



NUMBER 13-22-00413-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

**RODOLFO FRANZ AND SOUTH TEXAS
ELDERLY SERVICES, INC.,**

Appellants,

v.

**INTERIM POLICE CHIEF ROMERO
RODRIGUEZ AND CITY OF HIDALGO,**

Appellees.

**On appeal from the County Court at Law No. 2
of Hidalgo County, Texas.**

MEMORANDUM OPINION

**Before Justices Tijerina, Silva, and Peña
Memorandum Opinion by Justice Silva**

Appellants Rodolfo Franz and South Texas Elderly Services, Inc. (STES) sued appellees City of Hidalgo (the City), Interim Police Chief Romero Rodriguez, and Gustavo Sanchez, individually and in his capacity as Commissioner of the City, after the City

removed a political sign located on STES's premises. By what we construe as a single issue, appellants challenge the trial court's dismissal of its federal § 1983 claims against appellees Rodriguez and Sanchez under § 101.106 of the Texas Tort Claims Act (TTCA). See 42 U.S.C. § 1983; TEX. CIV. PRAC. & REM. CODE ANN. § 101.106. We affirm.

I. BACKGROUND

On September 23, 2020, Rodriguez was contacted regarding the existence of a political sign located on STES's property. The sign depicted a picture of Sanchez next to a cartoon rat wearing a jersey with the name "Gus." Written in Spanish were allegations that Sanchez had stolen \$65,000 from Hidalgo Independent School District. At the time, Sanchez was up for re-election. Rodriguez testified he observed the sign to be in violation of Texas Election Code § 259.001(a) and Texas Transportation Code § 393.002 in that it was situated upon the right-of-way and large enough to impede traffic visibility. Rodriguez ordered the sign removed.

Franz, principal owner of STES, a limited liability company, filed suit against the City and Rodriguez on September 25, 2020, seeking a temporary restraining order to enjoin appellees from removing any political signs on property belonging to him. The trial court granted a temporary restraining order. A timely original answer and general denial by appellees followed.

On October 20, 2020, appellees filed a plea to the jurisdiction and a motion to dismiss pursuant to § 101.106(e) of the Texas Civil Practice and Remedies Code. After which, appellants filed an amended petition, adding defendant Sanchez, individually and in his capacity as commissioner. Appellants' amended petition alleged a claim of

retaliation, stating that appellees had issued citations and confiscated vehicles operated by Franz in response to his suit. Appellants additionally pleaded a request for permanent injunction on claims of illegal entry, conversion, and “violation of article 1 [§] 8 of the Texas [C]onstitution.” On February 24, 2021, appellees filed a supplemental motion to dismiss and plea to the jurisdiction, addressing appellants’ amended petition.

In a second amended petition and request for permanent injunction, appellants amended their retaliation allegations, asserting the following:

The City’s enforcement of its business permit regulations so close to an election was clearly retaliatory and further demonstrates “bad faith” on [the] part of [the City]. [The City’s] actions violated the Texas Election Code, Texas Penal Code, Texas and U.S. Constitution and 42 [U.S.C. §] 1983.

No other mention of § 1983 exists in the pleading.

On April 13, 2021, the trial court signed an order denying the City’s plea to the jurisdiction and another order granting the City’s motion to dismiss, dismissing “all of Plaintiffs’ claims” against Rodriguez and Sanchez with prejudice.

The parties proceeded on appellants’ claims against the City, and after a bench trial on the merits, the trial court entered a take-nothing judgment in favor of the City. This appeal followed.

II. DISCUSSION

The issue before this Court is narrow: whether the trial court improperly dismissed appellants’ federal § 1983 claims against Sanchez and Rodriguez in its order granting dismissal pursuant to § 101.106(e) of the civil practice and remedies code.¹ See 42

¹ Appellants’ argument on appeal is included in its entirety below:

U.S.C. § 1983; TEX. CIV. PRAC. & REM. CODE ANN. § 101.106.

A. Standard of Review and Applicable Law

Section 101.106(e) provides that if a suit is filed under the TTCA “against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.” TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e). This provision is generally designed to funnel claims away from the individual government employees toward the governmental entity. *Molina v. Alvarado*, 463 S.W.3d 867, 870 (Tex. 2015) (per curiam); *Crockett County v. Damian*, 622 S.W.3d 58, 61 (Tex. App.—El Paso 2020, no pet.). When a governmental unit chooses to file a

Texas Civil Practice and Remed[ies] Code § 101.106 does not afford government officials sued in their individual capacities “qualified immunity” from suit alleging violations of Appellants’ First Amendment Rights guaranteed under [t]he Constitution of the United States when [Rodriguez] and [Sanchez] were acting under “Color of Law” (42 U.S.C[.] 1983). [Swain v. Hutson, No. 2-09-038-CV, 2009 WL 3246750, at *1 (Tex. App.—Fort Worth Oct. 8, 2009, pet. denied); Dibrell v. Huber, No. CIV.A.H-04-4854, 2006 WL 14570, at *1 (S.D. Tex. Jan. 3, 2006), aff’d, 226 Fed. Appx. 332 (5th Cir. 2007)]. “Section 101.106(e) of the Civil Practice and Remedies Code, which applies to only suits brought under the [TTCA], does not apply to federal [§] 1983 claims[.]” [Swain, 2009 WL 3246750, at *6]. At trial the [appellants] established the removal of [a]ppellant Franz’s political sign was committed by [Rodriguez] acting “under Color of Law”. [Rodriguez] was wearing his official uniform; was armed; and had driven in an official City of Hidalgo police car to [STES’s] premises[.] [Record citation] The evidence established [appellants’] sign involved protected political speech, and that the sequestering of sign involved conduct depriving [a]ppellant Franz’s of Rights, Privil[e]ges, Immunities guaranteed under [t]he Constitu[]tion of the United States—First Amendment.

To the extent that appellants challenge the trial court’s take-nothing judgment against the City or the trial court’s dismissal of any state claims against Rodriguez and Sanchez, we find these arguments to be waived for inadequate briefing. See TEX. R. APP. P. 38.1. To assert an issue on appeal, an appellant’s brief must contain “a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.” *Id.* Even though reviewing courts are to interpret briefing requirements reasonably, parties asserting error on appeal must put forth some specific argument and substantive analysis citing the record and authorities in support of their argument. *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 126 (Tex. 2018); *Med. Specialist Grp., P.A. v. Radiology Assocs., L.L.P.*, 171 S.W.3d 727, 732 (Tex. App.—Corpus Christi—Edinburg 2005, pet. denied) (“Failure to cite authority or provide substantive analysis waives an issue on appeal.”); see also *Gonzalez v. Gonzalez*, No. 13-20-00532-CV, 2022 WL 2163881, at *9–10 (Tex. App.—Corpus Christi—Edinburg June 16, 2022, pet. denied) (mem. op.).

§ 101.106(e) motion, it “effectively confirms the employee was acting within the scope of employment and that the government, not the employee, is the proper party.” *Tex. Adjutant Gen’s Off. v. Ngakoue*, 408 S.W.3d 350, 358 (Tex. 2013). Because the filing of a TTCA suit “against a governmental unit constitutes an irrevocable election by the plaintiff,” a § 101.106(e) motion to dismiss the individual employees bars “immediately and forever . . . any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.” TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a). Section 101.106, however, does not bar non-state law tort claims (i.e., § 1983 claims) brought against employees in their individual capacities. *Tex. Dep’t of Aging & Disability Servs. v. Cannon*, 453 S.W.3d 411, 416 (Tex. 2015). We review de novo the trial court’s granting of the City’s motion to dismiss pursuant to § 101.106(e). See *Univ. of Tex. Health Sci. Ctr. at Hous. v. Rios*, 542 S.W.3d 530, 536 (Tex. 2017); *Damian*, 622 S.W.3d at 61.

Section 1983 is a vehicle for a plaintiff to vindicate rights protected by the United States Constitution and other federal laws. *City of Pharr v. Garcia*, 581 S.W.3d 930, 934 (Tex. App.—Corpus Christi—Edinburg 2019, no pet.); see *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994) (“Section 1983 does not create any substantive rights but is merely a method for vindicating federal rights elsewhere conferred.”) (cleaned up). “A claim under 42 U.S.C. § 1983 has two foundational elements: a violation of the Constitution or of federal law, and that the violation was committed by someone acting under color of state law.” *Webb v. Town of Saint Joseph*, 925 F.3d 209, 214 (5th Cir. 2019) (cleaned up). Although a § 1983 claim may be brought against an individual or

municipality, the elemental requirements for liability differ depending on the identity of the defending party. See *Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 690 (1978); *Gomez v. Hous. Auth. of the City of El Paso*, 148 S.W.3d 471, 478 (Tex. App.—El Paso 2004, pet. denied). In an action against an individual employee, the plaintiff must show that his actions “were objectively unreasonable in light of clearly established law at the time of the violation.” *Webb*, 925 F.3d at 214 (quoting *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (per curiam)). For liability to attach to a municipality, a plaintiff must show the local government *itself* subjected him to a deprivation of rights or caused him to be subjected to such a deprivation through official action or imprimatur. See *Connick v. Thompson*, 563 U.S. 51, 60–61 (2011); *Martinez v. Nueces County, Tex.*, 71 F.4th 385, 389 (5th Cir. 2023); *Webb*, 925 F.3d at 214 (“While municipalities can be sued directly under § 1983, *Monell* establishes that they cannot be found liable on a theory of vicarious liability or *respondeat superior*.”) (cleaned up). “[A] claimant must prove three critical elements: an official policy, promulgated by the local government unit’s policymaker, that was the ‘moving force’ behind the [constitutional] violation.” *Harris County v. Coats*, 607 S.W.3d 359, 372–73 (Tex. App.—Houston [14th Dist.] 2020, no pet.). “These elements distinguish individual violations by employees from those of the governmental entity.” *Gomez*, 148 S.W.3d at 478.

B. Analysis

Appellants are correct in that a dismissal pursuant to § 101.106(e) applies only to suits brought under the TTCA—not to federal § 1983 claims. See *Rios*, 542 S.W.3d at 533 n.7; *Cannon*, 453 S.W.3d at 416 (“[S]ubsection 101.106(e) does not contemplate or

require dismissal of [§] 1983 claims against individual government employees, or any other claim not brought under the [TTCA]."). Nonetheless, having reviewed appellants' live pleading, we find no discernable § 1983 claim against Sanchez and Rodriguez.

Appellants' only mention of § 1983 is embedded in appellants' pleaded retaliation claim:

On [September 28], 2020, [the City] in order to further stifle the [Franz] political participation in the electoral process served him with notice revoking the transport business permit of SIG Transport Service LLC,[²] a company in which [Franz] is the principal. This action was allegedly due to some outstanding property taxes. The offending outstanding taxes [statements] are attached and marked Exhibit 2. When [Franz] requested information on the alleged delinquent taxes, he was informed by Code Enforcement they did[no]t know what was owed only that they had been instructed to shut down [Franz's] businesses based on the City's Permit Ordinance. [Franz] requested a copy of the permit ordinance. [Franz] was subsequently afforded copies of the alleged ordinance he has violated, after the court orally ordered [the City] to produce the ordinance [t]he Plaintiff contacted the [the City's] tax collection firm and paid all of the taxes due on several of businesses owned/or operated by [Franz]. [The City] continued to harass [Franz]; issued a citation and sequestered a van operated by SIG Transit Services[,] LLC. [Franz] suffered loss of revenue. If this court had not intervened, [Franz's] businesses would have been shut down. The City's enforcement of its business permit regulations so close to an election was clearly retaliatory and further demonstrates "bad faith" on [the] part of [the City]. [The City's] actions violated the Texas Election Code, Texas Penal Code, Texas and U.S. Constitution and 42 [U.S.C. §] 1983.

Even broadly construing appellants' pleadings, we are unable to determine that a § 1983 cause of action against Rodriguez and Sanchez was pleaded. See *Kinder Morgan SACROC, LP v. Scurry County*, 622 S.W.3d 835, 850–51 (Tex. 2021) ("[I]n determining whether a cause of action was pled, plaintiff's pleadings must be adequate for the court

² In a third amended petition filed on September 15, 2021, appellants attempted to name SIG Transport Service LLC as a plaintiff. The petition was struck by the trial court.

to be able, *from an examination of the plaintiff's pleadings alone*, to ascertain with reasonable certainty and without resorting to *information aliunde* the elements of plaintiff's cause of action.") (internal citations omitted). Rather, appellants appear to plead that the City itself subjected appellants to an alleged deprivation of unspecified federal rights through official action or imprimatur. See *Connick*, 563 U.S. at 60–61.

The trial court's dismissal³ of appellants' state claims remaining unchallenged, we find no error in the trial court's granting of the motion to dismiss. We overrule appellants' sole issue on appeal.

III. CONCLUSION

We affirm the trial court's judgment.

CLARISSA SILVA
Justice

Delivered and filed on the
10th day of August, 2023.

³ The trial court's dismissal order makes no mention of appellants alleged § 1983 claim:

On April 9, 2021, came to be heard Defendants' Motion to Dismiss the claims against [Rodriguez] and [Sanchez] pursuant to Texas Civil Practice and Remedies Code Section 101.106(e). After reviewing said motion, the evidence, responses filed and arguments of counsel, the Court finds that said motion should be in all things GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss all claims asserted against [Rodriguez] and [Sanchez] is GRANTED and all of Plaintiffs' claims against [Rodriguez] and [Sanchez] are hereby dismissed with prejudice.