Court of Appeals of Texas, Dallas.

CITY OF DALLAS, Appellant

v.

Vernell KENNEDY, Appellee

No. 05-19-01299-CV

|

Opinion Filed June 18, 2020

MEMORANDUM OPINION

Opinion by Justice Whitehill

Appellee Vernell Kennedy sued appellant City of Dallas alleging that she sustained injuries in a fall on City owned premises. The City asserted governmental immunity in a plea to the jurisdiction, which the trial court denied. The City then perfected this interlocutory appeal.

We conclude that (i) the City owed Kennedy the duties owed to a licensee and (ii) the evidence established that the City didn't have actual knowledge of the dangerous condition that allegedly caused Kennedy's injuries. Accordingly, the City is immune from Kennedy's suit. We reverse the trial court's order and render judgment dismissing the case.

I. BACKGROUND

A. Facts

Kennedy's live pleading alleged the following facts:

The City owns and maintains the Eddie Bernice Johnson Union Station and its adjoining pedestrian areas.

Kennedy traveled by train from Kilgore to Dallas and arrived at Union Station. As she was leaving the station, her foot contacted "an unexpected, eroded, broken, and depressed area of tile that bordered and contacted the door base." The depression made her lose her balance and fall. She suffered personal injuries requiring medical treatment and care.

B. Procedural History

Kennedy sued the City for her injuries, alleging that the City negligently failed to repair the floor and failed to warn her of the dangerous condition.

The City answered and invoked governmental immunity in a plea to the jurisdiction.

Kennedy amended her petition, dropping another defendant but continuing to assert the same claims against the City.

The City filed a supplemental plea to the jurisdiction with evidence attached.

Kennedy responded and filed her own evidence.

The City filed a reply brief with objections to Kennedy's evidence.

The trial court heard and denied the City's supplemental plea. A few days later, it overruled the City's evidentiary objections.

The City appealed. See TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

II. ISSUES AND STANDARD OF REVIEW

The City raises three issues:

1. the trial court erred by denying the City's jurisdictional plea;

2. the evidence conclusively established that Kennedy was a licensee and the City did not have prior actual knowledge of the allegedly dangerous condition; and

3. the trial court erred by overruling the City's evidentiary objections.

We review the denial of a jurisdictional plea de novo. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 228 (Tex. 2004).

In this case, the City argues that the evidence conclusively established that immunity barred Kennedy's suit. Thus, we consider the relevant evidence to resolve the jurisdictional issues raised. Seeid. at 227. If the evidence is undisputed or fails to raise a fact question on the jurisdictional issues, we rule on the plea as a matter of law. Id. at 228. We employ a standard resembling a traditional summary judgment, taking as true evidence favoring the nonmovant and indulging every inference and resolving any doubts in her favor. Id.

We review evidentiary rulings for abuse of discretion. See City of Dallas v. Rodriguez, No. 05-19-00045-CV, 2020 WL 1486831, at *3 (Tex. App.—Dallas Mar. 27, 2020, no pet.) (mem. op.).

III. ANALYSIS

A. Applicable Law

Governmental immunity deprives a trial court of subject matter jurisdiction over a suit against a governmental unit unless the unit consents to suit. City of Dallas v. Gatlin, 329 S.W.3d 222, 225 (Tex. App.—Dallas 2010, no pet.).

A city enjoys governmental immunity from suits based on its performance of governmental functions but not from suits based on its performance of proprietary functions. Wasson Interests, Ltd. v. City of Jacksonville, 559 S.W.3d 142, 146 (Tex. 2018). “[T]ransportation systems” are governmental functions. CIV. PRAC. & REM. CODE § 101.0215(a)(22).

The Texas Tort Claims Act waives a city’s governmental immunity for personal injuries caused by a real property condition if the city would, were it a private person, be liable to the claimant under Texas law. City of Dallas v. Davenport, 418 S.W.3d 844, 847 (Tex. App.—Dallas 2013, no pet.) (citing CIV. PRAC. & REM. CODE § 101.021(2)). The city’s duty to the claimant is that owed by a private person to a licensee “unless the claimant pays for the use of the premises.” CIV. PRAC. & REM. CODE § 101.022(a). If the claimant pays to use the premises, the city’s duty is elevated to that owed to an invitee. Davenport, 418 S.W.3d at 847.

A premises owner owes a licensee the duty not to injure her (i) by willful, wanton, or grossly negligent conduct or (ii) by failing to use ordinary care to warn of or make safe a dangerous condition of which the owner is aware and the licensee is not. Sampson v. Univ. of Tex. at Austin, 500 S.W.3d 380, 385 (Tex. 2016). By contrast, an invitee must prove only that the owner knew or should have known about the dangerous condition. Davenport, 418 S.W.3d at 847.

B. Does the evidence establish that the City owed Kennedy the duty a private premises owner owes a licensee?

Yes. The evidence established that Kennedy paid for a train ticket and used it to travel to Union Station but didn’t pay anything specifically to use Union Station itself. Under these facts and this Court’s precedent, Kennedy is considered a licensee under § 101.022(a).1

Both the City and Kennedy filed excerpts from Kennedy’s deposition. She testified that she took an Amtrak train from Kilgore to Union Station in Dallas. She bought her train ticket in Longview. She didn’t pay the City any fee to enter and exit Union Station. The only fee she paid was for her Amtrak ticket.

She further testified that she fell while attempting to walk through what she described as “the front door.” She had been to Union Station before, but previously she had always used a “back door” to leave. She also testified that there were four to six sets of doors she could have used to exit Union Station onto the street she was trying to reach.

The question is whether Kennedy’s buying a train ticket qualified under § 101.022(a) as “pay[ing] for the use of” Dallas’s Union Station. Our Davenport decision establishes that it did not.

In Davenport we held that “[a] fee must be paid specifically for entry onto and use of the premises” to trigger invitee status under § 101.022(a). 418 S.W.3d at 848. In that case, Davenport slipped and fell on an orange liquid in an underground walkway connecting the Love Field airport terminal to an airport parking garage. He had just flown in from Chicago and was returning to his car in the garage. He sued the City for his injuries on a premises liability theory, the trial court denied the City’s jurisdictional plea, and we reversed and rendered. Id. at 845–46. We held that Davenport’s payments to buy his airplane ticket and park his car were not payments “paid specifically for entry onto and use of the terminal in the area where he fell.” Id. at 849. Thus, Davenport was a

licensee, and the City was entitled to dismissal because the evidence showed that the City didn't have actual knowledge about the substance Davenport slipped on. Id. at 849–50.

Here, Kennedy bought a train ticket in Longview, but she paid no fee specifically to use Union Station, just as Davenport paid for an airplane ticket and for parking but paid no fee to use the terminal's underground walkway where he fell. Davenport is indistinguishable and dictates that the City owed Kennedy the duties owed to a licensee.

Although Kennedy argues that our Davenport analysis was incorrect, we are obliged to follow it. See Chakrabarty v. Ganguly, 573 S.W.3d 413, 415 (Tex. App.—Dallas 2019, no pet.) (en banc) ("Once a panel of this Court has spoken, subsequent panels are powerless to contradict that decision, barring reconsideration by the Court sitting en banc or an intervening decision by the supreme court.").

She also argues that the Fort Worth Court of Appeals recently disagreed with Davenport. See City of Fort Worth v. Posey, 593 S.W.3d 924, 929 (Tex. App.—Fort Worth 2020, no pet.). But opinions from other Texas courts of appeals are not binding on us. See Arnold v. Life Partners, Inc., 416 S.W.3d 577, 585 (Tex. App.—Dallas 2013), aff'd, 464 S.W.3d 660 (Tex. 2015). We must follow our own precedent. See Chakrabarty, 573 S.W.3d at 415.

We hold that the evidence conclusively establishes Kennedy's licensee status for duty purposes.

C. Does the evidence establish that the City lacked actual knowledge of the alleged dangerous condition?

Yes. The City's evidence negates actual knowledge, and Kennedy's evidence doesn't raise a genuine fact issue.[2]

1. The City's evidence negates actual knowledge.

The City filed an affidavit by Sheila Gray, a records custodian for the City's 311 Customer Service Center. She explained that complaints and calls for City services regarding any alleged hazardous conditions in the City are recorded in the City's "CRMS system" and routed to the appropriate City department for handling. She searched the CRMS records for the two years leading up to Kennedy's accident and found no record of any call, report, or complaint "regarding an eroded, broken, or depressed area of tile, or any other defects in the flooring in the area of the doorways located on the premises of Eddie Bernice Johnson Union Station."

The City also filed Kennedy's deposition testimony that (i) she never notified the City of Dallas about the "eroded tile area" before she fell, (ii) she was not aware that anyone else ever so notified the City, and (iii) she had no evidence that the City knew about a problem with the area before she fell.

In response, Kennedy argues that the erosion, depressing, or wearing of the tile floor must have taken place "over many, many years," so there's a reasonable inference that the City had actual knowledge of it.

We hold that the City's evidence negates actual knowledge. In licensee cases, "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). In Aguilar, the injured person tripped over a water hose lying across a sidewalk, and the supreme court held that the university adequately disproved actual knowledge with evidence that (i) there had been no similar tripping incidents in the previous five years and (ii) water hoses had never been a problem on campus. Id.

We recently held that evidence like the City's sufficiently negated actual knowledge. In City of Dallas v. Freeman, claimant Freeman alleged that he was injured in a bicycle accident caused by a three-inch elevation change between the sidewalk and the abutting curb. No. 05-18-00961-CV, 2019 WL 3214152, at *1 & n.2 (Tex. App.—Dallas July 17, 2019, no pet.) (mem. op.). The City filed a jurisdictional plea based on (i) evidence that the City had received no complaints about the accident location's condition for the two years before the accident and (ii) Freeman's admission he had no evidence that the City knew of any problem with the sidewalk before his accident. Id. at. *2. We held that this evidence sufficiently negated actual knowledge. Id. at *5–6. Freeman compels the conclusion that the City's evidence in this case also negates actual knowledge.

We reject Kennedy's argument that we should infer actual knowledge based on the apparent age of the defect. Although a premises owner may know that premises can deteriorate over time and become dangerous, this does not show actual knowledge of an existing dangerous condition. See City of Denton v. Paper, 376 S.W.3d 762, 767 (Tex. 2012) (per curiam) (owner must know about the dangerous condition at the time accident occurs, not merely possibility that dangerous condition can develop over time); accord Freeman, 2019 WL 3214152, at *6.

2. Kennedy's evidence doesn't raise a genuine fact issue regarding actual knowledge.

In the trial court, Kennedy relied on two pieces of evidence to raise a genuine fact issue regarding the City's actual knowledge of the allegedly dangerous condition. We hold that Kennedy's evidence fails to raise a genuine fact issue.

One piece of evidence is Kennedy's deposition testimony about a post-accident conversation she had with an African-American man wearing "a gray top [and] blue pants":

When we got ready to leave, he walked me and the lady [who came] to pick me up to the car. And he told us to go out on that end because he said they should've been have—had that fixed a long time ago.

Kennedy further said that she didn't know the man's name and didn't know whom he was talking about when he said that "they" should have fixed the floor. She guessed that he worked for Amtrak, but she didn't know.

Kennedy also relied on two of her own interrogatory responses. In the first, she said:

[A]fter Plaintiff fell and was injured, an employee told her, "We've told these people that we've got to get this fixed or someone will get hurt."

In the other, she said:

[A] worker or employee on the scene at the time of Plaintiff's accident, said to her, "We've told these people that we need to get this fixed or someone will get hurt."

The City objected to all these statements as inadmissible hearsay. The trial court overruled the objections.

On appeal, the City argues that Kennedy's interrogatory answers are incompetent evidence and cannot be considered even though the City didn't object on this basis. We agree. See Watson v. Henderson, No. 05-08-01158-CV, 2010 WL 175082, at *3 (Tex. App.—Dallas Jan. 20, 2010, pet. denied) (mem. op.) (interrogatory answers are incompetent summary judgment evidence and cannot be considered even if not objected to in the trial court).

This leaves Kennedy's deposition testimony that after her accident a man said, "[T]hey should've been have—had that fixed a long time ago." For this case, we will assume without deciding that the trial court properly overruled the City's hearsay objection to this testimony. Even so, the evidence doesn't raise a genuine fact issue regarding the City's actual knowledge.

To begin, there's no evidence that the man was a City employee or agent. Kennedy didn't know for whom the man worked, but she guessed he worked for Amtrak. Thus, even if the statement supports a reasonable inference that the man knew about the floor's condition for "a long time" before the accident, there's no evidence that his knowledge could be imputed to the City.

Moreover, the man's opinion that "they" should have fixed the floor doesn't create a reasonable inference that he ever actually reported the condition to anyone, much less that he (or anyone else) reported the condition specifically to the City. It is equally possible that he observed the condition and thought it should be fixed but never reported it to anyone.

In sum, the inference from the man's statement that the City had actual knowledge of this particular floor condition (i) is so weak that it amounts to mere speculation and (ii) doesn't raise a genuine fact issue that the City actually knew about the dangerous condition at the time of the accident. See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 114 (Tex. 2009) ("Findings based on speculation are not based on legally sufficient evidence."); Karaa v. Aramoonie, No. 05-17-00571-CV, 2018 WL 1373958, at *3 (Tex. App.—Dallas Mar. 19, 2018, no pet.) (mem. op.) ("Conclusory statements and speculation are legally no evidence."); see also Freeman, 2019 WL 3214152, at *5 ("Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident....").

IV. CONCLUSION

We sustain the City's first two issues, and we sustain in part the City's third issue regarding Kennedy's interrogatory answers. We reverse the order denying the City's supplemental plea to the jurisdiction and render judgment granting the plea and dismissing Kennedy's lawsuit.

Footnotes

1

The City asserts, and Kennedy does not dispute, that owning and maintaining Union Station is a governmental function, thus triggering governmental immunity unless a waiver applies. See CIV. PRAC. & REM. CODE § 101.0215(a)(22) ("transportation systems" are governmental functions). We agree with the City.

2

Kennedy doesn't allege that the City's conduct was willful, wanton, or grossly negligent, so only the actual knowledge prong of the City's duty to licensees is at issue.