** (slippery floor held to be a premises defect) (citing ***State v. Tennison***, 509 S.W.2d 560, 562 (Tex. 1974) (same)). Therefore, the duty TDCJ owed to Hetzler was not to injure willfully, wantonly, or through gross negligence. *See* ***Cobb***, 965 S.W.2d at 62; *see also* ***Payne***, 838 S.W.2d at 237. However, because the summary judgment evidence indicates that Hetzler knew about the defect, he can recover only if he can prove gross negligence or willful, wanton conduct. *See* ***Cobb***, 965 S.W.2d at 62; ***Weaver v. KFC Mgmt., Inc.***, 750 S.W.2d 24, 26 (Tex. App.–Dallas 1988, writ denied); *see also* ***Brazoria Cty. v. Davenport***, 780 S.W.2d 827, 829 (Tex. App.–Houston [1st Dist.] 1989, no writ) (because jury found plaintiff knew of slippery condition, on appeal, judgment could be sustained only if evidence supported finding that County was grossly negligence).

Gross Negligence

Gross negligence is the entire want of care which raises the conclusion that the act or omission was the result of conscious indifference to the welfare of the injured party. ***Universal Svcs. Co., Inc. v. Ung***, 904 S.W.2d 638, 640 (Tex. 1995); ***Burk Royalty Co. v. Walls***, 616 S.W.2d 911, 922 (Tex. 1981); ***Davenport***, 780 S.W.2d at 829. Ordinary negligence rises to the level of gross negligence if the defendant's act or omission shows it was aware of the danger and did not care enough to avoid it. ***Cobb***, 965 S.W.2d at 63; *see* ***Burk Royalty***, 616 S.W.2d at 920; ***Davenport***, 780 S.W.2d at 829.

Here, TDCJ argues that the work orders in the summary judgment evidence demonstrate that it was not grossly negligent. Specifically, it contends that the evidence supports that its employees were not negligent and took steps to remedy the situation by ordering the floor to be

repaired in June 2011. The work order on which TDCJ relies indicates that, in making these repairs, TDCJ engaged in extensive demolition of the kitchen floor to install a new floor drain system. But it further appears from these work orders that replacing the tiles around the steam kettle did not occur until after Heltzer's injury. The record further indicates that Hetzler was required to work in the kitchen on multiple occasions during this approximately ten month period of repairs, which were ongoing at the time of his injury. Thus, despite the fact that TDCJ did not wholly ignore the issue, a jury could view this evidence and conclude that the work orders also demonstrate that TDCJ employees were grossly negligent because they were aware of the hazard and still required Hetzler to work on the unsafe kitchen floor, while it was undergoing an extensive period of demolition and repair. Therefore, we hold there is a fact issue regarding whether TDCJ was grossly negligent since there is evidence that its employees knew the floor was in need of repair but did not believe the problem to be serious enough to warrant its preventing Hetzler from working around it. *See* ***Cobb***, 965 S.W.2d at 63; *see also* ***Davenport***, 780 S.W.2d at 829.

Liability Under Texas Government Code, Section 497.096

Texas Government Code, Section 497.096 provides an affirmative defense to certain government employees. *See* ***Doyal***, 276 S.W.3d at 537. Section 497.096 provides as follows:

> An employee of the Texas Department of Criminal Justice, sheriff, employee of a sheriff's department, county commissioner, county employee, county judge, employee of a community corrections and supervision department, restitution center, or officer or employee of a political subdivision other than a county is not liable for damages arising from an act or failure to act in connection with community service performed by an inmate imprisoned in a facility operated by the department or in connection with an inmate or offender programmatic or nonprogrammatic activity, including work, community service, educational, and treatment activities, if the act or failure to act was not intentional, wilfully or wantonly negligent, or performed with conscious indifference or reckless disregard for the safety of others.

TEX. GOV'T CODE ANN. § 497.096 (West 2012). If it is determined that the affirmative defense in Section 497.096 applies to an officer or employee of TDCJ, TDCJ likewise is immune from suit. *See* ***Evans v. Tex. Dep't of Criminal Justice-Inst. Div.***, No. 01-07-00847-CV, 2008 WL 2548986, at *4 (Tex. App.–Houston [1st Dist.] Jun. 26, 2008, no pet.) (mem. op.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.021).

Thus, TDCJ is immune under Section 497.096 only if it can prove its employees did not act with intentional, willful, or wanton negligence or reckless disregard for Hetzler's safety. As

set forth above, there is a fact issue regarding whether TDCJ was grossly negligent. *See* ***Cobb***, 965 S.W.2d at 63.

Because there is a fact issue regarding whether TDCJ was grossly negligent, we hold that the trial correctly denied TDCJ's motion for summary judgment. TDCJ's sole issue is overruled.

DISPOSITION

Having overruled TDCJ's sole issue, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered June 21, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 21, 2017

NO. 12-16-00002-CV

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Appellant
V.
GARY HETZLER,
Appellee

Appeal from the 349th District Court
of Houston County, Texas (Tr.Ct.No. 12-0150)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.