In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-20-00054-CV

RAUL GONZALES, Appellant

V.

CITY OF FARMERS BRANCH, Appellee

On Appeal from the 68th District Court
Dallas County, Texas
Trial Court No. DC-19-10991

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Raul Gonzales appeals the trial court's entry of summary judgment in favor of the City of Farmers Branch, Texas (City).[1] On appeal, Gonzales argues that the "trial court committed reversible error by holding a non-jury trial without his presence" and by failing to consider his third amended petition before granting the City's summary judgment based on its plea to the jurisdiction. Because (1) Gonzales's claims were rejected by summary judgment, not trial, and (2) there was no obligation to consider Gonzales's late-filed third amended petition, we affirm the trial court's judgment.

Gonzales sued the City after a police officer allegedly negligently shot and killed the driver of a vehicle in which Gonzales was a passenger and "fired two more rounds toward the backseat of the vehicle where [Gonzales] was seated." Gonzales alleged that the City negligently trained and supervised the police officer, who may have "suffer[ed] from a mental disorder due to [his] service in our country's armed forces." He further alleged that the City was responsible for the officer's use of his pistol, which was used "in BAD Faith, with conscious indifference and or reckless disregard to the lives of [Gonzales] and [the driver]." As a result, Gonzales sought damages for injuries to his low back and for post-traumatic stress, anxiety, depression, and mental anguish, among other things.

The City responded by filing a plea to the jurisdiction and by later filing a traditional motion for summary judgment on its plea and a no-evidence motion for summary judgment on

[1]Originally appealed to the Fifth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We follow the precedent of the Fifth Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

Gonzales's claims. In its plea, the City argued that it was not liable for intentional torts and that, despite Gonzales's pleadings alleging negligence, the gravamen of his complaint was the intentional discharge of the officer's firearm.[2] In its no-evidence motion for summary judgment, the City argued that Gonzales had no evidence of any negligent act that proximately caused his alleged injuries.[3]

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[2]The Texas Tort Claims Act (TTCA) applies to the City because it is a governmental unit. *See* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B). The TTCA waives sovereign and governmental immunity for

> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
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> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021. However, sovereign and governmental immunity is not waived for claims "arising out of assault, battery, false imprisonment, or any other intentional tort . . ."). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2). The Texas Supreme Court has held that a claim arising from an officer's aiming and discharge of a weapon "is clearly intentional" and "fits squarely within section 101.057's exclusion of claims" and that suit against a governmental agency for failing to properly train or instruct an officer who commits the intentional aiming and discharge of a firearm is not "an injury resulting from the 'condition or use of tangible personal or real property.'" *Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2)). As a result, "[i]f a plaintiff pleads facts which amount to an intentional tort, no matter if the claim is framed as negligence, the claim generally is for an intentional tort and is barred by the TTCA. . . . A plaintiff cannot circumvent the intentional tort exception by couching his claims in terms of negligence." *Harris Cty., TX v. Cabazos*, 177 S.W.3d 105, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (concluding that claims of negligent supervision arising from an officer's discharge of a weapon were required to be dismissed because the officer's acts were intentional); *see City of Waco v. Williams*, 209 S.W.3d 216, 221 (Tex. App.—Waco 2006, pet. denied) (discussing "a line of cases standing for the proposition that a negligence claim under the TTCA cannot arise out of the intentional acts, including excessive force, of a law enforcement officer against a person").

[3]Because Gonzales had also filed this case in another court, the City moved to consolidate both cases. The City's motion was granted.

Gonzales was ordered to appear for a telephonic hearing set for May 22, 2020.[4] On June 17, the trial court granted the City's plea to the jurisdiction and its summary judgment and dismissed Gonzales's claims against the City with prejudice. On the same date that the trial court entered its judgment, Gonzales filed a third amended petition.

(1) Gonzales's Claims Were Rejected by Summary Judgment, Not Trial

Admitting that a hearing was held May 22, Gonzales complains that the trial court erred in dismissing the case after a "non-jury trial." He argues that he should have been present for the "non-jury trial." No trial was held in this case. Because the record shows that Gonzales's claims were dismissed via summary judgment, not trial, Gonzales's first claim is meritless and overruled.

(2) There Was No Obligation to Consider Gonzales's Late-Filed Third Amended Petition

Gonzales also asserts that the trial court erred in not giving "significant weight to appellant-plaintiffs' Third Supplemental Amended Petition" in its ruling on the City's plea to the jurisdiction and motion for summary judgment. Critically, Gonzales does not argue that the trial court erred in dismissing the claims made in his original and amended petition. He also raises no challenge to the grant of the no-evidence motion for summary judgment.

Instead, his argument focuses on the trial court's failure to consider his third amended petition. However, Gonzales filed his third amended petition after the summary judgment hearing and on the same day that the trial court entered its judgment.

[4]Less than twenty days before the hearing, Gonzales filed his own motion for summary judgment, which the City argued was untimely.

Pleadings "offered for filing within seven days of the date of trial or thereafter . . . shall be filed only after leave of the judge is obtained . . . ." TEX. R. CIV. P. 63. "This rule applies to summary-judgment proceedings because they are trials within the meaning of this rule." *Horie v. Law Offices of Art Dula*, 560 S.W.3d 425, 431 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988); *see Jefferson v. Geico Cty. Mut. Ins. Co.*, No. 05-17-01033-CV, 2018 WL 6333246, at *3 (Tex. App.—Dallas Nov. 29, 2018, no pet.) (mem. op.) (citing TEX. R. CIV. P. 63).

Because Gonzales did not obtain leave of court to file his late-amended petition, the trial court was not required to consider it. *See Invasix, Inc. v. James*, No. 05-19-00494-CV, 2020 WL 897243, at *5 (Tex. App.—Dallas Feb. 25, 2020, no pet.) (mem. op.). Consequently, we overrule Gonzales's last point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: October 22, 2020
Date Decided: November 5, 2020