United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce
Clerk

No. 20-40342

Barbara Cobb, *individually and as administratrix of* the Estate of William Cobb, Deceased; Jessica Ryane Cobb, *individually*;

Plaintiffs—Appellants,

versus

James Construction Group, L.L.C.,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:17-CV-208

Before Jolly, Haynes, and Oldham, *Circuit Judges*.

Per Curiam:*

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

This is a premises liability tort case stemming from a highway accident on US 82. Relatives of the deceased driver, William Cobb,[1] sued James Construction Group, L.L.C. ("James Construction"), who was the general contractor responsible for a highway improvement project (the "Project") on the portion of the highway where the accident occurred. Specifically, the Cobbs raised various state law claims, including negligence, gross negligence, and defective premises for injuries stemming from the accident. The district court granted James Construction's motion for summary judgment and dismissed the Cobbs' claims with prejudice. For the following reasons, we AFFIRM.

I. Background

Bowie County and the Texas Department of Transportation ("TxDOT") executed an agreement authorizing Bowie County to develop the Project on US 82. James Construction entered into an agreement with Bowie County to construct the Project, splitting it into different phases. At the time of the accident, the Project was in Phase 2. Relevant here, Phase 2's traffic control plan (the "Plan") specified that the width for the two travel lanes on US 82 should be 11 feet each, for a total of 22 feet. The Plan did not require, however, an improved shoulder border on the eastbound travel lane.

On the day of the accident, Mr. Cobb and Luis Salinas ("Mr. Salinas") were driving east through the Project in a company car. Mr. Cobb was aware of the ongoing construction when he entered the Project. At some point, the vehicle left the roadway and went into mud. Mr. Cobb veered into

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[1] We refer to William Cobb as "Mr. Cobb" and his plaintiff family members as "the Cobbs."

oncoming traffic, then overcorrected, resulting in the vehicle going into a side skid and rolling. The impact killed Mr. Cobb and injured Mr. Salinas.

Mr. Cobb and Mr. Salinas were working as employees of G.T. Michelli Company, Inc. at the time of the accident. Because workers' compensation benefits were being paid, an adjuster commissioned an investigation of the accident. The investigator discovered there had been nineteen crashes on the same section of highway where the accident occurred between June 1, 2015 and January 15, 2016. Moreover, a Texas State Trooper told the investigator that he knew of three or four accidents where vehicles went off the road due to narrow lanes, which occurred *after* the lanes were shifted in Phase 2.

The Cobbs sued James Construction in federal district court, asserting state law claims of negligence, gross negligence, and defective premises. They claimed James Construction proximately caused the accident by acts and omissions, including but not limited to, the failure to comply with the Plan's roadway width and shoulder specifications and the corresponding failure to inspect for and warn of non-compliance.

James Construction moved for summary judgment to dismiss all of the Cobbs' claims. The district court granted James Construction's motion for summary judgment and dismissed the Cobbs' claims with prejudice. *Cobb v. James Constr. Grp., LLC*, No. 5:17CV208-CMC, 2020 WL 3516227, at *1 (E.D. Tex. Jan. 13, 2020). While rejecting one of James Construction's arguments, after examining the Cobbs' negligence claims, it found that they failed as a matter of law because they arose out of nonfeasance as opposed to negligent activity. *Id.* at *25–26. This finding resulted in the dismissal of the Cobbs' gross negligence claim. *Id.* at *34.

As for the Cobbs' premises liability claim, the court appeared to apply, without explanation, the Texas Tort Claims Act ("TTCA") § 101.022(c),

which applies to "governmental units" and provides a licensee status requirement. *Id.* at *27–29. The court thus held that James Construction owed Mr. Cobb a duty to warn of dangerous conditions if it had actual knowledge of the condition. *Id.* at *29. Because the Cobbs failed to provide evidence that James Construction was actually aware of its alleged non-compliance with the Plan, the Cobbs' premises liability claim failed as a matter of law, *see id.* at *30–33, 34. The Cobbs timely appealed.

II. Standard of Review

We review de novo a grant of summary judgment, using the same standards as the district court.[2] *Jenkins v. C.R.E.S. Mgmt., L.L.C.*, 811 F.3d 753, 756 (5th Cir. 2016). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "[A]ll facts and inferences must be construed in the light most favorable to the non-movant." *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 248 (5th Cir. 2008). We may affirm the district court's grant of summary judgment, even if it made some error of law, so long as it is apparent on appeal that no genuine issue of fact exists under the proper legal analysis. *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1281 (5th Cir. 1981), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989).

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[2] When the Cobbs filed their lawsuit, they claimed that the district court had diversity jurisdiction under 28 U.S.C. § 1332. Relatives of Mr. Salinas also sued James Construction, but they were later dismissed from the lawsuit, along with the workers' compensation insurer who had intervened. As the Cobbs later admitted, complete diversity was lacking when the lawsuit was filed. However, this jurisdictional defect was cured when the non-diverse parties (Mr. Salinas' relatives and others) were dismissed from the case by agreement. *See Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 572 (2004) (acknowledging such a dismissal of a diversity-destroying party as a "method of curing a jurisdictional defect" long recognized as an "exception to the time-of-filing rule").

III. Discussion

The Cobbs' primary contention is that the district court applied the wrong legal standard in assessing their premises liability claim. The Cobbs note that the district court applied a provision of the TTCA, which pertains only to "governmental units," not independent contractors (like James Construction). This error, according to the Cobbs, resulted in the application of the "wrong standard" that requires "actual knowledge." Instead, they argue that a "knew or should have known" standard was proper.[3]

In Texas, "[p]remises liability is a special form of negligence where the duty owed to the plaintiff depends upon the status of the plaintiff at the time the incident occurred." *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). That is, whether the plaintiff was an invitee, a licensee, or a trespasser. *See Cath. Diocese of El Paso v. Porter*, 622 S.W.3d 824, 829 (Tex. 2021). Generally, the determination of status is a question of law, but "it can be a question for the jury when facts relevant to the legal standard are in dispute."[4] *Id.*; *see Olivier v. Snowden*, 426 S.W.2d 545, 550 (Tex. 1968) ("The facts essential to the determination of [the claimant]'s status are not in dispute. Therefore, whether the facts showed [the claimant] to have been an invitee or a licensee was a legal question for the Court."). The burden of

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[3] The Cobbs also passingly refer to their negligent activity claims, but they waived this argument by failing to adequately brief it on appeal. *See Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004).

[4] On appeal, the parties do not dispute the facts underlying Mr. Cobb's legal status—namely, the monetary value of the construction contract and the fact that Mr. Cobb was a member of the public traveling on the road to avoid "taking a longer re-directed route."

proving status is on the claimant. *See Wilson v. Nw. Tex. Healthcare Sys., Inc.*, 576 S.W.3d 844, 850 (Tex. App.—Amarillo 2019, no pet.).

Relevant here, Mr. Cobb's legal status was either that of an invitee or licensee.[5] The difference between an invitee and a licensee depends on the purpose for the person's presence on the premises. An invitee is a person "who enters the property of another with the owner's knowledge and for the mutual benefit of both"; a licensee, in contrast, "is a person who goes on the premises of another merely by permission, express or implied, and not by any express or implied invitation." *Porter*, 622 S.W.3d at 829 (quotation omitted). To determine invitee or licensee status, Texas courts ask the following:

> whether the injured person, at the time of the injury, had present business relations with the owner . . . which would render his presence of mutual aid to both, or whether his presence on the premises was for his own convenience, or on business with others than the owner.

Id. at 830 (quotation omitted). For an invitee, a "mutual benefit" must be a "shared business or economic interest" with the owner or occupier of the property. *Id.* at 829 (quotation omitted).

In premises liability cases, the distinction between an invitee and a licensee is significant because a "lesser duty" is owed to a licensee. *Id.* For an invitee, the landowner owes a duty "to exercise reasonable care to protect against danger from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover." *Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411,

[5] Neither party argues that Mr. Cobb was a trespasser.

412 (Tex. 2010) (quotation omitted). In contrast, for a licensee, a landowner has a duty to "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." *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 387 (Tex. 2016) (quotation omitted). In other words, to impose liability on a licensee, a claimant must prove the defendant had actual knowledge rather than constructive knowledge. *See State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992) (acknowledging "that 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" (emphasis added)).

A. *Premises Liability Status*

We agree that the TTCA does not apply here,[6] but we must still determine claimant status under the applicable law, a question addressed at length in the district court's opinion. The Cobbs argue that Mr. Cobb was an invitee because he "was on the highway at the express or implied invitation by James [Construction]"; "the highway was open for travel by the public"; he was "a member of the public"; and the purpose for which the premises were held open was "connected with the business" interests of James Construction. Specifically, the Cobbs contend that there was a "mutual benefit" for both James Construction and Mr. Cobb because he avoided "taking a longer re-directed route," and James Construction benefitted from a $27 million construction contract. To support their argument, the Cobbs cite to Texas Pattern Jury Charges 66.6 and 66.7, which

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[6] Under the statute, a "governmental unit" does not include a governmental contractor. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(2) & (3); *see also Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 129 (Tex. 2015).

consider "a member of the public for a purpose for which the premises are held open to the public" as an invitee.

The Cobbs' argument fails, in large part, because they cannot raise a factual issue to demonstrate that the benefit James Construction received was sufficiently mutual; that is, they cannot prove there was a *shared* benefit between James Construction and Mr. Cobb.[7] Though the Cobbs maintain that James Construction received an economic benefit, they have not shown how that benefit was tied to Mr. Cobb's presence on the highway. Indeed, James Construction received its economic benefit (via a $27 million contract) from a third party. This third-party benefit was insufficient to create a mutual benefit between Mr. Cobb and James Construction necessary to establish invitee status.[8] *See Porter*, 622 S.W.3d at 831–32 (rejecting invitee status based on a third-party benefit theory).

The Cobbs' citation to Texas Pattern Jury Charges 66.6 and 66.7 does not compel a contrary conclusion. The definition of an invitee in these two charges appears to adopt the Restatement's articulation of a "public invitee": namely "a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the

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[7] At oral argument, the Cobbs conceded, outside of an indirect benefit, there was no mutual benefit between Mr. Cobb and James Construction.

[8] Moreover, Mr. Cobb would not have qualified as an invitee of *the County*, even though he was using public premises. To impose premises liability on a governmental unit, "invitee status requires payment of a specific fee for entry onto and use of public premises." *City of Dall. v. Davenport*, 418 S.W.3d 844, 847, 848 (Tex. App.—Dallas 2013, no pet.) (quotation omitted); *see* Tex. Civ. Prac. & Rem. Code Ann. § 101.022. As applicable here, it would make little sense to extend invitee status to Mr. Cobb in relation to James Construction (the occupier of the premises) when it would not extend to Bowie County (the owner of the premises). *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997) ("A general contractor in control of the premises is charged with the *same duty* as an owner or occupier." (emphasis added)).

public." Restatement (Second) of Torts § 332 (1965). However, the Supreme Court of Texas has declined to adopt the Restatement's "public invitee" concept, so we cannot do so here. *Porter*, 622 S.W.3d 824, 830 n.31, 831–32 (Tex. 2021). We therefore hold that Mr. Cobb was a licensee as a matter of law.

B. *Actual Knowledge*

Because we conclude that Mr. Cobb was a licensee, we must determine whether the district court erred in concluding that the Cobbs failed to raise an issue of material fact regarding James Construction's actual knowledge at the time of the accident. *See Payne*, 838 S.W.2d at 237; *see also Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 117 (Tex. 2010). There is no singular test for determining actual knowledge, but "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).

On appeal, the Cobbs failed to make an actual knowledge argument, so this issue is waived.[9] Moreover, the Cobbs appeared to concede before the district court that they were "without knowledge or information regarding exactly what James [Construction] knew about the width of the travel lane or James [Construction]'s knowledge about the other approximately 19 accidents occurring in or about the construction project." We therefore conclude that the Cobbs failed to raise a material fact issue regarding James Construction's actual knowledge.

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[9] At oral argument, the Cobbs also conceded that if they lose to James Construction on the question of licensee status, "then this court would be hard pressed to find error in the district court."

Accordingly, we AFFIRM the district court's grant of summary judgment in favor of James Construction.