

Affirmed and Memorandum Opinion filed August 17, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00166-CV

RICHARD A. DUNSMORE, Appellant

V.

**UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE, ALLEN HIGHTOWER,
LANNETTE LINTHICUM, and JOE TAYLOR, Appellees**

**On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 78057-I**

M E M O R A N D U M O P I N I O N

Richard A. Dunsmore, an inmate incarcerated in the Texas Department of Criminal Justice (TDCJ), appeals from the dismissal for want of jurisdiction of his lawsuit against TDCJ, the University of Texas Medical Branch at Galveston, and certain individuals. On appeal, Dunsmore challenges the denial of his motion to recuse the trial judge, the failure of the trial court to appoint counsel to represent

him, and the dismissal of his lawsuit.¹ We affirm.

Background

In his lawsuit, filed pro se on July 22, 2014, Dunsmore raised a multitude of allegations against appellees pertaining to the conditions of his incarceration, as well as the provision of medical care to him during his incarceration, at the C.T. Turrell Unit in Brazoria County. In March 2015, Dunsmore filed a motion requesting the trial judge, Robert J. Kern, be recused from the case. Among his complaints, Dunsmore cited Kern's failure to appoint counsel to represent Dunsmore in the case. The recusal motion was denied by the presiding judge of the administrative judicial region on April 8, 2015.

On October 25, 2015, the trial court granted a temporary injunction Dunsmore had requested, prohibiting TDCJ, as well as its agents and employees, from turning on the heating system at the C.T. Turrell Unit or "using the existing overhead ductworks inside the dormitory as a means to supply heat and air circulation at the . . . Unit."² By its own terms, the injunction was to remain in force until the court was presented with evidence that the Brazoria County Health Department had tested the ductwork and determined it to be safe for use.

The trial court ultimately granted appellees' plea to the jurisdiction and motion to dismiss for lack of jurisdiction based on sovereign immunity grounds. On this basis, the trial court dismissed all of Dunsmore's claims.

¹ Dunsmore's pro se appellate brief does not strictly follow all of the Texas Rules of Appellate Procedure requirements for such briefs; in particular, it does not contain a concise statement of the issues presented. *See* Tex. R. App. P. 38.1(f). The listed issues appear to be the specific complaints he is making in this appeal.

² Dunsmore alleged that certain contaminants had been allowed to enter the ductwork, which had caused various health problems for inmates.

Motion for Recusal

Dunsmore first complains regarding the presiding judge's denial of his motion to recuse the trial judge, Judge Kern, pursuant to Texas Rules of Civil Procedure 18a and 18b.³ *See* Tex. R. Civ. P. 18a, 18b. In his motion, Dunsmore complained about Judge Kern's actions and inaction during the proceedings, including, primarily, Kern's failure to appoint counsel to aid Dunsmore in the lawsuit, but also Kern's denial of Dunsmore's request for an "Atypical Bench Warrant."⁴ Dunsmore further complained that Kern had ignored his objection to venue and request for a continuance. Dunsmore specifically alleged that these rulings demonstrated Kern possessed a bias or prejudice against Dunsmore due to Dunsmore's disabilities, which include several mental conditions such as schizophrenia and dementia.

We review an order denying a motion to recuse for an abuse of discretion. *Id.* 18a(f); *Catt v. DeLozier*, No. 14-16-00524-CV, 2017 WL 2384636, at *1 (Tex. App.—Houston [14th Dist.] June 1, 2017, no pet. h.) (mem. op.). In his order, the presiding judge accurately set forth salient points of the law on recusal, noting first that Rule 18a provides that a motion to recuse "must not be based solely on the judge's rulings in the case." Tex. R. Civ. P. 18a(a)(3). Additionally, when a party challenges the denial of a recusal motion based on alleged bias or impartiality, the party must show that the bias or impartiality arose from an extrajudicial source and not from actions during the pendency of the trial court proceedings, unless those actions indicate such a high degree of favoritism or antagonism to have rendered fair judgment impossible. *Sommers v. Concepcion*, 20 S.W.3d 27, 41 (Tex. App.—

³ Rule 18a governs procedures related to the recusal and disqualification of judges, and Rule 18b sets forth grounds for recusal and disqualification.

⁴ In his request, Dunsmore alleged that in the past, he had had "terrible (almost fatal) continuity of care experiences at the Brazoria County Detention Center" and requested that he never be housed there on a bench warrant or transport order.

Houston [14th Dist.] 2000, pet. denied); *Ludlow v. DeBerry*, 959 S.W.2d 265, 271 (Tex. App.—Houston [14th Dist.] 1997, no writ). A party’s remedy for unfair rulings is typically to assign error regarding the adverse rulings. *E.g.*, *Sommers*, 20 S.W.3d at 41.

The presiding judge concluded in his order that Dunsmore’s allegations against Kern complained only of the “judge’s rulings and actions in the case [and did] not allege extra-judicial conduct . . . that would constitute a basis for recusal.” The presiding judge further determined that the actions Dunsmore complained of did not indicate such a high degree of favoritism and antagonism as to render fair judgment impossible.

As stated above, Dunsmore’s primary complaint in his motion was that the trial judge refused to appoint counsel to represent Dunsmore. Nothing in the record indicates that this refusal was based on a bias or prejudice against Dunsmore because of his disabilities, as Dunsmore maintains, as opposed to the judge’s legal conclusions regarding the requests. The same can be said regarding the trial judge’s denial of Dunsmore’s request for an “Atypical Bench Warrant,” as well as the action or inaction on his objection to venue and request for a continuance. Accordingly, the presiding judge did not abuse his discretion in denying the recusal motion. *See* Tex. R. Civ. P. 18a(a)(3); *Sommers*, 20 S.W.3d at 42. We overrule this issue.⁵

Appointment of Counsel

Next, Dunsmore asserts that he was entitled to appointment of counsel to

⁵ To the extent Dunsmore’s complaint could be construed as an objection to Judge Kern’s assignment to the case, we note that the record does not contain either the order of assignment nor any timely objection by Dunsmore to the assignment. *See* Tex. Gov’t Code Ann. § 74.053(c) (“An objection [to the assignment of a retired or senior judge to a trial court] must be filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier.”).

assist him in his lawsuit. Dunsmore, however, offers neither citation to the record or authority nor cogent argument in support of this contention. The issue is therefore inadequately briefed. *See* Tex. R. App. P. 38.1(i); *see also* *Tran v. Nguyen*, 480 S.W.3d 119, 132–33 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (“Pro se appellants are held to the same standards as licensed attorneys and must comply with applicable laws and procedures.”); *In re S.A.H.*, 420 S.W.3d 911, 929 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (declining to craft an appellant’s argument for him).

Moreover, in his numerous requests for appointed counsel in the trial court, Dunsmore primarily relied upon legal authority with no applicability to the present case. *See, e.g.*, Tex. Code Crim. Proc. arts. 11.49 (providing that an applicant for habeas corpus, or his counsel, has the right to open and conclude argument), 46B.006 (providing that a criminal defendant is entitled to representation in a proceeding to determine competency to stand trial); Tex. Health & Safety Code §§ 81.151-.153 (providing for an attorney to be appointed for persons with a communicable disease who present a threat to public health and against whom an application for management of that person has been filed by a government representative); Tex. R. App. P. 20.1 (providing for waiver of certain costs on appeal); *In re L.E.H.*, 228 S.W.3d 219, 220 (Tex. App.—San Antonio 2007, no pet.) (noting the subject of an involuntary civil commitment proceeding has the right to effective assistance of counsel at all significant stages of the commitment process).

In a few of his requests, however, Dunsmore cited cases that discuss Texas Government Code section 24.016, which provides district judges with the discretion to appoint counsel for indigent parties in civil cases. *See* Tex. Gov’t Code § 24.016. Texas courts have never held that a civil litigant must be represented by counsel in order for a court to carry on its essential, constitutional function. *Gibson v. Tolbert*,

102 S.W.3d 710, 712 (Tex. 2003). But, under section 24.016, district judges have the discretion to appoint counsel in some exceptional cases, when the public and private interests at stake are such that the administration of justice may best be served by appointing a lawyer to represent an indigent civil litigant. *See id.*; *Mayfield*, 923 S.W.2d at 594. The Texas Supreme Court has further explained that “exceptional” in this context refers to “rare and unusual” and that inmate lawsuits against prison personnel are, to the contrary, rather common. *Gibson*, 102 S.W.3d at 713.

In his brief, Dunsmore does not specifically identify any “rare or unusual” features of the present case that would warrant the appointment of counsel.⁶ *See Dunsmore v. Ortiz*, No. 14-15-00437-CV, 2016 WL 7401893, at *2 (Tex. App.—Houston [14th Dist.] Dec. 20, 2016, no pet.) (rejecting appointment of counsel complaint by same appellant in prior case because he “provided no argument supporting a determination that the private or public interests at stake in his case are such that the administration of justice would best be served by the appointment of counsel to represent him”). Under these circumstances, we cannot say that the trial court abused its discretion in declining to appoint counsel under section 24.016. Accordingly, we overrule Dunsmore’s second issue.

Jurisdiction

Lastly, Dunsmore challenges the trial court’s determination that it lacked subject matter jurisdiction over his allegations based on the doctrine of sovereign immunity.⁷ Sovereign immunity refers to the state’s general immunity from suit and

⁶ In at least one motion, Dunsmore refers to the case as “exceptional” but provides no features except his indigence and that the allegations, if true, would support a finding of criminal acts.

⁷ The individual defendants in the case also argued in the motion to dismiss that they were not proper parties to the suit pursuant to section 101.106(f) of the Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 101.106(f). As indicated, the trial court granted the motion. Dunsmore does not specifically challenge this part of the trial court’s ruling. *See Pat Baker Co. v.*

liability. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). In addition to protecting the state from liability, it also protects the various divisions of state government, including agencies, boards, hospitals, and universities. *Id.* In Texas, sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued, unless the state consents to suit. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004).

The University of Texas Medical Branch is a governmental entity that generally enjoys sovereign immunity from tort liability unless immunity has been waived. *See Univ. of Tex. Med. Branch at Galveston v. Simmons*, No. 14-11-00215-CV, 2012 WL 19665, at *2 (Tex. App.—Houston [14th Dist.] Jan. 5, 2012, no pet.) (mem. op.); *Wesela v. Univ. of Tex. Med. Branch at Galveston*, 899 S.W.2d 292, 293 (Tex. App.—Houston [14th] 1995, no writ). TDCJ also is immune from tort liability unless immunity has been waived. *See* Tex. Civ. Prac. & Rem. Code § 101.001(3)(A) (defining a governmental unit to include “all departments” of the state); *see also Miranda*, 133 S.W.3d at 224–25. Dunsmore bears the burden of pleading facts demonstrating a waiver of immunity. *Sullivan v. Sheridan Hills Dev. L.P.*, No. 14-15-00630-CV, 2017 WL 1719170, at *4 (Tex. App.—Houston [14th Dist.] May 2, 2017, no pet.) (mem. op.).

In his brief, Dunsmore questions how the trial court could dismiss the case based on sovereign immunity after having granted a temporary injunction in the case earlier in the proceedings. However, the trial court’s action—taken before the institutional parties in this case were named defendants and before they had filed their plea to the jurisdiction and motion to dismiss—did not endow the court with

Wilson, 971 S.W.2d 447, 450 (Tex. 1998) (per curiam) (explaining that court of appeals may not reverse a case on unassigned error).

subject matter jurisdiction over the lawsuit. *See generally Miranda*, 133 S.W.3d at 224. Dunsmore does not argue that immunity has been waived. Finding no merit in Dunsmore's contention, we overrule his third issue.

We affirm the trial court's judgment

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Boyce, Jamison, and Brown.