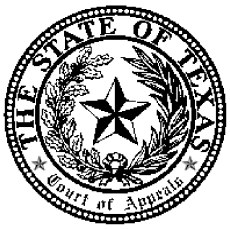
Reversed and Remanded and Opinion filed October 18, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00572-CV

PAUL SEAN GAFFNEY, Appellant

V.

TDCJ-ID, KENNY JAMES, AND SHAWN BLAIR, Appellees

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 20,471-C

M E M O R A N D U M O P I N I O N

Paul Sean Gaffney, an inmate of the Texas Department of Criminal Justice ("TDCJ"), appeals the trial court's summary judgment dismissing his claims against appellees TDCJ, Kenny James, and Shawn Blair. We reverse the trial court's judgment and remand this case for further proceedings consistent with this opinion.

On February 23, 1999, Gaffney suffered personal injuries when he stepped on the covering of a drainage trench and the covering collapsed, cutting Gaffney's right leg. This incident occurred in the sandblasting department of the Ellis Unit bus repair facility. Gaffney alleges that, at the time of his injuries, appellees James and Blair were employees of TDCJ

and knew about the premises defect that caused Gaffney's injuries. Appellees admitted that another inmate, Steven Gilbert, was injured by the same condition of the premises shortly before Gaffney's injuries. Further, Gaffney filed with the trial court a statement by inmate Leonard Crooms indicating that James had been aware of this condition of the premise for over five months. After Gilbert was injured, James did not post any warnings of the condition of the premises; rather, he left the scene to get equipment to repair the condition. Appellees claim that James told the inmates in the area to warn other inmates to stay away from the defect in question and that these inmates warned Gaffney of this defect before he was injured. Gaffney stated that he never received any warning about this premises defect and that he was not aware of the defect before he was injured.

Gaffney filed a premises-liability claim against appellees alleging negligence and gross negligence relating to the allegedly defective condition of the drainage trench in question. Appellees filed a motion for summary judgment. Appellees asserted the following grounds for summary judgment: (1) there is no fact issue regarding appellees' claim that they complied with any negligence duty that they owe to Gaffney as a licensee; and (2) Blair and James are entitled to official immunity as a matter of law. While the appellees cited cases that correctly state the licensee standard of care, appellees repeatedly mischaracterized this standard of care in their arguments to the trial court—both in their motion and at oral argument on the motion. Appellees asserted that, in order to recover as a licensee, Gaffney must prove that appellees engaged in willful or wanton conduct or gross negligence. At the end of oral argument, the trial court stated it granted appellees' motion for summary judgment because it found no genuine issue of fact as to gross negligence.

Appellees misstated Texas premises-liability law. The duty owed to a licensee is not to injure the licensee willfully, wantonly, or through gross negligence, and, in cases in which the defendant has actual knowledge of a dangerous condition unknown to the licensee, to warn of or make safe the dangerous condition. *State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). While Gaffney can recover under a licensee

theory if he proves willful, wanton, or grossly negligent conduct, he need not prove such conduct. Rather, even in the absence of any willful, wanton, or grossly negligent conduct, Gaffney can recover under a licensee theory by proving the following: (1) a condition of the premises created an unreasonable risk of harm to Gaffney; (2) the TDCJ actually knew of the condition; (3) Gaffney did not actually know of the condition; (4) the TDCJ failed to exercise ordinary care to protect Gaffney from danger; (5) the TDCJ's failure was a proximate cause of injury to Gaffney. *Id*. Appellees did not dispute the first two elements.[1] Gaffney's evidence raised a genuine issue of material fact as to the other three elements. In fact, during oral argument in the trial court, appellees' counsel admitted several times that there was a fact issue as to these elements; however, counsel argued that these fact issues were not material because Gaffney has to prove willful, wanton, or grossly negligent conduct and because there was no fact issue as to this type of conduct. This was a misstatement of the law.

In his first issue, Gaffney asserts that the trial court erred in granting appellees' motion for summary judgment because of fact issues regarding his ability to recover. We agree and sustain Gaffney's first issue.[2] Appellees did not negate as a matter of law any essential element of Gaffney's premises-liability claims. Therefore, the trial court erred in granting summary judgment based on appellees' argument that there was no fact issue as to Gaffney's premises-liability claims.

Although appellees did not attach any affidavits from James or Blair and although appellees did not assert official immunity at oral argument in the trial court, the trial court's judgment does not specify the basis for summary judgment, and appellees' motion contains

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[1] Appellees do not appear to have disputed the first two elements in the trial court. In any event, Gaffney asserted that these elements were true in the statement of facts in his brief, and appellees have not filed a brief in this appeal. Because appellees have not contradicted these facts, we accept them as true. TEX. R. APP. P. 38.1(f); *Suarez v. Jordan*, 35 S.W.3d 268, 271 n. 2 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

[2] Because we have granted Gaffney the relief he seeks, we need not address his second issue.

a conclusory assertion that summary judgment should be granted under the official immunity doctrine. We hold that official immunity provides no basis for affirming the trial court's judgment. First, the TDCJ may be liable under Gaffney's premises-liability theory, even if James and Blair are immune from liability. *DeWitt v. Harris County*, 904 S.W.2d 650, 653 (Tex. 1995) (if liability is based on a premises defect, governmental unit is not shielded by its employees' official immunity); *accord City of Baytown v. Peoples*, 9 S.W.3d 391, 395 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Therefore, official immunity provides no basis for affirming the trial court's judgment as to the TDCJ. Second, as to James and Blair, they had the burden of conclusively proving all three elements of the affirmative defense of official immunity. *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994). The only summary-judgment proof submitted by appellees was a four-page report of inmate injury. James and Blair did not conclusively prove the three elements of official immunity. *See, e.g., Wadewitz v. Montgomery*, 951 S.W.2d 464, 466-67 (Tex. 1997). Therefore, appellees were not entitled to summary judgment based on the official-immunity ground asserted in their motion. We reverse the trial court's judgment and remand this case for further proceedings consistent with this opinion.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed October 18, 2001.
Panel consists of Justices Yates, Fowler, and Wittig.[3]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Senior Justice Don Wittig sitting by assignment.