NUMBER 13-17-00289-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE ODEBRECHT CONSTRUCTION, INC.

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Rodriguez[1]

Relator, Odebrecht Construction, Inc. (Odebrecht), filed a petition for writ of mandamus through which it seeks to compel the trial court to grant its motion to dismiss the underlying case against it as a "baseless" cause of action under Texas Rule of Civil Procedure 91a. *See generally* TEX. R. CIV. P. 91a. Real party in interest Rodolfo Mora brought suit against Odebrecht for wrongful termination, alleging that Odebrecht terminated Mora's employment because Mora's son, a co-worker, suffered an injury at

[1] *See* TEX. R. APP. P. 47.4 (distinguishing opinions and memorandum opinions); *id.* R. 52.8(d) ("When denying relief [in an original proceeding], the court may hand down an opinion but is not required to do so. When granting relief, the court must hand down an opinion as in any other case.").

work and filed a claim for workers' compensation. Odebrecht contends that Mora's claim is a baseless cause of action under Texas Labor Code Chapter 451 because Mora failed to allege any facts to show that he "testified" or was "about to testify" in a workers' compensation proceeding. *See* TEX. LAB. CODE ANN. § 451.001(4) (West, Westlaw through Ch. 49, 2017 R.S.). Through this original proceeding, Odebrecht seeks to compel the trial court to: (1) vacate its order denying Odebrecht's motion to dismiss under Texas Rule of Civil Procedure 91a; (2) grant its motion to dismiss; and (3) award Odebrecht its costs and attorney's fees. *See* TEX. R. CIV. P. 91a.[2] We conditionally grant the petition for writ of mandamus.

I. BACKGROUND

According to Mora's original petition, Mora was wrongfully terminated from his employment with Odebrecht when Mora's son filed a workers' compensation claim after being injured during the course and scope of his employment with Odebrecht. Mora alleged discrimination "pursuant to Chapter 451 of the Texas Labor Code." Odebrecht filed a motion to dismiss Mora's case under Texas Rule of Civil Procedure 91a on grounds that the facts alleged by Mora did not "state a cognizable legal claim under any of the narrow exceptions to Texas's at-will employment doctrine." Odebrecht asserted that Chapter 451 of the Texas Labor Code is a statutory exception to the Texas common law doctrine of employment at-will, which prohibits discrimination against employees involved in certain aspects of the workers' compensation process, and that Mora's claims failed to fall within this statutory exception. Odebrecht thus alleged that it had the right to terminate Mora based on his status as an "at-will" employee.

[2] This original proceeding arises from trial court cause number C-0468-17-H in the 389th District Court of Hidalgo County, Texas, and the respondent in this cause is the Honorable Letty Lopez. *See* TEX. R. APP. P. 52.2.

Mora subsequently filed a first amended petition which stated the following under a heading entitled "Facts, Causes of Action, and Damages":

> On or about January 22, 2016, Plaintiff was wrongfully terminated from his employment with Defendant ODEBRECHT. Plaintiff [was] discriminated against pursuant to Chapter 451 of the Texas Labor Code, when he was [terminated] just a few weeks after his son was injured while in the course and scope of his employment with Defendant ODEBRECHT.
>
> Plaintiff RODOLFO MORA is the father of the injured employee JUAN MORA [who is the Plaintiff in a separate lawsuit, and a copy of the petition in that lawsuit is attached hereto as Exhibit "A"] and Foreman of the crew which employed the injured employee, his son JUAN MORA. He, his son and the crew were called in after the accident and told they were going to be terminated. The people who were terminated were witnesses to the accident and/or of the defective condition of the machinery which caused the employee, JUAN MORA to be entangled, almost killed, and severely injured.
>
> One of the crew members who was not a family member was then pulled aside and then told he was –"wink, wink" going to be retained but was told this to make it appear it was a lay off even though there was additional work which needed be done, and there was not a reduction in force, that was being actually imposed.
>
> As a proximate result of the aforementioned negligence, Plaintiff suffered damages. All of the above was caused by the negligence complained of herein.
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> Plaintiff's damages are in excess of the minimum jurisdictional requirements of this Honorable Court.
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> Pursuant to Texas Rules of Civil Procedure 47(c)(4) Plaintiffs seeks monetary relief over $200,000 but not more than $1,000,000.00.

As referenced in this pleading, Mora attached his son's original petition in trial court cause number C-3329-16-I in the 398th District Court of Hidalgo County, *Juan Mora v. Odebrecht Construction, Inc., Zachry Construction Corporation, Zachry Industrial, Inc., David Defriese, individually and as agent for Zachry Construction Corporation and Zachry Industrial Inc., and Zachry-Odebrecht Parkway Builders,* to his first amended petition.

After receiving additional briefing from the parties, the trial court denied Odebrecht's motion to dismiss. This original proceeding ensued. Odebrecht raises one issue through which it contends that Mora's claim that he was wrongfully terminated due to his coworker-son's workers' compensation injury is a baseless cause of action under Texas Labor Code Chapter 451 because Mora failed to allege any facts to show that he "testified" or was "about to testify" in a workers' compensation proceeding. This Court requested and received a response to the petition from Mora, and further received a reply thereto from Odebrecht.

II. STANDARD OF REVIEW

"Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal." *In re Frank Motor Co*., 361 S.W.3d 628, 630 (Tex. 2012) (orig. proceeding); *see In re Olshan Found. Repair Co*., 328 S.W.3d 883, 887 (Tex. 2010) (orig. proceeding); *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Olshan Found. Repair Co*., 328 S.W.3d at 888; *Walker*, 827 S.W.2d at 840. Mandamus will not issue "when the law provides another plain, adequate, and complete remedy." *In re Tex. Dep't of Family & Protective Servs*., 210 S.W.3d 609, 613 (Tex. 2006) (orig. proceeding) (quoting *In re Prudential*, 148 S.W.3d at 135–36).

Mandamus is available to review a trial court's denial of a motion to dismiss under Texas Rule of Civil Procedure 91a. *In re Essex Ins. Co*., 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding) (per curiam); *In re Butt*, 495 S.W.3d 455, 460 (Tex. App.—Corpus Christi 2016, orig. proceeding). In laying the groundwork for a rule mandating the

early dismissal of baseless causes of action, the Legislature has effectively already balanced most of the relevant costs and benefits of an appellate remedy, and mandamus review of orders denying Rule 91a motions comports with the Legislature's requirement for an early and speedy resolution of baseless claims. *In re Butt,* 495 S.W.3d at 460.

III. BASELESS CAUSES OF ACTION

In 2013, the Texas Supreme Court adopted Texas Rule of Civil Procedure 91a, which governs the dismissal of baseless causes of action and which provides in pertinent part:

> [A] party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in the law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

TEX. R. CIV. P. 91a.1. "A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both." *Id.* R. 91a.2. The rule allows the responding party to either nonsuit or amend the challenged cause of action at least three days before the date of the hearing on the motion to dismiss. *See id.* R. 91a.5(a),(b).[3] The trial court may, but is not required to, conduct an oral hearing on the motion. *See id*. R. 91a.6. Furthermore, "the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by" the rules of civil procedure. *Id.* R. 91a.6; *see also* TEX. R. CIV. P. 59 (permitting a party to attach to a pleading certain instruments—"[n]otes, accounts, bonds, mortgages, records, and all

[3] Mora's original petition was filed against Odebrecht in January of 2013. Mora filed a first amended petition after Odebrecht filed its motion to dismiss. This last petition is the live pleading under consideration in this proceeding.

other written instruments"—which constitute the claim sued on or a matter set up in defense, and providing that such instruments "may be made a part of the pleadings"); *Reaves v. City of Corpus Christi*, No. 13-15-00057-CV, __ S.W.3d __, __, 2017 WL 2200297, at *2 (Tex. App.—Corpus Christi Apr. 13, 2017, no pet. h.); *AC Interests L.P. v. Tex. Comm'n on Envtl. Quality*, No. 01-15-00378-CV, 2016 WL 636546, at *1 (Tex. App.—Houston [1st Dist.] Feb. 11, 2016, no pet.) (mem. op).

We perform a de novo review of the trial court's ruling on a 91a motion to dismiss because the availability of a remedy under the facts alleged is a question of law and the rule's factual-plausibility standard is akin to a legal-sufficiency review. *See City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam); *Jones v. Shipley*, 508 S.W.3d 766, 768 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *see also Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *GoDaddy.com, L.L.C. v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied). "Texas is a notice pleading jurisdiction, and a petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim." *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 536 (Tex. 2013); *see Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982). Accordingly, in conducting our review on a Rule 91a ruling, we apply the fair notice pleading standard whereby we must construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact. *See Yeske v. Piazza Del Arte, Inc.*, 513 S.W.3d 652, 661 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *In re Butt*, 495 S.W.3d at 461–62; *Wooley*, 447 S.W.3d at 76; *Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 183–84 (Tex. App.—Houston [14th Dist.] 2015, pet.

denied); *see also Quintanilla v. Trevino*, No. 13-15-00377-CV, 2016 WL 1552025, at *2 (Tex. App.—Corpus Christi Apr. 14, 2016, no. pet.) (mem. op.).

IV. ANALYSIS

Odebrecht contends that Mora's cause of action for wrongful termination arising from his son's workers' compensation injury is a baseless cause of action under Texas Labor Code Chapter 451 because Mora failed to allege any facts to show that he "testified" or was "about to testify" in a workers' compensation proceeding. Mora responds that the Rule 91a proceeding should not function as a hearing on special exceptions or a summary judgment hearing, and that if there is "any way, by the law or by the facts, conceivably existing" that he has a meritorious cause, "then the motion is not properly granted under its own terms." Mora further argues that Odebrecht has not similarly filed a motion to dismiss in his son's separate lawsuit as referenced above. *See generally* TEX. LAB. CODE ANN. §§ 417.001–.004 (West, Westlaw through Ch. 49, 2017 R.S.) (governing third-party liability in workers' compensation cases). Mora asserts that if Odebrecht believed that his claims were frivolous, it would have filed a motion to dismiss in that case, but it has not done so.

The general rule in Texas is that "absent a specific agreement to the contrary, employment may be terminated by either the employer or the employee at will, for good cause, bad cause, or no cause at all." *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998); *see Cmty. Health Sys. Prof'l Servs. Corp., v. Hansen*, No. 14-1033, __ S.W.3d __, __, 2017 WL 2608352, at *4 (Tex. June 16, 2017); *Matagorda Cnty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 739 (Tex. 2006). The legislature has created several statutory exceptions to the employment-at-will doctrine. *Sawyer v. E.I. Du Pont De Nemours & Co.*, 430 S.W.3d 396, 399 (Tex. 2014); *Martin v. Clinical*

Pathology Labs., Inc., 343 S.W.3d 885, 891 (Tex. App.—Dallas 2011, pet. denied). For example, statutory causes of action exist in favor of employees who are terminated for filing workers' compensation claims in good faith, because of jury service, or because of their race, color, disability, religion, sex, national origin, or age. *See Martin*, 343 S.W.3d at 891 (collecting examples and citing TEX. LAB. CODE ANN. §§ 451.001–.003 (West, Westlaw through Ch. 49, 2017 R.S.), TEX. CIV. PRAC. & REM. CODE ANN. §§ 122.001–.002 (West, Westlaw through Ch. 49, 2017 R.S.), TEX. LAB. CODE ANN. §§ 21.051, 21.254 (West, Westlaw through Ch. 49, 2017 R.S.)). The Texas Supreme Court has recognized only one common-law exception to the employment-at-will doctrine that addresses the discharge of an employee for the sole reason that the employee refused to perform an illegal act. *Sawyer*, 430 S.W.3d at 399; *Martin*, 343 S.W.3d at 891; *see Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). As an intermediate appellate court, it is not an appropriate role for this Court to enlarge or extend the grounds for wrongful discharge under the employment-at-will doctrine through the creation of additional exceptions. *Johnson v. Waxahachie Indep. Sch. Dist.*, 322 S.W.3d 396, 400 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Martin*, 343 S.W.3d at 891.

The parties' arguments in this case focus on Section 451.001 of the Texas Labor Code, which provides statutory exceptions to the employment-at-will doctrine:

> A person may not discharge or in any other manner discriminate against an employee because the employee has:
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> (1) filed a workers' compensation claim in good faith;
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> (2) hired a lawyer to represent the employee in a claim;
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> (3) instituted or caused to be instituted in good faith a proceeding under Subtitle A; or
>
> (4) testified or is about to testify in a proceeding under Subtitle A.

TEX. LAB. CODE ANN. § 451.001; *see Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309, 312 (Tex. 2015); *Cardenas v. Bilfinger TEPSCO, Inc.*, No. 01-16-00422-CV, __, S.W.3d __, __, 2017 WL 2376532, at *5 (Tex. App.—Houston [1st Dist.] June 1, 2017, no pet. h.). An employer who violates this statute is subject to a retaliation claim, which is an exception to the traditional doctrine of employment at-will found in Texas law. *Kingsaire, Inc.*, 477 S.W.3d at 312; *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 453 (Tex. 1996); *Cardenas, Inc.*, __ S.W.3d at __, 2017 WL 2376532, at *5; *Lozoya v. Air Sys. Components, Inc.*, 81 S.W.3d 344, 347 (Tex. App.—El Paso 2002, no pet.); *Jenkins v. Guardian Indus. Corp.*, 16 S.W.3d 431, 435 (Tex. App.—Waco 2000, pet. denied).

The statute is intended to protect persons entitled to benefits under the Texas Workers' Compensation Act and to prevent them from being discharged for filing claims to collect those benefits. *Trico Tech. Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997); *Lozoya*, 81 S.W.3d at 347. An employee must show that the employer's prohibited action would not have occurred when it did absent the employee's protected conduct. *Trico Tech. Corp.*, 949 S.W.2d at 312; *Cont'l Coffee Prods. Co.*, 937 S.W.2d at 450; *Echostar Satellite L.L.C. v. Aguilar*, 394 S.W.3d 276, 286 (Tex. App.—El Paso 2012, pet. denied). An employee generally may rely on circumstantial evidence to prove causation. *Kingsaire, Inc.*, 477 S.W.3d at 312. Such circumstantial evidence may include knowledge of the compensation claim by the decision-maker to terminate, an employer's expression of a negative attitude toward the employee's injury, an employer's discriminatory treatment of the employee compared with similarly situated employees, an employer's failure to adhere to established company policy, and evidence that the employer's stated reason for termination was false. *Id.*; *Cazarez*, 937 S.W.2d at 451. An additional factor

is temporal proximity of the termination to the date of the injury or claim. *Echostar Satellite L.L.C.*, 394 S.W.3d at 288.

The question for this Court is whether Mora's alleged cause of action for wrongful termination is recognized under Texas law. As stated previously, we determine this issue based "solely" on Mora's first amended petition and the pleading exhibits as permitted by the rules of civil procedure. TEX. R. CIV. P. 91a.6; *see also AC Interests L.P.*, 2016 WL 636546, at *1. Examined liberally, Mora's first amended petition does not allege any facts that would support a conclusion that Odebrecht's conduct with regard to Mora fell within the exception to the employment-at-will doctrine contained in labor code section 451.001. *See* TEX. LAB. CODE ANN. § 451.001. While Mora asserts that Odebrecht's conduct in terminating him was retaliatory in nature based on his son's workers' compensation claim, the Texas Labor Code prohibits an employer from discharging an employee only where *the employee* has engaged in specified protected conduct—filing a workers' compensation claim in good faith, hiring a lawyer to represent the employee in a claim, instituting a proceeding under the workers' compensation act, or testifying or preparing to testify in a proceeding under the act. TEX. LAB. CODE ANN. § 451.001. Mora's pleadings allege generally that his son engaged in these specified protected acts. *See id.* In contrast, Mora did not file a workers' compensation claim, hire a lawyer to represent him in a workers' compensation claim, or institute a workers compensation claim of his own. *See id.* § 451.001(1)-(3). Further, examining Mora's first amended petition liberally and construing it to include all claims that might reasonably be inferred from the language used in the petition, Mora does not allege that he has testified or is about to testify in a workers compensation proceeding. *See id.* § 451.001(4). We conclude that Mora's allegations, taken as true, together with inferences reasonably drawn from them, do not

present a cause of action against Odebrecht that would entitle Mora to the relief sought on his case for wrongful discharge. *See* TEX. R. CIV. P. 91a. We are not at liberty to adopt a new exception to the employment-at-will doctrine applicable to the facts Mora has alleged. *See Johnson*, 322 S.W.3d at 400. Accordingly, we conclude that the trial court erred in denying Odebrecht's Rule 91a motion to dismiss. We further conclude that Odebrecht lacks an adequate remedy by appeal to address this error. *See In re Essex Ins. Co.*, 450 S.W.3d at 528.

VI. ATTORNEY'S FEES

Odebrecht contends that the trial court must award it attorney's fees and costs. Under Texas law, attorney's fees are not recoverable unless specifically provided by contract or statute. *MBM Fin. Corp. v. Woodlands Operating Co*., 292 S.W.3d 660, 669 (Tex. 2009). In this case, Rule 91a expressly provides:

> **Award of Costs and Attorney Fees Required**. Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award.

TEX. R. CIV. P. 91a.7; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 30.021 (West, Westlaw through Ch. 49, 2017 R.S.) (stating that the trial court "shall award costs and reasonable and necessary attorney's fees to the prevailing party" for the granting or denial of a motion to dismiss).

"Undisputedly, the rule mandates an award of attorney's fees to a prevailing party, and the award is not discretionary." *Zheng*, 468 S.W.3d at 187; *see In re Butt*, 495 S.W.3d at 467; *Guillory v. Seaton, L.L.C.*, 470 S.W.3d 237, 243–44 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (stating that the award of attorney's fees under Rule 91a.7 is based upon which party prevails on the motion); *see also Drake v. Chase Bank*, No. 02–

13–00340–CV, 2014 WL 6493411, at *2 (Tex. App.—Fort Worth Nov. 20, 2014, no pet.) (mem. op.). Accordingly, Odebrecht is entitled to an award of costs and attorney's fees because it is the prevailing party with regard to the motion to dismiss. *See* TEX. R. CIV. P. 91a.7; *Zheng,* 468 S.W.3d at 187. Upon consideration of this matter in the trial court, the trial court shall convene a hearing in order to consider evidence regarding costs and fees in determining the amount of the award to issue in favor of Odebrecht as the prevailing party. *See* TEX. R. CIV. P. 91a.7.

VII. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the response, the reply, and the applicable law, is of the opinion that Odebrecht has met its burden to obtain mandamus relief. Accordingly, we lift the stay previously imposed in this cause. *See* TEX. R. APP. P. 52.10(b) ("Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided."). We conditionally grant the petition for writ of mandamus, and we direct the trial court to: (1) withdraw its order denying Odebrecht's motion to dismiss; (2) grant the motion to dismiss; and (3) award Odebrecht its costs and attorney's fees after conducting a hearing to consider evidence on these matters. Our writ will issue only if the trial court fails to act in accordance with this opinion.

NELDA V. RODRIGUEZ
Justice

Dissenting Memorandum Opinion
by Justice Benavides.

Delivered and filed the
15th day of August, 2017.