NUMBER 13-15-00188-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DONNIE DOYLE BROWN, Appellant,

v.

CORPUS CHRISTI REGIONAL TRANSPORTATION AUTHORITY, Appellee.

On appeal from the County Court at Law No. 1 of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Benavides and Hinojosa
Memorandum Opinion by Justice Benavides

We issued our original memorandum opinion and dissenting opinion on March 9, 2017. Appellant Donnie Doyle Brown filed a motion for rehearing. After due consideration, and within our plenary power, we *sua sponte* withdraw our previous memorandum opinion, dissenting memorandum opinion, and judgment and substitute the following memorandum opinion, dissenting memorandum opinion, and judgment in their place. We deny Brown's motion for rehearing, with a notation that Chief Justice Valdez would grant Brown's motion.

See TEX. R. APP. P. 19.1. By one issue, Brown appeals the trial court's grant of a plea to the jurisdiction in favor of appellee, the Corpus Christi Regional Transportation Authority ("RTA"). We affirm.

I. BACKGROUND

On May 4, 2012, a RTA bus ("the bus") reported an accident to police near the intersection of South Alameda Street and Texas Trail in Corpus Christi. According to the police report, the bus travelled along its route on Alameda Street, stopped at a bus stop in which two individuals were at the stop, but only one of the individuals boarded the bus. The other individual—later identified as Brown—stayed behind at the stop. Almost immediately after boarding, the passenger who had just boarded asked the driver to exit the bus. The bus driver stopped the bus and complied to let him off the bus. As the bus began to move again, Brown now attempted to board the bus, lost his balance along the curb, fell to the ground, and the bus's right rear tire ran over Brown's left arm causing Brown injury.

The investigating police officer's report placed fault for the accident solely on Brown and did not attribute any fault to RTA. RTA collected statements from the bus's driver, Angelo Franzone, contact information from other riders on the bus, and conducted its own internal investigation of the incident. Nothing in those internal investigation reports expressly blames, fully or in part, Franzone or RTA.

Nearly two years later, Brown filed suit against RTA alleging a cause of action for negligence and sought damages. RTA answered and shortly thereafter filed a plea to the jurisdiction alleging that Brown failed to meet the formal notice provision of the Texas Tort Claims Act nor did RTA have actual notice of Brown's claim, to invoke the trial court's

subject-matter jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (West, Westlaw through 2015 R.S.) (providing that notice is a jurisdictional requirement in all suits against a governmental entity); TEX. GOV'T CODE ANN. § 311.034 (West, Westlaw through 2015 R.S.). In response, Brown did not dispute that he failed to provide formal written notice under section 101.101(a) of the civil practice and remedies code to RTA, but asserted that RTA had actual notice of his claim. *See id.* § 101.101(c).

The trial court granted RTA's plea to the jurisdiction and dismissed Brown's claims against RTA. This appeal followed.

II. PLEA TO THE JURISDICTION

By his sole issue, Brown asserts that the trial court erred by granting RTA's plea to the jurisdiction.

A. Standard of Review and Applicable Law

The purpose of a plea to the jurisdiction is to "defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). A challenge to the trial court's subject matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

Section 101.101 of the Texas Tort Claims Act ("TTCA"), "titled 'Notice,' provides that a governmental unit is entitled to receive notice of a damage or injury claim against it not later than six months after the day the incident giving rise to the claim occurred."[1] *Id.*

[1] Section 101.101 of the TTCA requires for a claimant to provide a governmental unit notice of a claim, including a reasonable description of the damage or injury claimed, the time and place of the incident and the incident, not later than six months after the day that the incident occurred. TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (West, Westlaw through R.S. 2015).

(citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a)). Failure of a claimant to provide the requisite notice deprives a trial court of subject matter jurisdiction. *Univ. of Tex. Sw. Med. Center at Dallas v. Estate of Arancibia ex rel. Vasquez-Arancibia*, 324 S.W.3d 544, 548 (Tex. 2010) (explaining that the purported failure to provide notice would deprive the trial court of jurisdiction); *see also Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 511 (Tex. 2012) (providing that any "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity").

However, subsection (c) of section 101.101 provides that "[t]he notice requirements provided . . . by Subsection[ ] (a) . . . do not apply [in pertinent part] if the governmental unit has actual notice that [. . .]the claimant has received some injury." TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c); *Univ. of Tex. Sw. Med. Center at Dallas*, 324 S.W.3d at 548 (explaining that section 101.101 does not require written notice if a governmental unit has "actual notice" of the injury).

The Texas Supreme Court stated that it had "rejected an interpretation of actual notice that would 'require[ ] *only* that a governmental unit have knowledge of a death, an injury, or property damage,' because a defendant, like a hospital, would then have 'to investigate the standard of care provided to each and every patient that received treatment,' eviscerating the notice requirement's purpose." *Id.* (emphasis in original). Instead, the Texas Supreme Court "held that the governmental unit had to know of its 'alleged fault producing or contributing to the death, injury, or property damage.'" *Id.* The court explained that under section 101.101 actual awareness means that the governmental unit has a "subjective awareness of its fault, *as* ultimately alleged by the claimant, in producing or contributing to the claimed injury." *Id.* (emphasis added).

B. Discussion

1. Actual Notice

The record shows that Brown failed to provide RTA with formal notice of his injury within six months of the incident on May 4, 2012. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a). Thus, in order for Brown to avoid a jurisdictional defeat in this case, he needed to show that RTA had actual notice of: (1) an injury; (2) the RTA's alleged fault producing or contributing to the injury; and (3) the identity of the parties involved. *Tex. Dep't of Crim. Justice v. Simons*, 140 S.W.3d 338, 344 (Tex. 2004). To have actual notice, the governmental unit must have the same information it would have had if the claimant had complied with the formal notice requirements, and mere notice that an incident occurred is not enough to establish notice under the Texas Tort Claims Act. *Texana Cmty. MHMR Ctr. v. Silvas*, 62 S.W.3d 317, 325 (Tex. App.—Corpus Christi 2001, no pet.).

The sole element in dispute in this appeal is whether RTA had actual notice of its alleged fault producing or contributing to Brown's injury. In order to meet this requirement, a governmental unit should have knowledge that amounts to the same notice to which it is entitled by the formal notice provision of section 101.101(a). *See Simons*, 140 S.W.3d at 347. Such notice also includes subjective awareness of the governmental unit's fault, as alleged by the claimant, in producing or contributing to the claimed injury. *Id.* Under *Simons*,

> It is not enough that a governmental unit should have investigated an incident as a prudent person would have, or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault. If a governmental unit is not subjectively aware of its fault, it does not have the same incentive to gather information that the statute is designed to provide, even when it would not be unreasonable to believe that the governmental unit was at fault.

Id. 140 S.W.3d at 347–48. While generally, the question of actual notice is a question of fact when the evidence is disputed, it can often be determined as a matter of law. *Id.* at 348. At times, subjective awareness must be proved, if at all, by circumstantial evidence. *Id.*

2. Application

The record in this appeal shows that RTA had no subjective awareness of its alleged fault producing or contributing to Brown's injury.

First, we examined the affidavit signed by RTA's director of safety and security, Mike Pefanis. Pefanis testified that on May 4, 2012, he "traveled to the scene to assist in the investigation" of the incident involving Brown. During the course of his investigation, Pefanis spoke to the driver of the bus and Corpus Christi police officers located at the scene. Pefanis asserted in his affidavit that Corpus Christi police officers left him with the impression that Brown was at fault for the incident that resulted in his injuries. Additionally, Pefanis conducted RTA's own investigation into the incident "by completing a Driver's Incident Report and Supervisor's Report." According to Pefanis, nothing in those reports indicate that RTA was at fault "in any way." Lastly, Pefanis testified that RTA received no formal written notices of claims in the six months following the incident.

Second, the certified police report of the incident places blame for the incident solely on Brown. According to the investigating officer's report narrative, Brown was asleep at a bus stop, when the RTA bus stopped to pick up passengers. Brown failed to timely board the bus while it stopped, and instead "woke up and attempted to get on" the bus. As the bus moved, Brown "attempted to grab hold of the bus, lost his balance due to the curb,

fell, and was dragged for approximately 10 feet" causing him to fall to the street and causing the right tire of the bus to run over Brown's left arm. The Texas Supreme Court has held that "when a police report does not indicate that the governmental unit was at fault, the governmental unit has little, if any, incentive to investigate its potential liability because it is unaware that liability is even at issue." *City of Dallas v. Carbajal*, 324 S.W.3d 537, 539 (Tex. 2010).[2]

Third, we viewed two internal accident reports produced by RTA. The first report was prepared by driver Angelo Franzone and provides a first-hand account of his version of the incident. In it, Franzone writes that "there were two male customers" at the bus stop on Alameda and Texas Trail. One passenger boarded the bus, while the other remained asleep at the bus stop. According to Franzone, the one passenger who he initially let on the bus, immediately wanted to get off the bus, and Franzone allowed him to exit the bus at a red light "about 35 ft. from the bus stop." At that point, Franzone stated that the other passenger who was asleep at the stop (Brown) ran behind the bus, tripped on the curve, and fell with his left arm under the rear tire of the bus. The second report was prepared by RTA supervisor Charles Rogers. In this report, Rogers essentially reiterates Franzone's account of the incident.

Additionally, we reviewed the pleadings and evidence put forward by Brown. In his response to RTA's plea to the jurisdiction, Brown argued that RTA had actual notice through circumstantial evidence. We disagree. The first pieces of evidence that Brown

[2] We do not read this holding as suggesting that a police officer's conclusion that a governmental entity was not at fault is a per se bar to a showing of actual notice. See *City of Houston v. Daniels*, 66 S.W.3d 420, 424 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (holding there was a fact issue concerning actual notice where a police officer rear-ended a stationary bus and the investigating officer concluded that the accident was caused by a third driver, but the police officer was driving at an excessive speed). In this case, however, there is nothing in the police report or from another source that demonstrates RTA's subjective awareness of its fault.

relies upon are photographs taken by the Corpus Christi Police Department. These photographs depict the exterior of the bus following the incident, as well as the view from the driver's seat looking at the rear view mirrors. These photographs, while helpful in illustrating the written narratives and reports in this case, do not establish a subjective awareness of RTA's fault in causing Brown's injuries.

Furthermore, we disagree with Brown's "sole instrument" argument. The Texas Supreme Court held in *Estate of Arancibia* that the governmental unit was the sole instrumentality of harm regarding a patient's death following surgery at the governmental unit's hospital. *See* 324 S.W.3d at 550. Unlike this case, however, the record in *Estate of Arancibia* showed that the governmental unit acknowledged errors during surgery that ultimately led to the claimant's death and that such acknowledgement was enough to establish actual notice of the claim involved in that case. *See id.* Nothing in this record shows that RTA has conceded to any errors on its part that caused Brown's injuries. Accordingly, the facts of this case are distinguishable from *Estate of Arancibia*, making that case inapplicable to the present one.

Next, Brown directs us to RTA's bus manual, which offers various guidelines for drivers to follow while operating a bus. These guidelines by themselves and without application to the present set of facts, however, do not establish any subjective awareness of RTA's fault in causing Brown's injuries. Brown also points to two prior RTA accidents where Franzone was the driver. Like the RTA bus manual, this evidence, by itself, is not enough to establish any subjective awareness of RTA's fault in this particular case to put RTA on actual notice. Moreover, Brown's reliance on a newspaper article reporting on "a RTA Bus Audit [which states] the RTA has had too many preventable accidents" is again

insufficient evidence to establish any subjective awareness of RTA's fault in this particular incident involving Brown.

Finally, we decline to consider Brown's affidavit that was filed on October 9, 2014, which is more than two years after the incident in question and after Brown's lawsuit was filed. Unlike the affidavit provided by RTA, Brown's affidavit fails to address what RTA knew about the incident during the six-month notice window. Such highly delayed notice would defeat the purpose of the notice provision, which is "to ensure 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." *Simons*, 140 S.W.3d at 344. Thus, to consider and rely on such an untimely affidavit goes against the clear purpose of the jurisdictional notice provision. We overrule Brown's issue.

III. CONCLUSION

We affirm the trial court's judgment.

/s/ Gina M. Benavides
GINA M. BENAVIDES,
Justice

Dissenting Memorandum Opinion
by Chief Justice Rogelio Valdez.

Delivered and filed the
29th day of June, 2017.