Frazier v. City of Dallas

2000 | Cited 0 times | Court of Appeals of Texas | May 24, 2000

AFFIRMED; Opinion issued May 24, 2000

OPINION

Billy Frazier appeals the summary judgment granted in favor of the City of Dallas. Appellant brings three issues asserting the trial court erred in determining that flood waters were not a special defect of which the City had constructive knowledge and a duty to warn appellant. We resolve appellant's issues against him and affirm the trial court's judgment.

FACTUAL BACKGROUND

On the evening of May 5, 1995, Dallas endured a massive thunderstorm, replete with widespread flash flooding and hail. [1] The flash flooding encompassed virtually all areas of Dallas. Appellant was a passenger in a vehicle attempting to cross the bridge over Cedar Creek at Beckley Avenue during the thunderstorm. As the car attempted to cross the bridge, water flowing over the bridge swept the car into the creek below. Appellant survived, but the other four passengers drowned. No signs, warning devices, or barricades were present to alert motorists that the bridge would flood.

Appellant sued the City for premises liability for not warning of the danger of the flood waters and for negligence in rescuing appellant. The City moved for summary judgment under Texas Rule of Civil Procedure 166a(c) and (i) on the grounds it proved its entitlement to sovereign immunity as a matter of law and that appellant failed to present summary judgment evidence raising a fact question concerning the City's liability under the Texas Tort Claims Act. See Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (Vernon 1997). The trial court granted the City's motion for summary judgment.

SUMMARY JUDGMENT

In his three issues, appellant asserts the trial court erred in granting the City's motion for summary judgment. The function of a summary judgment is not to deprive a litigant of its right to a full hearing on the merits of any real issue of fact but is to eliminate patently unmeritorious claims and untenable defenses. See Gulbenkian v. Penn, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952). A no-evidence motion for summary judgment is essentially a pretrial motion for instructed verdict, and we apply the same standard of review. See Moore v. K Mart Corp., 981 S.W.2d 266, 269 (Tex. App._San Antonio 1998, pet. denied); see also General Mills Restaurants, Inc. v. Texas Wings, Inc., 12 S.W.3d 827, 832-33 (Tex. App._Dallas 2000, no pet.); cf. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250

(1986) (federal summary-judgment rule mirrors the standard for instructed verdict). We consider all the evidence in the light most favorable to the adverse party, disregarding all contrary evidence and inferences. See Sibai v. Wal Mart Stores, Inc., 986 S.W.2d 702, 705 (Tex. App._Dallas 1999, no pet.); Moore, 981 S.W.2d at 269. A no-evidence summary judgment is improper if the adverse party has produced more than a scintilla of probative evidence raising a genuine issue of material fact on each challenged element of a claim or defense. See Roth v. FFP Operating Partners, L.P., 994 S.W.2d 190, 195 (Tex. App._Amarillo 1999, pet. denied); Moore, 981 S.W.2d at 269. Evidence that "is so weak as to do no more than create a mere surmise or suspicion" of a fact is legally insufficient and constitutes no evidence. See Moore, 981 S.W.2d at 269 (quoting Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983)). "More than a scintilla of evidence exists when the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.' " Moore, 981 S.W.2d at 269 (quoting Merrill Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).

At trial, appellant alleged various theories for the City's liability, but on appeal, appellant argues only a single theory:

that the water over the bridge constituted a special defect of which the City knew or should have known necessitating a warning to appellant of the dangerous condition.

Governmental units waive sovereign immunity for personal injury and death caused by a condition of real property to the extent a private person would be liable to the claimant. See Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (Vernon 1997). For a special defect, such as a road obstruction, the governmental unit owes the traveling public the same duty to warn and make safe a private person owes an invitee. Thus, to overcome the City's sovereign immunity, appellant must prove:

(1) a condition created an unreasonable risk of harm; (2) the City knew or reasonably should have known of the condition; (3) it failed to exercise ordinary care to protect appellant; (4) and the City's failure to exercise ordinary care was the proximate cause of appellant's injury. See State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 237 (Tex. 1992); State v. Williams, 932 S.W.2d 546, 550 (Tex. App._Tyler 1995), writ denied per curiam, 940 S.W.2d 583, 584 (Tex. 1996); City of Fort Worth v. Adams, 888 S.W.2d 607, 613 (Tex. App._Tyler 1994, writ denied). The "condition" appellant asserts is the special defect is the bridge's tendency to flood. The City asserted that, after adequate time for discovery, no evidence showed the City knew or should have known the bridge would flood. See Tex. R. Civ. P. 166a(i).

The City presented the affidavit of Jack Antebi, the Senior Engineer in the Transportation and Engineering Division of the Department of Public Works and Transportation in the City, who stated that "[t]he bridge is not normally subject to flooding, even in heavy rainfall, and is not on the City's list of known areas or intersections that are normally subject to flooding." In response, appellant cites his own affidavit and the affidavit of Alan Lagarde. Appellant's affidavit is substantively defective because it is neither signed nor notarized. Unsigned, unsworn affidavits are not competent

summary judgment proof and they lack probative value to defeat a motion for summary judgment. See De Los Santos v. Southwest Tex. Methodist Hosp., 802 S.W.2d 749, 755 (Tex. App._San Antonio 1990, no writ), overruled on other grounds by Lewis v. Blake, 876 S.W.2d 314, 315 (Tex. 1994); Brown Found. Repair & Consulting, Inc. v. Friendly Chevrolet Co., 715 S.W.2d 115, 117 (Tex. App._Dallas 1986, writ ref'd n.r.e.); Davis v. Sherrill, 113 S.W. 556, 557 (Tex. Civ. App. 1908). Because appellant's unsigned affidavit is not competent summary judgment evidence, it cannot defeat the City's motion for summary judgment.

Alan Lagarde states in his affidavit:

I've noticed that the Beckley Street Bridge . . . has a tendency to flood during a heavy rain storm. On several occasions, water has run over the top of the bridge.

In 1989, the City experienced several severe rain storms. On at least three occasions, during that time, water flooded the Beckley Street Bridge. Once, I noticed a vehicle trapped on the bridge by the current.

For several years, prior to 1989, I was involved in a community organization known as "Friends of Cedar Creek Lake." Our purpose was to work with the City of Dallas towards cleaning up and improving the conditions of Cedar Creek Lake. The City of Dallas assisted us in these programs. Our organization recommended several ideas for improving Cedar Creek Lake, including notifying the City of Dallas about how the area around the Beckley Street Bridge floods in bad weather. (Emphasis added.)

Appellant asserts Lagarde's statement that his organization notified the City "about how the area around the Beckley Street Bridge floods in bad weather" raised a fact question regarding whether the City knew or should have known the bridge floods in bad weather. We disagree. Lagarde did not state his organization notified the City that the bridge floods. Instead, he says they told the City only that the area around the bridge floods. The purpose of a bridge is to provide travelers a means to traverse flooded areas around it. Lagarde's affidavit is not evidence the City knew or should have known the bridge would flood.

Appellant also relies on the December 1978 report of Albert H. Halff Associates, Inc., and a flood-plain map. Halff prepared the report with the authorization of the Dallas City Council recommending improvements to the flood plain of Cedar Creek and its tributaries. The report notes that the bridges over Cedar Creek flood during bad weather and recommends renovations to the bridge and the Creek to reduce the risk of flooding. However, this report is not certified, sworn to, or otherwise authenticated. The flood-plain map shows the Beckley Avenue bridge across Cedar Creek is in the hundred-year flood plain, but this map is not certified, sworn to, or otherwise authenticated. Documents submitted as summary judgment evidence must be sworn to or certified. See Tex. R. Civ. P. 166a(f); Llopa, Inc. v. Nagel, 956 S.W.2d 82, 87 (Tex. App._San Antonio 1997, pet. denied). Without

authentication, Hallf's report and the flood-plain map are substantively defective and lack probative value to defeat summary judgment. See Llopa, Inc., 956 S.W.2d at 87.

Appellant did not present summary judgment evidence raising a fact issue regarding whether the City knew or should have known the bridge would flood. We hold appellant has not shown the trial court erred in granting the City's motion for summary judgment. We resolve appellant's issues against him.

We affirm the trial court's judgment.

TOM JAMES, JUSTICE

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Tex. R. App. P. 47

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1. The damage and chaos caused by the storm were tremendous. Danny Millaway, the Assistant Chief of the Dallas Fire Department, stated in his affidavit the storm resulted in 17 deaths, numerous injuries, and several million dollars in property damage. The six-hour period during the storm saw 9-1-1 calls jump from the average during that period of 1,200 calls to 4,803 calls. Thirty-nine police cars flooded trying to respond to emergency calls. Virtually all low-lying roadways and underpasses in Dallas experienced high-water problems.