Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00192-CV

Abelardo G. **GONZALEZ**,
Appellant

v.

Nicholas **LICHTENBERGER**; Judge Jose Antonio Lopez; City of Laredo; Roque Perez; Christina M. Pena; Webb County; Martin Cuellar; Pepe Salinas; Sergio Lozano; and Edward A. Nolen,
Appellees

From the 49th Judicial District Court, Webb County, Texas
Trial Court No. 2015CVT003714 D1
Honorable Robert C. Cheshire, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: June 14, 2017

AFFIRMED

Abelardo G. Gonzalez appeals the trial court's order dismissing his claims against all of the defendants in the underlying lawsuit. Gonzalez asserts sixteen issues on appeal. We affirm the trial court's order.

BACKGROUND

Gonzalez filed the underlying lawsuit against numerous defendants alleging they were grossly negligent in failing to warn him of a threat made against his life by the Mexican Mafia

prison gang. Gonzalez alleged the threat was discovered by the defendants during an investigation of three bomb threats that were made during Gonzalez's criminal trial which was held the week of January 11, 2010. Gonzalez further alleged the defendants had a duty to warn him regarding the threat, and the defendants' failure to warn him proximately caused the damages he sustained when two members of the Mexican Mafia prison gang made an attempt on his life on November 19, 2013. Gonzalez alleged he sustained serious bodily injuries as a result of the attempt on his life.

The allegations against the various defendants can be grouped based on their alleged involvement. Gonzalez alleged the following defendants were grossly negligent in failing to competently and effectively investigate the 2010 threat against his life and inform him about the threat: (1) Nicholas Lichtenberger, a supervisor with the Laredo Police Department; (2) Roque Perez, an investigator with the Laredo Police Department; (3) Cristina M. Pena, a police officer with the Laredo Police Department; and (4) the City of Laredo through its police department (Lichtenberger, Perez, and Pena are collectively referred to herein as the "Individual Laredo Defendants"). Gonzalez similarly alleged the following defendants were grossly negligent in failing to communicate the threat to Gonzalez or the Texas Department of Criminal Justice: (1) Sergio Lozano, an assistant district attorney; (2) Edward Nolen, an assistant district attorney; (3) Pepe Salinas, the Webb County jail commander; (4) Martin Cuellar, the Webb County Sheriff; and (5) Webb County (Lozano, Nolen, Salinas, and Cuellar are collectively referred to herein as the "Individual Webb County Defendants"). Finally, Gonzalez alleged Judge Jose Antonio Lopez, the judge who presided over Gonzalez's criminal trial, also failed to inform him about the threat on his life.

On March 11, 2014, the trial court signed an order dismissing Gonzalez's claims against all of the defendants with prejudice, citing section 14.003 of the Texas Civil Practice and Remedies Code. In the order, the trial court found the claims should be dismissed for the following reasons:

(1) the claims were frivolous; (2) the claims were barred by limitations; (3) the claims against the Individual Laredo Defendants and the Individual Webb County Defendants were barred by election of remedies and immunity; (4) the claims against the City of Laredo and Webb County were barred by immunity; and (5) the claims against Judge Lopez were barred by election of remedies and official and judicial immunity. Gonzalez appeals.

ASSIGNMENT ORDER AND QUALIFICATIONS

In his first issue, Gonzalez contends the trial court lacked jurisdiction because the order assigning the trial judge to hear the case under chapter 74 of the Texas Government Code contained clerical or typographical errors. In his second issue, Gonzalez contends the trial court lacked jurisdiction because the record does not contain proof that the trial judge assigned to hear the case met the requirements of section 74.055 of the Texas Government Code.

Section 74.056 of the Texas Government Code authorizes the presiding judge of an administrative region to assign visiting judges to preside over cases. TEX. GOV'T CODE ANN. § 74.056 (West 2013). Gonzalez contends clerical or typographical errors in the order assigning the visiting judge to the underlying case deprived the visiting judge of jurisdiction to preside over the case. Gonzalez cites no law in support of his argument. *See* TEX. R. APP. P. 38.1(i) (noting arguments must be supported with appropriate citations to authorities). We hold the clerical or typographical error in the assignment order did not render the order void or deprive the visiting judge of jurisdiction. *See Brewer v. State*, No. AP-76,378, 2011 WL 5881612, at *1 (Tex. Crim. App. Nov. 23, 2011) (not designated for publication) (holding clerical error in order on motion to quash did not deprive the trial court of jurisdiction); *Kim v. Evans*, No. 03-11-00193-CV, 2013 WL 491009, at *2 (Tex. App.—Austin Jan. 31, 2013, no pet.) (mem. op.) (holding clerical error in order did not invalidate order); *Delacerda v. State*, 425 S.W.3d 367, 380 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (holding clerical errors in order pursuant to which district court

assumed jurisdiction did not affect district court's jurisdiction); *Speer v. State*, 890 S.W.2d 87, 93 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (holding discrepancy in district court number within order assuming jurisdiction was "no more than a typographical error or editing oversight," and district court named in caption properly assumed jurisdiction); *Miller v. K & M P'ship*, 770 S.W.2d 84, 88 (Tex. App.—Houston [1st Dist.] 1989, no writ) (refusing to find typographical error in order rendered the order void).

Section 74.055 of the Texas Government Code requires the presiding judge of an administrative region to maintain a list of retired and former judges who meet the requirements of section 74.055. TEX. GOV'T CODE ANN. § 74.055. In his second issue, Gonzalez contends the trial court abused its discretion in not providing him with proof that the visiting judge "annually demonstrated that the judge has completed in the past fiscal year the educational requirements for active district, statutory, probate, and statutory county court judges" as required by section 74.055(c)(5). Gonzalez cites no authority for the proposition that he must be provided with proof that a visiting judge meets the requirements set forth in section 74.055(c). *See* TEX. R. APP. P. 38.1(i) (noting arguments must be supported with appropriate citations to authorities).[1]

APPOINTMENT OF ATTORNEY

In his third issue, Gonzalez contends the trial court erred in not appointing an attorney to represent him.

A court may appoint counsel for an indigent person in any case. TEX. GOV'T CODE ANN. § 24.016. "However, except in limited circumstances not applicable here, the indigent pro se has no right to an attorney and the decision to appoint one is entrusted to the trial court's discretion."

[1] We note Judge Cheshire's name appears on the list of senior and former judges available to serve on assignment for 2015 and 2016, and he was appointed to the underlying case on February 29, 2016. *See* http://www.txcourts.gov/media/868296/Senior-and-Former-Judges-2015.pdf; http://www.txcourts.gov/media/1311281/Senior-and-Former-Judges.pdf.

Cavazos v. San Antonio Hous. Auth., No. 04-09-00659-CV, 2010 WL 2772450, at *3 (Tex. App.—San Antonio July 14, 2010, no pet.) (mem. op.) (citing *Gibson v. Tolbert*, 102 S.W.3d 710, 712 (Tex. 2003)). In determining whether counsel should be appointed, the trial court should consider whether the case is an "exceptional case" in which "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." *Travelers Indem. Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 594 (Tex. 1996). "[W]hat is exceptional is by definition rare and unusual." *Gibson*, 102 S.W.3d at 713. Inmate litigation for injuries sustained while incarcerated is not rare or unusual. *See id.* (holding trial court did not abuse its discretion in refusing to appoint counsel in inmate's medical malpractice lawsuit); *Reed v. Tex. Dep't of Criminal Justice Inst. Div.*, No. 01-02-00734-CV, 2003 WL 21545122, at *1 (Tex. App.—Houston [1st Dist.] July 10, 2003, pet. denied) (mem. op.) (holding no abuse of discretion in denying inmate's motion to appoint counsel in lawsuit against prison employees for use of excessive force); *Henderson v. Univ. of Tex. Med. Branch*, No. 12-02-00092-CV, 2003 WL 21553761, at *1-2 (Tex. App.—Tyler July 9, 2003, pet. denied) (mem. op.) (holding no abuse of discretion in denying inmate appointed counsel to pursue medical malpractice lawsuit for injuries sustained while incarcerated). Therefore, we hold the trial court did not abuse its discretion in denying Gonzalez's request for appointed counsel in the instant case.

CHANGE OF VENUE

In his fourth issue, Gonzalez contends the trial court abused its discretion in denying his motion for change of venue.

The denial of a motion requesting a change of venue will not be disturbed on appeal absent an abuse of discretion. *Palacios v. Ramos*, No. 04-04-00780-CV, 2006 WL 332537, at *7 (Tex. App.—San Antonio Feb. 15, 2006, no pet.) (mem. op.). A motion requesting a change of venue must be supported by the affidavit of at least three credible persons, who are residents of the county

in which the suit is pending. TEX. R. CIV. P. 257. Conclusory statements in an affidavit are not credible. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *Albright v. Good Samaritan Soc'y-Denton Vill.*, No. 02-16-00090-CV, 2017 WL 1428724, at *3 (Tex. App.—Fort Worth Apr. 20, 2017, no. pet. h.) (mem. op.). The affidavits attached to Gonzalez's motion were conclusory; therefore, the trial court did not abuse its discretion in denying Gonzalez's motion to transfer venue.

DISMISSAL OF CLAIMS

Gonzalez's remaining issues raise various complaints relating to the trial court's dismissal of his claims. In these issues, Gonzalez challenges the multiple grounds upon which the trial court based the dismissal.

Because Gonzalez is an inmate, the trial court had the discretion to dismiss his claims, either before or after service of process, if the court found the claims were frivolous.[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(2) (West 2017). Because the trial court did not hold a hearing before dismissing Gonzalez's claims, the issue before this court is whether the trial court properly determined his claims had no arguable basis in law.[3] *See Lopez v. Serna*, 414 S.W.3d 890, 893 (Tex. App.—San Antonio 2013, no pet.); *In re Douglas*, 333 S.W.3d 273, 292 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Hamilton v. Williams*, 298 S.W.3d 334, 339 (Tex. App.—Fort Worth 2009, pet. denied). Although dismissals of inmate claims are typically reviewed under an abuse of discretion standard, whether there was an arguable basis in law for an

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[2] In his eleventh issue, Gonzalez makes reference to one of the defendants failing to answer. Because the trial court could dismiss Gonzalez's claims on its own motion before service of process, the trial court necessarily could dismiss the claims in the absence of an answer. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a),(c) (West 2017).

[3] In his fifth issue, Gonzalez complains about the trial court's failure to hold a hearing. As the above-cited cases establish, however, the trial court is not required to conduct a hearing. Instead, the trial court's decision not to conduct a hearing merely narrows the grounds upon which the court is permitted to dismiss the claims.

inmate's claim is reviewed de novo.[4] *In re Douglas*, 333 S.W.3d at 293. "To determine whether a trial court has properly determined there is no arguable basis in law for a claim, 'we examine the types of relief and causes of action appellant pleaded in his petition to determine whether, as a matter of law, the petition stated a cause of action that would authorize relief.'" *Lopez*, 414 S.W.3d at 893 (quoting *Spurlock v. Johnson*, 94 S.W.3d 655, 658 (Tex. App.—San Antonio 2002, no pet.)).

With regard to Gonzalez's claims against the Individual Laredo Defendants and the Individual Webb County Defendants, one of the grounds on which the trial court dismissed the claims was that the claims were barred by election of remedies. Section 101.106(f) of the Texas Tort Claims Act ("Act") 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) (West 2011). In this case, Gonzalez sued the Individual Laredo Defendants and the Individual Webb County Defendants for conduct within the general scope of their employment. The Texas Supreme Court has held "any tort claim against the government is brought 'under' the Act for purposes of section 101.106, even if the Act does not waive immunity." *Franka v. Velasquez*, 332 S.W.3d 367, 375 (Tex. 2011). Therefore, because Gonzalez sued the Individual Laredo Defendants and the Individual Webb County Defendants for conduct within the general scope of their employment and his tort claims against them could have

[4] In his tenth issue, Gonzalez complains the trial court failed to consider his verified reply. Even if we accept Gonzalez's contention that the trial court failed to consider his verified reply, no reversible error would result in this case because we review the dismissal under a de novo standard of review.

been brought against the City of Laredo and Webb County, the trial court properly dismissed the claims against those individual defendants. *See Lopez*, 414 S.W.3d at 896-97 (holding trial court properly dismissed inmate's claims against prison correctional officers as having no basis in law where officers could have moved for claims to be dismissed under section 101.106(f)).

With regard to Gonzalez's claims against the City of Laredo and Webb County, "[a] trial court may rely on Chapter 14, specifically section 14.003(b)(1), to dismiss an inmate's claim if the petition alleges facts showing that sovereign immunity would, in all likelihood, bar the inmate's claim." *Id.* at 895. In this case, the Act only waives a governmental unit's sovereign immunity for personal injury arising from the operation or use of a motor-driven vehicle or from the condition or use of tangible personal or real property. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021. Because Gonzalez's claims do not arise out of the operation or use of a motor-driven vehicle or from the condition or use of tangible personal or real property, the City of Laredo and Webb County are immune from his claims. Therefore, the trial court did not err in dismissing those claims.

Finally, with regard to Judge Lopez, Gonzalez alleged Judge Lopez was grossly negligent in failing to warn him about the threat which was discovered while Judge Lopez was presiding over Gonzalez's criminal trial. As our sister court has recently noted:

> It is well established that judges enjoy absolute immunity for judicial acts performed in judicial proceedings. The doctrine of judicial immunity is founded upon the premise that a judge, in performing his or her judicial duties, should be free to act upon his or her convictions without threat of suit for damages.
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> Absolute judicial immunity protects a judge from suit and not just an ultimate assessment of damages. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction. Thus, motive for a judge's complained-of actions is irrelevant in the judicial immunity determination. Absolute judicial immunity is an affirmative defense.
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> A judge's judicial immunity can be overcome in only two instances: first, where the complained-of actions were non-judicial; and second, where the

> complained-of actions, though judicial in nature, were taken in the complete absence of all jurisdiction.

West v. Robinson, 486 S.W.3d 669, 673-74 (Tex. App.—Amarillo 2016, pet. denied) (internal quotations and citations omitted). Because Gonzalez's claim against Judge Lopez was for actions Judge Lopez took or failed to take during judicial proceedings, Gonzalez's claim is barred by judicial immunity, and the trial court did not err in dismissing that claim.

Finally, Gonzalez contends the trial court erred in dismissing his claims with prejudice. "[W]hen we review a trial court's dismissal with prejudice under chapter fourteen, we consider whether the inmate could remedy the error through a more specific pleading." *Hamilton*, 298 S.W.3d at 340. Given that Gonzalez's claims were barred by election of remedies and immunity, he could not remedy the error through a more specific pleading. Therefore, the trial court did not err in dismissing his claims with prejudice.

CONCLUSION

The order of the trial court is affirmed.

Rebeca C. Martinez, Justice