

Affirmed and Memorandum Opinion filed August 29, 2023.



In The

Fourteenth Court of Appeals

NO. 14-22-00537-CV

DAVID JONES, Appellant

V.

CADE CLARK, Appellee

**On Appeal from the County Court at Law No. 2 & Probate Court
Brazoria County, Texas
Trial Court Cause No. CI63640**

MEMORANDUM OPINION

Appellant, David Jones, appeals the trial court's order dismissing his claims against Appellee, Cade Clark, due to lack of subject matter jurisdiction. Jones asserts that the trial court erroneously dismissed his malicious prosecution claim against Clark pursuant to Civil Practice & Remedies Code section 101.106(f) in violation of the open courts provision of the Texas Constitution. We affirm.

BACKGROUND

Clark is a peace officer employed by the Texas Department of Public Safety. Jones owns a wrecker service, which is on a rotation schedule in Brazoria County. In January 2020, Jones was called out to tow a trailer that had rolled over as a result of an accident. When Jones arrived, Clark was at the scene. Jones agreed to get the trailer back on its wheels for \$500, but was unsuccessful. The trailer fell apart and Jones moved the debris off the road and onto the shoulder and grass. After Clark told Jones that he could not leave the trailer debris, Jones refunded the wrecker fee to the trailer's owner and left. Clark criminally charged Jones with illegal dumping. Jones was also removed from the Brazoria County wrecker rotation, which caused him to lose revenue. After charges against Jones were dismissed, he was again placed on the rotation.

On January 7, 2022, Jones sued Clark for malicious prosecution, business disparagement, and defamation. On March 7, 2022, Clark filed a general denial and, among other things, alleged he is entitled to (1) "sovereign immunity from this suit" because he was a "state official acting within the course and scope of his employment, and is therefore immune from suit, pursuant to the Texas Tort Claims Act" (the "Act"); (2) "the defense of governmental immunity and/or official immunity"; and (3) sovereign immunity for intentional tort claims because Civil Practice & Remedies Code section 101.057 excludes intentional torts from the Act's limited waiver of sovereign immunity.

That same day, Clark filed a motion to dismiss alleging lack of subject matter jurisdiction under the Act. He specifically invoked section 101.106(f) of the Act, arguing that sovereign immunity protects him from suit and liability. He stated that section 101.106(f) provides that if a suit is filed against an employee of a governmental unit based upon conduct within the general scope of that

employee's employment, "and if it could have been brought against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only." Clark asserted that Jones "makes clear that the factual basis of his claims — the filing of criminal charges against him — involve actions taken in [Clark]'s capacity as a Texas State Trooper," so that Jones's claims fall under section 101.106(f) and are barred. Additionally, Clark asserted that Jones's claims are all intentional torts and, therefore, are barred by the Act's section 101.057, "which specifically excludes any waiver of sovereign immunity for intentional torts."

On June 13, 2022, Jones filed a response to Clark's motion to dismiss. Jones argued that section 101.106(f) is inapplicable in this case because (1) Clark's conduct was not within the general scope of his employment as he "acted *ultra vires*" and, thus, sovereign immunity does not bar suit; and (2) malicious prosecution is an intentional tort for which sovereign immunity is not waived so that "suit could not be brought for malicious prosecution against the TxDPS." Jones further argued that the interpretation and intention of section 101.106(f) to prohibit suit for intentional torts committed by government employees violates the open courts provision of the Texas Constitution.

That same day, Clark filed his reply to Jones's response. Clark asserted that Jones's suit is foreclosed by section 101.106(f) because Jones acknowledged that "Clark's intentional act of bringing criminal charges against Jones was done within the scope of Clark's employment as a police officer." Clark noted that Jones mentioned in his response that Clark "acted *ultra vires*", but Jones did not explain what the alleged *ultra vires* act was nor did Jones plead an *ultra vires* claim. Clark also asserted that the supreme court "reaffirmed that all tort claims brought against government entities fall under the Tort Claims Act, 'even when the TTCA does not

waive immunity for those claims” so that Jones’s claims “could have been brought under the TTCA against the government,” thereby “directly refuting Jones’ position on § 101.106(f).”

Clark further contended that Jones’s claims are barred by section 101.057, which specifically excludes any waiver of sovereign immunity for intentional tort claims. Lastly, Clark argued that “absolute immunities have existed” since time immemorial and routinely served to deprive potential litigants of recourse, that Texas courts have rejected Jones’s open courts argument, and “a Texas Tort Claims Act bar of tort claims against individual government actors does not violate Texas’ constitutional guarantee of open courts.”

On June 17, 2022, Jones filed a sur-reply in which he only addressed his open courts argument. On June 20, 2022, the trial court held a hearing. A day later, the court signed an order of dismissal, stating “The Court finds that it lacks jurisdiction to consider the relief requested in Plaintiff’s Complaint. The motions to dismiss and stay discovery are therefore GRANTED for the reasons stated therein. The claims against Defendant Cade Clark are hereby DISMISSED with prejudice. This is a final order.” Jones filed a timely appeal.

ANALYSIS

In one issue, Jones argues that the trial court erroneously dismissed his malicious prosecution claim pursuant to Civil Practice & Remedies Code section 101.106(f) because it denies him redress for his “well-established common law claim” in violation of the Texas Constitution’s open courts provision. Section 101.106(f) provides:

If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee’s employment and if it could have been brought under this chapter against the

governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f). Citing *Franka v. Velasquez*, Jones states that although the supreme court held that for purposes of section 101.106(f) a tort action is brought "under" the Texas Tort Claims Act, even if the government has not waived its immunity for such actions, the supreme court did not address "the narrow issue raised in this case" because a constitutional challenge regarding section 101.106(f) relative to the open courts provision had not been presented in *Franka*. See *Franka v. Velasquez*, 332 S.W.3d 367, 369, 379-80 (Tex. 2011).

Nonetheless, Jones asks us to hold section 101.106(f) is unconstitutional, noting that (1) "[s]uit for the intentional tort of malicious prosecution has been recognized by the U.S. Supreme Court since 1981" and by the Supreme Court of Texas since 1852; (2) section 101.106(f) was added to the Act in 2003, so that "the common-law tort of malicious prosecution was well established before its passage"; and (3) "the Legislature would absolve a class of persons from well-established causes of action without any alternative for recompense is simply too much to believe." However, this court and our sister courts have already considered this same constitutional challenge to section 101.106(f) and have found it to be without merit.

The open courts provision states that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Tex. Const. art. I, § 13. "This provision, among other things, prohibits the Legislature from unreasonably restricting common law

causes of action.” *Thomas v. Oldham*, 895 S.W.2d 352, 357 (Tex. 1995) (citing *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993)).

Statutes are presumed to be constitutional. See Tex. Gov’t Code Ann. § 311.021(1); *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003). When challenging a statute as unconstitutional on the basis that it restricts a common law cause of action, the litigant must demonstrate that (1) the statute restricts a well-recognized common law cause of action; and (2) the restriction is unreasonable when balanced against the statute’s purpose. *Hintz v. Lally*, 305 S.W.3d 761, 772 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

Although a pre-*Franka* decision, we first considered and rejected an open courts challenge to section 101.106(f) in *Hintz*. 305 S.W.3d at 772-73. In reasoning that “section 101.106 served to narrow the issues, reduce delay, and avoid duplicative litigation spawned by the simultaneous pursuit of alternative claims against both the governmental employer and its governmental employee,” we concluded that “section 101.106(f)’s restriction on suing a governmental employee is reasonable when balanced against the statute’s purpose.” *Id.* at 773.

Post-*Franka*, we again rejected an open courts challenge to section 101.106(f). See *Protas v. Univ. of Tex. Med. Branch at Galveston*, No. 14-17-00084-CV, 2018 WL 3235449, at *5 (Tex. App.—Houston [14th Dist.] July 3, 2018, no pet.) (mem. op.). Several of our sister courts have agreed with our holding in *Hintz*. See *City of Dallas v. Groden*, No. 05-15-00033-CV, 2016 WL 1367380, at *5 (Tex. App.—Dallas Apr. 6, 2016, pet. denied) (mem. op.); *Hamilton v. Pechacek*, No. 02-12-00383-CV, 2014 WL 1096018, at *6 (Tex. App.—Fort Worth Mar. 20, 2014, no pet.) (mem. op.); *Harold v. Carrick*, No. 01-12-00175-CV, 2013 WL 4828744, at *2-3 (Tex. App.—Houston [1st Dist.] Sept. 10, 2013, pet. denied) (mem. op.); *Williams v. Nealon*, 394 S.W.3d 9, 13-14 (Tex.

App.—Houston [1st Dist.] 2012, pet. denied).

Moreover, although an open courts challenge to section 101.106(f) was not made in *Franka*, the majority of the supreme court nonetheless voiced its opinion on the outcome of such a challenge, stating:

We recognize that the Open Courts provision of the Texas Constitution “prohibits the Legislature from unreasonably abrogating well-established common-law claims”, but restrictions on government employee liability have always been part of the tradeoff for the Act’s waiver of immunity, expanding the government’s own liability for its employees’ conduct, and thus “a reasonable exercise of the police power in the interest of the general welfare.”

332 S.W.3d at 385 (quoting *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 202 (Tex. 2002) and *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995)). Therefore, the supreme court indicated that it would reject an open courts challenge to section 101.106(f) because the restriction is reasonable when balanced against the statute’s purpose. *See id.*; *see also Elias v. Griffith*, No. 01-17-00333-CV, 2018 WL 3233587, at *11 (Tex. App.—Houston [1st Dist.] July 3, 2018, no pet.) (mem. op.); *McFadden v. Olesky*, 517 S.W.3d 287, 299 (Tex. App.—Austin 2017, pet. denied); *Hamilton*, 2014 WL 1096018, at *6; *see also Groden*, 2016 WL 1367380, at *5.

Additionally, relying on the supreme court’s statements in *Franka*, several of our sister courts have addressed constitutional challenges to section 101.106(f) and concluded that it does not violate the open courts provision of the Texas Constitution. *See Hernandez v. Kanlic*, 583 S.W.3d 878, 889 (Tex. App.—El Paso 2019, pet. denied); *Elias*, 2018 WL 3233587, at *10-11; *McFadden*, 517 S.W.3d at 299; *Groden*, 2016 WL 1367380, at *5; *Hamilton*, 2014 WL 1096018, at *6; *Lund v. Giauque*, 416 S.W.3d 122, 133 (Tex. App.—Fort Worth 2013, no pet.); *Harold*, 2013 WL 4828744, at *2; *Williams*, 394 S.W.3d at 13. Further, we note that

although the open courts provision protects established common law rights, there is no common law right to sue the government. *See McFadden*, 517 S.W.3d at 299.

Accordingly, we again conclude that section 101.106(f) does not violate the open courts provision of the Texas Constitution, and we reject Jones's constitutional challenge. We overrule Jones's issue.

CONCLUSION

We affirm the trial court's order.

/s/ Meagan Hassan
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant.