Appellant's Appeal Dismissed as Moot; Affirmed and Majority and Dissenting and Concurring Opinions filed May 28, 2020

In the

Fourteenth Court of Appeals

NO. 14-19-00166-CV

HARRIS COUNTY SPORTS & CONVENTION CORPORATION, Appellant/Cross-Appellee

v.

NICOLE FINLAN CUOMO, Appellee/Cross-Appellant

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2014-35933

DISSENTING AND CONCURRING OPINION

Over the course of decades, the judiciary has rewired itself so that it no longer sees disputed facts where it once did, turning summary judgment from something

rare into something routine. How far will this go? This appeal once again pushes the boundaries of what we once thought was a fact question, subjective awareness.[1]

In its March 2019 order denying Cuomo's motion for summary judgment, the trial court effectively granted the plea to the jurisdiction filed by the governmental unit, Harris County Sports & Convention Corporation ("Harris County S&C"). I agree that this order is a final, appealable judgment.[2] And when a plea to the jurisdiction challenges the existence of jurisdictional facts with supporting evidence,

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[1] The court affirms the trial court's final judgment, from which only Cuomo has filed a notice of appeal. Based on the case name on the court's opinion, you might think that "appellant" Harris County Sports & Convention Corporation lost its appeal. But you would be incorrect; in this appeal it is "appellee" Cuomo who loses when the court affirms the final judgment. This is needlessly confusing, and I do not understand why the court insists on issuing the opinion this way.

[2] Harris County S&C previously filed a February 2019 notice of appeal from the trial court's February 2019 orders. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (authorizing interlocutory appeal from grant or denial of plea to jurisdiction by governmental unit as that term is defined in Tex. Civ. Prac. & Rem. Code Ann. § 101.001). Neither Cuomo nor Harris County S&C argues that the trial court violated the statutory automatic stay of the commencement of trial when it rendered the March 2019 final judgment. *See id.* § 51.014(b) ("An interlocutory appeal under Subsection (a) . . . stays the commencement of a trial in the trial court pending resolution of the appeal.").

The March 2019 final judgment is captioned as follows: "Proposed Order Denying Plaintiff's Summary Judgment as to Trial Court's Subject Matter Jurisdiction over Harris County Sports & Convention Corporation." A better caption for the signed order would have been "Final Judgment." Cuomo filed a notice of appeal and a later amended notice of appeal from the trial court's final judgment, which recited it "was an appeal from an interlocutory appeal." Perhaps because of the confusion over the status of the order, the amended notice of appeal did not receive a separate case number in this court.

Regardless of the captions on the March 2019 order and the "amended notice of appeal," the order is a final judgment under *Lehmann v. Har-Con Corp.*, and this court has jurisdiction over that final judgment. 39 S.W.3d 191 (Tex. 2001). The trial court's final judgment makes Harris County S&C's February 2019 interlocutory appeal moot, and this court dismisses that appeal in our judgment. I agree that Harris County S&C's separate February 2019 interlocutory appeal is moot and must be dismissed, so I concur in that portion of the court's judgment. The only appeal that is not moot is Cuomo's separate appeal based on the notice of appeal she filed from the March 2019 final judgment: *Cuomo v. Harris Cty. Sports & Convention Corp*. Harris County S&C neither filed a notice of appeal from the final judgment, so it is not an appellant (*see* Tex. R. App. P. 3.1(a)), nor was it possible for Harris County S&C to file a cross-point because there was no judgment n.o.v. (*see* Tex. R. Civ. P. 324(c)).

the standard of review mirrors that of a traditional summary judgment: all the evidence is reviewed in the light most favorable to the plaintiff to determine whether a genuine issue of material fact exists. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004).

The relevant question in this case is did Harris County S&C have actual notice through subjective awareness that Cuomo received some injury under the Texas Tort Claims Act?[3] *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.101(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). More to the point, is there a genuine issue as to that material fact that precludes dismissing the case for lack of jurisdiction?

The court dutifully recites *Miranda* for the proposition that we take as true all evidence favorable to the plaintiff and indulge every reasonable inference and resolve any doubts in the plaintiff's favor. 133 S.W.3d at 226. The court goes on to conclude:

> That an attorney claims injury and requests communication with a governmental unit's liability insurer, without more, does not equate with or supply a reasonable inference that the unit is subjectively aware of a proximate connection between the alleged injury and the unit's unalleged conduct in creating or controlling an unalleged unreasonable hazard. The March 28, 2013 letter does nothing to make [Harris County S&C] subjectively aware of its alleged fault in contributing to the injury.

The court concludes that "there is no evidence that [Harris County S&C] . . . was subjectively aware of allegations that it was responsible for the parking lot or that

[3] There is an unresolved agency issue in this case regarding Harris County S&C's management company SMG, but in light of the court's holding, it is not necessary to the court's disposition of the appeal to resolve that issue.

[Harris County S&C]'s . . . failure to maintain the parking lot was responsible for or contributed to Cuomo's claimed injuries."

Following *Miranda*, the March 28, 2013 letter looks like *some* evidence to me of Harris County S&C's subjective awareness:

> This firm represents Nicole Cuomo with regard to serious injuries sustained by her on March 9, 2013, at the Reliant Stadium Yellow Parking Lot.[4]
>
> Ms. Cuomo has assigned this firm an undivided interest in her claim. . . . Please forward a copy of this letter to your liability insurance company and ask a representative to contact me.

Are there no reasonable inferences to be drawn from "serious injuries," "claim," and "forward a copy of this letter to your liability insurance company"? Does anyone really think there is no reasonable inference of an allegation that Harris County S&C was at fault?[5] The court thinks there is no reasonable inference. In my opinion,

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[4] A March 9, 2013 Reliant Park incident report states:

> Officers were advised that there was an injured person in Yellow 33. Officers arrived and observed W/F Cuomo laying on the grass in pain. Cuomo left ankle was swollen appeared to be broken. HFD was contacted and ambulance 33 was dispatched to the location. Cuomo stated that she was walked thru the parking lot when she stepped up on the cement circle around the oak trees. Cuomo stated that she did not plant her foot and when she stepped onto the cement she turned her ankle and fell to the ground. WITN Fowler who was walking behind Cuomo stated the same. Ambulance 33 arrived and transported Cuomo to Hermann Hospital.

(minor spelling mistakes corrected).

[5] Harris County S&C's responses to discovery were mixed concerning its anticipation of a lawsuit. In its January 8, 2015 responses to Cuomo's first request for production 26 and 27, Harris County S&C stated, "Subject to and without waiving the foregoing objection, Defendant was put on notice of the Plaintiff's anticipation of filing a lawsuit on March 28, 2013. Please see attached letter from Gregg Anderson dated March 28, 2013." On July 5, 2018, these responses were amended to state, "Subject to and without waiving the foregoing objections, Harris County Sports & Convention Corporation was first notified of the incident when its outside counsel at Haynes & Boone, LLP received a demand from the Houston Livestock Show & Rodeo on July 22, 2014. Please see the Houston Livestock Show & Rodeo's Demand for Indemnity and Defense previously produced by Defendant in this case."

Cuomo's case has been dismissed with prejudice because the "magic words" were not said.

Reviewing the supreme court's opinions on actual notice that the court cites, I agree this is not a case in which the actual notice was alleged to come from a police report.[6] Instead, it is a case in which Cuomo's attorney reported a claim. I also agree that this is not a case in which a governmental unit denied a claim on an administrative level and used that administrative denial as a basis to avoid actual notice.[7] None of these supreme-court opinions resolves the issue in Cuomo's appeal.

The supreme court recently stated that "[p]rompt notice allows 'governmental units to expeditiously undertake remedial measures that may be required to protect the public' and 'advances fundamental immunity underpinnings by allowing governmental units an opportunity to defend against tort claims and allocate resources to resolve potentially meritorious claims.'" *Reyes v. Jefferson Cty.*, No. 18-1221, 2020 WL 1898542, at *2 (Tex. Apr. 17, 2020) (per curiam). Unfortunately, this court resolves Cuomo's appeal in a manner that does not advance the supreme court's stated public-policy concerns. Instead, this court's opinion will only encourage governmental units to test the boundaries of how to avoid the submission

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Harris County S&C's January 8, 2015 response to Cuomo's first set of interrogatories 13 ("Please describe how, from whom, and the date your first learned about the incident in question.") stated, "We learned of the incident through SMG's incident report." On July 5, 2018 this response was amended to state, "Harris County Sports & Convention Corporation first learned of the incident made the basis of this suit when its outside counsel at Haynes & Boone, LLP received a demand from the Houston Livestock Show & Rodeo on July 22, 2014. Please see the Houston Livestock Show & Rodeo's Demand for Indemnity and Defense previously produced by Defendant in this case."

[6] *Worsdale v. City of Killeen*, 578 S.W.3d 57 (Tex. 2019); *City of San Antonio v. Tenorio*, 543 S.W.3d 772 (Tex. 2018); *City of Dallas v. Carbajal*, 324 S.W.3d 537 (Tex. 2010) (per curiam).

[7] *Reyes v. Jefferson Cty.*, No. 18-1221, 2020 WL 1898542 (Tex. Apr. 17, 2020) (per curiam).

to a factfinder of the issue of their subjective awareness.

Could Cuomo's notice have been clearer? Obviously. But is there a genuine issue as to that material fact that precludes dismissing the case for lack of jurisdiction using the summary-judgment standard? If "magic words" are required, then there is nothing to see here. I do not believe that the supreme-court caselaw cited by this court requires a holding that Cuomo has done *nothing* to make Harris County S&C subjectively aware "of allegations that it was responsible for the parking lot or that [Harris County S&C]'s . . . failure to maintain the parking lot was responsible for or contributed to Cuomo's claimed injuries." Nor does the court cite any controlling precedent from our court that dictates such a result.

Reviewing all the evidence in the light most favorable to Cuomo, a genuine issue of material fact exists concerning Harris County S&C's actual notice through subjective awareness that Cuomo received some injury under the Texas Tort Claims Act. This issue should be submitted to a factfinder, and the trial court committed reversible error in granting the plea to the jurisdiction and dismissing her claims.

Whether Cuomo's claims are ultimately dismissed on jurisdictional grounds is part of the everyday work of the judiciary. But saying, "Nothing here to see, move along" is truly extraordinary.

I respectfully dissent from the portion of the court's judgment affirming the March 2019 final judgment and concur in the portion of the court's judgment dismissing as moot Harris County S&C's separate February 2019 interlocutory appeal.

/s/ Charles A. Spain
Charles A. Spain
Justice

Panel consists of Chief Justice Frost and Justices Jewell and Spain. (Spain, J., dissenting and concurring).