Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00168-CV

City of **SAN ANTONIO**,
Appellant

v.

Carlos **MENDOZA**,
Appellee

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2016CI09979
Honorable Michael E. Mery, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: September 13, 2017

AFFIRMED

The City of San Antonio appeals from an interlocutory order denying its plea to the jurisdiction. We affirm.

BACKGROUND

On July 30, 2015, Frank Gonzales, an on-duty San Antonio City Park Police Officer driving a police car, rear-ended a van driven by Carlos Mendoza. Shortly after the accident, Gonzales's supervisor, Fidencio Herrera, arrived at the scene to investigate and spoke to Gonzales and Mendoza. Herrera prepared investigative reports concerning the accident.

Almost a year later, Mendoza sued the City of San Antonio for damages under the Texas Tort Claims Act, alleging that Gonzales's negligence had caused the accident and that Mendoza had sustained serious and permanent bodily injury in the accident. Mendoza's petition also alleged that the City was provided with formal and actual notice of his claims.

The City generally denied the allegations in Mendoza's petition. The City also filed a plea to the jurisdiction, arguing the trial court lacked subject-matter jurisdiction because Mendoza had failed to provide it with timely notice, either actual or formal, of his claim as required by law. In response, Mendoza did not dispute that his formal notice was untimely but argued that he had satisfied the notice requirement because he had told Gonzales and Herrera about his injury at the scene of the accident. Therefore, according to Mendoza, the City had actual notice of his injury. After a hearing, the trial court denied the plea to the jurisdiction. The City appealed.

NOTICE REQUIREMENT

Absent a waiver, governmental entities are generally immune from suits for damages. *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 324 S.W.3d 544, 546 (Tex. 2010). The Texas Tort Claims Act waives immunity from suit for negligent acts in certain circumstances, including personal injury arising from the operation or use of a motor-driven vehicle. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011). To take advantage of this waiver, a claimant must notify the governmental unit of the negligent act not later than six months after the day that the incident giving rise to the claim occurred. *Id.* § 101.101(a). The notice must reasonably describe the injury, the time and place of the incident, and the incident itself. *Id.*; *Arancibia*, 324 S.W.3d at 546. However, formal notice is not required "if the governmental unit has actual notice" "that the claimant has received some injury." TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c).

The purpose of section 101.101's notice requirement is to ensure the prompt reporting of claims in order to enable governmental units to gather information necessary to guard against

unfounded claims, settle claims, and prepare for trial. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). "The notice required by section 101.101 is jurisdictional and is a condition of the Act's waiver of immunity from suit." *City of San Antonio v. Cervantes*, 521 S.W.3d 390, 393 (Tex. App.—San Antonio 2017, no pet.); *see* TEX. GOV'T CODE ANN. § 311.034 (West 2013). Thus, in the absence of timely notice of a claim, a governmental unit retains its immunity from suit. *Cervantes*, 521 S.W.3d at 393-94 (citing *City of Dallas v. Carbajal*, 324 S.W.3d 537, 537-38 (Tex. 2010)).

PLEA TO THE JURISDICTION

Because immunity from suit defeats a trial court's subject-matter jurisdiction, it may be raised in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). "[A] court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). A plaintiff bears the burden of affirmatively demonstrating a trial court's jurisdiction. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012); *Cervantes*, 521 S.W.3d at 394.

"[I]n a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists." *Miranda*, 133 S.W.3d at 227. This standard generally mirrors the standard employed in evaluating summary judgments. *Id*. at 228. A jurisdictional issue implicates the merits of a case when the determination of many, if not most, of the challenged jurisdictional facts will also determine whether the plaintiff is entitled to relief on the merits. *Univ. of Tex. v. Poindexter*, 306 S.W.3d 798, 806 (Tex. App.—Austin 2009, no pet.).

When the jurisdictional issue does not substantially implicate the merits of the case, and the jurisdictional facts are disputed, the trial court makes the findings necessary to resolve the

jurisdictional issue. *See Miranda*, 133 S.W.3d at 226; *Cervantes*, 521 S.W.3d at 394; *Poindexter*, 306 S.W.3d at 806. Stated another way, "[w]hen a jurisdictional issue is not intertwined with the merits of the claims . . . disputed fact issues are resolved by the court, not the jury." *Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015). When the jurisdictional issue does not substantially implicate the merits of the case, and the jurisdictional facts are undisputed, the trial court makes the jurisdictional determination as a matter of law based solely on the undisputed facts. *Poindexter*, 306 S.W.3d at 806.

STANDARD OF REVIEW

Whether the trial court had subject-matter jurisdiction over Mendoza's suit is a question of law that we review de novo. *See Miranda*, 133 S.W.3d at 226; *Cervantes*, 521 S.W.3d at 394. In conducting our review, we presume that the trial court made the factual findings that support its order. *Cervantes*, 521 S.W.3d at 394; *Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161, 182 (Tex. App.—Austin 2013, no pet.) (explaining that when the jurisdictional facts do not overlap the merits of a claim, a reviewing court presumes that the trial court implicitly found (or failed to find) the facts in a manner that supports the judgment).

DISCUSSION

In a single issue, the City argues the trial court erred in denying its plea to the jurisdiction because Mendoza failed to present evidence that the City received formal or actual notice in a timely manner and, thus, the trial court lacked subject-matter jurisdiction because there was no waiver of the City's governmental immunity. As previously stated, Mendoza only relies on actual notice and does not dispute that the formal notice he provided was untimely.

We first address the correct trial court standard for analyzing the City's plea to the jurisdiction. Both the City and Mendoza argued below that the trial court was required to review the evidence to determine if a fact issue existed. However, the jurisdictional issue presented here—

whether the City had actual notice that Mendoza was injured in the accident—did not implicate the merits of Mendoza's suit. *See Cervantes*, 521 S.W.3d at 394 (concluding jurisdictional issue concerning actual notice of injury did not substantially implicate the merits of the plaintiff's suit). Again, a jurisdictional issue implicates the merits of a case when the determination of many, if not most, of the jurisdictional facts will also determine whether the plaintiff is entitled to relief on the merits of the case. *Poindexter*, 306 S.W.3d at 806. Because the jurisdictional issue in this case did not implicate the merits of Mendoza's claim, the trial court was required to consider the relevant evidence submitted by the parties and resolve the jurisdictional issue on the basis of the facts it found or the facts that were undisputed. *See Cervantes*, 521 S.W.3d at 394.

We now address the merits of the issue presented on appeal. In its plea to the jurisdiction, the City argued that Mendoza did not provide it with actual notice of his injury at the scene of the accident. According to the City, both Herrera and Gonzales had testified that Mendoza did not complain about any injury at the scene of the accident and, therefore, the evidence showed that Mendoza did not provide it with actual notice of his injury. In responding to the plea to the jurisdiction, Mendoza argued that he satisfied the notice requirement because the City had actual notice of the accident and its potential liability within one day of the accident. To support his argument, Mendoza relied on the investigative reports, which the City stipulated it received the day after the accident. These reports detailed the time and place of the accident, stated that the accident occurred because Gonzales became distracted while driving, and identified the parties to the accident. Mendoza further relied on Mendoza's deposition testimony stating that he had told Gonzales and Herrera immediately after the accident that he had a "slight pain."

The trial court denied the City's plea to the jurisdiction. Therefore, the trial court impliedly found that the City had received actual notice of Mendoza's claim. *See Cervantes*, 521 S.W.3d at 395. A governmental unit has actual notice of a claim when it has "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. To establish knowledge of an injury, it is not necessary that the governmental unit be absolutely certain of the nature and extent of the injury. *Cervantes*, 521 S.W.3d at 396. "Knowledge" requires "actual, subjective awareness." *Id*. (citing *Tex. Dep't. of Criminal Justice v. Simons*, 140 S.W.3d 338, 348 (Tex. 2004)). Subjective awareness may be proved by circumstantial evidence. *Simons*, 140 S.W.3d at 348. Finally, knowledge can be imputed to a governmental unit by an agent or representative who has a duty to gather facts and investigate. *City of Houston v. Daniels*, 66 S.W.3d 420, 424 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

The critical issue in this appeal is whether the evidence supports the trial court's implied finding that the City had knowledge of Mendoza's injury. The City does not challenge any of the other elements of actual notice. Mendoza maintains that the City had knowledge of his injury based on his communications with Herrera and Gonzales immediately after the accident.

The jurisdictional evidence before the trial court consisted of deposition testimony from Herrera, Gonzales, and Mendoza and several investigative accident reports. This evidence showed that Gonzales collided with Mendoza's van because he took his eyes off the road briefly to look at his laptop, and when Gonzales returned his gaze to the road, he was too close to Mendoza's van to avoid the collision. One of the investigative reports stated that the accident was "preventable" and that Gonzales had "failed to do everything he possibly could have done to prevent or avoid being involved in the accident." As future preventable action, the report recommended that Gonzales "be attentive while operating [a] patrol vehicle."

In his deposition testimony, Herrera testified that when he arrived at the accident scene he asked both Gonzales and Mendoza whether they were injured. According to Herrera, both Gonzales and Mendoza told him they were not injured. In one of the reports, Herrera indicated that

no injuries were sustained in the accident. Similarly, Gonzales testified in his deposition that he asked Mendoza if he needed an ambulance, but Mendoza stated that he was fine. Gonzales did not remember Mendoza's exact words, but the idea was that Mendoza was "okay." Gonzales did not see Mendoza rubbing or holding his back or crouching or trying to stretch out his back.

However, in his deposition, Mendoza testified that when Gonzales asked him if he was "okay," he responded by saying, "I have a slight, you know, pain." Mendoza indicated that at the time he was "bend[ing] down" and "kind of kneel[ing] down, kind of try[ing] to stretch." According to Mendoza, Gonzales did not respond to Mendoza's comments about his pain. Mendoza further testified that Herrera asked him if he was "okay," to which Mendoza responded, "I got a slight pain." Mendoza added that while he made these comments he was "kind of rubbing my back."

Under the proper standard of review, we must presume the trial court resolved disputed fact issues in favor of its ruling. Therefore, we presume that the trial court found that Mendoza, in response to the officers' inquiries about whether he was injured, told both Herrera and Gonzales that he had a "slight pain" and, as he did so, he was bending down and trying to stretch or was rubbing his back.

In arguing that the trial court erred in denying its plea to the jurisdiction, the City asserts there was no evidence that the officers had actual, subjective awareness of Mendoza's injury at the scene of the accident. The City emphasizes Gonzales and Herrera's testimony that they did not hear Mendoza's complaints about feeling pain immediately after the collision. The City also points to Mendoza's testimony acknowledging that neither Gonzales nor Herrera responded after he allegedly informed them about the pain he felt. According to the City, "Herrera either did not hear Mendoza's complaints about back pain or interpreted Mendoza's comments to mean he was not injured." However, under our standard of review, we must presume that the trial court made the

factual findings that support its order. *See Cervantes*, 521 S.W.3d at 394; *Bacon*, 411 S.W.3d at 182. Here, the evidence included Mendoza's deposition testimony in which he testified that he complained about pain immediately after the accident and in response to the officers' questions about his well-being. Based on this evidence, the trial court could have inferred that the officers heard Mendoza's complaints. *Simons*, 140 S.W.3d at 348 (recognizing that knowledge may be proved by circumstantial evidence).

The City next argues that Mendoza's complaints, even if heard by the officers, were insufficient to provide the City with actual, subjective awareness of any injury Mendoza might have sustained. The City argues that Mendoza's statements were "too vague and indefinite" to provide the City with actual notice of his alleged injuries. To bolster its argument, the City relies on *Cervantes*, a case in which we held that the plaintiff's comments to a police department supervisor immediately following a collision that he was "kind of shaken up" but that he thought he was "okay" were not sufficient to provide the City with actual, subjective awareness of any injury. *Cervantes*, 521 S.W.3d at 396. The plaintiff in *Cervantes* also commented to his own supervisor, "Man, I'm feeling kind of numb; but I'm all right, I guess." *Id*. After considering the evidence, we stated:

> We decline to hold that a person who states he is feeling "shaken up" or "kind of numb," but thinks he is "all right" and "okay" has by those words given any notice that he has received some injury. Being "shaken up" or "numb" is a natural consequence of being in a vehicular accident and communicating that fact does not, alone, give notice that the person has been injured. Whereas, "I think I'm okay" communicates that the speaker does not believe he has suffered an injury.

Id. Therefore, in *Cervantes*, we concluded there was no evidence before the trial court to support an implied finding that the City had actual notice that the plaintiff received some injury in the accident. *Id*.

Here, however, Mendoza testified that he told each of the officers that he had a "slight pain." These statements were more specific than the comments in *Cervantes* indicating that the plaintiff was "shaken up" and "kind of numb." Additionally, Mendoza's statements were reinforced by his actions. Mendoza testified that he made the statements about his pain while he was bending and stretching or rubbing his back. Finally, Mendoza's comments were not followed by statements indicating that he was "all right" and "okay." Unlike the comments made by the plaintiff in *Cervantes,* Mendoza's comments that he had a "slight pain" ultimately communicated to the officers that he was not "okay" and had suffered an injury. We conclude there was evidence to support the trial court's implied finding that the City had knowledge of Mendoza's injury.

Because the evidence supports an implied finding that the City had knowledge of Mendoza's injury and the City does not challenge the other elements of actual notice, we conclude that Mendoza satisfied the notice requirement. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c). We hold the trial court did not err in denying the City's plea to the jurisdiction.

CONCLUSION

We affirm the trial court's order denying the City's plea to the jurisdiction.

Karen Angelini, Justice