In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00303-CV

NATHAN COGSDIL, APPELLANT

V.

JIMMY FINCHER BODY SHOP, LLC, APPELLEE

On Appeal from the County Court at Law No. 1
Potter County, Texas
Trial Court No. 102609-00-1, Honorable W. F. (Corky) Roberts, Presiding

October 30, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Through four issues appellant Nathan Cogsdil appeals a money judgment rendered in favor of appellee Jimmy Fincher Body Shop, LLC (Fincher) and an order of the Honorable Kelly Moore, regional administrative judge, denying Cogsdil's motion to recuse the trial court judge, the Honorable W.F. "Corky" Roberts.[1] We will overrule each of Cogsdil's issues, overrule Fincher's motion to strike Cogsdil's reply brief and

[1] *See* TEX. R. CIV. P. 18a(j)(1)(A) ("An order denying a motion to recuse may be reviewed only for abuse of discretion on appeal from the final judgment").

motion for damages on appeal, and affirm the trial court's judgment and Judge Moore's order denying the motion to recuse.

Background

Cogsdil's vehicle was damaged in a motor vehicle collision in 2013. Fincher repaired the vehicle but in a manner Cogsdil deemed substandard. Cogsdil did not pay Fincher's repair charges and Fincher accordingly sued Cogsdil in justice court.

In March 2014, Cogsdil brought a separate suit, filed in Judge Robert's court, Potter County Court at Law Number One, against Fincher, Jimmy Fincher individually, the driver who collided with Cogsdil and the driver's insurance company. Cogsdil sought remedies in contract and tort from the defendants, and alleged damages resulting from the collision and substandard repair of his vehicle.

Meanwhile, in May 2014, Fincher's suit against Cogsdil in justice court was tried resulting in a take-nothing judgment against Fincher. Fincher's appeal of the judgment also was assigned to Potter County Court at Law Number One. In June 2014, Cogsdil moved to consolidate his suit with Fincher's de novo appeal of the justice court's judgment. The record does not include a reporter's record of the consolidation hearing and the clerk's record does not contain a written order ruling on the motion.[2]

[2] A docket entry dated September 15, 2014, states the court "[r]uled in favor of" plaintiff. Fincher states in its brief the entry means the trial court "den[ied] the consolidation." Regardless, a docket sheet entry does not suffice for a written order. *See Smith v. McCorkle,* 895 S.W.2d 692, 692 (Tex. 1995) (orig. proceeding) (per curiam) ("A docket entry does not constitute a written order").

Trial de novo of the case from justice court was to the bench on May 16, 2016, with a money judgment rendered in Fincher's favor. At the conclusion of the trial, Cogsdil contends, Judge Roberts made a remark that formed the basis for Cogsdil's motion to recuse. His appellate brief states, "After the trial Judge Roberts expressed his appreciation for Mr. [Danny] Needham's efforts as his 'Campaign Manager' in the previous election while the parties were still in the courtroom." The record does not contain the remark. Fincher's brief acknowledges its counsel, Mr. Needham, "had previously served as the trial judge's campaign treasurer." It characterizes Cogsdil's description of the judge's remark, however, as a "blatant misrepresentation of what was said," and asserts "there is nothing in the record to support it."

Cogsdil filed a motion for new trial, but it did not address the judge's remark. It later was overruled by operation of law.

Although it is not included in the record, it is undisputed that following trial Cogsdil filed a motion to recuse Judge Roberts. Judge Roberts referred the motion to Judge Moore who heard the matter on August 15, 2016. The record does not contain a reporter's record of that hearing. Judge Moore denied Cogsdil's motion to recuse.

Analysis

First Issue

Cogsdil first asserts the trial court abused its discretion by denying his motion to consolidate Fincher's appeal from justice court with Cogsdil's suit against Fincher and the other parties.

Texas Rule of Civil Procedure 174(a) provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

TEX. R. CIV. P. 174(a). A trial court has broad discretion in ruling on a motion to consolidate and its determination is reviewed for an abuse of discretion. *Thuesen v. Amerisure Ins. Co.,* 487 S.W.3d 291, 296 (Tex. App.—Houston [14th Dist.] 2016, no pet.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985). In ruling on a motion to consolidate, "[c]ourts must balance the judicial economy and convenience that may be gained by consolidation against the possibility that consolidation may cause delay, prejudice, or jury confusion." *In re Shell Oil Co.,* 202 S.W.3d 286, 290 (Tex. App—Beaumont 2006, orig. proceeding).

As noted, no written order denying Cogsdil's motion to consolidate was made part of the record. Nothing is therefore preserved for our review and the issue is waived. TEX. R. APP. P. 33.1(a)(2) (the record must show the trial court ruled on the motion, either expressly or implicitly).

Moreover, even assuming the motion was implicitly overruled, TEX. R. APP. P. 33.1(a)(2)(A), and error thus preserved, we would find no abuse of discretion. While generally related to Cogsdil's motor-vehicle accident, the two cases contain notable dissimilarities. The amount of damages recoverable in Fincher's de novo appeal was

limited by the amount-in-controversy jurisdictional limit of the justice court. *See Crumpton v. Stevens,* 936 S.W.2d 473, 476 (Tex. App.—Fort Worth 1996, no writ) ("the appellate jurisdiction of the county court is confined to the jurisdictional limits of the justice court . . . ."); TEX. GOV'T CODE ANN. § 27.031(a)(1) (West Supp. 2016) ("the justice court has original jurisdiction of . . . civil matters in which exclusive jurisdiction is not in the district or county court and in which the amount in controversy is not more than $10,000, exclusive of interest"). In his lawsuit, Cogsdil included a negligence claim against the other driver involved in the collision, a claim for fraud against the driver's insurance company, and claims of fraud and breach of contract against Fincher and Jimmy Fincher. Cogsdil sought contract rescission, economic damages in tort, non-economic damages, exemplary damages, and contract-based attorney's fees. Cogsdil does not say, and we venture no guess, how the parties might have been rightly aligned had the trial court ordered the two suits consolidated. The motion to consolidate stated consolidation would "avoid unnecessary duplication and waste of judicial resources both for the [c]ourt and the parties." In light of the factors we have mentioned, we see no abuse of discretion in the trial court's implicit contrary conclusion. Cogsdil's first issue is overruled.

Second Issue

Cogsdil's remaining issues address Judge Moore's denial of his motion to recuse Judge Roberts. By his second issue, Cogsdil argues Judge Moore incorrectly applied the law when he overruled the motion to recuse. Cogsdil explains in his brief, "[Judge Moore] confused the case law providing campaign manager status alone is not

sufficient with the ability of Cogsdil to show *other issues* which together would establish a violation of discretionary authority." (internal quotation marks omitted, emphasis ours).[3]

A ruling denying a motion to recuse is reviewed for an abuse of discretion. TEX. R. CIV. P. 18a(j)(1)(A). The record does not contain a reporter's record from the recusal hearing and the order denying the motion to recuse merely states the court considered "the evidence, legal authorities, and argument of counsel. . . ." "Failure to bring forward a *reporter's record* precludes appellate review of any errors except for those reflected in the clerk's record." 6 Roy W. McDonald & Elaine A. Grafton Carlson, TEXAS CIVIL PRACTICE § 1:17 (2d ed. rev. 2014) (emphasis in original, footnote omitted); *id.* at § 16.6 ("when a reporter's record is necessary for appellate review, and the complainant fails to bring forward the record, a presumption arises that the reporter's record contained matters that support the trial court's judgment, hence, the judgment must be affirmed"). Cogsdil has not shown that the presence of any other issues presented to Judge Moore required him to grant the motion to recuse. No abuse of discretion is shown. Cogsdil's second issue is overruled.

Third Issue

Cogsdil frames his third issue as follows: "The Texas system for determining the propriety of recusal of judges when a partisan supporter of a judge comes before the

[3] *See Hansen v. JP Morgan Chase Bank, N.A.,* 346 S.W.3d 769, 779 (Tex. App.—Dallas 2011, no pet.) (finding "[a] reasonable member of the public, understanding that Texas trial judges commonly rely on members of the bar for campaign assistance, would not necessarily conclude that the relationship between [the attorney who served as the trial judge's campaign treasurer] and the trial judge would translate into bias in favor of all attorneys at the [attorney's] firm").

court denies constitutional due process and equal protection to non-campaign supporters and campaign officials." We find no indication in the record that Cogsdil's constitutional complaint was presented to the trial court. Accordingly the issue is not preserved for our review. TEX. R. APP. P. 33.1(a); *Robinson v. KTRK Television, Inc.,* No. 01-14-00880-CV, 2016 Tex. App. LEXIS 3345, at *6 (Tex. App.—Houston [1st Dist.] Mar. 31, 2016, pet. denied) (mem. op.) ("Even constitutional complaints must be raised below or they are not preserved for appellate review").

Even if preserved, Cogsdil's argument consists of little more than a statement of his disagreement with the manner in which our state's rules for judicial recusal and disqualification comport with our system of electing judges. He mentions the United States Supreme Court's opinion in *Caperton v. Massey,* 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009), but his argument contains only his opinions that our state's recusal and disqualification rules do not protect our judiciary from the appearance of impropriety and that our "current system is not providing due process and equal treatment as constitutionally mandated," together with his suggestions for a modified system of handling recusal and disqualifications. As an assertion of constitutional violations, the issue is inadequately briefed, and therefore waived. *See* TEX. R. APP. P. 38.1(i) (appellant's brief must contain clear and concise argument for contentions made, with appropriate citations to authorities and the record); *In re Estate of Valdez,* 406 S.W.3d 228, 235 (Tex. App.—San Antonio 2013, pet. denied) (stating failure to satisfy appellate rule 38.1(i) waives the issue on appeal). To the degree it is briefed, the issue is unpersuasive. For all the reasons mentioned, we overrule Cogsdil's third issue.

Fourth Issue

Finally, Cogsdil argues Judge Moore reversibly erred by failing to file findings of fact and conclusions of law supporting his decision denying Cogsdil's motion to recuse. According to Cogsdil, findings of fact and conclusions of law would have informed him whether Judge Moore decided the recusal motion by resolving fact issues or as a matter of law. Cogsdil timely requested findings and conclusions and gave timely notice of past-due findings. *See* TEX. R. CIV. P. 296, 297. Judge Moore issued an order stating he did not believe findings of fact and conclusions of law were required following a recusal hearing.

On proper request, findings of fact and conclusions of law shall be filed in cases "tried in the district or county court without a jury." TEX. R. CIV. P. 296; *AD Villarai, LLC v. Chan Il Pak*, 519 S.W.3d 132, 135 (Tex. 2017) (per curiam). Rule 296's purpose focuses on "conventional trial[s] on the merits before the court." *IKB Indus. v. Pro-Line Corp.,* 938 S.W.2d 440, 442 (Tex. 1997). In other cases findings and conclusions are proper, and may be helpful, but they are not required. *See id*. Thus after a hearing on a motion to recuse, findings may be helpful, but they are not required. *Chandler v. Chandler,* 991 S.W.2d 367, 388 (Tex. App.—El Paso 1999, pet. denied) ("A hearing on a motion to recuse is not a 'case tried without a jury'; it is purely a pretrial matter. While findings in certain pretrial and post-trial matters may be helpful, they are not required"); *see Puri v. Mansukhani*, 973 S.W.2d 701, 707-08 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (motion for new trial); *see also Gammon v. Henry I. Hank Hodes & Diag. Experts of Austin, Inc.*, No. 03-13-00124-CV, 2015 Tex. App. LEXIS 4235 (Tex. App.—

Austin Apr. 24, 2015, pet. denied) (mem. op.) (findings and conclusions not required for fee-forfeiture ruling subject to abuse-of-discretion standard of review).

Moreover, the issue Cogsdil raises on appeal regarding the denial of the motion to recuse, his second appellate issue, asserts the trial court misapplied the law applicable to recusal. Findings of fact are of no benefit when the question is one of law. *See, e.g., Flathers v. Texas Dept. of Public Safety,* 279 S.W.3d 789, 790-91 (Tex. App.—Amarillo 2007, no pet.) ("Where judgment is rendered as a matter of law, a party is not entitled to findings and conclusions"). Cogsdil's fourth issue is overruled.

Fincher's Request for Damages

Alleging the appeal is frivolous, Fincher filed a motion seeking damages against Cogsdil under appellate rule 45. TEX. R. APP. P. 45. Appellate rule 45 authorizes an appellate court to sanction an appellant if it determines the appeal is frivolous. TEX. R. APP. P. 45. The decision to award sanctions rests with the sound discretion of the appellate court. *Rios v. Northwestern Steel & Wire Co.,* 974 S.W.2d 932, 936 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Having reviewed the record of the proceedings and considered Fincher's request for damages, we deny its request.

Fincher's Motion to Strike Cogsdil's Reply Brief

Fincher moved to strike Cogsdil's reply brief, arguing it addresses matters beyond those discussed in Fincher's response brief and contains false statements. We carried the motion with the case. In part, Texas Rule of Appellate Procedure 38.3 provides a reply brief may address any matter in the appellee's brief. TEX. R. APP. P.

38.3. Cogsdil's reply brief contains no argument or authority warranting a different disposition of this case. We deny Fincher's motion to strike.[4]

Conclusion

Having overruled each of Cogsdil's issues, and denied Fincher's appellate motions, we affirm the judgment of the trial court and the order denying recusal of Judge Roberts.

James T. Campbell
Justice

[4] To the extent Cogsdil intended by his reply brief to request leave to amend or supplement his brief with documents attached to his reply brief, *see* TEX. R. APP. P. 38.7, that request is denied. *See Samara v. Samara,* 52 S.W.3d 455, 456 n.1 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (op. on reh'g) (stating appellate court may not consider documents attached to an appellate brief unless the documents are included in appellate record).