Reversed and Rendered and Memorandum Opinion filed April 18, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00211-CV

NEEDHAM FIRE & RESCUE CO. AND MONTGOMERY COUNTY EMERGENCY SERVICES DISTRICT NO.4, Appellants

V.

ESMERALDA BALDERAS, INDIVIDUALLY AND AS NEXT FRIEND OF HEIDI PADILLA, A MINOR, Appellee

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On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2015-29756

M E M O R A N D U M O P I N I O N

This appeal arises from the denial of a plea to the jurisdiction. For the reasons stated below, we reverse and render.

FACTUAL BACKGROUND

On February 4, 2014, there was a collision between a motor vehicle driven by Esmeralda Balderas and a Needham Fire & Rescue Company truck, driven by Joseph Galleno, Jr. There was a passenger in Balderas' vehicle, her minor daughter, Heidi Padilla.

On May 22, 2015, Balderas filed suit against the Needham Fire & Rescue Company, Montgomery County Emergency Services District No. 4 ("ESD No. 4"), Galleno, and Montgomery County, Texas, for personal injuries sustained in the collision. Galleno was dismissed from the suit pursuant to section 101.106(e)[1] of the Texas Civil Practices and Remedies Code, and a nonsuit, without prejudice, was entered as to Montgomery County, Texas. Needham Fire & Rescue and ESD No. 4 filed a plea to the jurisdiction. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e) (West 2011). Following a hearing, the trial court denied the plea and from that order Needham Fire & Rescue and ESD No. 4 (collectively "appellants") bring this appeal.

STANDARD OF REVIEW

We review a trial court's ruling on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). If the evidence creates a fact question regarding jurisdiction, the trial court cannot grant the plea, and the fact question will be resolved by the factfinder. *Miranda*, 133 S.W.3d at 227–28. If the relevant evidence is undisputed or fails to raise a fact question, the trial court rules on the plea as a matter of law. *Id*. at 228.The standard of review for a plea to the jurisdiction based on evidence "generally mirrors that of

[1] Subsection (e) provides "If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e) (West 2011).

a summary judgment under Texas Rule of Civil Procedure 166a(c).” *Id.*; *see Thornton v. Ne. Harris Cty. MUD* 1, 447 S.W.3d 23, 32 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Under this standard, we take as true all evidence favoring the nonmovant and draw all reasonable inferences and resolve any doubts in the nonmovant’s favor. *Miranda*, 133 S.W.3d at 228. “[A]fter the state asserts and supports with evidence that the trial court lacks subject matter jurisdiction, we simply require the plaintiff[ ], when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue.” *Id.*; *see City of Galveston v. Murphy*, No. 14–14–00222–CV, 2015 WL 167178, at *2 (Tex. App.—Houston [14th Dist.] Jan. 13, 2015, no pet.) (mem. op.) (if the movant presents conclusive proof that the trial court lacks subject matter jurisdiction, then the nonmovant must present evidence sufficient to raise a material issue of fact regarding jurisdiction, or the plea will be sustained).

REQUIRED NOTICE

The parties do not dispute that Needham Fire & Rescue and ESD No. 4 are governmental units and immune from suit, except to the extent their immunity may be waived by the Texas Tort Claims Act (“TTCA”). *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.001 (West Supp. 2016). In their first issue, appellants contend immunity was not waived because Balderas failed to comply with the notice provision of the TTCA.

The TTCA requires a plaintiff to notify a governmental unit of a claim in order to invoke a waiver of sovereign immunity under the statute. Tex. Civ. Prac. & Rem. Code § 101.101 (West 2011).[2] The purpose of the notice requirement is to

[2] Section 101.101 of the Texas Civil Practices and Remedies Code provides, in pertinent part:

> (a) A governmental unit is entitled to receive notice of a claim against it under

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 Crim. Justice v. Simons*, 140 S.W.3d 338, 344 (Tex. 2004). The failure to comply with the notice requirements in the TTCA deprives the trial court of subject-matter jurisdiction. *City of Dallas v. Carbajal*, 324 S.W.3d 537, 537–38 (Tex. 2010) (per curiam). There are two methods of accomplishing notice: formal notice and actual notice. *See id*. We first address whether Balderas provided formal notice.

Formal Notice

Formal notice must be submitted in writing. *Cathey v. Booth*, 900 S.W.2d 339, 340 (Tex. 1995) (per curiam). Further, the notice must be received within six months after the day of the incident giving rise to claim. Tex. Civ. Prac. & Rem. Code § 101.101(a).

The record includes a copy of a letter addressed to the Needham Fire Department, dated April 30, 2014. An affidavit was filed by Steven Nelson, an employee of Balderas' former counsel, swearing that:

> 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.
>
> . . .
>
> (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 (West 2011).

> I personally drafted, placed in an envelope, stamped and mailed the attached letter to the Needham Fire Department on April 30, 2014, in order to comply with the statutory notice requirements of the Texas Tort Claims Act.
>
> The attached letter to the Needham Fire Department was never returned to our office even though the return address was on the outside of the envelope.

However, there is no evidence the letter was received by Needham Fire & Rescue or ESD No. 4 on or before August 5, 2014. The affidavit of Helen Capozzelli, custodian of the official records for Needham Fire & Rescue and the records management officer for ESD No. 4, avers as follows:

> Included among the official records of the Needham Fire Dept. and the EDS No. 4 are all letters and notices received by the Fire Chief and/or the two entities. These official records include any claims, notices, or letters submitted to the Needham Fire Dept., the EDS No. 4, and/or the Fire Chief regarding personal injuries or damages incurred by a third party as a result of an alleged act of negligence or fault on the part of the Needham Fire Dept., the FSD No, 4 and/or any of its employees.
>
> I have searched the official records of the Needham Fire Dept. and the ESD No. 4, and I have found no written claim, letter, or notice from Esmeralda Balderas, Heidi Padilla, and/or their representative that was received within six (6) months of the incident that now serves as the basis for Plaintiffs' lawsuit, and that reasonably describes the damages or injuries they claim, the time and place of the incident from which their alleged injuries occurred, and the incident itself. The first notice of claim, letter, or notice from Esmeralda Balderas, Heidi Padilla, and/or their representative regarding a claim against cither entity was in the form of service of the present lawsuit on the Needham Fire Dept. and the ESD No. 4 on July 15, 2015.
>
> Additionally, as an administrative assistant. I attend all open meetings of the [sic] both the Needham Eire Dept. and the ESD No. 4. The only discussion about the accident that occurred on February 4, 2014, between the Fire Truck Tanker driver, Joseph Galleno, Jr., and Esmeralda Balderas, was that the accident occurred, that there were injuries sustained in the accident, and that Esmeralda Balderas was

found at fault in the accident and received a citation. There was never any discussion or expressed opinion that the Fire Truck Tanker driver, Joseph Galleno, Jr. contributed to cause the accident.

Further, a claim for damage to the Fire Truck Tanker was made against the insurance currier for Esmeralda Balderas, and was ultimately paid by Balderas's insurance carrier.

According to the plain language of the TTCA, it is the date that the governmental unit receives notice—not when the claimant sends notice—that is controlling. *See* Tex. Civ. Prac. & Rem. Code § 101.101(a); *Adams v. City of Dallas*, No. 05-14-1143-CV, 2015 WL 7280893, at *2 (Tex. App.—Dallas Nov. 18, 2015, no pet.) (mem. op.).[3] Nelson's affidavit makes no claim that notice was *received.* Thus Capozzelli's affidavit that formal notice was never received was undisputed. Therefore, there is no fact issue that appellants received notice under subsection (a) of section 101.101. *See* Tex. Civ. Prac. & Rem. Code § 101.101(a) (West 2011).

Actual Notice

We therefore next address whether there is any evidence that Needham Fire & Rescue or ESD No. 4 had actual notice, an exception to the formal notice requirement. *See* Tex. Civ. Prac. & Rem. Code § 101.101(c) (West 2011). For a

[3] We note that the TTCA's more specific requirement of "receipt" to invoke a waiver of sovereign immunity controls over the more general requirement of "service" found in Texas Rules of Civil Procedure 21 and 21a. *See Columbia Hosp. Corp. v. Moore*, 92 S.W.3d 470, 473 (Tex. 2002) (applying the statutory construction principle that the more specific statute controls over the more general one). Thus we do not apply Rule 21a's presumption that a mailed notice was received. *See* Tex. R. Civ. P. 21a(a)(2), (b)(1), (d); *Tex. Dep't of State Health Servs. v. Gonzalez*, No. 13-14-259-CV, 2014 WL 7205332, at *4 (Tex. App.—Corpus Christi Dec. 18, 2014, no pet.) (mem. op.) (rejecting argument that mailbox rule applied to claim brought under the TTCA); *cf. Univ. of Tex. Med. Branch at Galveston v. Callas*, 497 S.W.3d 58, 64–65 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (holding Rule 21a applies to statutory requirement of section 74.351 of the Texas Civil Practice and Remedies Code that claimant "serve" expert report on opposing counsel even though report is not required to be filed with the court).

governmental unit to have actual notice, it must have knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to it; and (3) the identity of the parties involved. *Cathey*, 900 S.W.2d at 341; *see also Simons*, 140 S.W.3d at 344–48 (discussing the *Cathey* elements). Actual notice may be imputed to a governmental unit when its fault is obvious or an agent charged with a duty to investigate and report to the unit receives notice of the three *Cathey* elements. *Angleton Danbury Hosp. Dist. v. Chavana*, 120 S.W.3d 424, 427 (Tex. App.—Houston [14th Dist.] 2003, no pet.). If there is evidence to connect the accident to an action or omission by the governmental unit, such that it should have known of its potential culpability, an incident that triggers an investigation and accident report will impute such notice. *Id.* A governmental unit must have knowledge that equates to the same notice to which it is entitled under the statute. *Univ. of Texas Health Sci. Ctr. at Houston v. Cheatham*, No. 14-14-00628-CV, 2015 WL 3878111, at *3 (Tex. App.—Houston [14th Dist.] June 23, 2015, no pet.) (mem. op.). Such knowledge "'includes subjective awareness of its fault, as ultimately alleged by the claimant, in producing or contributing to the claimed injury.' " *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 324 S.W.3d 544, 548–49 (Tex. 2010) (quoting *Simons*, 140 S.W.3d at 347).

Balderas contends appellants had actual notice based upon the following:

- The chief of the fire department responded to the scene of the collision; and
- Appellants received a copy of the accident report on February 19, 2014;
    - The report noted Balderas was injured; and
    - The report contains the following statement by Padilla, "THE LIGHT TURNED GREEN. WE WENT AND THEN WE WERE HIT BY A FIRE TRUCK."

The accident report also contains the following information:

- Balderas was charged with failure to yield right of way to an emergency vehicle in an intersection;
- Balderas was transported to the hospital for possible injuries; and
- In the investigator's opinion Balderas' vehicle was a contributing factor.

The investigator did not find the fire truck to be a contributing factor. The letter sent by Balderas' lawyer contends that witnesses who "fail to appear in the police report . . . will verify they never heard a siren before the wreck occurred" but Balderas has not shown that appellants had timely notice of this alleged fault.

Balderas claims Padilla's statement the light was green "would clearly have given the fire department notice that at least ONE plaintiff believed the fire truck to be in the wrong." We disagree. Balderas was not charged with running a red light, but with failing to yield her right of way — the green light — to an emergency vehicle. The fact that the light was green was the grounds for the charge levelled against Balderas. It is not evidence that put appellants on notice that more than a year later Balderas would claim appellants were at fault.

Accident reports are often insufficient to provide actual notice under the Tort Claims Act. *See City of Dallas v. Carbajal*, 324 S.W.3d 537, 538-39 (Tex. 2010) (per curiam) (holding a police report did not provide the city with actual notice of a motorist's claim and dismissing the suit for lack of jurisdiction); *Rojas v. Cty. of El Paso*, 408 S.W.3d 535, 541–42 (Tex. App.—El Paso 2013, no pet.) (concluding the notice requirements were not met because there was no evidence of the County's subjective awareness that it was at fault for appellants' injuries); *City of San Antonio v. Herrera*, No. 04–13–00304–CV, 2013 WL 5653311 (Tex. App.—San Antonio Oct. 16, 2013, pet. filed) (mem. op.) (concluding police reports failed

to raise a fact issue as to whether the City had knowledge of its alleged fault in producing or contributing to the plaintiff's injury). Merely investigating an accident also does not provide a governmental unit with subjective awareness of its fault. *Simons,* 140 S.W.3d at 347–48.

Applying these principles, the mere presence of the chief of the fire department at the scene of the collision does not raise a fact issue regarding actual notice. *See City of Houston v. Atkins*, No. 14–10–01265–CV, 2011 WL 1744207, at *3 (Tex. App.—Houston [14th Dist.] May 5, 2011, no pet.) (mem.op.) (holding the evidence failed to present a jurisdictional fact issue regarding actual notice even though City employees were present at the scene of the accident). And in this case, the investigative report assigned fault for the accident to Balderas, not Galleno. *See City of Houston v. McGowen*, 14-13-00415-CV, 2014 WL 2039856, at *6 (Tex. App.—Houston [14th Dist.] May 15, 2014, no pet.) (concluding the City did not have actual notice where, among other things, the report did not assign fault); *cf Ortiz–Guevara v. City of Houston*, No 14–13–00384–CV, 2014 WL 1618371, at *2–4 (Tex. App.—Houston [14th Dist.] Apr. 22, 2014, no pet.) (mem. op.) (finding police report raised a fact question on the City's actual notice because it assigned fault to the City police officer involved in the accident). In fact, the record reflects that during the hearing on the plea to the jurisdiction appellants' counsel stated, without objection or correction, "there was a claim made against the plaintiff's insurance carrier, and it was — for the fire truck damage. It was paid." While this does not establish fault, it is consistent with appellants' position that they had no knowledge of their alleged fault in causing or contributing to Balderas' injuries.

We conclude there is no evidence in the investigative report record that raises a fact question as to appellants' subjective awareness of its alleged fault.

Thus there is no fact issue that appellants received actual under subsection (c) of section 101.101. *See* Tex. Civ. Prac. & Rem. Code § 101.101(c) (West 2011).

CONCLUSION

Under the applicable standard of review, we conclude there is no evidence Needham Fire & Rescue or ESD No. 4 received formal notice of Balderas' claim. Further, the evidence does not raise a fact question as to whether Needham Fire & Rescue or ESD No. 4 had actual notice. Lack of notice is an incurable jurisdictional defect. Accordingly, we sustain appellants' first issue. It is therefore unnecessary to address appellants' remaining issues. We reverse the trial court's order denying appellants' plea to the jurisdiction and render judgment dismissing Balderas' claims for lack of subject-matter jurisdiction.

/s/ John Donovan
Justice

Panel consists of Justices Busby, Donovan, and Brown.