NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2013 CA 0284

DAN S. COLLINS AND
DAN S. COLLINS, CPL & ASSOCIATES, INC.

VERSUS

STATE OF LOUISIANA, THROUGH DEPARTMENT OF NATURAL RESOURCES, ROBERT BENOIT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ASSISTANT DIRECTOR ATCHAFALAYA BASIN PROGRAM, LOUISIANA DEPARTMENT OF NATURAL RESOURCES

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Judgment Rendered: DEC 20 2013

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 592154, SECTION "25"
THE HONORABLE WILSON E. FIELDS, JUDGE

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Atchafalaya Basin Program

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McClendon, J. concurs with the result reached by the majority

McDONALD, J.

In this case, the plaintiffs, Dan S. Collins and Dan S. Collins, CPL & Associates, appeal a summary judgment granted in favor of the defendants, the State of Louisiana through the Department of Natural Resources, and Robert Benoit, individually and in his official capacity as Assistant Director of the Atchafalaya Basin Program.

From 1997 to 2010, Dan S. Collins (a certified professional landman) and Dan S. Collins, CPL & Associates, Inc. (collectively plaintiffs or Collins) provided consulting services for land, title, and environmental research, for the Louisiana Department of Natural Resources (DNR), including the Atchafalaya Basin Program and the Coastal Protection and Restoration Program. Robert Benoit served as Assistant Director of the Atchafalaya Basin Program.

Starting in 2007, Mr. Collins discovered what he believed to be violations of environmental laws, rules, and regulations pertaining to the dredged water quality project known as the Bayou Postillion Water Quality Project and the Big Bayou Pigeon Water Quality Project. Mr. Collins reported his findings to DNR, Mr. Benoit, and Scott Angelle, Secretary of DNR. Both projects were conducted by the Atchafalaya Basin Program within the basin to improve water quality for fishermen and crawfishermen. Mr. Collins believed that he discovered the real purpose of the projects was oil and gas exploration for the use and benefit of adjacent landowners.

Collins' contract with DNR for 2009 ended, and it was not renewed for 2010. Collins filed suit on June 29, 2010, naming as defendants the State of Louisiana, through DNR, and Mr. Benoit, individually and in his capacity as Assistant Director of the Atchafalaya Basin Program at DNR, asserting that "defendants have refused to employ Petitioners and denied Petitioners the ability to continue employment with defendant DNR on account of their whistle-blowing

activities regarding the violations of Federal and State law, rules, and regulations." Collins asserted that DNR violated La. R.S. 30:2027 (the Louisiana Environmental Whistleblower Statute) and La. R.S. 23:967 (the Louisiana Whistleblower Statute) and that DNR and Mr. Benoit violated La. R.S. 42:1169 (the Louisiana Code of Governmental Ethics Whistleblower Statute). Collins prayed for judgment in their favor including punitive damages, triple damages as allowed by law, and attorney fees, as well as all other relief to which they were entitled, including declaratory and injunctive relief.

Defendants filed peremptory exceptions raising the objections of no cause of action as to the claims raised pursuant to La. R.S. 23:967, La. R.S. 30:2027, and La. R.S. 42:1169, which were sustained by the district court. Defendants also filed a dilatory exception raising the objection of prematurity as to the claims raised pursuant to La. R.S. 42:1169, which was denied as moot. The district court gave plaintiffs thirty days to amend their petition to state a cause of action. After plaintiffs timely amended their petition, defendants again filed peremptory exceptions raising the objections of no cause of action as to claims under La. R.S. 23:967, La. R.S. 30:2027, and La. R.S. 42:1169, which were subsequently sustained by the district court, and the plaintiffs' claims pursuant to those statutes were dismissed. The plaintiffs appealed that judgment. This court affirmed the ruling that plaintiffs failed to state a cause of action pursuant to La. R.S. 42:1169, reversed the ruling that the plaintiffs failed to state a cause of action pursuant to La. R.S. 30:2027, affirmed the ruling that plaintiffs failed to state a cause of action pursuant to La. R.S. 23:967, and remanded the matter to the district court. **Collins v. State ex rel. Dept. of Natural Resources**, 2012-1031 (La. App. 1 Cir. 5/30/13), 118 So.3d 43.

Plaintiffs also asserted a 42 U.S.C. Section 1983 claim against Mr. Benoit, claiming that he "violated their clearly established rights pursuant to the 1st

Amendment, to report and oppose unlawful conduct, and pursuant to the 14th Amendment, to due process of laws and to one's good name and reputation." On March 5, 2012, DNR filed a motion for summary judgment concerning Collins' intentional infliction of emotional distress claim, asserting that the decision by DNR to no longer utilize the services of Collins did not give rise to extreme and outrageous conduct such that a reasonable person could not endure as required by Louisiana law to support the claim. On September 12, 2012, DNR and Mr. Benoit filed a motion for summary judgment seeking to dismiss Collins' First and Fourteenth Amendment claims and all ancillary claims. The defendants asserted that one or more essential elements to Collins' claims were absent, and that Collins would not be able to provide evidentiary support sufficient to establish its First and Fourteenth Amendment claims. Further, Mr. Benoit and DNR asserted that even if Collins could state a viable claim under those amendments, the claims were waived and some had prescribed, and that Mr. Benoit was immune from suit under the defense of qualified immunity.

The district court granted the motions for summary judgment on October 29, 2012, and signed the judgment on November 14, 2012, adopting the defendants' memoranda in support of its motions for summary judgment as its reasons for judgment and dismissing all of plaintiffs' remaining claims against the defendants. The plaintiffs are appealing that judgment and make the following assignments of error:

> 1. The Trial Court erred in concluding that the granting of Appellees' motions for summary judgment was not premature and unduly prejudicial when discovery was still ongoing, the parties were attempting to schedule additional depositions, and there were outstanding discovery requests at the time of the hearing on the motions for summary judgment.
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> 2. The Trial Court erred in concluding that there were no genuine issues of material fact remaining as to whether Appellees' conduct rose to the level of extreme and outrageous conduct to support a claim of Intentional Infliction of Emotional Distress.

3. The Trial Court erred in concluding that the failure to be awarded contracts and the interference with an existing State contract which result[ed] in preventing Appellants from performing billable work could not constitute adverse actions or support a claim of retaliation.

4. The Trial Court erred in concluding that there were no genuine issues of material fact remaining as to whether Appellee Robert Benoit is entitled to a defense of qualified immunity.

5. The Trial Court erred in concluding that there were no genuine issues of material fact remaining as to whether Appellee Robert Benoit played a role in denying Appellants contracts, influenced the bidding process, and/or interfered with their existing State contract.

6. The Trial Court erred in concluding that there were no genuine issues of material fact remaining as to whether Appellants had a protected liberty interest in their existing State contract and in their good name and reputation.

7. The Trial Court erred in concluding that Appellants' Section 1983 First Amendment retaliation claim was time barred as the limitations period begins to run when the plaintiff "becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987).

8. The Trial Court erred in concluding that Appellants failed to exhaust administrative remedies set forth in the Public Bid Law when Appellants did not file the instant action pursuant to the Public Bid Law under Title 38, Chapter 10 of the Louisiana Revised Statutes.

THE STANDARD OF REVIEW

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. **Sanders v. Ashland Oil, Inc.**, 96-1751 (La. App. 1 Cir. 6/20/97), 696 So.2d 1031, 1034, writ denied, 97-1911 (La. 10/31/97), 703 So.2d 29. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2).

The burden of proof on a motion for summary judgment remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2).

In determining whether summary judgment is appropriate, appellate courts review summary judgment *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Sanders v. Ashland Oil, Inc.**, 696 So.2d at 1035. Furthermore, an appellate court asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. **Guardia v. Lakeview Regional Medical Center**, 2008-1369 (La. App. 1 Cir. 5/8/09), 13 So.3d 625, 627. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Board of Sup'rs of Louisiana State University v. Louisiana Agr. Finance Authority**, 2007-0107 (La. App. 1 Cir. 2/8/08), 984 So.2d 72, 80. **Louisiana Workers' Compensation Corp. v. Landry**, 2011-1973 (La. App. 1 Cir. 5/2/12), 92 So.3d 1018, 1020-1021.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, Collins asserts that the trial court erred in granting defendants' motions for summary judgment when discovery was ongoing.

After the suit was filed on June 29, 2010, the parties had more than two years to conduct discovery. The hearing on the motions for summary judgment was held on October 29, 2012. A review of the record shows there is no transcript from this hearing. The minutes reflect that each side was represented in court that day, and there is no minute entry or written motion that Collins requested a continuance of the hearing on the motion for summary judgment. The judgment was signed on November 14, 2012, and refers to oral reasons assigned on October 29, 2012. There is no transcript of these reasons in the record. Without a transcript of an oral motion to continue, or a written motion to continue, Collins cannot now complain that they were not ready for the hearing and needed additional time for discovery. This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, Collins maintains that the trial court erred in concluding that there were no genuine issues of material fact remaining as to whether the defendants' conduct rose to the level of extreme and outrageous conduct required to support a claim of intentional infliction of emotional distress.

In order to recover for intentional infliction of emotional distress, a plaintiff must establish (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. **White v. Monsanto Co.**, 585 So.2d 1205, 1209 (La. 1991).

The deposition testimony of Mr. Collins established that he did not suffer from severe emotional distress. Mr. Collins testified that he was not seeing a physician for anxiety related to the case, that he was not taking medication for anxiety or depression, and that he was not suffering from physical or mental symptoms related to the case. Further, the record failed to establish extreme or

outrageous conduct by the defendant. After the defendants pointed out to the court the absence of factual support for one or more elements essential to Collins' claim of intentional infliction of emotional distress, and Collins failed to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden at trial, there was no genuine issue of fact. This assignment of error has no merit.

ASSIGNMENTS OF ERROR NOS. 3 AND 5

In these assignments of error, Collins asserts that the trial court erred in concluding that the failure to be awarded contracts and the interference with an existing State contract that prevented plaintiffs from performing billable work could not constitute adverse actions or support a claim of retaliation, erred in concluding that there were no genuine issues of material fact remaining as to whether Mr. Benoit played a role in denying Collins' contracts, influenced the bidding process, and interfered with their existing State contract.

In support of DNR and Mr. Benoit's motions for summary judgment in relation to a retaliation or adverse action claim, they provided the affidavit of DNR's Contracts and Grants Administrator, Julia Raiford. Her affidavit provided details of the three proposals that Collins submitted in response to three different requests for proposals and statements of interest and qualifications issued by DNR between 2007 and 2009. These resulted in three contracts that Collins claimed it was not awarded as a result of its whistleblower actions.

DNR issued request for statements of interest and qualifications number 2511-08-04 for "West Belle Pass Barrier Headland Restoration" on June 26, 2007. DNR received eight statements of interest and qualifications that were reviewed by a Technical Committee, which then recommended the top three scoring firms to an Engineering Selection Committee. The Engineering Selection Committee then recommended to the Secretary of DNR that the highest scoring contractor, Coastal

Planning & Engineering, be awarded the contract, and the Secretary later approved the recommendation. A proposal submitted by Tetra Tech listed Collins as a subcontractor. Tetra Tech ranked third out of the eight proposals.

DNR issued request for proposals number 2503-08-80 for "Professional Land Services for Coastal Restoration Project" on May 15, 2008. Ten proposals were submitted, including one from Collins. A Proposal Review Committee reviewed the proposals and scored them based upon the criteria listed in the request for proposals. Oil Land Services, Inc. was found to have the highest ranking, and the Proposal Review Committee recommended that it be awarded the contract. The Secretary approved the recommendation, and Oil Land Services, Inc. was awarded the contract. Collins' proposal ranked sixth out of the ten proposals.

The third DNR request for proposal at issue is number 2503-10-63. DNR issued a request for proposals for "Professional Land Services for Coastal Protection and Restoration Projects" on December 3, 2009. Fifteen proposals were submitted, and a Proposal Review Committee reviewed them. The Proposal Review Committee ranked the proposals and recommended that contracts be awarded to the five highest ranking respondents. Collins' proposal was ranked fourteenth.

This affidavit demonstrated the lack of adverse employment action or retaliation in Collins not receiving the contracts it sought where it did not have the ranking necessary to receive the contracts at issue. Further, Ms. Raiford's affidavit showed that after Collins' whistleblower activities began in 2007, two DNR contracts were awarded to Collins, further undermining Collins' claim of adverse action and retaliation. One DNR contract was awarded to Collins in 2007, which began on July 1, 2007, and ended on June 30, 2009. The second DNR contract was awarded to Collins on September 1, 2008, which began on that same date and ended on August 31, 2009. Neither contract was terminated early.

After the defendants pointed out to the court the absence of factual support for one or more elements essential to Collins' claims of adverse actions and retaliation as a result of its whistleblower activities, and Collins failed to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden at trial on the claims, there was no genuine issue of fact.

These assignments of error have no merit.

ASSIGNMENT OF ERROR NO. 6

In this assignment of error, Collins asserts that the trial court erred in concluding that there were no genuine issues of material fact remaining as to whether Collins had a protected liberty interest in an existing State contract and in their good name and reputation. In its petitions, Collins did not assert that DNR or Mr. Benoit interfered with an existing contract. The allegation of interference was first raised in Collins' memorandum in opposition to DNR and Mr. Benoit's motions for summary judgment.

A legal memorandum or a brief is not a pleading or evidence and there is no requirement that it be filed. Unlike the pleadings, depositions, interrogatories and admissions, a legal memorandum has no independent admissibility. **Anderson v. Allstate Ins. Co.**, 642 So.2d 208, 214 (La. App. 1 Cir.) writ denied, 646 So.2d 404 (La. 1994). This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 4

In this assignment of error, Collins asserts that the trial court erred in concluding that there were no genuine issues of material fact remaining as to whether Mr. Benoit is entitled to a defense of qualified immunity.

A qualified immunity generally applies to most acts of government officials. In **Harlow v. Fitzgerald**, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), the United State Supreme Court articulated a new objective standard with regard to the qualified immunity defense, stating that government officials

performing discretionary functions generally are shielded from liability for civil damages, unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. **Lambert v. Riverboat Gaming Enforc. Div.**, 96-1856 (La. App. 1 Cir. 12/29/97), 706 So.2d 172, 176, writ denied, 98-0297 (La. 3/20/98) 715 So.2d 1221.

Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an immunity from suit rather than a mere defense to liability. Once raised, a plaintiff has the burden to rebut the qualified immunity defense by establishing that the official's allegedly wrongful conduct violated clearly established law. Qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law. **Estate of Davis ex rel. McCully v. City of North Richland Hills**, 406 F.3d 375, 380 (5th Cir. 2005).

DNR and Mr. Benoit demonstrated an absence of evidence for Collins' First and Fourteenth Amendment claims; thus, Collins had the burden to rebut the qualified immunity defense by establishing that Mr. Benoit's conduct violated clearly established law. Collins failed to meet this burden. This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 7

In this assignment of error, Collins asserts that the trial court erred in concluding that its Section 1983 First Amendment retaliation claim was time barred as the limitations period begins to run when the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.

In civil rights actions, federal courts look to state law for its tolling provisions. **Hardin v. Straub**, 490 U.S. 536, 538-539, 109 S.Ct. 1998, 2000-2001, 104 L.Ed.2d 582 (1989). Like Louisiana tort claims, claims brought under Section 1983 are subject to a prescriptive period of one year. **Vallery v. City of Baton Rouge,** 2011-1611 (La. App. 1 Cir. 5/3/12), 2012 WL 2877599 (unpublished), writ denied, 2012-1263 (La. 9/28/12), 98 So.3d 837.

The first two of three contracts that Collins claims it was not awarded as a result of his whistleblower activities were awarded more than one year before Collins filed its suit. Thus, these claims were prescribed. This assignment of error has no merit as to those claims.

ASSIGNMENT OF ERROR NO. 8

In this assignment of error, Collins asserts that the trial court erred in concluding that they failed to exhaust the administrative remedies set forth in the Public Bid Law when Collins did not file the instant action pursuant to the Public Bid Law under Title 38, Chapter 10 of the Louisiana Revised Statutes. Collins asserts that it was never required to exhaust any administrative remedies prior to filing this suit. Mr. Collins testified by deposition that he was unaware that there was an administrative appeal process, and further, that he did not think it was worthwhile to follow that process.

The Louisiana Administrative Code relative to government contracts for professional and consulting services provides that an aggrieved bidder who wishes to contest an award shall submit a written protest within 14 days after the award is announced. LAC 34:V.145(A)(8). Such a protest will stay the award until the agency resolves the protest. LAC 34:V.145(A)(9). If the aggrieved party is not satisfied after receiving the agency's resolution, that party must appeal in writing to the Commissioner of Administration within 14 days. If the aggrieved party is still unsatisfied after receiving the Commissioner's decision, it must bring suit

within six months. LAC 34:V.145(A)(11). The delays may be extended only with the concurrence of the agency, the protesting party, and the Commissioner of Administration. LAC 34:V.145(A)(12). This assignment of error has no merit.

DECREE

For the foregoing reasons, the judgment in favor of DNR and Mr. Benoit, dismissing Collins' claims, is affirmed. Costs are assessed against Collins.

AFFIRMED.