NUMBER 13-16-00179-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

LECREASE JACKSON, INDIVIDUALLY AND AS SURVIVING PARENT OF XX, A DECEASED MINOR, AND CEDRIC CORBIN, INDIVIDUALLY AND AS SURVIVING PARENT OF XX, A DECEASED MINOR, Appellants,

v.

THE CITY OF TEXAS CITY, TEXAS, Appellee.

On appeal from the 405th District Court of Galveston County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Longoria
Memorandum Opinion by Justice Rodriguez

Appellants Lecrease Jackson and Cedric Corbin appeal from an order dismissing their suit against appellee the City of Texas City. Appellants filed suit individually and as

the surviving parents of Kaloni,[1] a two-year-old girl who tragically drowned in a public park owned and maintained by Texas City. By one issue on appeal, appellants contend that the trial court erred in granting Texas City's plea to the jurisdiction on the basis of governmental immunity. We affirm.

I. BACKGROUND

At the time the trial court granted dismissal, appellants' live petition alleged as follows.[2] On July 6, 2013, appellants and their daughter Kaloni attended a family reunion at Carver Park in Texas City. During the reunion, appellants took turns watching Kaloni, with one parent present at all times. Over the course of several hours, Kaloni played at the park's playground, which was approximately forty feet away from the edge of a pond—one of two ponds which Texas City constructed at Carver Park in 1974. Kaloni also sat with her parents and relatives at a group of picnic tables, which were approximately thirty feet away from the pond.

At the conclusion of the reunion, Jackson went to help relatives round up their children, leaving Kaloni with Corbin. According to the petition, Corbin "turned to gather items from the picnic table and seconds later noticed that [Kaloni] was not present." Corbin immediately began searching for Kaloni, and he was soon joined by Jackson. They soon contacted authorities, fearing that Kaloni had fallen in the water. In the hours

[1] In the style of the case, appellants' daughter is referred to by the alias "XX," as she was identified in the trial court's judgment. She is referred to in the body of this opinion by her given name, "Kaloni."

[2] This case is before the Court on transfer from the First Court of Appeals in Houston pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.). Because this is a transfer case, we apply the precedent of the First Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

that followed, a diving team arrived and discovered Kaloni's body at the bottom of the pond.[3]

It is undisputed that Texas City had posted at least one warning sign near the ponds which read "No Swimming, Beware of Snakes." The parties also agree that there were no barriers or fences along the edge of the pond nearest to the playground and picnic areas.

Appellants filed suit based on these allegations, raising claims for negligence and gross negligence. As to gross negligence, appellants alleged that Texas City had actual awareness of the extreme degree of risk that children would drown in its "unprotected, artificially created bodies of water, which were positioned near the playground and easily accessible by children." According to appellants, Texas City "allowed children and others to visit Carver Park with conscious indifference of this risk." Further, appellants alleged that Texas City was grossly negligent in failing to place protective barriers around the pond or to adequately warn of the dangers associated with the water.

Texas City submitted a plea to the jurisdiction and a supplemental plea. The supplement argued that there had been no incidents at Carver Park which would provide Texas City with notice that the pond presented some risk beyond the understanding of ordinary recreational users. Attached to the supplement was an affidavit by the custodian of records for the Texas City Police Department. The affidavit certified that

[3] We use "pond" in the singular to refer to portions of the record which specifically pertain to the pond in which Kaloni drowned and "ponds" in the plural to refer to portions of the record which speak of the water without differentiating between the ponds.

the custodian was unable to locate any records of drownings or near-drownings in Carver Park in the last five years.

Appellants submitted a response with new allegations—among them, that Texas City had fenced off a concrete structure near a different area of the ponds. According to appellants' response, the alleged presence of the fence demonstrated Texas City's awareness of the ponds' risks. Appellants attached exhibits to this response, including photographs which showed various aspects of Carver Park. One photograph showed a picnic table near a body of water. Another depicted a playground, though no water was pictured. A third showed what was called a "splash pad"—an area with several fountains in which children could play. Also included were three aerial photos of Carver Park, with measurements between various structures and the ponds, as well as a newspaper article concerning Kaloni's untimely death. Finally, at the hearing on the plea to the jurisdiction, appellants asked the trial court to review portions of a video taken by appellants' counsel. This video was apparently intended to show various aspects of Carver Park, including the ponds. However, the video was not entered into evidence and does not appear in the appellate record, and the trial court reviewed only a few unspecified portions of this video rather than its entirety. No other evidence was received.

According to appellants, their photos and other submissions demonstrated at least four dangerous features of the pond: its proximity to areas frequented by children, its unsafe depth, its steep banks, and that certain parts of the banks were made of unstable soil which would easily give way under pressure.

At the conclusion of the hearing, the trial court granted Texas City's plea to the jurisdiction on the basis of governmental immunity. This appeal followed.

II. DISCUSSION

On appeal, appellants do not contest the dismissal of their negligence claim. Instead, appellants contend that they demonstrated Texas City's gross negligence and that the trial court therefore erred in dismissing this claim. Appellants argue that this showing of gross negligence was sufficient to survive the plea to the jurisdiction under the standards of the two applicable statutes: the Texas Tort Claims Act (TTCA) and the recreational use statute.

A. Standard of Review

"We review de novo the disposition of Texas City's jurisdictional plea." *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632 (Tex. 2015). The plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity. *Dallas Area Rapid Transit v. Whitley,* 104 S.W.3d 540, 542 (Tex. 2003). We assume the truth of the jurisdictional facts alleged in the pleadings unless the defendant presents evidence to negate their existence. *Tex. Dep't of Pub. Safety v. Sparks*, 347 S.W.3d 834, 837 (Tex. App.—Corpus Christi 2011, no pet.). After the government-defendant "asserts and supports with evidence that the trial court lacks subject matter jurisdiction, we simply require the plaintiffs, 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." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). Thus, while a plaintiff has the initial burden to plead the elements of his cause of action, and allege the basic facts that make up his claim, a plaintiff will only be required to submit

evidence if the defendant presents evidence negating one of those basic facts. *City of El Paso v. Collins*, 483 S.W.3d 742, 756 (Tex. App.—El Paso 2016, no pet.) (quoting *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012)). "Accordingly, the defendant cannot simply deny the existence of jurisdictional facts and force the plaintiff to demonstrate the existence of a fact issue" with evidence. *HS Tejas, Ltd. v. City of Houston*, 462 S.W.3d 552, 556 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *see Sparks*, 347 S.W.3d at 837.

In our review, we take as true all evidence favorable to the nonmovant, indulge every reasonable inference, and resolve any doubts in the nonmovant's favor. *Suarez*, 465 S.W.3d at 633. If the evidence creates a fact question regarding jurisdiction, the plea must be denied pending resolution by the fact finder. *Id.* However, if the relevant evidence is undisputed or fails to raise a question of fact on the jurisdictional issue, the plea to the jurisdiction may be ruled on as a matter of law. *Collins*, 483 S.W.3d at 755; *see Suarez*, 465 S.W.3d at 633. The question whether a landowner owes a duty to an individual on its property is a question of law for a court to decide. *Austin v. Kroger Tex., LP*, 465 S.W.3d 193, 209 (Tex. 2015).

B. Texas Tort Claims Act

Home-rule cities, such as Texas City, have all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter. *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007). Among those powers is immunity from suit for governmental functions. *Id.* The TTCA defines "parks and zoos" as part of a municipality's governmental functions. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(13) (West, Westlaw through 2015 R.S.).

The TTCA provides a limited waiver of this immunity for suits alleging personal injury or death caused by premises defects. *State v. Shumake*, 199 S.W.3d 279, 283 (Tex. 2006). In premises defect cases, the government-defendant generally owes the claimant only the duty that a private person owes to a licensee on private property. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) (West, Westlaw through 2015 R.S.); *see also State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 236–37 (Tex. 1992) (op. on reh'g) (comparing licensee protections with the "higher standard of care" owed to invitees).

C. Recreational Use Statute

Where the recreational use statute applies, however, the statute limits a government-defendant's duty regarding premises defects further than the TTCA: the government unit retains its immunity unless it is guilty of gross negligence, malicious intent, or bad faith—a lower standard of care which is associated with trespassers rather than licensees. *Suarez*, 465 S.W.3d at 632; *see Shumake*, 199 S.W.3d at 283; *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.002(c)–(f), 101.058 (West, Westlaw through 2015 R.S.). As used in the recreational use statute, "gross negligence" has both an objective and a subjective component:

> (1) viewed objectively from the standpoint of the actor at the time of its occurrence, the act or omission involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
>
> (2) the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Suarez, 465 S.W.3d at 633. By specifying gross negligence, malicious intent, and bad faith as the standards of care, the recreational use statute elevates the burden necessary to invoke the TTCA's waiver of immunity. *Id.* at 632.

To defeat immunity in a premises case, it must also be established that the government-defendant had a duty to warn or protect the injured party. *See id.* at 633. A landowner has no duty to warn or protect recreational users from open and obvious defects or conditions. *Shumake*, 199 S.W.3d at 288. However, a government-defendant has a duty to warn or protect regarding any artificial condition which creates a danger that is "latent and not so inherent in the recreational use that it could reasonably be anticipated" by the recreational user. *Suarez*, 465 S.W.3d at 633.

D. Application

Our inquiry is a narrow one. For one, appellants have not pleaded attractive nuisance, nor would such a theory be cognizable under the TTCA. *See Todaro v. City of Houston*, 135 S.W.3d 287, 293 (Tex. App.—Houston [14th Dist.] 2004, no pet.). For another, appellants do not dispute that Texas City is generally entitled to immunity for its governmental functions, among which is Texas City's operation of Carver Park. *See City of Galveston*, 217 S.W.3d at 469. Appellants also agree that they and their daughter were engaged in recreation at the time of Kaloni's death. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 75.001(3) (West, Westlaw through 2015 R.S.). Appellants thus concede that Texas City is held to a limited standard of care pursuant to the recreational use statute, under which a waiver of immunity can be demonstrated by only three means: gross negligence, malicious intent, or bad faith. *See Suarez*, 465 S.W.3d at 632. Out

of those three, appellants only alleged a violation of the gross negligence standard. Thus, we need only address the parties' presentations on gross negligence.

In its plea to the jurisdiction, Texas City asserted that there have been no incidents at Carver Park that would show Texas City's actual, subjective awareness of some risk regarding the pond beyond the cognizance of ordinary recreational users.[4] *See id.* at 634. Texas City corroborated this assertion with an affidavit certifying that Texas City had no record of any similar incidents in Carver Park in the last five years. *See Sparks*, 347 S.W.3d at 837. Although there is no one test for determining actual knowledge that a condition presents an unreasonable risk of harm, courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition. *Univ. of Tex.–Pan Am. v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008) (per curiam).

We conclude that Texas City carried its initial burden by presenting evidence which negated the subjective-awareness component of appellants' claim for gross negligence. *See Collins*, 483 S.W.3d at 756. The burden therefore shifted to the plaintiff to introduce evidence supporting the existence of a fact issue. *See id.*; *Aguilar,* 251 S.W.3d at 513 (relying on testimony from government officials that they had never received reports of similar accidents and holding this sufficient to shift the burden to the plaintiff to present evidence that the government-defendant had actual knowledge of a dangerous condition

[4] Texas City also argued that many of appellants' other factual allegations were "unsupported by the record." However, Texas City did not introduce evidence to negate those allegations, and the burden therefore never shifted to appellants to introduce evidence creating a fact issue as to those allegations. *See HS Tejas, Ltd. v. City of Houston*, 462 S.W.3d 552, 556 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

on the premises); *City of Dallas v. Patrick,* 347 S.W.3d 452, 457 (Tex. App.—Dallas 2011, no pet.) (similar); *City of Houston v. Harris,* 192 S.W.3d 167, 175 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (similar).

To satisfy this burden and "raise a fact issue regarding gross negligence, there must be legally sufficient evidence that Texas City had actual, subjective awareness that conditions at the [pond] involved an extreme degree of [risk] but nevertheless was consciously indifferent to the rights, safety, or welfare of others." *Suarez*, 465 S.W.3d at 633–34. Because the government-defendant has no duty to warn of open and obvious conditions, this burden requires evidence that Texas City was "subjectively aware of perils at the [pond] that were beyond the ken of a reasonable recreational user." *Id*.

In support of this burden, appellants refer back to their allegations that Texas City constructed the pond in a dangerous fashion, with its unsafe depth and steep banks made of unstable soil, near areas frequented by children. According to appellants, Texas City's awareness is supported by its conscious execution of these dangerous engineering choices in building the pond. We find appellants' argument unavailing.

It is true that at least in some contexts, "[t]he fact that the owner or occupier of a premises created a condition that posed an unreasonable risk of harm may support an inference of knowledge." *Keetch v. Kroger Co.*, 845 S.W.2d 262, 265 (Tex. 1992); *Rice Food Mkt., Inc. v. Hicks*, 111 S.W.3d 610, 613 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *see Jefferson Cnty. v. Akins*, 487 S.W.3d 216, 228 (Tex. App.—Beaumont 2016, pet. denied) (applying this rule to a suit against a government-defendant). However, under the precedent of the Houston First Court of Appeals—which controls here—an

inference of knowledge from the creation of the condition is only allowable where there is "evidence in the record that the [alleged defect] was a dangerous condition from the moment it was" created, even if the harm does not occur immediately. *See Hicks*, 111 S.W.3d at 613; *Brazoria Cnty. v. Colquitt*, 226 S.W.3d 551, 556 n.2 (Tex. App.—Houston [1st Dist.] 2007, no pet.). It is the temporal connection between the defendant's creation of the condition and the emergence of the danger that makes it plausible to infer the defendant knew of the danger. *E.I. DuPont de Nemours & Co. v. Roye*, 447 S.W.3d 48, 63 & n.19 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd). In *CMH Homes, Inc. v. Daenen*, the Texas Supreme Court relied on similar reasoning to distinguish past precedent and reverse a judgment in favor of a premises-defect plaintiff: whereas the defect in a prior case "constituted a dangerous condition from the moment it was used," the allegedly defective condition that was created by CMH Homes "had been safely used for periods of twelve to fifteen months." *See* 15 S.W.3d 97, 101 (Tex. 2000) (distinguishing *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 294 (Tex. 1983)).

Here, Texas City provided evidence that the ponds had been safely situated in the park for at least the preceding five years, a period much longer than the safety record of twelve to fifteen months cited in *CMH Homes*. *See id.* Appellants did not dispute this fact with evidence concerning incidents in the previous five years, much less any incidents since 1974, which appellants alleged was the year when Texas City created the ponds. *See id.*

Moreover, in response to Texas City's evidentiary challenge concerning knowledge, appellants solely argue that knowledge could be inferred from the creation of

dangerous conditions; this being the case, it was incumbent upon appellants to, at a minimum, produce evidence of the dangerous conditions. But appellants presented no evidence to show two of the dangerous features they alleged: the pond's unsafe depth and unstable soil along its edges. Nor did appellants present evidence to support their assertion that Texas City had fenced off another area of the ponds.

Appellants did submit evidence substantiating two other alleged dangers, including photographs and aerial maps which, viewed in the light most favorable to appellants, showed the pond's sloped banks and proximity to areas frequented by children. However, under similar facts, this Court reversed a verdict in favor of plaintiffs and rendered a take-nothing judgment in favor of a government-defendant, holding that any risks from a lake's sloped banks and proximity to a public park were open and obvious as a matter of law. *See City of San Benito v. Cantu*, 831 S.W.2d 416, 425 (Tex. App.—Corpus Christi 1992, no writ). In *Cantu*, a boy of seven drowned in a manmade lake or "resaca" on the edge of a park owned and operated by government-defendants. *Id.* at 419. It was "undisputed that the slope near the place where the drowning occurred was very steep," *id.* at 425, and that the boy's father had initially accompanied him that day, though not nearly as closely as Jackson and Corbin did here. *See id.* at 420. Nevertheless, we held that the defendants did not have any duty to warn of the "open and obvious" danger posed by the waters at the park's edge: San Benito "did not have any duty to place barricades or warning signs along the bank of the resaca." *Id.* at 425. This

was so even though, under then-current law, the decedent was considered a licensee rather than a trespasser, as here. *See id.*[5]

Here, barriers and warning signs are the two precautions that, according to appellants, Texas City was grossly negligent in failing to provide. As in *Cantu*, we conclude that Texas City had no duty to place barricades or additional warning signs to guard recreational users against the open and obvious risks inherent in the only two features which are substantiated by the record: the pond's steep banks and proximity to areas frequented by children. *See id*. In our view, the open and obvious character of the hazard is one reason why appellants saw to it that one parent was with Kaloni at all times during the family reunion and why, when Kaloni disappeared while Corbin momentarily turned his back, they immediately feared that Kaloni had fallen in the water. *See id.* (relying on case-specific evidence of awareness to confirm the open and obvious character of the alleged danger); *cf. Kopplin v. City of Garland*, 869 S.W.2d 433, 437 & 441 (Tex. App.—Dallas 1993, writ denied) (rejecting liability when a boy was injured falling off playground equipment at a public park, where a nearby parent was able to appreciate the "open and obvious" risks of the playground, but had "left the area" momentarily, and suggesting that liability under certain theories should be "limited so that care for children

[5] Moreover, unlike *Cantu*, Texas City had placed at least one sign along the banks of the ponds warning of the danger of swimming in the ponds—though it was due to the presence of snakes rather than the danger cited by appellants. If this sign has any impact on the case at hand, it is somewhat favorable to Texas City: "We do not intend to discourage landowners from posting detailed warning signs where necessary, but a barrier and a sign warning a recreational user to stay away from a dangerous natural condition generally will be sufficient to avoid a showing of 'conscious indifference' . . . ." *City of Waco v. Kirwan*, 298 S.W.3d 618, 628 (Tex. 2009); *see also Smither v. Tex. Utils. Elec. Co.*, 824 S.W.2d 693, 696 (Tex. App.—El Paso 1992, writ dism'd by agr.) (concluding, in a suit concerning a drowned trespasser, that "[t]he additional signs warning of the dangerous waters were not required as to a trespasser but do show a *conscious concern* of [appellee] for the safety even of trespassers" (emphasis added)).

who are unable to recognize patent dangers is not shifted from their parents to strangers").

While we empathize with appellants, we must conclude that they have produced no evidence that Texas City was subjectively aware of perils at the pond that were beyond the cognizance of a reasonable recreational user, *see Suarez*, 465 S.W.3d at 634, and they have not carried their burden to demonstrate a fact issue. *See Miranda*, 133 S.W.3d at 228. Texas City's plea to the jurisdiction was correctly granted.

We overrule appellants' sole issue on appeal.

III. CONCLUSION

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
20th day of April, 2017.