

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA


COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 0192

RICARDO CARMOUCHE

VERSUS


**BURL N. CAIN, WARDEN, LOUISIANA STATE PRISON,
JAMES LEBLANC, SECRETARY OF THE DEPARTMENT OF
PUBLIC SAFETY & CORRECTIONS, KEVIN BENJAMIN,
PERRY STAGG, CAPTAIN P. DIXON, LIEUTENANT LANDRY,
LIEUTENANT DUPAS, MASTER SERGEANT DUNBAR,
AND MEDICAL DIRECTOR**

Judgment Rendered: September 21, 2012

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 599,807**

The Honorable William A. Morvant, Judge Presiding

**Ricardo Carmouche
Angola, Louisiana**

**Plaintiff/Appellant
*pro se***

**Terri L. Cannon
Angola, Louisiana**

**Counsel for Defendant/Appellee
James LeBlanc, Secretary
Louisiana State Penitentiary**

BEFORE: CARTER, C.J., GUIDRY, AND GAIDRY, JJ.

Guidry, J. Concur

GAIDRY, J.

This is an appeal of the judicial review by the Nineteenth Judicial District Court of a claim raised by an inmate of Louisiana State Penitentiary (“LSP”) for inadequate medical treatment or deliberate indifference to a diabetic condition. For the following reasons, we affirm the decision by the Nineteenth JDC to dismiss the appellant’s petition without prejudice.

FACTS AND PROCEDURAL HISTORY

The appellant, Ricardo Carmouche, applied for an Administrative Remedy Action (“ARP”) on or about November 3, 2010, for the alleged failure of Warden Burl Cain and other staff of LSP to give him an adequate “p.m. snack” which is medically necessary to sustain Mr. Carmouche when his blood sugar level drops due to his diabetic condition. He originally requested monetary damages,¹ that the prison’s medical director issue a clear definition of what a p.m. snack is to be, that the kitchen of LSP conform to that definition when preparing p.m. snacks, and that qualified employees prepare the p.m. snacks.

Mr. Carmouche’s ARP was denied in its initial review by LSP in December of 2010. The reasons for denial were that LSP verified with Captain P. Dixon, the Main Prison Kitchen Supervisor, that all of Mr. Carmouche’s meals and p.m. snacks were prepared to his specific dietary needs. Capt. Dixon learned that Mr. Carmouche’s dietary needs had slightly changed, and his meals were changed accordingly. Seeing that Mr. Carmouche had insufficient evidence to substantiate his claims, his ARP was denied.

Mr. Carmouche applied for his “second step” ARP on December 23, 2010, with the same list of complaints and requested remedies. That

¹ Mr. Carmouche subsequently dropped his request for monetary damages.

application was also denied by LSP Headquarters. The reason given is that Mr. Carmouche's specific dietary needs were investigated and adjusted, and no further remedy was necessary.

Mr. Carmouche then sought judicial review with the 19th JDC, filing his petition on February 28, 2011.² A Commissioner's report was filed on September 13, 2011, with the following recommendation:

[I]t is the recommendation of the Commissioner that this administrative appeal be dismissed without prejudice because it involves a claim for adequate medical treatment based on allegations of injury to the Petitioner's medical condition, and pursuant to R.S. 15:1177C, it is improperly filed on the Uniform Petition for judicial review, under this Court's appellate jurisdiction, rather than filed as an ordinary suit in the Court of exclusive venue for such claims.

The 19th JDC accepted the Commissioner's report and rendered judgment on October 21, 2011 according to the recommendation. Mr. Carmouche filed a motion for appeal on November 21, 2011, which was granted on December 12, 2011.

ASSIGNMENT OF ERROR

The trial court erred when it adopted the Commissioner's recommendation to dismiss the Petition for Judicial Review based on improper mandatory venue, wrong format, and as being a tort claim.

STANDARD OF REVIEW

Louisiana Revised Statute 15:1177(A)(9) states:

The court may reverse or modify the decision only if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

² The office of the Commissioner of the Nineteenth Judicial District Court was created by La. R.S. 13:711 to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. The Commissioner's written findings and recommendations are submitted to a district court judge, who may accept, reject, or modify them. LA. R.S. 13:713(C)(5).

- (a) In violation of constitutional or statutory provisions.
- (b) In excess of the statutory authority of the agency.
- (c) Made upon unlawful procedure.
- (d) Affected by another error of law.
- (e) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
- (f) Manifestly erroneous in view of the reliable, probative and substantial evidence on the whole record...

15:1177(A)(9) gives the standard of review by which the 19th JDC would review the administrative decision of LSP. While being mindful of all the factors, factor (e) appears most relevant to Mr. Carmouche's claims. However, the court dismissed his claim based on improper venue.³ This issue raised in Mr. Carmouche's sole assignment of error is not a factual dispute, but rather a legal one. We must therefore decide in this appeal whether or not legal error has been committed. *See Starks v. American Bank Nat. Ass'n*, 2004-1219, p. 2, 3 (La. App. 3 Cir. 5/4/05), 901 So.2d 1243, 1245. The de novo standard of review is applicable in a case involving the granting of an exception of improper venue. *Cyprien v. Board of Sup'rs of University of Louisiana System*, 2005-1247, p. 5 (La. App. 4 Cir. 1/10/07), 950 So.2d 41, 44. While we recognize no exception for improper venue was filed by either party, the same standard of review would apply when the court dismisses a case for improper venue on its own motion.⁴

DISCUSSION

The exclusive venue for delictual actions for injury or damages shall be the parish where the prison is situated to which the prisoner was assigned when the cause of action arose. *Peterson v. Hanson*, 2003-1448, p. 4 (La. App. 1 Cir. 9/17/04), 897 So.2d 32, 34 (citing La.R.S. 15:1184(F)). If Mr.

³ La.C.C.P. Art. 121 states:

When an action is brought in a court of improper venue, the court may dismiss the action, or in the interest of justice transfer it to a court of proper venue.

⁴ *See McLean v. Majestic Mortuary Services, Inc.*, 2012 WL 1867614, p. 6 (La. App. 5 Cir. 5/22/12), ___ So.3d ___.

Carmouche's action is delictual in nature, the proper venue for the action would be in the parish of West Feliciana (the 20th JDC), where LSP is located and where the alleged damage occurred to Mr. Carmouche.

Mr. Carmouche seems to rely upon La.R.S. 15:1177(A)⁵ for filing his claim in the parish of East Baton Rouge, but the use of the statute in relation to tort actions has been ruled unconstitutional as it divests district courts of their original jurisdiction over tort actions. See Pope v. State, 99-2559, p. 6 (La. 6/29/01) 792 So.2d 713, 716-717. This problem of constitutionality is rectified by La.R.S. 15:1184(F), which states:

F. The exclusive venue for delictual actions for injury or damages shall be the parish where the prison is situated to which the prisoner was assigned when the cause of action arose.

In Louisiana, legal responsibility in tort claims is determined under a duty-risk analysis, which requires the plaintiff to prove four distinct elements: (1) duty, (2) breach, (3) cause in fact and (4) actual damages. *Becnel v. Grodner*, 2007-1041, p. 3 (La. App. 4 Cir. 4/2/08), 982 So.2d 891, 894. In Mr. Carmouche's ARP, he recites a duty owed to him by LSP; namely, that they provide him a proper p.m. snack according to his personal dietary needs. He then recites a breach of that duty when LSP refused to provide him a proper p.m. snack. Mr. Carmouche alleges in his ARP that this refusal by LSP to give him the proper p.m. causes him to become hypoglycemic, where he allegedly suffers insulin shock, along with mental and physical incapacity throughout the night. On the face of his complaint, without commenting on the veracity of the allegations, Mr. Carmouche pleads all four elements of a delictual claim.

⁵ La.R.S. 15:1177(A) states, in pertinent part:

A. Any offender who is aggrieved by an adverse decision, excluding decisions relative to delictual actions for injury or damages, by the Department of Public Safety and Corrections or a contractor operating a private prison facility rendered pursuant to any administrative remedy procedures under this Part may, within thirty days after receipt of the decision, seek judicial review of the decision only in the Nineteenth Judicial District Court or, if the offender is in the physical custody of the sheriff, in the district court having jurisdiction in the parish in which the sheriff is located...

This court has previously ruled that despite what a plaintiff may call his claim in his petition, it is the form of the unambiguously pleaded allegations that determine the true nature of the claim. In *Gallant Investments, Ltd. v. Illinois Central Railroad Company*, 2008-1404, (La. App. 1 Cir. 2/13/09), 7 So.3d 12, the plaintiff claimed that a removal of spur tracks caused unjust enrichment to the defendant and sued for equity. However, upon an examination of the allegations in the pleadings, this court decided that the plaintiff had actually made a claim of conversion, an action in tort. The plaintiff was therefore not entitled to the equitable remedy afforded by a successful claim of unjust enrichment. See *Gallant*, at 18-19.

In the instant case, Mr. Carmouche has applied for an administrative remedy provided under La.R.S. 15:1177. The statute can provide an appropriate remedy for any adverse decision made by the Department of Corrections or one of its contractors, *except* for decisions relating to delictual actions. Prisoner tort actions are governed by La.R.S. 15:1184(F).

CONCLUSION

By seeking judicial review from the 19th JDC, Mr. Carmouche has sought relief in the wrong venue. The trial court rightly ruled to dismiss Mr. Carmouche's petition, but without prejudice so that Mr. Carmouche can file his tort claim in the proper parish.

DECREE

The Judgment of the 19th JDC in this matter, dismissing the appellant's petition for judicial review without prejudice is affirmed. Costs of this appeal are assessed to the appellant, Ricardo Carmouche.

AFFIRMED.