COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

NUMBER 13-16-00639-CV

JILMA VINSON, **Appellant,**

v.

MARSHA (MARCY) TUCKER, **Appellee.**

NUMBER 13-16-00642-CV

RAYMOND GARCIA, **Appellant,**

v.

MARSHA (MARCY) TUCKER, **Appellee.**

On appeal from the 105th District Court
of Kleberg County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Contreras and Hinojosa
Memorandum Opinion by Justice Contreras

Appellee Marsha (Marcy) Tucker sued appellants Jilma Vinson and Raymond Garcia, her colleagues at Texas A&M University-Kingsville (TAMUK), for defamation, malicious prosecution, and intentional infliction of emotional distress. On appeal, Vinson[1] and Garcia[2] each contend by two issues that the trial court erred by denying their second amended motions to dismiss Tucker's suits on jurisdictional grounds. We will dismiss the appeals for want of jurisdiction.

I. BACKGROUND

Tucker is an assistant professor and Vinson and Garcia are lecturers in TAMUK's Department of Language and Literature. In her petition against Vinson, Tucker alleged that, on July 10, 2015, Vinson reported to campus police that: (1) she saw Tucker in possession of a personnel file belonging to another TAMUK assistant professor, Jodi Briones; (2) Tucker had obtained Briones's personnel file by breaking into the office of Michelle Johnson-Vela, a TAMUK associate professor; and (3) Tucker had used confidential information in the personnel file to lodge an ethical complaint against Briones. In her petition against Garcia, Tucker alleged that Garcia reported to campus police that: (1) he assisted Tucker in breaking into Johnson-Vela's office to obtain Briones's personnel file; and (2) Tucker admitted to him that she used confidential information contained in the personnel file to lodge an ethical complaint against Briones. According to Tucker's petitions, TAMUK police investigated the reports made by Vinson and Garcia and determined that they were unfounded.

Vinson and Garcia filed motions to dismiss on the basis of sovereign immunity, arguing specifically that the suits must be dismissed under section 101.106(f) of the Texas

[1] Appellate cause number 13-16-00639-CV.

[2] Appellate cause number 13-16-00642-CV.

Tort Claims Act (TTCA). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West, Westlaw through 2017 1st C.S.) ("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."). Vinson and Garcia each attached affidavits to their motions in which they stated: "At no time have I made any reports to the TAMUK Police Department concerning Dr. Tucker." In response to the motions, Tucker argued that section 101.106 does not apply because her claims are for intentional torts which cannot be brought under the TTCA against a governmental unit. *See id.* After a hearing on August 22, 2016, the trial court denied the motions to dismiss. The trial court noted at the hearing that it may be "appropriate to refile" the motions to dismiss after more discovery is completed.

Subsequently, Vinson and Garcia filed amended motions to dismiss which included three additional pieces of evidence. First, the amended motions included a "Summary of Hotline Investigation" report indicating that an anonymous complaint had been made to a university ethics hotline about the incident in question. The report states that a TAMUK police investigator, Todd Burris, interviewed "every party that was alleged to have participated in or had knowledge of the incident," including Vinson and Garcia, but "could find no proof that the personnel file that was in Dr. Tucker's possession was obtained through criminal actions." Second, a TAMUK Police Department report authored by Burris stated that, as part of his investigation into the anonymous complaint, he

interviewed both Vinson and Garcia. Third, the amended motions included a copy of a TAMUK regulation concerning "Control of Fraud, Waste and Abuse" which states in part that "[a]ll employees are to cooperate fully with those performing an investigation pursuant to this regulation." Vinson and Garcia argued in their amended motions that this evidence demonstrates that Tucker's allegations involve only "conduct within in the general scope" of their employment with TAMUK, and that the suits should therefore be dismissed under section 101.106(f) of the TTCA. *See id*. The amended motions also included an additional section contending that Tucker's allegations do not describe *ultra vires* actions such that sovereign immunity would be inapplicable. *See Beeman v. Livingston*, 468 S.W.3d 534, 538 (Tex. 2015).

Vinson and Garcia then filed second amended motions to dismiss which made the same arguments as the earlier motions and additionally requested sanctions against Tucker for alleged discovery violations. After another hearing, the trial court denied the second amended motions to dismiss and these accelerated interlocutory appeals followed. By two issues, Vinson and Garcia each contend that the trial court erred in denying their second amended motions to dismiss because: (1) dismissal was required under TTCA section 101.106(f); and (2) Vinson and Garcia were acting within the general scope of their employment, and were not acting *ultra vires*, when they responded to TAMUK's police investigation.[3]

II. APPELLATE JURISDICTION

Before considering the merits of the issues raised by Vinson and Garcia, we must discern whether we have jurisdiction over their appeals. *See M.O. Dental Lab v. Rape*,

[3] Vinson and Garcia do not contend on appeal that the trial court erred in denying the request for sanctions contained in their second amended motions to dismiss.

139 S.W.3d 671, 673 (Tex. 2004) ("[W]e are obligated to review *sua sponte* issues affecting jurisdiction.").

An interlocutory order denying a motion to dismiss by a government employee on grounds of immunity is generally appealable. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (West, Westlaw through 2017 1st C.S.) (allowing the immediate appeal of an interlocutory order that "denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state"); *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 301 (Tex. 2011) (holding that "an appeal may be taken from orders denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used"). However, there is no statutory provision for appellate jurisdiction over an order denying a motion to reconsider or motion for new trial. *Cf*. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a); *State Office of Risk Mgmt. v. Berdan*, 335 S.W.3d 421, 428 (Tex. App.—Corpus Christi 2011, pet. denied). And courts have held that, when a motion challenging the trial court's jurisdiction is denied and then "renewed" in a new motion raising the same grounds as the original motion, that "renewed" motion is in effect a motion to reconsider, and the denial thereof is not an appealable order. *See City of Houston v. Estate of Jones*, 388 S.W.3d 663, 667 (Tex. 2012) ("Because the City made a new argument in its amended plea to the jurisdiction, but did not assert a new ground, the amended plea was substantively a motion to reconsider the denial of its [earlier] plea. The court of appeals did not have jurisdiction to consider any part of the merits of the interlocutory appeal."); *CTL/Thompson Tex., LLC v. Morrison Homes*, 337 S.W.3d 437, 442 (Tex. App.—Fort Worth 2011, pet. denied); *see also Gulf Energy Expl. Corp. v. Fugro Chance, Inc.*, No. 13-10-00686-CV, 2012 WL 601413, at *2 (Tex. App.—Corpus Christi

Feb. 23, 2012, no pet.) (mem. op.). This is true even when the "renewed" motion raises an argument or cites authority that was not included in the original motion. *See City of Houston*, 388 S.W.3d at 667; *Denton Cty. v. Huther*, 43 S.W.3d 665, 667 (Tex. App.—Fort Worth 2001, no pet.) ("The mere fact that the motion cites additional authority in support of Appellants' plea to the jurisdiction that was not included in the plea to the jurisdiction when it was first presented to the trial court, did not transform the motion into a second, separate and distinct plea to the jurisdiction.").

Here, the trial court denied Vinson's and Garcia's original motions to dismiss by written orders dated August 22, 2016. Those orders were not appealed. Vinson's and Garcia's amended and second amended motions to dismiss made the same argument as their original motions—i.e., that the trial court was required to dismiss for want of jurisdiction under section 101.106(f) of the TTCA. The amended motions included three additional pieces of evidence which were not attached to the original motions, and they also included a new section addressing whether the actions complained of by Tucker were *ultra vires* such that governmental immunity would not apply. But the ultimate issue raised in the amended motions was identical to the ultimate issue raised in the original motions and decided by the August 22, 2016 orders.[4] There is no substantive difference between Vinson's and Garcia's amended and second amended motions to dismiss and a typical motion for new trial or motion to reconsider. *See Huther*, 43 S.W.3d at 667. Accordingly, the interlocutory orders denying the second motions to dismiss are not appealable.

[4] There is nothing in the record indicating that the three pieces of evidence contained in the amended motions were newly discovered or were otherwise unable to be included with the original motions.

III. CONCLUSION

For the reasons stated herein, we dismiss the appeals for want of jurisdiction.

DORI CONTRERAS
Justice

Delivered and filed the
9th day of November, 2017.