In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00224-CV

MARIA CASTRO, INDIVIDUALLY, AND A/N/F OF M.C., A MINOR, AND PERLA CASTRO, APPELLANTS

V.

WALKER COUNTY AND BRUCE BAKER, APPELLEES

On Appeal from the 12th District Court
Walker County, Texas
Trial Court No. 1929412, Honorable Donald L. Kraemer, Presiding

March 18, 2020

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

This appeal arises from an order granting a plea to the jurisdiction and dismissing the suit filed by Maria Castro, individually, and M.C., a minor, and Perla Castro against Walker County and its employee, Bruce Baker.[1] The former sued the latter for damages purportedly related to a vehicle accident. Baker allegedly failed to stop his county vehicle from colliding with that of the Castros. The County and Baker moved to dismiss the suit

[1] Melissa Castro was also a plaintiff in the underlying suit. However, she did not file or join in the notice of appeal. Thus, the order of dismissal stands as to her.

because the Castros failed to comply with the notice provisions appearing in § 101.101 of the Texas Civil Practice and Remedies Code. The trial court granted the plea and dismissed the suit, with prejudice. They contend on appeal that they did comply. We affirm.[2]

To negate governmental immunity when urging a tort claim encompassed within § 101.001 *et seq*. of the Civil Practice and Remedies Code, one must timely provide the governmental unit involved with notice of the claim as required by § 101.101.[3] *Reyes v. Jefferson Cty.*, 601 S.W.3d 797 (Tex. 2020) (per curiam). Per § 101.101, a "governmental unit is entitled to receive notice of a claim against it . . . not later than six months after the day that the incident giving rise to the claim occurred," which notice "must reasonably describe: (1) the damage or injury claimed; (2) the time and place of the incident; and (3) the incident." TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (West 2019). The requirement, though, does not apply if the 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). Our Supreme Court has held that the latter provision is satisfied when the governmental unit has knowledge of 1) a death, injury, or property damage; 2) the governmental unit's alleged fault producing or contributing to same; and 3) the identity of the parties involved. *Reyes*, 601 S.W.3d at 798.

[2] Because this appeal was transferred from the Tenth Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

[3] No one disputes that this notice provision encompassed the claims urged by the Castros. And, whether such notice was provided is a question of law. *Reyes v. Jefferson Cty.,* 601 S.W.3d 795, 798 (Tex. 2020) (per curiam). A greater explanation of the standard of review we apply here appears in *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 783–86 (Tex. 2018). When jurisdictional facts are implicated, not simply the pleadings, that standard mirrors the one applicable to traditional motions for summary judgment. *Id.* at 785. Such is the case here.

Formal Notice

We begin our assessment of the appeal with the matter of formal notice. The Castros purportedly afforded it to the County when another person in their vehicle, Isidra Castro, informed the County of her claim. Said information appeared in a letter dated May 9, 2018, and to the Walker County judge by her separate attorney. Missing from that notice, though, is any mention of a claim being asserted by Maria Castro, Perla Castro, or M. C. And, while it alludes to a traffic accident caused by Baker when he struck a vehicle within which Isidra rode, nothing was said about Maria, Perla, or M. C. also being in that vehicle or being victims of the collision in any way.

Again, § 101.101(a) speaks of the governmental unit being entitled to "notice of a claim." The only claim of which Walker County was notified via Isidra's May 9th letter was that of Isidra and no others. So, her letter did not satisfy the formal notice requirement imposed on Maria, Perla, and M. C. under § 101.101(a).

Actual Notice

Next, we address whether Walker County had actual notice of the claims of Maria, Perla, and M.C. They assert it garnered such notice through 1) the aforementioned May 9th letter from Isidra, 2) an accident report being attached to Isidra's notice, 3) the investigation of the incident by a local police officer, 4) Baker's involvement in the incident, and 5) a claim being sent to Mary Briseno, a person who apparently worked for the Texas Association of Counties Risk Management Pool.

Concerning the claim sent to Briseno, evidence that such occurred was first tendered to the trial court by the Castros via a motion to reconsider the dismissal order. This was and is problematic.

Though the proceeding at bar is an appeal from an order granting a jurisdictional plea, the standard of review mirrors that applied to a traditional motion for summary judgment, as noted earlier. And, when one files a motion to reconsider or moves for a new trial after a summary judgment ruling, the trial court ordinarily considers only the record as it existed before hearing the motion the first time. *Brown v. Traditions Oil & Gas, LLC*, No. 07-18-00242-CV, 2019 Tex. App. LEXIS 8324, at *6 (Tex. App.—Amarillo Sept. 13, 2019, pet. dism'd) (mem. op.); *In re Estate of Mooney*, No. 01-18-00096-CV, 2019 Tex. App. LEXIS 7339, at *19 (Tex. App.—Houston [1st Dist.] Aug. 20, 2019, no pet.) (mem. op.); *Hagan v. Pennington*, No. 05-18-00010-CV, 2019 Tex. App. LEXIS 5101, at *10 (Tex. App.—Dallas June 19, 2019, no pet.) (mem. op.); *Circle X Land & Cattle Co. v. Mumford Indep. Sch. Dist.*, 325 S.W.3d 859, 863 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (op. on reh'g). Moreover, the record which we may peruse to address a trial court ruling is normally limited to that which existed when the trial court issued the ruling. Consequently, evidence that was not before the trial court when it ruled generally is not considered by the reviewing court when asked to determine if the trial court ruled correctly. *See Brown*, 2019 Tex. App. LEXIS 8324, at *6.

Of course, the trial court has the discretion to consider additional evidence appended to a motion to reconsider or for new trial. *PNP Petroleum I, LP v. Taylor*, 438 S.W.3d 723, 729 (Tex. App.—San Antonio 2014, pet. denied). If it does, then we too may consider it. Yet, the record must affirmatively reflect that the trial court considered or accepted that evidence. *Brown*, 2019 Tex. App. LEXIS 8324, at *6 n.3; *In re Estate of Mooney*, 2019 Tex. App. LEXIS 7339, at *19; *accord PNP Petroleum I, LP*, 438 S.W.3d at 730 (stating that when the trial court affirmatively indicates on the record that it accepted or considered the evidence attached to a motion to reconsider, the reviewing

court reviews the decision based upon the grounds and proof in both prejudgment and post-judgment filings).

Returning to the case at hand, we find of record the trial court's order denying the motion for reconsideration. It began the order with the following language: "CAME ON this day to be heard Plaintiffs' Motion for Reconsideration. The Court, ***after considering the pleadings, papers, arguments of counsel***, and applicable law, is of the opinion that such Motion should be denied." (Emphasis added). Verbiage like that which we highlighted has been held to fall short of affirmatively indicating that the trial court accepted or considered any new evidence attached to a motion for reconsideration or new trial. *See NMRO Holdings, LLC v. Williams,* No. 01-16-00816-CV, 2017 Tex. App. LEXIS 9939, at *13 (Tex. App.—Houston [1st Dist.] Oct. 24, 2017, no pet.) (mem. op.) (wherein the appellate court concluded that it could not consider the new evidence because the trial court's order stating that it "has considered the motion for new trial and motion for reconsideration . . . any response, the arguments of counsel, and the papers on file" did not affirmatively indicate that the trial court accepted or considered the later-filed evidence); *see also McMahan v. Greenwood,* 108 S.W.3d 467, 500 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (op. on reh'g) (holding that the trial court did not affirmatively indicate that it accepted or considered the new evidence when its order stated that "it considered the motion, all responses, and argument of counsel"). In short, the language at bar does not ***affirmatively*** indicate that the trial court considered or accepted evidence of a claim being submitted to Mary Briseno when it denied the motion to reconsider. Nor does anything else in the order or record so indicate. Thus, we cannot consider it when addressing the Castros' actual-notice contention.

As for actual notice garnered through Baker's involvement in the accident, the Castros attempt to impute the information he knew to the County. It is true that actual notice may be imputed to the governmental unit, but that occurs when the agent or representative from whom the knowledge is imputed was or is charged with a duty to investigate and report to the governmental unit. *City of Wichita Falls v. Jenkins*, 307 S.W.3d 854, 858 (Tex. App.—Fort Worth 2010, pet. denied); *accord Tex. Tech Univ. Health Scis. Ctr. v. Bonewit*, No. 07-16-00211-CV, 2017 Tex. App. LEXIS 10775, at *12–13 (Tex. App.—Amarillo Nov. 15, 2017, pet. denied) (mem. op.) (stating that actual notice may be imputed to the governmental unit by an agent or representative that receives notice of the required elements and who is charged with a duty to investigate the facts and report them to a person of sufficient authority). The Castros cite us to nothing of record indicating that Baker was charged with a duty to investigate and report the incident to anyone of authority with Walker County. Nor did we find any such evidence. Without it, we cannot impute Baker's knowledge of the incident to Walker County for purposes of satisfying § 101.101(c). The same is no less true about the knowledge garnered by the police officer who investigated the accident.

The Castros merely assert that the officer was an agent of Walker County. No evidence accompanied their conclusory assertion. More importantly, being a bare conclusion, it would not be competent evidence even if it appeared in an affidavit or was uttered under oath at a hearing. *See Windrum v. Kareh*, 581 S.W.3d 761, 770 (Tex. 2019) (stating that when evidence presented is conclusory, it is considered no evidence).

Yet, there is evidence of record contradicting the Castros' allegation. It appeared in the form of an affidavit from the Walker County judge. Therein, he attested that the officer was not an employee of the county but rather of a city within the county, i.e.,

Huntsville. As such, the officer had no duty to investigate and report the accident to Walker County. The latter also lacked the right to control the progress, details, and methods of the Huntsville officer, could not terminate him, did not pay him or withhold taxes from his salary, did not furnish him with tools or equipment of his trade, and did not have the power to control the officer's performance or the details of his employment. Thus, the officer was not an agent of the County from whom actual notice could be imputed, according to the affiant. Given the foregoing evidence, we cannot disagree with the county judge. *See McAfee, Inc. v. Agilysys, Inc.,* 316 S.W.3d 820, 829 (Tex. App.—Dallas 2010, no pet.) (stating that the crucial element of an agency relationship is the right to control and the principal must have control of both the means and details of the process by which the agent is to accomplish his task for an agency relationship to exist). Thus, the officer's knowledge was not subject to imputation to Walker County.

As for the Isidra claim mentioned earlier, again it lacked reference to anyone other than her. This is critical since the elements of actual notice include knowledge of the parties involved. *See Reyes*, 601 S.W.3d at 798. If the Isidra notice said nothing of the others in the car, then it hardly provided actual notice of parties involved, such as Maria, Perla, or M. C.

As for the accident report, though it accompanied the response to the County's plea, no evidence indicates that the County had a copy of it. Nor does the May 9th Isidra letter refer to or otherwise incorporate it. Similarly missing is evidence that the report was sent to the Walker County judge along with the May 9th missive. Because we cannot simply presume the document was included with the letter or the County received it in some manner, it fails to establish actual knowledge on the part of the county.

In short, the record before us does not support the Castros' allegation that they complied with either § 101.101(a) or (c) of the Texas Civil Practice and Remedies Code. Thus, we overrule their contentions and affirm the trial court's order dismissing the suit.

Brian Quinn
Chief Justice