In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00173-CV

HENRY PATTERSON, JAMES COOPER, STEVEN TRAVIS GREENE, REX EVANS, MARK ELLINGTON AND LIBERTY COUNTY, TEXAS, Appellants

V.

JEREMY R. MARCANTEL, Appellee

On Appeal from the 253rd District Court
Liberty County, Texas
Trial Cause No. CV1408497

MEMORANDUM OPINION

This is an accelerated appeal of an interlocutory order denying the Defendants' motion for summary judgment which included pleas to the jurisdiction. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(5), (8) (West Supp. 2016). The Defendants appealed. Marcantel filed the underlying lawsuit after he was terminated from his employment as a deputy sheriff with the Liberty County Sheriff's Office.

Marcantel alleged that the Defendants engaged in wrongful conduct that led to and continued after his termination. We reverse in part.

Plaintiff's Original Petition

On August 18, 2014, Marcantel filed Plaintiff's Original Petition, naming as defendants Henry W. Patterson, James M. Cooper Jr., Steven T. Greene, Rex E. Evans, Mark D. Ellington, and Liberty County, Texas.[1] Marcantel sued Patterson, Cooper, Greene, Evans, and Ellington as individuals and in their official capacities.

According to Marcantel, he stopped a truck driver on January 7, 2011. The stop resulted in charges against the driver for traffic violations and possession of illegal drugs, and the driver's uninsured truck was towed (the "truck incident"). In his original petition, Marcantel alleged that the driver filed a complaint against Marcantel accusing Marcantel of setting up the traffic stop in order to "repossess" the driver's vehicle. Marcantel also alleged that the Defendants investigated the complaint, terminated Marcantel's employment "under dishonorable circumstances" on March 4, 2011, and Marcantel was arrested for and ultimately indicted for official oppression.

[1] We refer to all the defendants collectively as "Defendants" or "Appellants." We refer to Patterson, Cooper, Greene, Evans, and Ellington collectively as "the Individual Defendants."

Marcantel further alleged that he administratively appealed the termination of his employment, and in February of 2012, the Texas State Office of Administrative Hearings (SOAH) issued an order that "exonerated Marcantel of the misconduct allegations" and directed the Sheriff's Office to change Marcantel's service records to reflect an "honorable discharge." According to Marcantel, the Defendants "feared exposure of misconduct within the sheriff's office and [] attempted to silence and discredit Marcantel using their official public capacity and public resources." Marcantel brought the following claims against the Defendants:

1. interference with the right to life, liberty, and property under the Texas Constitution;
2. interference with the right to work under the Texas Constitution and the Business and Commerce Code;
3. defamation under the Texas Constitution and the Civil Practice and Remedies Code;
4. equal protection and denial of due process under the Texas Constitution;
5. equal protection and denial of liberty and property rights under the Texas Constitution;
6. malicious prosecution under the Texas Constitution;
7. false imprisonment under the Texas Constitution;
8. intentional infliction of emotional distress;
9. negligent hiring, supervision, training, or retention;
10. wrongful discharge under the Texas Whistleblower Act; and
11. breach of a contract of employment.

Marcantel alleged that his "discharge from employment is believed to have been in retaliation because the defendants feared that Marcantel knew of misconduct within the sheriff's office and that he would report it to authorities."

Marcantel also alleged that he suffered irreparable harm as a result of Defendants' wrongful conduct, including financial hardship, permanent injury to his personal and professional reputation, and pain and suffering. The original petition sought money damages and "a permanent injunction enjoining the defendants and their agents from engaging in any further harmful conduct against Marcantel[.]"

In the original petition, Marcantel alleged the following regarding the "waiver of immunity":

> [] The defendant Liberty County, Texas is a political subdivision of the State of Texas and all known defendants were agents of this governmental unit during the events that give rise to this case. The doctrine of governmental immunity affords these defendants some protection from suit and liability while engaged in governmental acts.
>
> [] In this case, the defendants willfully acted with conscious disregard of the clearly established rights, immunities, and privileges of Marcantel. The defendants acted maliciously in bad faith with intent to harm Marcantel and the defendants did so while acting under Color of State Law using public resources. The individual defendants are not entitled to immunity.

Defendants' Motion for Summary Judgment

On October 17, 2014, the Defendants filed an answer, which included a general denial and various defenses including "sovereign, governmental, official, and qualified immunity." Defendants subsequently deposed Marcantel and on March 10, 2015, the Defendants filed Defendants' Traditional and No-Evidence Motion for

Summary Judgment arguing that "the Court lacks jurisdiction over all Marcantel's claims, except for his claims under the Texas Constitution."

According to the summary judgment motion,

> . . . the summary judgment evidence conclusively establishes that Liberty County terminated Marcantel's employment on March 4, 2011 for legitimate non-discriminatory and non-retaliatory reasons. More specifically—and in addition to Marcantel's documented history of poor performance and disciplinary action—the County reasonably concluded that Marcantel improperly targeted a vehicle for a traffic stop and its driver for an arrest, to help his friend obtain a financial benefit. This same incident also provided probable cause to support Marcantel's November 15, 2011 indictment for official oppression.

Defendants alleged that Marcantel had been counseled for performance issues numerous times in 2007, 2008, and 2011. In the motion for summary judgment, the Defendants described an incident in February of 2011, during which Marcantel was dispatched to an alarm call at a Sam Houston Electrical Co-Op (SHECO) substation. The motion alleged that Marcantel performed only a brief search before clearing the call, and that an hour later, SHECO employees discovered that a hole had been cut in the fence and a "massive theft" of more than $100,000 had occurred. As a result of the SHECO incident, an internal affairs investigation occurred, which concluded that Marcantel had violated policies regarding "rules of conduct, performance of duties, and conducting an investigation."

The motion also addressed the January 2011 truck incident. According to the Defendants, Marcantel was friends with a man whose mother was the owner of the truck. The friend's mother sold the truck to the driver on a payment plan. Defendants alleged that, after arresting the driver of the truck, Marcantel telephoned his friend (whose mother was selling the truck) and advised him the driver had been arrested and that the truck was being towed. In a subsequent internal affairs investigation, Marcantel acknowledged that he understood the driver had alleged that Marcantel had worked with the truck owner to help repossess the truck.

Defendants also addressed Marcantel's claim of retaliatory discharge in the motion for summary judgment. According to the Defendants, Marcantel's Whistleblower Act claim related to Marcantel's contention that he found a draft press release prepared by Evans. In his deposition, Marcantel testified that Sheriff Patterson had instructed deputies not to make any type of press release, that the press release prepared by Evans was in violation of that instruction, and that Marcantel had reported this violation to his supervisor.

Defendants alleged further that, as a result of the truck incident, SHECO incident, and subsequent investigations, the County terminated Marcantel's employment. According to Defendants, there is no competent evidence of an administrative appeal hearing. Regarding Marcantel's indictment, Defendants

explained that Marcantel testified in his deposition that he had an opportunity to testify at the grand jury but he chose not to testify.

Defendants argued that Marcantel's constitutional claims should be denied because money damages are not available for claims under the Texas Constitution and because the injunctive relief Marcantel requested was "inappropriate[]" and "impermissibly vague."[2]

Defendants argued that after a reasonable time for discovery, there was:

> (1) no evidence Defendants violated any right guaranteed to Marcantel under the Texas Constitution, including no evidence that Defendants:
>
> a. conducted any unreasonable search or seizure;
> b. deprived Marcantel of any right without due process;
> c. denied him equal protection by treating him differently based on any government classification;
> d. initiated a criminal prosecution against him without probable cause;
> e. initiated a criminal prosecution against him out of malice;
> f. imprisoned him without lawful authority; or
> g. defamed Marcantel resulting in an adverse effect on any other recognized interest Marcantel may have had;
>
> (2) no evidence Plaintiff's claims fit into any waiver of immunity;
> (3) no evidence the individual Defendants failed to perform discretionary duties, in good faith, and within the scope of their

[2] Defendants also argued in the motion for summary judgment that Marcantel's claims under the Texas Constitution are barred by limitations. According to the Defendants, Marcantel's employment ended on March 4, 2011; he was arrested on November 23, 2011; he was indicted on November 15, 2011; and, he filed his original petition on August 18, 2014, more than two years following the "relevant events[]" underlying his claims and outside the applicable two-year statute of limitations. However the constitutional claims are not currently before us on appeal.

> authority, to overcome official immunity defenses for the individual Defendants and Liberty County;
> (4) no evidence Defendants initiated a criminal prosecution without probable cause or initiated a criminal prosecution out of malice;
> (5) no evidence Defendants imprisoned Marcantel without lawful authority;
> (6) no evidence Defendants engaged in "extreme and outrageous" conduct that was intended to cause severe emotional distress;
> (7) no evidence Defendants caused severe emotional distress;
> (8) no evidence Defendants owed any duty or violated any duty with respect to the hiring, training, supervision, and retention of employees, or that any alleged violation of any such duty proximately caused Marcantel any harm;
> (9) no evidence Defendants employed incompetent or unfit persons;
> (10) no evidence Defendants had a contract with Marcantel;
> (11) no evidence Defendants breached a contract with Marcantel; and
> (12) no evidence Marcantel made a good faith report of a violation of law to an appropriate law enforcement authority.

As to Marcantel's tort claims, Defendants alleged that: Defendants are immune from Marcantel's tort claims under the TTCA; Marcantel failed to provide pre-suit notice required by the TTCA; and the TTCA's limited waiver of immunity only applies to certain torts arising from the operation of a vehicle, motor-driven equipment, or tangible personal or real property and does not apply to the tort claims Marcantel asserted. The Defendants also argued that Marcantel's tort claims are barred by limitations, and Marcantel's tort claims fail on the merits. In addition, Defendants argued that the claims against the Individual Defendants must be dismissed under the TTCA's election-of-remedies provision.

As to the Whistleblower Act and breach of contract claims, the Defendants argued that the claims against the Individual Defendants should be dismissed because Marcantel was not employed by the Individual Defendants, they had no contract with Marcantel, and the Whistleblower Act does not create a cause of action against government actors in their individual capacity. In addition, the Defendants argued that Marcantel failed to allege that he reported a violation of the law, which is a predicate for bringing a Whistleblower Act claim, and that the claim is barred by limitations. The Defendants also argued that Marcantel's breach of employment claim against the County fails because the Legislature has provided no waiver of immunity for contract claims against counties and because Marcantel was an at-will employee.

Defendants also alleged that official immunity bars Marcantel's claims against the Individual Defendants because they were performing discretionary duties in good faith and within the scope of their authority. In particular, the Defendants argued that

> [n]othing about the individual Defendants' decision to terminate Marcantel, or their decision to refer the case to the district attorney's office, is indicative of anything other than good faith. With respect to the characterization of Marcantel's discharge as "dishonorable," the individual Defendants reasonably believed that Marcantel had engaged in criminal misconduct—[] as ultimately found by the grand jury—and there is nothing indicating the individual Defendants acted with anything other than good faith.

Defendants' motion for summary judgment included as exhibits selections from Marcantel's deposition, certain records pertaining to Marcantel's employment and internal affairs investigations, and Marcantel's indictment, capias, and the order dismissing the indictment.

Plaintiff's Response to Motion for Summary Judgment

The motion for summary judgment hearing was originally set for May 4, 2015, and later reset for June 1, 2015. On May 11, 2015, Marcantel filed a response to the motion for summary judgment. Therein, Marcantel alleged that

> [d]uring Marcantel's employment with the Sheriff's Office he inadvertently learned of activity where some or all of the defendants were attempting to secret certain matters concerning another senior official in the Patterson administration who had been federally indicted on 107[] counts for theft of firearms and ammunition from a local police department.[] Shortly after Marcantel learned about this activity he became the target of numerous internal affair[s] investigations by the defendants.

Marcantel did not dispute that the Individual Defendants exercised discretionary actions, but he argued that the Individual Defendants were not entitled to official immunity because they "did not act lawfully within the scope of their official positions nor did they act in good faith." Marcantel further argued that the criminal case against him was "based on perversions of the truth and lies[]" and that the SOAH found the allegations against him by the Sheriff's Office were "meritless[.]"

In Marcantel's response, he also argued that the County was not entitled to immunity because it had voluntarily removed an earlier lawsuit against it brought by Marcantel to federal district court. Marcantel also argued that the County had waived immunity by answering the lawsuit with affirmative pleadings, failing to make a special appearance, and by making a general appearance.

In Marcantel's response, he acknowledged that the Whistleblower Act includes its own "waiver of immunity" provision. *See* Tex. Gov't Code Ann. § 554.0035 (West 2012). And, Marcantel acknowledged that the TTCA does not provide a waiver of immunity for intentional torts, but he argued that

> [i]n this case, Marcantel principally charged the defendants with violations of The Texas Constitution[] and with collateral charges for violation of the Texas Whistleblower Act[], breach of contract[], intentional infliction of emotional distress[], and conspiracy[]. With exception of the collateral charges, no tort claims were alleged other than as an underlying basis for the aforementioned constitutional violations.

Marcantel also argued that "the discovery period in this case had not closed as a matter of law or court order" and that, although he had made efforts to schedule depositions of the Individual Defendants, such depositions had not been taken. Marcantel attached no exhibits to his response.

Defendants' Reply

The hearing on the motion for summary judgment was rescheduled for August 13, 2015. On July 20, 2015, Defendants filed their reply to Marcantel's response to the motion for summary judgment. In the reply, the Defendants restated their arguments that Marcantel's tort claims do not fall within the limited waiver of immunity in the TTCA and fail for lack of pre-suit notice required by the TTCA, and that the claims against the Individual Defendants must be dismissed under the TTCA's election-of-remedies provision. The Defendants also argued that Marcantel failed to plead facts or provide evidence necessary to establish a waiver of immunity under the Whistleblower Act, and that there is no allegation or evidence that Marcantel made a good faith report of a violation of law. Defendants further responded to the argument made by Marcantel regarding the removal of a previous lawsuit and averred that such would not constitute a waiver of immunity in this lawsuit, nor would filing a special appearance. The Defendants also argued that Marcantel failed to file an appropriate affidavit requesting a continuance for the purposes of conducting additional discovery. In support of their no-evidence motion for summary judgment, Defendants again emphasized their argument that "there is no evidence Defendants had any improper or unlawful motive when they disciplined Marcantel for poor performance and policy violations[,]" that Marcantel had not

filed in this case any competent evidence concerning the SOAH hearing, and that Defendants relied on Marcantel's own deposition testimony to dispute many of the allegations in his Original Petition.

Plaintiff's Supplement to Summary Judgment Response

On August 6, 2015, Marcantel filed Plaintiff's Supplement to Summary Judgment Response, and he attached his own affidavit. In addition to restating his allegations, Marcantel alleged that discovery was not complete. Marcantel attached no other exhibits to his supplement.

Defendants' Response to Plaintiff's Supplement

On August 7, 2015, Defendants filed a Response to Plaintiff's Supplement to Summary Judgment Response. In the response, Defendants argued that "the summary judgment record—composed almost exclusively of Plaintiff's deposition testimony—does not contain any disputed facts." Defendants also argued that Marcantel may not create a fact issue by alleging facts in his affidavit that conflict with his previous deposition testimony. In addition, Defendants argued that they had cooperated with discovery but that Plaintiff had not "diligently pursued" Defendants' offers regarding scheduling depositions.

2015 Hearing on Motion for Summary Judgment

On August 13, 2015, the trial court held a hearing on the motion for summary judgment. The trial court did not rule on the motion for summary judgment at the August 13th hearing. But, the court directed the parties to develop dates for depositions and a proposed scheduling order and also stated to plaintiff "you can go ahead and amend, and you can amend if you need to[]" in light of the additional discovery the parties anticipated.

Plaintiff's Amended Petition

Marcantel filed Plaintiff's Amended Original Petition on January 28, 2016. Therein, Marcantel alleged "ten causes of action against the defendants, seven in official capacity and three in individual capacity." Marcantel claimed various alleged violations under the Texas Constitution. Marcantel also asserted claims for unlawful retaliation under the Whistleblower Act and for breach of employment contract. Marcantel's remaining tort claims were for defamation/blacklisting, negligent employment, conspiracy, defamation per se, and intentional infliction of emotional distress. All of Marcantel's remaining tort claims were asserted against the County and the Individual Defendants in their official capacity except the following: conspiracy (brought against Patterson, Cooper, Green, Evans, and Ellington), defamation (brought against Cooper), and intentional infliction of

emotional distress (brought against Patterson, Cooper, Greene, Evans, and Ellington).

In his amended petition, Marcantel pleaded the following regarding the "waiver of sovereign immunity":

> [] Sovereign immunity was voluntarily waived by the defendant Liberty County Texas when it failed to make a special appearance in plea of jurisdiction when this case was originally filed in January 2014. This waiver was further ratified by the defendant in March 2014 when it voluntarily removed the case to federal court and it again made a general appearance. Once again the defendant ratified the waiver in October 2014 after the case was re-filed in the original state district court by making another general appearance.
>
> [] Sovereign immunity was further waived, with regards to the whistleblower claims, pursuant to Section 554.0035 of the Texas Government Code.

2016 Hearing on Motion for Summary Judgment

On January 29, 2016, the court held another hearing on the motion for summary judgment and plea to the jurisdiction. The Defendants argued the points raised in their motion for summary judgment and plea to the jurisdiction. The Defendants argued that the court lacked subject matter jurisdiction under the TTCA and the Whistleblower Act, that the legislature has not waived immunity for contract claims against a county, and that "[t]he elements that [Marcantel] would have to prove on any of these causes of action simply aren't there, based on his own deposition testimony."

At the conclusion of the hearing, the court stated "[t]he Motion for Summary Judgment is denied." On May 2, 2016, the court signed an order denying Defendants' Traditional and No-Evidence Motion for Summary Judgment.[3] The trial court did not enter findings of fact and conclusions of law, nor does the record reflect that any were requested. Defendants timely filed a notice of appeal.

Issues on Appeal

Appellants ask this Court to "reverse, in part, the trial court's order denying Defendants' Traditional and No-Evidence Motion for Summary Judgment and dismiss Plaintiff Jeremy Marcantel's claims for defamation, conspiracy, intentional infliction of emotional distress, negligent employment practices, violation of the Whistleblower Act, and breach of contract." Appellants specifically do not challenge the denial of the motion for summary judgment as to Marcantel's constitutional claims.[4]

[3] The appellate record includes no evidence that any pleadings, motions, or briefs were filed after the January 29, 2016 hearing but before the May 2, 2016 order.

[4] While we do not address the merits of Marcantel's constitutional claims, we note that his amended petition, like his original petition, sought money damages for his claims under the Texas Constitution. There is no private cause of action against a governmental entity for money damages relating to the governmental entity's alleged violations of an individual's constitutional rights. *See City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 147-48 (Tex. 1995).

In eight issues, Appellants argue that the trial court lacked subject matter jurisdiction based on governmental and official immunity:

1. Plaintiff's tort claims against the Individual Defendants must be dismissed under the TTCA's election of remedies provision.
2. Plaintiff's tort claims must be dismissed because Plaintiff failed to provide pre-suit notice, which is a jurisdictional requirement under the TTCA.
3. Plaintiff's intentional tort claims must be dismissed because the TTCA does not waive immunity for intentional torts.
4. All of Plaintiff's tort claims must be dismissed because they do not fall under the TTCA's limited waiver of immunity.
5. The trial court lacks jurisdiction over Plaintiff's Texas Whistleblower Act claim because Plaintiff has not alleged and cannot establish a prima facie case to establish a waiver of governmental immunity.
6. The County's governmental immunity has not been waived for Plaintiff's breach of contract action.
7. The County did not waive its governmental immunity by removing Plaintiff's prior lawsuit to federal court.
8. The Individual Defendants are entitled to official immunity.

Appellate Jurisdiction

Generally, appellate courts do not have jurisdiction over appeals that arise from a trial court's ruling to deny a party's motion for summary judgment. *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966); *Highlands Mgmt. Co. v. First Interstate Bank of Tex., N.A.*, 956 S.W.2d 749, 752 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). However, we have jurisdiction over this interlocutory appeal pursuant to sections 51.014(a)(5) and (8) of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(5), (8) (providing for

interlocutory appeal of an order granting or denying a plea to the jurisdiction brought where an individual defendant is claiming official immunity or a governmental entity is claiming immunity); *see also Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840, 845-46 (Tex. 2007) (explaining that, when a defendant files both a plea to the jurisdiction and motion for summary judgment on the grounds of immunity, if either is denied, the defendant may properly bring an interlocutory appeal); *Lone Star Groundwater Conservation Dist. v. City of Conroe*, 515 S.W.3d 406, 411 (Tex. App.—Beaumont 2017, no pet.).

Standard of Review

We review a trial court's ruling on a motion for summary judgment de novo. *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012); *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When, as in this case, the order granting summary judgment does not specify the grounds upon which the trial court relied, we must affirm the summary judgment if any of the independent summary-judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

A judgment on a combined traditional and no-evidence motion is reviewed first under the no-evidence standards of Rule 166a(i). *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004); *see also* Tex. R. Civ. P. 166a(i). If the

non-movant fails to produce more than a scintilla of evidence to support the challenged element of his claim, there is no need to analyze the traditional motion for summary judgment. *Ford Motor Co.*, 135 S.W.3d at 600. The non-movant, here the plaintiff, must produce summary judgment evidence raising a genuine issue of material fact to defeat the summary judgment. *See* Tex. R. Civ. P. 166a(i). "A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced[]" and if reasonable and fair-minded jurors could differ in their conclusions in light of all the summary-judgment evidence. *See Ford Motor Co*., 135 S.W.3d at 600-01; *see also Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). We consider the evidence in the light most favorable to the non-movant. *Ford Motor Co.*, 135 S.W.3d at 601.

The movant for traditional summary judgment must establish that (1) there is no genuine issue of material fact and (2) that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). If the moving party produces evidence that it is entitled to summary judgment, the burden shifts to the non-movant to present evidence that raises a material fact issue. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). In determining whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* at 549.

We review the trial court's ruling on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). When the plea to the jurisdiction challenges the pleadings, we construe the plaintiff's pleadings liberally to determine if the petition alleges facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Id.* at 226. Dismissal is appropriate if the pleadings affirmatively negate the existence of jurisdiction. *Id.* at 227. If the plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties to determine if a fact issue exists. *Id.* In reviewing the evidence presented in support of the plea to the jurisdiction, we take as true all evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Id.* at 228. If the evidence creates a genuine issue of a material fact regarding jurisdiction, the plea to the jurisdiction must be denied and the fact issue will be resolved by the factfinder. *Id.* at 227-28. But if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

When evidence is submitted that implicates the merits of the case, our standard of review generally mirrors the summary judgment standard under Texas Rule of Civil Procedure 166a(c). *Id.*; *see also* Tex. R. Civ. P. 166a(c). The burden is on the governmental unit to present evidence to support its plea to the jurisdiction, and if it does so, the burden then shifts to the plaintiff to show that a disputed material fact exists regarding the jurisdictional issue. *Miranda*, 133 S.W.3d at 228. When, as here, a trial court does not make findings of fact and conclusions of law, we will affirm the trial court's order denying the plea to the jurisdiction if it can be upheld on any legal theory that finds support in the evidence. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

Governmental Immunity

Absent a statute where the Legislature has expressly waived a governmental entity's immunity from suit, trial courts generally lack subject-matter jurisdiction over suits against governmental entities, including claims against counties. *See Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). A trial court's subject matter jurisdiction over a case is reviewed as a question of law. *Miranda*, 133 S.W.3d at 226; *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

Generally, "immunity from suit implicates courts' subject-matter jurisdiction[]" for lawsuits in which the state or certain governmental units have been sued, unless the state consents to suit. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 91 (Tex. 2012); *accord Miranda*, 133 S.W.3d at 224 (citing *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam)). The state or governmental unit can be sued only if the Legislature has waived immunity in "clear and unambiguous language." Tex. Gov't Code Ann. § 311.034 (West 2013).

There are two distinct principles of sovereign immunity: immunity from suit and immunity from liability. *Miranda*, 133 S.W.3d at 224. The Texas Tort Claims Act creates "a unique statutory scheme in which the two immunities are co-extensive: 'Sovereign immunity to suit is waived and abolished to the extent of liability created by [the TTCA].'" *Id.* (quoting Tex. Civ. Prac. & Rem. Code § 101.025(a) (West 2011)). Thus, a governmental unit is immune from suit on tort claims unless the TTCA expressly waives immunity. The TTCA expressly waives immunity when the claim involves: (1) use of publicly owned automobiles; (2) injuries arising out of a condition or use of tangible personal property; and (3) premises defects. *Id.* (citing *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 554 (Tex. 2002)); *see* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-.109 (West 2011 & Supp. 2016). The Whistleblower Protection Act, which prohibits retaliation for reporting a

violation of law, also contains a waiver of immunity provision. *See* Tex. Gov't Code Ann. §§ 554.002, 554.0035 (West 2012).

Governmental immunity from suit defeats a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *See Miranda,* 133 S.W.3d at 225-26; *Jones,* 8 S.W.3d at 638. A plea to the jurisdiction may challenge the sufficiency of the facts pleaded in a petition or it may challenge the existence of jurisdictional facts. *Green Tree Servicing, LLC v. Woods,* 388 S.W.3d 785, 791 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (citing *Miranda,* 133 S.W.3d at 226-27).

Waiver of Governmental Immunity

First, we address the alleged waiver of governmental immunity. Appellants' seventh issue challenges Marcantel's allegations and arguments that the County waived governmental immunity by removing a prior lawsuit to federal court and by filing an answer and making a general appearance in this lawsuit.

In his response to the Defendants' motion for summary judgment, Marcantel argued that he had filed a lawsuit against the Defendants in cause number CV1407707 that Defendants removed to federal court. Relying on *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), Marcantel argued to the trial court that "a State waives sovereign immunity when it voluntarily removes a case from a state court to a federal court."

In *Lapides*, the state defendants conceded that a state statute waived sovereign immunity from state-law claims in state court, and the issue before the Supreme Court narrowly addressed whether the state defendants were immune from suit on state-law claims in federal court by virtue of the Eleventh Amendment. *See id.* at 616. The state defendants in *Lapides* voluntarily agreed to remove the case to federal court and by this act, they invoked the federal court's jurisdiction. *Id.* at 620. The Supreme Court held that a state's voluntary agreement to remove a case to federal court constitutes a form of voluntary invocation of the federal court's jurisdiction and a waiver of Eleventh Amendment immunity. *See id.* at 616, 620, 624.

Marcantel also cites to a Fifth Circuit Court of Appeals case in support of his contention that *Lapides* "applies to Texas counties as a waiver of sovereign immunity '[in] any private suit which a state [or county] removes to federal court[.]'" *See Meyers v. Texas*, 410 F.3d 236 (5th Cir. 2005). In *Meyers*, the Fifth Circuit expressly noted that the *Lapides* holding was limited to the context of "'state law claims, in respect to which the State had waived immunity in its own courts.'" *Id.* at 244 (quoting *Lapides*, 535 U.S. at 617). Furthermore, the Fifth Circuit expressly did not "determine and the state is not precluded from pursuing a claim that it is immune from liability under principles of Texas sovereign immunity law, separate and apart from its waiver of its immunity from suit in federal court in this case." *Id.* at 256. In

other words, *Meyers* did not address immunity from suit under Texas sovereign immunity law. *See id.*

Marcantel fails to cite any Texas state court or federal opinions in which *Lapides* or *Meyers* have been applied in the same context and facts before us, nor are we aware of any. The matter currently before us is distinguishable from *Lapides* and *Meyers*, which concerned the application of the Eleventh Amendment and jurisdiction of federal courts.

Moreover, the appellate record includes no evidence concerning the prior lawsuit. *See* Tex. R. App. P. 34.1. In Marcantel's appellate brief, he acknowledges that the documents or records in the prior suit between the parties are not part of the appellate record in this matter. Marcantel contends that the Appellants admitted "that the instant case originated from a prior state case that was removed by the government appellants to federal court." Appellants stated in their appellate brief that "Defendants removed Marcantel's prior case to federal court because he asserted claims under 42 U.S.C. § 1983 for alleged violations of the United States Constitution." Appellants request that we take judicial notice of the federal district court's order in the previous lawsuit, a copy of which was attached to the appellate brief but was not part of the appellate record. In relevant part the federal district court order states as follows:

> Pending before the court is Plaintiff Jeremy Marcantel's Motion to Dismiss (#13), wherein he seeks a dismissal without prejudice of all his claims against Defendants. The court has been informed that Defendants do not object to the dismissal. Therefore pursuant to Federal Rule of Civil Procedure 41(a)(2), this action is dismissed in its entirety without prejudice.

We have insufficient evidence in our record from which we can determine the basis of the federal suit or the nature of the claims asserted therein. We cannot speculate on the facts or any legal ruling in the prior proceedings between the parties because our appellate record includes no documents or records from any previous litigation. *See In re M.S.*, 115 S.W.3d 534, 546 (Tex. 2003) (an appellate court may only consider the record presented to it and cannot speculate on what might or might not be documents outside the record). Nevertheless, even if we decided to take judicial notice of the documents filed by Marcantel on appeal pertaining to the federal district court's order, by its express terms, the order does not include a ruling on jurisdiction, governmental immunity, or waiver of immunity. Accordingly, we conclude on the record before us that the alleged removal of the earlier suit did not constitute a waiver of governmental immunity.

Appellants' seventh issue also addresses Marcantel's argument that the County waived sovereign immunity by filing an answer and making a general appearance in this lawsuit. Citing to Texas Rule of Civil Procedure 120a, Marcantel argued to the trial court that "[i]f a special appearance is not the first action on the

part of a defendant in a case then the defendant waives objection to the jurisdiction of the court."

Rule 120a provides that a nonresident defendant may file a special appearance "for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant[.]" *See* Tex. R. Civ. P. 120a(1); *see also Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 n.3 (Tex. 2010) (explaining that Rule 120a "allows nonresident defendants to specially appear for the sole purpose of challenging the trial court's jurisdiction over them or their property[]").

Defendants did not argue in their motion for summary judgment that they are nonresidents over whom the court lacked personal jurisdiction. Rather, Defendants argued the trial court lacked subject matter jurisdiction because Marcantel's claims did not "fit into any waiver of immunity[]" and because Marcantel failed to provide the required pre-suit notice. Governmental immunity deprives a court of subject matter jurisdiction. *See Miranda*, 133 S.W.3d at 224. Subject matter jurisdiction may be raised at any time. *See Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (citing *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004)). Accordingly, we conclude that Rule 120a's due order of pleading requirement does not apply to the Defendants' plea to the jurisdiction. We sustain Appellants' seventh issue on appeal.

Whistleblower Act Claim

In their fifth issue on appeal, Appellants argue that the trial court lacked jurisdiction over Marcantel's claim under the Texas Whistleblower Act because Marcantel did not allege and cannot establish a prima facie case under the Act to establish a waiver of governmental immunity. Appellants contend that Marcantel's pleadings also fail to allege that he reported any violation of law, as required under the Act. *See* Tex. Gov't Code Ann. § 554.002(a). According to Appellants, Marcantel "conceded" in his deposition that he did not believe the "press release" he reported was a violation of the law. Because Marcantel did not allege and cannot establish that he reported a violation of any law, Appellants argue that the Defendants cannot be liable under the Whistleblower Act and their immunity from suit has not been waived.

"A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." *Id.* § 554.002(a). A public employee who alleges a violation of the Whistleblower Act "may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability

for the relief allowed under this chapter for a violation of this chapter." *Id.* § 554.0035.

To qualify for the Whistleblower Act's waiver of governmental immunity, Marcantel had the burden to allege and demonstrate more than a scintilla of evidence in response to the no-evidence motion for summary judgment the following elements: (1) he was a public employee; (2) he made a good faith report of a violation of law; (3) he made the report to an appropriate law enforcement authority; and (4) he suffered retaliation as a result of making the report. *See id.* § 554.002(a). The elements of section 554.002 are jurisdictional requirements. *State v. Lueck*, 290 S.W.3d 876, 883-84 (Tex. 2009) ("the 554.002(a) elements are jurisdictional when necessary to ascertain whether plaintiff has adequately alleged a violation of the chapter[]"); *see also Univ. of Houston v. Barth*, 403 S.W.3d 851, 854 (Tex. 2013) (The elements of a Whistleblower Act claim "are jurisdictional and may not be waived.").

The Whistleblower Act defines "law" as "(A) a state or federal statute; (B) an ordinance of a local governmental entity; or (C) a rule adopted under a statute or ordinance." Tex. Gov't Code Ann. § 554.001(1) (West 2012). The Act does not require that the employee report the specific law he asserts was violated, but there must be some law prohibiting the complained-of-conduct. *Wilson v. Dallas Indep.*

Sch. Dist., 376 S.W.3d 319, 323 (Tex. App.—Dallas 2012, no pet.). In addition, during the litigation, the employee-plaintiff must identify the specific law he alleged was violated. *Id.* at 327.

In Marcantel's amended petition he alleged that he was terminated in retaliation for reporting paperwork he found in a police vehicle concerning a former officer. According to the amended petition, the paperwork was a draft of a press release that reported the former officer's "conviction a month before the jury verdict[]" and contained "subject matter that all sheriff's office employees had been ordered to keep secret." In his response to the Defendants' motion for summary judgment, Marcantel did not identify any violation of law, nor did he identify a violation of law when he made reference to his "administrative appeal complaining about the wrongful employment disciplinary action[.]"

Defendants attached portions of Marcantel's deposition to their motion for summary judgment and plea to the jurisdiction. The deposition excerpts reflect that, in his deposition, Marcantel was questioned about the draft press release he reported as follows:

> Q. And when you say you went and told him, you mean you went and told him about the [] press release?
>
> A. I was doored up with him. We had a conversation. I found it, the press release, at the same time we were having a conversation; and I advised

him, "Hey, this is a press release; and, so, we were told not to make press releases."

He told me to put it back and he would handle it.

Q. All right. In your mind, was it a violation of the law for [him] to have prepared the press release that you found?

A. A violation of policies.

Q. And a little bit different question for you: In your mind, was it a violation of the law?

A. No.

Marcantel argues on appeal that the draft press release he reported was in violation of a "rule adopted under a statute or ordinance" because "an elected sheriff has the authority under the law to establish rules that govern the conduct of subordinate government employees." *See* Tex. Gov't Code Ann. § 554.001(1)(C). However, the Texas Supreme Court has concluded that alleged violations of a governmental unit's internal procedures and policies will not support a Whistleblower Act claim. *See Barth*, 403 S.W.3d at 854-57 (report of violation of university administrative policies was not a violation of law under the Whistleblower Act because such policies were not rules adopted under a statute); *Harris Cty. Precinct Four Constable Dep't v. Grabowski*, 922 S.W.2d 954, 956 (Tex. 1996) (a constable department's internal policies are not "law" as the term is defined under the Whistleblower Act); *Mullins v. Dallas Indep. Sch. Dist.*, 357 S.W.3d 182, 188 (Tex. App.—Dallas 2012, pet.

denied) ("Other complaints and grievances, including alleged violations of an agency's internal procedures and policies, will not support a [Whistleblower Act] claim."); *City of Houston v. Kallina*, 97 S.W.3d 170, 174-75 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) ("[T]he Whistleblower Act does not protect reports of violations of a department's internal policies.").

Marcantel's pleadings do not factually allege that he reported any violation of law to the appropriate authority, nor has he produced more than a scintilla of evidence or created a fact issue thereon in response to the motion for summary judgment. *See Coll. of the Mainland v. Meneke*, 420 S.W.3d 865, 871-73 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (holding that a plaintiff could not establish the necessary waiver of governmental immunity under the Texas Whistleblower Act by alleging violations of administrative policy and also failed to create a fact issue regarding an allegation of criminal record tampering) (citing *Barth*, 403 S.W.3d at 854-55; *Tex. Dep't of Criminal Justice v. McElyea*, 239 S.W.3d 842, 850 (Tex. App.—Austin 2007, pet. denied)); *Llanes v. Corpus Christi Indep. Sch. Dist.*, 64 S.W.3d 638, 643 (Tex. App.—Corpus Christi 2001, pet. denied) (holding that the school district was entitled to summary judgment on a Whistleblower Act claim because there is no evidence that plaintiff reported an alleged violation of law). Therefore, we conclude that the trial court erred in denying

the Defendants plea to the jurisdiction and summary judgment on Marcantel's Whistleblower Act claim. *See* Tex. Gov't Code Ann. § 554.002(a); *Barth*, 403 S.W.3d at 854. We sustain Appellants' fifth issue.

Breach of Contract

In their sixth issue, Appellants argue that immunity has not been waived for Marcantel's breach of contract claim. According to Appellants, "[w]hile the Texas Legislature has enacted a waiver of immunity for certain contracts involving municipalities, it has expressly declined to do so for Texas counties."

"Local Government Code section 271.152 provides a limited waiver of immunity for local governmental entities that enter into certain contracts." *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 412 (Tex. 2011) (interpreting Tex. Local Gov't Code Ann. § 271.152 (West 2016)). Section 271.152 provides as follows:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

Tex. Local Gov't Code Ann. § 271.152. Section 271.151(3) specifies that counties are not a "[l]ocal governmental entity" for purposes of this subchapter. *Id.* § 271.151(3) (West 2016). Governmental immunity from suit may be waived only

by clear and unambiguous statutory language. *See* Tex. Gov't Code Ann. § 311.034 ("[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."); *IT-Davy*, 74 S.W.3d at 854. Therefore, because the Legislature expressly excluded counties from those political subdivisions encompassed within the definition of "local governmental entity," we conclude that the waiver-of-immunity provision in section 271.152 is not applicable to counties that are sued for breach of contract. Tex. Local Gov't Code Ann. § 271.151(3); *see also Harris Cty. Flood Control Dist. v. Great Am. Ins. Co.*, 359 S.W.3d 736, 743-44 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (explaining that section 271.151(3) defines "local governmental entity" to include various entities, including conservation and reclamation districts, but excludes counties). Thus, section 271.152 does not waive the County's immunity for breach of contract.

Additionally, in their motion for summary judgment the Defendants argued that "it should be undisputed" that Marcantel was employed by the County and not by any of the Individual Defendants. In Marcantel's amended petition, he alleged that he entered into an employment contract with "Liberty County[,] Texas" and that his cause of action for breach of contract was against "defendant Liberty County[,] Texas – through its agents[.]"

In Marcantel's deposition, the following exchange occurred:

Q. [by defense counsel] Did you sign any contracts in this case?

A. Not that I know of.

Q. Did you have any verbal contracts with any of the defendants?

A. With them?

Q. Yep.

A. I'll say no.

A copy of the Liberty County Sheriff's Department's policy on "Hiring & Retention of Personnel" was also attached as an exhibit to the Defendants' motion for summary judgment. The policy included the following statement:

> Will and Pleasure:
> The employment of employees of Liberty County Sheriff's Department is for an indefinite term and continues at the pleasure of county. At any time, Liberty County Sheriff's Department may dismiss and discipline employees within the guidelines of departmental policy as determined by Sheriff or his designee.

Marcantel presented no evidence that an employment contract existed between Marcantel and any of the Individual Defendants. Marcantel also failed to plead, argue, or present evidence of any waiver of governmental immunity for his claim for breach of contract. Under the record now before us, as a matter of law, Marcantel would not have a breach of contract claim against either the County or against the Individual Defendants. *See, e.g.*, *Triple X-Ray, Inc. v. Winkler Cty. Mem.*

Hosp., 366 S.W.3d 299, 304 (Tex. App.—El Paso 2012, no pet.) (holding that section 271.152 does not waive a county's immunity for breach of contract); *Potter Cty. v. Tuckness*, 308 S.W.3d 425, 431-32 (Tex. App.—Amarillo 2010, no pet.) (concluding that no cause of action for breach of contract lay against a county because the Legislature had not waived governmental immunity). The trial court erred in denying the Defendants' motion for summary judgment and plea to the jurisdiction with respect to Marcantel's breach of contract claim. We sustain Appellants' sixth issue.

Tort Claims

In four issues, Appellants argue that Marcantel's tort claims should have been dismissed under the TTCA's election of remedies provision, for failure to provide pre-suit notice as required by the TTCA, because the TTCA does not waive immunity for intentional torts, and because Marcantel's tort claims do not fall under the TTCA's limited waiver of immunity. The Appellants also argue that the Individual Defendants are entitled to official immunity. In response, Marcantel "agrees that [the TTCA] does not waive sovereign immunity for his claims because the Act does not govern his claims." Marcantel also argues on appeal that his claims against the Individual Defendants are based on ultra vires acts and that fact issues

exist regarding whether the Individual Defendants acted in good faith performing discretionary duties within the scope of their authority.[5]

Under the doctrine of sovereign immunity, a governmental entity cannot be held liable for the actions of its employees unless there is a constitutional or statutory provision waiving such immunity. *See City of Amarillo v. Martin*, 971 S.W.2d 426, 427 (Tex. 1998). Neither Marcantel's original petition nor his amended petition alleged any claims under the TTCA. Additionally, neither pleading alleged that his claims fit within the TTCA's limited waiver of immunity. As we have already discussed herein, Marcantel only pleaded and argued two bases for his contention that there was a waiver of immunity—removal to federal court and the due order of pleadings argument—and we have rejected both arguments. Marcantel has pleaded no other waivers of governmental immunity regarding his tort claims against the County. Therefore, the trial court erred in failing to dismiss Marcantel's tort claims against the County.

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[5] Marcantel did not argue to the trial court that his claims against the Individual Defendants were based on ultra vires acts, and, therefore, he did not preserve such argument for appeal. *See* Tex. R. App. P. 33.1(a). Moreover, Marcantel has conceded that the Individual Defendants exercised discretionary acts, which precludes an ultra vires claim. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) ("To fall within [the] ultra vires exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.").

In evaluating the viability of Marcantel's tort claims against the Individual Defendants in their individual capacity or for ultra vires actions, we focus on the true nature of the dispute, as a plaintiff may not engage in "artful pleading . . . to gain favorable redress under the law." *See Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007). When evaluating the claim, we examine the factual allegations in the pleadings to determine the applicability of governmental immunity, and we need not accept the stated legal theory advanced in the pleadings as valid. *See Gonzales v. Bexar Cty.*, No. 04-97-00679-CV, 1998 Tex. App. LEXIS 3276, at *7 (Tex. App.—San Antonio May 29, 1998, no pet.) (mem. op.); *see also City of Austin v. Silverman*, No. 03-06-00676-CV, 2009 Tex. App. LEXIS 3777, at **10-13 (Tex. App.—Austin May 21, 2009, pet. denied) (mem. op.). A plaintiff may not recast his claim in the language of another cause of action to avoid governmental immunity, limitations, or compliance with mandatory statutes. *See generally Earle v. Ratliff*, 998 S.W.2d 882, 893 (Tex. 1999) (essence of plaintiff's claim was that defendant was negligent by not conforming to the applicable standard of care despite labeling claims as DTPA causes of action); *Ambulatory Infusion Therapy Specialist, Inc. v. N. Amer. Adm'rs, Inc.*, 262 S.W.3d 107, 112 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Bell v. City of Dallas*, 146 S.W.3d 819, 823-24 (Tex. App.—Dallas 2004,

no pet.) (plaintiffs "cannot avoid the effect of governmental immunity by creative pleading").

Marcantel asserted a tort claim for defamation against Cooper, and claims of conspiracy and intentional infliction of emotional distress against Patterson, Cooper, Greene, Evans, and Ellington. These claims were asserted against the Individual Defendants in their individual capacities. Marcantel alleged what he described as a "conspiracy claim" against Patterson, Cooper, Greene, Evans, and Ellington. Therein, he alleged as follows:

> [] On or about February 17, 2011 and continuing through March 4, 2011 the defendants, jointly and/or severally, unjustly exercised government power to infringe on the plaintiff's right to work in lawful occupations; to be free from harassment and intimidation by government agents; to be free from unreasonable government searches and seizures; and to be [free] from defamation and publicity which unreasonably places a person in false light before the public.
>
> . . . .
>
> [] On or about February 17, 2011 through present the defendants Henry Patterson, James Cooper, Steven Greene, Rex Evans, and Mark Ellington have conspired to infringe on the plaintiff's constitutional and statutory rights; and, have committed unlawful and tortious acts in furtherance of this conspiracy. . . .

Marcantel further alleged the following

> . . . The Defendants used their government power to defame the plaintiff; to harass and intimidate the plaintiff; to cause the plaintiff's loss of current and future employment; and to cause the plaintiff to be criminally prosecuted.

. . . .

> . . . The defendants exercised unlawful government interference in the plaintiff's life that injured his reputation, his right to work, his property rights, and his liberty.
>
> . . . .
>
> . . . the defendants, jointly and/or severally, unjustly exercised government power to infringe on the plaintiff's right to work in lawful occupations; to be free from harassment and intimidation by government agents; to be free from unreasonable government searches and seizures; and to be [free] from defamation and publicity which unreasonably places a person in false light before the public.

Marcantel alleged that the County, through its agents, "created documents and [gave] statements that have caused the plaintiff to be blacklisted from new gainful employment." Marcantel also asserted a claim against the Individual Defendants for "intentional infliction of emotional distress" as follows:

> The unjust adverse administrative actions; malicious criminal prosecution; defamation and blacklisting intended to prevent future gainful employment; and loss of earning capacity and benefits has severely injured the plaintiff and his ability to support his family. These injuries have created severe emotion[al] distress that has continued from March 4, 2011 to present.

Examining the essence of Marcantel's claims, we conclude that these tort claims have simply been recast against the Individual Defendants and such claims are also barred by governmental immunity. *See Silverman*, 2009 Tex. App. LEXIS 3777, at **10-13; *Gonzales*, 1998 Tex. App. LEXIS 3276, at *7; *Bell*, 146 S.W.3d

at 824. Thus, the trial court erred in failing to grant summary judgment for the Individual Defendants as to these claims. *See Bell*, 146 S.W.3d at 824.

Marcantel also alleged the following in his amended petition regarding his claim against Cooper for defamation:

> [] On September 16, 2015 the defendant James Cooper testified at deposition in the presence of his attorney, the plaintiff, and other persons. At this deposition Cooper stated that the plaintiff was accused of committing family violence that involved threats, harassment, and a weapon; that he was accused of soliciting dates from women on traffic stops; and that he supplied methamphetamines to a girlfriend.
>
> . . . .
>
> [] On or about September 16, 2015 the defendant James Cooper published a statement of fact by oral communication to third-parties that the plaintiff was accused of committing family violence that involved threats, harassment, and a weapon, that the plaintiff was accused of soliciting dates from women as a peace officer on traffic stops, and that the plaintiff supplied methamphetamines to a girlfriend. *See* Pages 12-13 ¶¶ 47-50.[6]

Communications made in the course of a judicial proceeding are absolutely privileged and will not serve as the basis of a civil action for libel, slander, or business disparagement, regardless of the negligence or malice with which they are

[6] In our appellate record, pages twelve and thirteen of the clerk's record, which include paragraphs numbered forty-seven through fifty, are pages in Marcantel's original petition. These paragraphs alleged what Marcantel styled as part of his allegation of wrongful discharge and breach of contract, and the paragraphs do not include allegations concerning defamation.

made. *See James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982); *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942). Judicial privilege bars claims for defamation that are based on communications related to a judicial proceeding. *See Deuell v. Tex. Right to Life Comm., Inc.*, 508 S.W.3d 679, 689 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). This privilege extends to any statements made by the judges, jurors, counsel, parties, or witnesses and attaches to all aspects of the proceeding, including statements made in open court, pre-trial hearings, depositions, affidavits, and any pleadings or other papers in the case. *James*, 637 S.W.2d at 916-917.

According to the record, Marcantel's claim for defamation against Cooper is based on an alleged communication that occurred during Cooper's deposition in this lawsuit. We conclude that judicial privilege bars Marcantel's claim for defamation against Cooper, and the trial court erred in denying the Defendants' motion for summary judgment as to this claim.

As to the alleged "conspiracy" claims, we note that, in the Defendants' no-evidence motion for summary judgment, they argued, among other things, that Marcantel had produced "no evidence the individual Defendants failed to perform discretionary duties, in good faith, and within the scope of their authority[]" and had produced no evidence of any unlawful or tortious acts in furtherance of the alleged

conspiracy. We find on the record before us that Marcantel failed to produce more than a scintilla of evidence of an agreement or meeting of the minds or of a specific intent to accomplish an unlawful objective. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996); *Walker v. Hartman*, 516 S.W.3d 71, 81 (Tex. App.—Beaumont 2017, pet. filed). Accordingly, the trial court erred in denying Defendants' motion for summary judgment as to the claim for conspiracy against Patterson, Cooper, Greene, Evans, and Ellington.

We further conclude that an amended pleading would not cure the jurisdictional defects; therefore, we need not grant Marcantel further opportunity to amend with respect to such claims. *See Koseoglu*, 233 S.W.3d at 840. We reverse the trial court's order denying Defendants' motion for summary judgment as to Plaintiff's claims for retaliation under the Whistleblower Act, breach of employment contract, defamation, negligent employment practices, conspiracy, defamation, and intentional infliction of emotional distress. We render judgment for the Defendants on these claims and we dismiss these claims with prejudice. *See Sykes*, 136 S.W.3d at 636-37; *see also Koseoglu*, 233 S.W.3d at 846. Because the Defendants did not challenge the trial court's denial as to Plaintiff's constitutional claims, we remand

the case to the trial court solely on the alleged constitutional claims for further proceedings consistent with this opinion.[7]

REVERSED AND RENDERED IN PART AND REMANDED IN PART.

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LEANNE JOHNSON
Justice

Submitted on October 4, 2016
Opinion Delivered October 26, 2017

Before Kreger, Horton, and Johnson, JJ.

[7] Generally, "[w]hen a case has been remanded, the cause is pending and amended pleadings may be filed in pending cases pursuant to [rule] 63." *U.S. Fid. and Guar. Co. v. Beuhler*, 597 S.W.2d 523, 524-25 (Tex. Civ. App.—Beaumont 1980, no writ); *see also Sepulveda v. Krishnan*, 839 S.W.2d 132, 137 n.2 (Tex. App.—Corpus Christi 1992), *aff'd,* 916 S.W.2d 478 (Tex. 1995). However, when an appellate court remands a case and limits its remand to a particular issue, the trial court is restricted to a determination of that particular issue. *See Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986).