NUMBER 13-18-00062-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

CITY OF MCALLEN, **Appellant,**

v.

ANTONIO QUINTANILLA, **Appellee.**

On appeal from the 206th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Hinojosa

Appellee Antonio Quintanilla sued the City of McAllen (the City) asserting a premises liability claim. The City filed a plea to the jurisdiction, which the trial court denied. By four issues, which we treat as two, the City argues that the trial court erred in denying its plea because: (1) the jurisdictional record establishes that the City's

governmental immunity is not waived under the Texas Tort Claims Act (TTCA); and (2) the trial court should not have considered Quintanilla's untimely response to the City's plea to the jurisdiction. We reverse and render.

I. BACKGROUND

A. Pleadings

In his petition, Quintanilla alleges that he slipped and fell on a liquid substance at McAllen Central Station, a bus station owned by the City. Quintanilla claimed that the fall caused an abrasion to his head and injuries to his shoulder, arms, and wrist. The City filed a plea to the jurisdiction,[1] supported by evidence, arguing that Quintanilla could not establish a waiver of its governmental immunity under the TTCA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025. The City maintained that: (1) Quintanilla was not required to pay a fee to access the bus station, and therefore, the City only owed Quintanilla the duty owed to a licensee, *see id*. § 101.022 ("Duty Owed: Premise and Special Defects"); and (2) the City did not breach its duty to warn Quintanilla because it did not have actual knowledge of the alleged dangerous condition that caused Quintanilla's injuries. The City supported its plea with excerpts from Quintanilla's deposition testimony and video surveillance footage of the incident.

Quintanilla filed a response, contending that: (1) the City owed him the duty owed to an invitee because he was accompanying his aunt, who had paid to use the premises by purchasing a bus ticket; and (2) there existed a fact issue concerning whether the City

[1] The City filed a "Plea to the Jurisdiction, Motion to Dismiss, and Motion for Summary Judgment." Only the trial court's denial of the City's plea to the jurisdiction is at issue in this appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8).

had constructive knowledge of the dangerous condition. Quintanilla's response did not rely on any additional evidence.

B. Jurisdictional Record

Quintanilla testified in his deposition that his aunt purchased a ticket to travel by bus from McAllen, Texas to Monterrey, Mexico. Quintanilla accompanied his aunt to the bus station, but he did not purchase a ticket. According to Quintanilla, the bus station is open to the public, and it is not necessary to purchase a ticket to access the station. While walking through the station, Quintanilla slipped on a liquid substance and "fruit leftovers," which caused him to fall to the floor and strike his head on a nearby chair. Quintanilla stated that he suffered injuries to his arm, wrist, and head.

Quintanilla did not see the substance prior to his fall. He described the spill as being smaller than a piece of paper. After he fell, Quintanilla recalled that employees cleaned the area and placed warning signs. He did not believe that any bus station employees were aware of the spill before his fall.

A surveillance video shows Quintanilla seated in the waiting area of the bus station. An unknown individual pushes a dry mop down an aisle separating rows of chairs and past where Quintanilla is seated. Seconds later, a woman carrying a large bag in each hand walks down the aisle past Quintanilla. Almost immediately after she passes, Quintanilla stands and walks down the aisle where the woman had just travelled. After taking approximately three steps, and while in the middle of the aisle, Quintanilla slips, loses his balance, and falls to the floor, hitting his head on a nearby chair. Several persons help Quintanilla to his feet, and he appears to then take a seat. Moments later,

a bus station employee places two "wet floor" signs on each side of the spill before returning with a string mop to clean the area. The video depicts three individuals walking past the area prior to Quintanilla's fall—the employee pushing the dry mop, Quintanilla himself, and the woman carrying two large bags. The substance causing Quintanilla's fall is not visible on the video.

C. Trial Court Ruling

After setting the matter for submission, the trial court denied the City's plea to the jurisdiction. This interlocutory appeal followed. *See id*. § 51.014(a)(8).

II. STANDARD OF REVIEW

A plea to the jurisdiction is a dilatory plea; its purpose 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). The plea challenges the trial court's subject matter jurisdiction over a pleaded cause of action. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Subject matter jurisdiction is a question of law; therefore, when the determinative facts are undisputed, we review the trial court's ruling on a plea to the jurisdiction de novo. *Id*. Governmental immunity[2] deprives a trial court of jurisdiction over lawsuits in which the State's political subdivisions have been sued, unless immunity is waived by the Legislature. *Id*.; *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 636 (Tex. 2012). Therefore, governmental immunity is

[2] Governmental immunity is a common law doctrine protecting governmental entities from suit, similar to sovereign immunity. *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 57–58 (Tex. 2011). While sovereign immunity protects the State and its various agencies from suit, governmental immunity protects the State's political subdivisions, such as cities, counties, and school districts, from suit. *Id*. As a governmental unit, the City is generally protected from suit by governmental immunity.

properly asserted in a plea to the jurisdiction. *Miranda*, 133 S.W.3d at 225–26.

A governmental entity's plea to the jurisdiction can be based on the pleadings or on evidence. *Id*. at 226. When, as in this case, a plea to the jurisdiction challenges the existence of jurisdictional facts, a trial court's review "mirrors that of a traditional summary judgment motion." *Garcia*, 372 S.W.3d at 635. If a plaintiff's factual allegations are challenged with supporting evidence necessary to consider the plea to the jurisdiction, the plaintiff must raise at least a genuine issue of material fact to overcome the challenge to the trial court's subject matter jurisdiction. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016). We take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in the plaintiff's favor. *Id*.

III. DISCUSSION

By its first issue, the City argues that the trial court erred in denying its plea to the jurisdiction because Quintanilla, who the City contends was a licensee, presented no evidence that it had actual knowledge of the dangerous condition causing his injuries.

A. Immunity Waiver for Premises Defects

The TTCA provides a limited waiver of immunity for claims arising from a condition or use of real property. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(2). Liability for premises defects is implied under the TTCA because a premises defect arises from a condition existing on real property. *City of Haltom City v. Aurell,* 380 S.W.3d 839, 845 (Tex. App.—Fort Worth 2012, no pet.) (quoting *Perez v. City of Dallas*, 180 S.W.3d 906, 910 (Tex. App.—Dallas 2005, no pet.)). Whether a plaintiff has invoked a waiver of immunity is dependent upon the type of duty owed to the plaintiff. *City of Irving v. Seppy*,

301 S.W.3d 435, 441 (Tex. App.—Dallas 2009, no pet.). "If a claim arises from a premises defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property[.]" TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a). But if the plaintiff pays for the use of the premises, the governmental unit owes the plaintiff the duty owed to an invitee. *See id.*; *Seppy*, 301 S.W.3d at 441. The distinction is an important one. "[A] licensee must prove that the premises owner actually knew of the dangerous condition, while an invitee need only prove that the owner knew or reasonably should have known." *State Dep't. of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

B. Quintanilla's Status

The City argues that Quintanilla was a licensee because the bus station is open to the public and Quintanilla did not pay for the use of the premises. Quintanilla responds that the statute does not require that he pay directly for use of the premises, and his aunt's purchase of a bus ticket is sufficient to establish his status as an invitee.

Under the TTCA, "invitee status requires payment of a specific fee for entry onto and use of public premises[.]" *City of Dallas v. Davenport*, 418 S.W.3d 844, 847–48 (Tex. App.—Dallas 2013, no pet.). We focus our inquiry on whether the plaintiff would have been allowed entry onto the premises but for the payment of the fee. *City of El Paso v. Viel*, 523 S.W.3d 876, 892 (Tex. App.—El Paso 2017, no pet.). The fee does not need to be paid directly by the plaintiff. *See City of Dallas v. Patrick*, 347 S.W.3d 452, 457 (Tex. App.—Dallas 2011, no pet.) ("Although Patrick did not pay an entry fee herself, the evidence establishes that she obtained entry to the Zoo through her mother's

membership. Thus a fee was paid, and—absent that payment—Patrick could not have entered."). However, a fee that merely relates to the premises is not sufficient under the TTCA to constitute payment for use of the premises. *See Davenport*, 418 S.W.3d. at 848–49.

The record establishes that Quintanilla did not pay to use or access the area where he was injured. Importantly, his aunt's purchase of a bus ticket was not required for him to access the bus station, which he acknowledged was generally open to the public. At most, the purchase of the bus ticket related to the use of the premises. This is insufficient to establish Quintanilla's status as an invitee. *See id*. (concluding that neither claimant's payment to park his car in an airport parking garage nor his purchase of an airline ticket constituted a fee paid specifically for entry onto and use of the terminal in area where he fell); *Simpson v. Harris County*, 951 S.W.2d 251, 253 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (concluding that the payment of a filing fee did not constitute payment for use of a public courthouse); *see also Churchman v. City of Houston*, No. 01–96–00211–CV, 1996 WL 544250, at *2–3 (Tex. App.—Houston [1st Dist.] Sept. 26, 1996, writ denied) (op., not designated for publication) (concluding that a claimant who paid to park in an airport parking garage had paid for use of parking garage but not for use of airport terminal where she fell). Because Quintanilla did not pay to enter the bus station, we conclude that he was a licensee at the time of his injury. We must now determine if there exists a fact issue regarding whether the City breached the duty owed to a licensee. *See Sampson*, 500 S.W.3d at 384.

B. Actual Knowledge

The duty owed to a licensee requires that a landowner not injure a licensee by willful, wanton, or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not. *Id*. at 391. Quintanilla does not contend that there is any evidence of willful, wanton, or grossly negligence conduct. Therefore, to establish a waiver of the City's immunity, Quintanilla must show that the City had actual knowledge of the dangerous condition. *See City of Corsicana v. Stewart*, 249 S.W.3d 412, 413–14 (Tex. 2008).

"Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time." *Id*. at 414–15. "Actual knowledge of an unreasonably dangerous condition can sometimes be proven through circumstantial evidence." *Seppy*, 301 S.W.3d at 444 (citing *City of Austin v. Leggett*, 257 S.W.3d 456, 476 (Tex. App.—Austin 2008, pet. denied)). Circumstantial evidence establishes actual knowledge only when it "either directly or by reasonable inference" supports that conclusion. *State v. Gonzalez*, 82 S.W.3d 322, 330 (Tex. 2002). In determining whether a premises owner has actual knowledge of a dangerous condition, courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition. *Sampson*, 500 S.W.3d at 392 (citing *Univ. of Tex.-Pan Am. v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008) (per curiam)). In addition, the premises owner's creation of a condition may support an

inference of actual knowledge if there is evidence that the premises owner knew or should have reasonably foreseen that the condition presented an unreasonable risk of harm. *E.I. DuPont de Nemours & Co. v. Roye*, 447 S.W.3d 48, 62 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd) (citing *Keetch v. Kroger Co.*, 845 S.W.2d 262, 265–66 (Tex. 1992)).

We first note that there is no evidence that the City created the spill or that it received prior reports of a dangerous condition. On appeal, Quintanilla relies solely on evidence that a City employee can be seen on video pushing a dry mop through the area shortly before Quintanilla's fall. However, without evidence showing how long the hazardous condition existed, the proximity of an employee is no evidence of actual knowledge. *Sampson*, 500 S.W.3d at 395. There is no such evidence in this case. To the contrary, the fact that three individuals, including Quintanilla, passed through the area without incident just before Quintanilla's fall demonstrates that the spill was very recent. Absent any temporal evidence, the record in this case falls short of what is required to demonstrate actual knowledge.[3] *Compare City of Dallas v. Thompson*, 210 S.W.3d 601, 603–04 (Tex. 2006) (per curiam) (concluding that there was no evidence the city had actual knowledge of a cover plate protruding from the floor absent evidence of how long the hazard existed, despite evidence that city employees had been in the area and had probably walked over the hazard) *with City of San Antonio v. Rodriguez*, 931 S.W.2d 535,

[3] The evidence also fails to demonstrate constructive knowledge, the lesser burden required to establish a breach of the duty owed to an invitee. *See Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 816 (Tex. 2002) ("An employee's proximity to a hazard, with no evidence indicating how long the hazard was there, merely indicates that it was possible for the premises owner to discover the condition, not that the premises owner reasonably should have discovered it. Constructive notice demands a more extensive inquiry.").

537 (Tex. 1996) (rejecting the city's contention that there was no evidence it had actual knowledge of a wet public basketball court where the city knew that rain would drip to the floor through a leaky roof and had contemporaneous actual knowledge that it was raining); *see also Sampson*, 500 S.W.3d at 395 ("That employees were present, 'double checked' everything, and made sure 'everything was up and running,' without more, does not show actual knowledge of the dangerous position of the cord at the time of the injury—that it was strung through the ivy and over the walkway in a manner that presented a tripping hazard."); *Cox v. H.E.B. Grocery, L.P.*, No. 03-13-00714-CV, 2014 WL 4362884, at *3 (Tex. App.—Austin Aug. 27, 2014, no pet.) (mem. op.) (concluding that a store video was "legally insufficient to constitute competent summary judgment proof of how long the piece of peach was on the floor" where the piece of peach was not visible on the video).

We conclude that Quintanilla has failed to raise a genuine issue of material fact as to the City's requisite knowledge of the dangerous condition. *See Sampson*, 500 S.W.3d at 384.

C. Summary

Quintanilla did not pay to access the premises where he was injured. Therefore, the City owed him the duty owed to a licensee. *See Sampson*, 500 S.W.3d at 391. Absent any evidence that the City had actual knowledge of the spilled substance, Quintanilla cannot establish that the City breached its duty, which is necessary to invoke the TTCA's waiver of immunity. *See Stewart*, 249 S.W.3d at 413–14. Conducting a de novo review, we conclude that the trial court erred in denying the City's plea to the

jurisdiction. *See Miranda*, 133 S.W.3d at 226. We sustain the City's first issue.[4]

III. CONCLUSION

We reverse the trial court's order denying the City's plea to the jurisdiction and render judgment dismissing Quintanilla's suit for want of subject matter jurisdiction.

LETICIA HINOJOSA
Justice

Delivered and filed the
11th day of July, 2019.

[4] Our resolution of the City's first issue is dispositive. Therefore, we need not address the City's second issue. *See* TEX. R. APP. P. 47.1.