COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS AND TEXAS DEPARTMENT OF TRANSPORTATION,	§	No. 08-18-00017-CV
	§	Appeal from the
Appellants,		
v.	§	384th District Court
RAFAEL NAVARRETTE,	§	of El Paso County, Texas
Appellee.	§	(TC# 2017DCV3084)

O P I N I O N

Appellee Rafael Navarrette has filed a motion for rehearing of our opinion and judgment dated March 19, 2021. We deny Navarrette's motion for rehearing, withdraw our opinion and judgment of said date, and substitute the following opinion in its place.

This case presents an interlocutory appeal by Appellants, the State of Texas and the Texas Department of Transportation (collectively, TxDOT), challenging the trial court's order denying TxDOT's motion to dismiss Navarrette's petition for bill of review. Navarrette sought a bill of review after the trial court had dismissed his claim for lack of subject matter jurisdiction and severed the remaining claim against another party. Navarrette based the petition for a bill of review on newly discovered evidence. TxDOT again sought dismissal of the claim against it based on lack of jurisdiction, which the trial court denied. Because we conclude the trial court erred in denying

TxDOT's motion to dismiss, we reverse and render judgment dismissing the petition for bill of review.

I. BACKGROUND

A. The original lawsuit

Rafael Navarrette sustained personal injuries on June 2, 2014, when he fell from a highway overpass while performing duties as a firefighter-EMT with the El Paso Fire Department. At about 2:30 a.m., Navarrette's unit responded to an automobile accident on a Loop 375 overpass in El Paso. A car with a flat tire had pulled to the side, and while occupants changed its tire, they were struck by another vehicle. Arriving on scene, Navarrette learned there were three critical patients with life threatening injuries. Two of the injured persons had been ejected over a cement barrier of the overpass, each landing on the other side on a concrete drainage swale. To render aid, Navarrette carried a wooden backboard from his rescue vehicle to a young woman who sustained a severe leg injury. While running to his patient, Navarrette suddenly fell from the overpass to the ground below, a distance of twenty to thirty feet. Although he survived, he sustained significant injuries from the fall from the overpass.

On September 18, 2015, Navarrette filed suit asserting claims of premises liability and negligence against both TxDOT and the County of El Paso. By first amended petition, he added claims against defendant A.S. Horner, Inc., the contractor who had constructed the overpass from which he fell. Referring to the area where the two injured persons had landed over the concrete barrier, the lawsuit alleged that: "[w]hile between the barricades, on a defectively designed and installed cement catwalk without restraining railings he fell 20 to 30 feet through a 3½ or 4 feet opening." He also alleged he suffered injuries "caused by a dangerous condition on the road/personal property of Defendants, which Defendants knew or, in the exercise of ordinary care,

should have known existed." More specifically, he asserted that TxDOT "negligently caused or negligently permitted such condition to exist and negligently failed to correct the condition and failed to warn Plaintiff of the dangerous condition of the premises, despite the fact that Defendants, their agents, servants and employees knew, or in the exercise of ordinary care, should have known of the existence of the condition and that there was a likelihood of someone being injured as happened to Plaintiff." Additionally, under an alternative theory of liability, he asserted a series of negligent acts by TxDOT in: "failing to inspect the catwalk in order to discover the dangerous condition," "failing to [ensure] the catwalk design was safe," "failing to maintain the catwalk," "failing to maintain, repair, construct, and design [] the bridge and catwalk safely," and "failing to correct the dangerous condition which was created by the Defendants."

Navarrette alleged he gave TxDOT notice of claim on May 19, 2015, within a year after his fall but outside the six-month deadline imposed by the Texas Tort Claims Act (TTCA). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a). That notice was given in the form of a letter addressed to the governor of the State of Texas. TxDOT thereafter filed a plea to the jurisdiction challenging the trial court's subject matter jurisdiction. First, it asserted that Navarrette's written notice of claim was *not* timely as it was not provided within the six-month period mandated by the statute. And second, that TxDOT did not otherwise have actual notice of the claim. *Id.* § 101.101(c). The plea was supported by the verification of Laura Joy, stating:

> I am the Director of the Worker's Compensation, Tort and Liability Section of TxDOT, which is the Section that receives notices of claims for potential Texas Tort Claim Act suits against TxDOT.
>
> After reviewing the records of my Section, I have discovered and determined that no written notice of claim has ever been received by the Worker's Compensation, Tort and Liability Section of TxDOT for the subject accident prior to the filing of the above described suit, and there has been no report made to this office of the event in question or any subjective awareness of culpability on the part of TxDOT,

> so upon my oath and affirmation, I depose and say that TxDOT had no actual notice of the event alleged in the Plaintiff's Original Petition.

The trial court abated its ruling on the plea for a period of sixty days to give Navarrette the opportunity to conduct discovery on the issue of whether TxDOT had actual notice as required by the TTCA. Although Navarrette sought to depose Laura Joy during that interim, TxDOT asserted she was no longer employed by the agency. Instead, TxDOT produced Corey Smyth for deposition, who testified he had helped Joy with researching whether TxDOT's claims system demonstrated that TxDOT had received notice of Navarrette's claim within the required time. Based on his search of the system, he testified no one at TxDOT received notice of injury within six months of the date of Navarrette's injury. He acknowledged, though, that he did not inquire beyond records of the Occupational Safety Section. He testified he expected that if notice of injury had been received then it would be that section of the agency that would be informed. He admitted, however, that he did not directly contact either the El Paso or regional office to determine if notice of Navarrette's injury had been received by those offices.

The trial court granted TxDOT's plea to the jurisdiction, dismissed Navarrette's claims against it with prejudice, and severed the dismissed claim from the pending suit.[1] Navarrette filed no post-judgment motion or appeal challenging that dismissal ruling.

B. Romero's testimony

While pursuing his claim against defendant A.S. Horner, Inc., Navarrette deposed Ricardo Romero, P.E., the TxDOT area engineer who oversaw the work of the project manager, and the work of inspectors charged with ensuring the project was built according to plans. He testified the

[1] The trial court dismissed Navarrette's claims against the County but denied A.S. Horner, Inc.'s motion for summary judgment seeking a take-nothing judgment. That summary judgment ruling is the subject of a permissive interlocutory appeal issued this same day in Cause Number 08-18-00044-CV, styled *A.S. Horner, Inc. v. Rafael Navarrette.*

overpass was completed as of April 15, 2014, weeks prior to the fall. He described the project itself as "two direct connects," wherein one direct sends traffic from Loop 375 north to Zaragoza west, while the other sends traffic from Zaragoza west to Loop 375 south.

Romero testified he learned of Navarrette's injury, within a couple of weeks of the incident, from the maintenance section under his charge. When asked whether he recalled how he was made aware of Navarrette's accident, Romero responded:

> Yes. The Area Office also has a maintenance section, and every once in a while[,] when something happens on the state highway, this being a state highway -- Loop 375 being a state highway, they were called out on a -- TxDOT does a number of things when they're called out. One is clean up after the accident, and the other is traffic control after the accident. But if I remember correctly, talking to our maintenance section about this, they were actually not called that night. They were -- they knew about this the following morning.

Romero described that Navarrette fell from "a drainage concrete swale that separates the two barrier walls that separate the Loop 375 northbound traffic and the direct connect that was built by A.S. Horner that sends traffic onto Zaragoza east." When asked for details about what information was conveyed to him by members of the maintenance section, Romero testified as follows:

> Q: [Navarrette's counsel]: And did [the maintenance section] convey to you that a gentleman, first responder, Mr. Navarrette, had fallen through this gap in between the interchange and the highway?
>
> A: [Romero]: Yes, amongst other things. And they weren't specific about what happened. There was an accident in that area, and that's why the responders were there. That was more a general description of what happened. Specifically of someone falling over, that was until later.
>
> Q: [Navarrette's counsel]: All right. When did you find out that somebody had fallen in between that gap between the interchange and the roadway -- the highway?
>
> A: [Romero]: A couple of weeks later.

Q: [Navarrette's counsel]: Okay. And when you found out that a gentleman, specifically my client, you know now, Mr. Navarrette, fell in between that gap between the interchange and Loop 375, did you do anything in response to that?

A: [Romero]: No.

Q: [Navarrette's counsel]: Did you go out there?

A: [Romero]: No.

Q: [Navarrette's counsel]: Take any pictures?

A: [Romero]: No.

Q: [Navarrette's counsel]: Talk to anybody?

A: [Romero]: No.

He confirmed that he did not document the information provided to him by the maintenance crew, nor relay it to anyone else at TxDOT. With further questioning, he revealed the maintenance section ordinarily kept a diary of their activities and, as far as he knew, the diary would show any time workers had spent at the scene. He agreed that "if maintenance was aware of the fall of Mr. Navarrette, that may be something documented in the diary[.]"

C. Petition for bill of review

On September 1, 2017, eight months after Romero gave his deposition, Navarrette filed an original petition for bill of review seeking to reinstate his claim against TxDOT. Navarrette asserted that newly discovered evidence established that TxDOT had actual notice of his injury within six months of its occurrence. In support, he incorporated the pleadings, discovery, motions, and other jurisdictional evidence which had been filed in his prior suit, as well as the transcript of Romero's later testimony. His bill asserted that, due to responses TxDOT had given in response to certain discovery requests, that TxDOT intentionally prevented him from discovering evidence of its actual notice of the incident prior to the dismissal of his claim.

TxDOT answered and moved to dismiss the bill of review on several grounds, asserting: first, that Navarrette did not provide prima facie evidence of a meritorious defense to the prior judgment because there was no evidence that TxDOT had the requisite notice of Navarrette's claim within six months of the incident; second, that the allegedly dangerous condition was a result of TxDOT's discretion, and thus the underlying claim did not invoke any waiver of governmental immunity; third, that Navarrette failed to plead facts sufficient to establish the remaining two elements of a bill of review; and finally, that Navarrette did not present prima facie proof of each element of his underlying premises liability claim.

The trial court denied TxDOT's motion to dismiss by written order dated January 24, 2018. TxDOT filed this interlocutory appeal based on TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8).

II. ISSUES ON APPEAL

In five issues on appeal, TxDOT asserts the trial court erred in denying its motion to dismiss Navarrette's petition for bill of review for lack of jurisdiction, asserting that: (1) Navarrette's claim is barred because he failed to comply with the statutory notice of claim requirement of the TTCA; (2) Navarrette's claim is barred by the discretionary powers exclusion to the TTCA's waiver of sovereign immunity; (3) Navarrette did not establish his entitlement to judgment on his underlying premises liability claims; (4) Navarrette did not allege or prove extrinsic fraud; and (5) Navarrette did not demonstrate a good excuse for his lack of diligence. Responding, Navarrette argues the trial court properly denied TxDOT's motion to dismiss; but, in the event we conclude otherwise, he also contends the case should be remanded to allow him an opportunity to replead his claim to invoke the trial court's jurisdiction.

We focus on the first issue regarding actual notice of claim. We conclude the first issue is

dispositive of this appeal. *See* TEX. R. APP. P. 47.1.

III. DISCUSSION

A. Standard of review and applicable law

Ordinarily, we review the grant or denial of a bill of review under an abuse of discretion standard, *see Manley v. Parsons*, 112 S.W.3d 335, 337 (Tex. App.—Corpus Christi 2003, pet. denied), except when the inquiry involves a question of law. *See Mosley v. Dallas Cty. Child Protective Servs. Unit of Texas Dep't of Protective & Regulatory Servs.*, 110 S.W.3d 658, 661 (Tex. App.—Dallas 2003, pet. denied). Here, however, TxDOT does not appeal the trial court's grant of the petition for bill of review. Rather, TxDOT is challenging—within a bill of review proceeding—the trial court's denial of its motion to dismiss based on lack of jurisdiction.

A bill of review is an equitable action brought to set aside a final judgment in a former suit that is otherwise no longer appealable or subject to the trial court's plenary power. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *see also* TEX. R. CIV. P. 329b(f) ("On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause[.]"). Recognizing the fundamental importance to the administration of justice that final judgments be accorded some finality, courts do not readily grant equitable bills of review. *Valdez v. Hollenbeck*, 465 S.W.3d 217, 226 (Tex. 2015). Such proceeding is proper, however, "where a party has exercised due diligence to prosecute all adequate legal remedies against a former judgment, and at the time the bill of review is filed, there remains no such adequate legal remedy still available because, through no fault of the bill's proponent, fraud, accident, or mistake precludes presentation of a meritorious claim or defense." *King Ranch*, 118 S.W.3d at 751. Because a bill of review is a direct attack on a final judgment, it must be brought in the court that rendered the original judgment, and only that

court has jurisdiction over the bill. *Valdez*, 465 S.W.3d at 226. To be successful, a bill of review complainant must allege and present prima facie proof of the following elements: (1) a meritorious claim or defense to the cause of action alleged to support the prior judgment, (2) which the complainant was prevented from making by official mistake or by the opposing party's fraud, accident, or wrongful act, (3) unmixed with any fault or negligence by the complainant. *Id.*; *King Ranch*, 118 S.W.3d at 752. When a trial court grants a bill of review and sets aside a judgment rendered in a prior case, the subsequent trial on the merits must occur in the bill of review proceeding itself, not in the underlying case in which the judgment is vacated. *Alaimo v. U.S. Bank Tr. Nat'l Ass'n*, 551 S.W.3d 212, 216 (Tex. App.—Fort Worth 2017, no pet.); *see Retzlaff v. Mendieta-Morales*, 356 S.W.3d 676, 679 (Tex. App.—El Paso 2011, no pet.).

Generally, a trial court lacks jurisdiction over a bill of review if it is *not* the same court that rendered the challenged judgment. *See Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 504 (Tex. 2010). That is not to say, however, that jurisdiction is otherwise established over *all* such proceedings when brought in the proper court. For example, because immunity from suit is waived only by clear and unambiguous language from the Legislature, a trial court may arguably lack jurisdiction over certain petitions if the bill-of-review defendant is a governmental entity. *See generally Tooke v. City of Mexia*, 197 S.W.3d 325, 329 n.2 (Tex. 2006); *see also* TEX. GOV'T CODE ANN. § 311.034 ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity."). As relevant to the subject of this bill of review proceeding, Navarrete sued TxDOT based on the legislative waiver of the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a). "The Tort Claims Act provides a limited waiver of sovereign immunity, allowing suits to be brought against governmental units only in certain, narrowly defined circumstances." *Texas Dep't of Criminal*

Justice v. Miller, 51 S.W.3d 583, 587 (Tex. 2001). Referring to the waiver provision, *Miranda* described, "[s]overeign immunity to suit is waived and abolished to the extent of liability created by this chapter." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a)).

A motion to dismiss based on a lack of subject matter jurisdiction may be construed as a plea to the jurisdiction. *Erazo v. Sanchez*, 502 S.W.3d 894, 897 (Tex. App.—Houston [14th Dist.] 2016, no pet.). It is well established that subject matter jurisdiction is essential to the authority of a court to decide a case. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Whether a court has subject matter jurisdiction is a question of law reviewed de novo. *Miranda*, 133 S.W.3d at 226. Because sovereign immunity from suit defeats a trial court's subject matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *Id.* at 225-26. Similar to *Miranda*, this case presents a jurisdictional plea in which undisputed evidence implicates both the subject matter jurisdiction of the court and the merits of the case.

As *Miranda* instructs, the standard of review for such a jurisdictional plea generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c). *Id.* at 228. Under this standard, we credit evidence favoring the nonmovant and draw all reasonable inferences in the nonmovant's favor. *Id.* With such a plea, the defendant must initially assert the absence of subject-matter jurisdiction and present conclusive proof in support of that claim. *Id.* If the defendant discharges this burden, the plaintiff must then present evidence sufficient to raise a material issue of fact regarding jurisdiction, or the plea will be sustained. *Id.*

B. Analysis

In responding to TxDOT's plea to the jurisdiction, Navarrette contends he only must show the pleaded allegations, and jurisdictional evidence, created a fact issue on whether TxDOT had

actual notice of his underlying claim. Countering, TxDOT argues the procedural posture of the case, that is, a bill of review proceeding, notably alters the evidentiary standard applied to this case. As a bill of review proceeding, TxDOT argues Navarrette must make a prima facie showing of a meritorious claim—that is, first prove his claim was not barred as a matter of law and, second, prove that he would be entitled to a judgment even if TxDOT offered no contrary evidence.

In *Price* v. *Univ. of Texas at Brownsville Texas Southmost Coll.*, No. 13-16-00351-CV, 2017 WL 5505763, at *4 (Tex. App.—Corpus Christi Nov. 16, 2017, no pet.) (mem. op.), our sister court of appeals resolved a case of similar procedural posture, although the parties on appeal were in a reverse position with the appeal being advanced by the bill-of-review claimant, not the bill's defendant. *Id.* at *1. In that case, claimant Price filed a claim of disability discrimination against a governmental unit defendant based on provisions of the Texas Labor Code. *Id.* Following a hearing in which her counsel failed to appear, the trial court granted a plea to the jurisdiction based on the governmental defendant's assertion of sovereign immunity. *Id.* at *2. Afterwards, Price filed a petition for bill of review seeking to reinstate the underlying suit asserting her counsel's lack of appearance was not intentional nor the result of conscious indifference. *Id.* at *3. Responding to the bill of review petition, the governmental defendant filed a second plea to the jurisdiction contending that Price had not presented prima facie proof of the elements necessary to obtain a bill of review. *Id.* After the trial court granted the plea and dismissed the bill-of-review petition, Price appealed. *Id.*

When considering which standard of review to apply, the Corpus Christi Court of Appeals first recognized that, regardless of whether or how immunity had been waived for the equitable bill of review, the parties appeared to agree that the trial court had jurisdiction over Price's petition for bill of review *if and only if* she made a prima facie showing of the three equitable elements

required of a bill of review. *Id.* at *4. Though no party cited any case on point, *Price* assumed without deciding that the bill of review standard applied in the case. *Id.* And when applying that standard, *Price* concluded the bill-of-review claimant failed to make her required showing because she failed to make a prima facie showing of the first bill-of-review element. That is, the claimant failed to establish a prima facie showing of a meritorious claim. *Id.* Among other things, the court in *Price* found claimant's underlying suit was not timely filed pursuant to the Labor Code. *Id.* "To maintain a discrimination suit under the labor code, a complainant must first exhaust his or her administrative remedies by filing a complaint with the Texas Workforce Commission (TWC)." *Id.* at *5; *see also* TEX. LAB. CODE ANN. § 21.201. Without such showing, *Price* found the trial court lacked jurisdiction over the claim and the equitable proceeding. *Price*, 2017 WL 5505763, at *4. On review, we conclude we have a somewhat analogous circumstance here.

Regarding the issue of actual notice of claim, Navarrette alleged in his bill of review petition that he had obtained new evidence establishing that TxDOT received "notice" of his injuries pursuant to section 101.101 of the TTCA. And second, he further alleged he was not at fault nor negligent in failing to raise a meritorious defense to the earlier plea to the jurisdiction. Intertwining both allegations, he argued that, because the evidence showed that TxDOT had actual notice of his injuries, his new evidence established he had a meritorious defense to TxDOT's plea to the jurisdiction. Addressing the fault element of the bill of review proceeding, he asserted that TxDOT had concealed such evidence from him by its failure to candidly respond to discovery inquiries. Countering those assertions, TxDOT argued that because there was no evidence TxDOT had a subjective awareness of fault in connection with Navarrette's injury, he had not even raised a fact issue on actual notice, much less established the necessary showing to prevail on a bill of review. TxDOT also challenged Navarrette's assertions regarding the other elements required of a

bill of review action. On appeal, the parties essentially carried forward the same arguments in their briefing.

Like in *Price*, TxDOT and Navarrette appear to agree here that the trial court maintains jurisdiction over the bill of review proceeding *if and only if* Navarrette made a prima facie showing of the required elements of a bill of review action. *See Baker v. Goldsmith*, 582 S.W.2d 404, 406-07 (Tex. 1979). And, with regard to the first element, which requires a meritorious claim, they both argue about whether or not the newly discovered evidence raised a genuine issue of fact on the issue of actual notice of claim. Given the parties' agreement on this first issue, and following the approach of *Price*, we will assume—without deciding—that the bill of review standard is the proper standard to apply. *See Price*, 2017 WL 5505763, at *4.

A prima-facie showing is met if the bill of review petitioner would be entitled to judgment granting the bill if no evidence to the contrary were offered. *Baker*, 582 S.W.2d at 408-09. Prima facie proof may include evidence in any form that the trial court may receive in its discretion. *Id*. "The bill of review defendant may respond with like proof showing that the defense is barred as a matter of law, but factual questions arising out of factual disputes are resolved in favor of the complainant for the purposes of this pretrial, legal determination." *Id.* at 409. If the court determines that the bill-of-review complainant has not alleged and presented prima facie evidence of a meritorious defense, the proceeding terminates and the trial court must dismiss the case. *Id.* However, if the court finds that the complainant has alleged and presented prima facie evidence of a meritorious defense to the prior judgment, the court will conduct a trial on the bill of review. *Id.*

1. Whether Navarrette made a prima-facie showing that he has a meritorious defense to the prior judgment

As stated earlier, the first element of a bill of review requires a claimant to produce proof

of a meritorious defense or claim. *Id.* at 406-07. Here, it is undisputed that the plea to the jurisdiction in the prior lawsuit was based on TxDOT's assertion that it did not have actual notice of Navarrette's claim of personal injury within six months of its occurrence. "The Texas Tort Claims Act waives immunity for certain tort claims, including premises defects, 'to the extent of liability' under the Act." *Worsdale v. City of Killeen*, 578 S.W.3d 57, 62 (Tex. 2019) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.022). One jurisdictional prerequisite to suit under the Act is compliance with the statutory notice requirement. *Id.* That requirement provides that "[a] governmental unit . . . 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." TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a). The notice must reasonably describe the incident, the time and place of its occurrence, and the damage or injury claimed. *Id.* Such formal notice is not required, however, "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).

Thus, to make a prima facie showing of the first element of the bill of review, Navarrette must have presented prima facie proof precluding the granting of TxDOT's motion to dismiss or plea to the jurisdiction. *See Worsdale*, 578 S.W.3d at 66 (holding that when the evidence raises a jurisdictional fact issue that is intertwined with the merits, the trial court cannot grant the plea). If Navarrette's newly discovered evidence raises a prima facie showing as to TxDOT's actual notice of claim, he will have met the burden of proof required of the first element of his bill of review. *See Miranda*, 133 S.W.3d at 228. Based on the record presented, however, we cannot say that Navarrette carried that burden on the issue of actual notice as required by the TTCA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c).

Here, in presenting newly discovered evidence, Navarrette relies solely on the deposition testimony of TxDOT's area manager, Ricardo Romero, P.E. Specifically, he asserts that "Mr. Romero unequivocally admitted that TxDOT had actual knowledge of Plaintiff's incident and injuries well within six months of the date of the occurrence." But even when we view the evidence in favor of Navarrette, as we must, we conclude that it fails to even raise a fact issue regarding actual notice as that term is prescribed by section 101.101 of the TTCA, and controlling precedent. *See Worsdale*, 578 S.W.3d at 70-71 (concluding that "actual notice" requires not only knowledge of some harm but also information sufficient to identify the loss ultimately alleged such to alert the governmental unit to something impending); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c).

In expounding on the proper construction of the TTCA's notice provision, *Worsdale* observed that "the express use of coordinate language in subsections (a) and (c) and the structural relationship between the two—as rule and exception—cannot be ignored in discerning legislative intent." 578 S.W.3d at 70. Consequently, *Worsdale* instructs: "'actual notice' in subsection (c) essentially replicates subsection (a)'s 'notice of a claim' requirement because subsection (c) tethers actual notice to injuries suffered by a 'claimant.'" *Id.* Interpreting this statutory language, *Worsdale* observes that "[a] 'claim' is a statement that something yet to be proved is true, the assertion of an existing right, or a demand for money, property, or a legal remedy to which one asserts a right, and a 'claimant' is someone who asserts a right or demand." *Id.* (internal quotation marks omitted). Thus, from a plain-meaning standpoint, "the term 'notice,' in and of itself, refers to a 'warning' of something 'impending,' especially 'to allow preparations to be made.'" *Id.* And bringing all terms together, *Worsdale* reaches the following conclusion regarding the actual notice provision of the Act:

> Subsection (c) does not require that the governmental unit know that the claimant has actually made an allegation of fault[] but use of the term "claimant" necessarily refers to information identifying *which* loss. The statutory language, construed together rather than in isolation, requires not only knowledge of some harm but also information sufficient to (1) identify the particular loss ultimately alleged and (2) alert the governmental unit to something impending—for any number of reasons, but especially to allow preparations to be made.

Id. at 70-71 (internal citations omitted).

The Supreme Court further noted that "[a] recurrent theme in [its] jurisprudence is the importance of notice as a means of alerting governmental entities of the need to investigate claims." *Id.* at 64. That particular goal, *Worsdale* recognized, is not served "if a governmental unit is not subjectively aware that its alleged acts or omissions contributed to or produced injuries in the way the claimant ultimately alleges." *Id.* Consequently, "[w]hen the facts do not even *imply* the governmental unit's fault, they are legally insufficient to provide actual notice." *Id.* As a result, the Court has consistently held that "[k]nowledge that a death, injury, or property damage has occurred, standing alone, is not sufficient to put a governmental unit on actual notice for TTCA purposes." *City of San Antonio v. Tenorio*, 543 S.W.3d 772, 776 (Tex. 2018) (citing *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995)).

Thus, *Worsdale* emphasizes the standard by which actual notice of claim is assessed:

> We have plainly stated, however, that a governmental unit need only achieve subjective awareness of fault as ultimately alleged by the claimant. In other words, there must be subjective awareness connecting alleged governmental conduct to causation of an alleged injury to person or property in the manner ultimately asserted. The standard is necessarily subjective, because lack of formal notice is excused only by actual, not constructive, notice. Yet at the same time, subjective awareness of alleged fault requires neither adjudication of liability nor confession of fault.

Worsdale, 578 S.W.3d at 65 (internal quotation marks and citations omitted). Courts are instructed that the necessary fault establishing actual notice, "is not synonymous with liability; rather, it implies responsibility for the injury claimed." *Id.* at 66 (citing *Univ. of Texas Sw. Med. Ctr. at*

Dallas v. Estate of Arancibia, 324 S.W.3d 544, 550 (Tex. 2010)). Bringing it all together, "[a]ctual notice means the governmental unit is subjectively aware that it may be responsible for death, injury, or property damage in the manner ultimately alleged by the claimant." *Id.* at 77.

To better illustrate the distinctions, *Worsdale* described two prior opinions in which it had addressed the issue of actual notice, one in the context of an allegedly dangerous roadway condition and the other in the context of an allegedly negligent activity. *See id.* at 64-65 (citing *City of Dallas v. Carbajal*, 324 S.W.3d 537 (Tex. 2010) (per curiam) and *City of San Antonio v. Tenorio*, 543 S.W.3d at 772). In *Carbajal*, the plaintiff sued the City of Dallas for personal injuries she sustained when she drove her car onto an excavated road. *Carbajal*, 324 S.W.3d at 538. A police officer who had responded to the accident later completed an accident report describing that the plaintiff had driven her "veh[icle] into [a] gap in [the] street [that] was not properly blocked." *Id.* Carbajal contended that the police report provided the City with subjective awareness of the claim, thereby establishing actual notice under the Act. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c)). Rejecting the plaintiff's argument, the Supreme Court concluded the accident report failed to provide such notice. *Id.* Highlighting the report's deficiency, the Court explained: "[a]lthough both parties agree that the road was not properly blocked, the report here did not provide the City with subjective awareness of fault because it did not even imply, let alone expressly state, that the City was at fault." *Id.* at 539.

Consistent with that decision, the Court held similarly in *Tenorio.* In that case, a motorcycle operator was killed, and his passenger seriously injured when they were struck head-on by a vehicle that had been fleeing police officers. *Tenorio*, 543 S.W.3d at 775. The officers, however, had stopped their pursuit when the fleeing suspect entered a highway heading in the wrong direction. *Id.* at 774. Like in *Carbajal*, the Supreme Court rejected the witness statements and

police reports submitted by plaintiffs, when viewed alone, as satisfying the notice requirement of the statute:

> Evidence that a vehicle being pursued by the police is involved in a collision is not, by itself, sufficient to raise a fact question about whether the City, for purposes of the TTCA, had subjective awareness that it was in some manner at fault in connection with the collision. While the crash report listed a factor and condition contributing to the crash as "Fleeing or Evading Police," this is not an express statement or even an implication that the officers or the City were at fault in regard to the collision.

Id. at 778.

Worsdale itself, on the other hand, provides an example of facts sufficient to demonstrate actual notice of claim. In that case, a motorcycle operator and his passenger were killed when they collided with a mound of dirt spanning the entire width of an unlit road. *Worsdale*, 578 S.W.3d at 60. The obstruction was not marked by any warning signs or barricades. *Id.* Contrasted with *Carbajal* and *Tenorio*, the crash investigation of *Worsdale* revealed the City (1) was aware that the road had been obstructed for over two years, (2) it had not removed the obstruction because it believed that the county was responsible for the road, and (3) the City in fact owned the road because it had never passed an ordinance abandoning it. *Id.* Moreover, two days after the injuries were sustained, the City removed the dirt mound in its entirety from its location. *Id.* Based on that record, the Supreme Court concluded the City had actual notice of claim, describing:

> Well within section 101.101's six-month notice deadline, the City knew of allegations that it was responsible for maintaining a road and that the failure to maintain the road had been identified as a contributing factor to the injuries that provide the basis for this lawsuit. Whether the City believed it was liable or not is not the standard.

Id. at 66-67.

More recently, in *Reyes v. Jefferson County*, the Supreme Court similarly found the county had actual notice of a claim under the TTCA wherein the county's claims administrator knew about

the claimant alleging that he was injured when an on-duty police officer had crashed into him while driving a county-owned vehicle. 601 S.W.3d 795, 796 (Tex. 2020) (per curiam). The Court found the claimant's communications with the county's third-party administrator—coupled with its acknowledgment, investigation, and denial of his claim—established the subjective awareness of alleged fault required of actual notice. *Id.* at 798.

Here, in contrast, the newly discovered facts on which Navarrette relies to establish actual notice establish: (1) from maintenance employees, area engineer Romero learned the morning after the incident, that a vehicle accident had occurred on the overpass and someone had fallen from the structure; and (2) a few weeks later, Romero further learned, more specifically, that a first responder had fallen from the overpass while responding to the crash. No evidence, however, indicated that Romero, the maintenance workers, or some other person from TxDOT, had a subjective awareness of fault in connection with that overpass fall.

When asked if he did anything in response to learning of the incident, Romero testified negatively to each question. He did not go out to the area of the incident or otherwise engage in activities preparing for a response. For example, he described he did not take pictures or communicate with others within the agency after learning of the rescuer's fall. Based on Romero's testimony alone, we cannot say—nor can it be reasonably inferred from this record—that an issue of material fact exists as to whether TxDOT had a subjective awareness of fault. At most, Romero testified to learning of a firefighter's fall from an overpass, following a motor vehicle crash, and he confirmed he learned of this incident from the maintenance section who had either cleaned up after the accident or performed other tasks. Absent from this testimony, which is wholly relied on to support the bill of review, is any indication that Romero or the maintenance section were subjectively aware of not only some harm occurring but also aware of information sufficient to (1)

identify the particular loss ultimately alleged, and (2) to alert the agency of something impending such as to allow it to make further preparations. *See Worsdale*, 578 S.W.3d at 70-71.

As instructed by the Supreme Court of Texas, mere knowledge that an injury occurred, standing alone, is not enough to put a governmental unit on actual notice for purposes of the TTCA. *See Tenorio*, 543 S.W.3d at 776 (citing *Cathey*, 900 S.W.2d at 341); *Harris Cty. Sports & Convention Corp. v. Cuomo*, 604 S.W.3d 149, 154 (Tex. App.—Houston [14th Dist.] 2020, no pet.). Or, said differently, "mere knowledge that something happened somewhere to someone" does not satisfy the Act's notice requirement. *Worsdale*, 578 S.W.3d at 72.

Plainly, Romero's testimony acknowledging he was told by the maintenance crew that a rescuer fell from the overpass while responding to injuries from a motor-vehicle crash did not by itself raise a fact issue on TxDOT's actual notice of Navarrette's claim under the TTCA and controlling precedent. *See id.* at 70; s*ee also Tenorio*, 543 S.W.3d at 778 (knowledge that police pursuit was factor and condition contributing to crash insufficient to constitute actual notice of claim); *Carbajal*, 324 S.W.3d at 539 (knowledge of accident occurring through gap in street barricade not sufficient to constitute actual notice of claim). At minimum, actual notice requires subjective awareness by a governmental entity that it may be responsible for an injury in the manner ultimately alleged by a claimant. *See Worsdale*, 578 S.W.3d at 65.

The dissent argues that the maintenance department's reporting of Navarrette's fall to Romero meets the statutory requirement to establish that the maintenance employee may have had subjective knowledge of TxDOT's possible liability. But our record does not include any evidence from the maintenance section itself, or from one of its employees, establishing any other knowledge. Additionally, Romero himself testified the employee *only* reported that someone had fallen through a gap between the interchange and the roadway, and *not* that any party had alleged

some defect in the premises had contributed to the fall. This evidence, coupled with the fact that Romero did not take any subsequent actions whatsoever, nor pass any information on to others, coupled with the context of the information relating to a vehicular collision occurring on the overpass, only shows, at most, that TxDOT knew an injury had occurred, but it does not show any notice of claim, warning, or information, that identified the particular loss as ultimately alleged by Navarrette (i.e., a fall caused by a defectively designed and installed cement catwalk or swale without restraining railings). *See id*. at 70-71.

The dissent also criticizes Romero's policy of only investigating cases involving fatalities. However, by our Supreme Court jurisprudence, we are instructed that actual notice under the TTCA is a subjective standard, and even if it could be easily said that a prudent person would have investigated a particular incident, actual notice is not otherwise met under that circumstance. *See Tenorio*, 543 S.W.3d at 776 ("The actual notice requirement is not met just because the governmental unit (1) should have investigated an accident as a prudent person would have, (2) investigated an accident as part of its routine safety procedures, or (3) should have known it might have been at fault based on its investigation.").

Even with Navarrette's new evidence, we conclude he has not raised a fact issue as to whether TxDOT had actual notice of his claim—within six months of the incident—as he has not raised a fact issue regarding TxDOT's subjective awareness of fault or of something impending regarding the incident. As a result, we cannot say on this record that Navarrette met his evidentiary burden on the first element of his bill of review such as to show the trial court maintained subject matter jurisdiction over the case. Therefore, we conclude the trial court erred in denying TxDOT's motion to dismiss his bill of review. Because this holding is dispositive of the appeal, we need not determine whether Navarrette presented prima facie evidence of the other two elements of his bill

of review, or to otherwise address TxDOT's remaining issues.

2. Whether Navarrette should be afforded an opportunity to replead

Alternatively, Navarrette argues that he should be given an opportunity to replead his claim to allege facts sufficient to invoke jurisdiction under the TTCA. This opportunity is available when a jurisdictional challenge is based on a deficiency in plaintiff's pleading but the pleading "does not affirmatively demonstrate incurable defects in jurisdiction . . . ." *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *see Miranda*, 133 S.W.3d at 226-27. The opportunity to replead is not available, however, "if the pleadings affirmatively negate the existence of jurisdiction . . . ." *Brown*, 80 S.W.3d at 555. It is also not available if the jurisdictional challenge contests the existence of jurisdictional facts and the undisputed facts establish a lack of jurisdiction. *See Miranda*, 133 S.W.3d at 227.

We hold that the newly discovered evidence, even when construed in Navarrette's favor, does not constitute prima facie proof that Navarrette has a meritorious defense to the prior judgment. Instead, the evidence falls short of establishing a fact issue on TxDOT's notice of claim pursuant to the terms of the TTCA. In these circumstances, Navarrette is not entitled to an opportunity to replead.[2] *See Miranda*, 133 S.W.3d at 227; *Brown*, 80 S.W.3d at 555.

IV. CONCLUSION

The trial court erred in denying TxDOT's motion to dismiss Navarrette's bill of review. The trial court's January 24, 2018 Order denying TxDOT's motion to dismiss Navarrette's bill of review for lack of jurisdiction is reversed and judgment is rendered dismissing Navarrette's bill of review.

[2] We note that Navarrette does not identify any additional allegations or facts that could be raised in an amended pleading that would cure the lack of timely notice of claim.

GINA M. PALAFOX, Justice

November 18, 2022

Before Rodriguez, C.J., Palafox, J., and Larsen, J. (Senior Judge)
Rodriguez, C.J., dissenting
Larsen, J. (Senior Judge), sitting by assignment