

COURT OF APPEALS OF TEXAS, ELEVENTH DISTRICT

Larry R. Miller v. Ector County Hospital District D/B/A Medical Center Hospital

Miller v. Ector County Hospital District · No. 11-11-00221-CV · Decided August 8, 2013

SUMMARY

The Eleventh Court of Appeals of Texas affirmed dismissal of Larry R. Miller's libel, slander, defamation, and intentional-infliction-of-emotional-distress claims against Ector County Hospital District. The court held that Miller failed to properly preserve and support his request for a continuance and that the hospital district was immune from suit under the Texas Tort Claims Act for his intentional tort claims.

CASE DETAILS

COURT	Court of Appeals of Texas, Eleventh District
WRITING FOR THE COURT	Terry McCall; Wright, C.J.; Terry McCall, J.; Willson, J.
JURISDICTION	Texas
DECIDED	August 8, 2013
DOCKET	11-11-00221-CV
DISPOSITION	affirmed
PROCEDURAL POSTURE	Miller appealed the trial court's order granting the hospital district's plea to the jurisdiction and dismissing his claims with prejudice. On appeal, he challenged only the denial of a continuance to conduct additional discovery.
STANDARD OF REVIEW	Denial of a motion for continuance is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published
PARTIES	Larry R. Miller v. Ector County Hospital District d/b/a Medical Center Hospital

TOPICS

[subject matter jurisdiction](#)[civil procedure](#)[appellate procedure](#)[standard of review](#)[defamation](#)

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by denying Miller's request for a continuance to complete discovery before ruling on the hospital's plea to the jurisdiction and motion for summary judgment.

HOLDINGS

1. The trial court did not abuse its discretion in denying Miller's request for a continuance because Miller did not file a verified motion for continuance and did not show how the requested discovery could support a waiver of sovereign immunity under the Texas Tort Claims Act.
2. The governmental hospital district was immune from suit on Miller's intentional tort claims because the Texas Tort Claims Act does not waive governmental immunity for intentional torts.

KEY QUOTATIONS

“The Tort Claims Act expressly waives sovereign immunity in three general areas: ‘use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property.’” (at 1)

“But Miller did not outline anything in his response or affidavit that, if produced, would support any claim under the TTCA, and Medical Center was immune from suit for all of his intentional tort claims.” (at 3)

FACTUAL BACKGROUND

Miller, a former pharmacist at Medical Center Hospital, alleged that the hospital fired him or forced him to resign after receiving an anonymous letter accusing him of reporting to work intoxicated and stealing prescription medication. He claimed the allegations were false, that another employee instigated the investigation, and that the hospital published false statements, causing lost income, vacation, and retirement benefits. During the litigation, Miller identified billing records, prescription inventories, swipe-card activity, and camera images as discovery he claimed was necessary, but he did not explain how those materials would establish a waiver of sovereign immunity under the Texas Tort Claims Act.

PROCEDURAL HISTORY

Miller sued Ector County Hospital District for libel, slander, defamation, and intentional infliction of emotional distress arising from the termination or forced resignation of his employment. After discovery began, the hospital filed a plea to the jurisdiction and motion for summary judgment asserting sovereign immunity under the Texas Tort Claims Act. The district court granted the plea and entered a final judgment dismissing the claims with prejudice. The court of appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- County of Cameron v. Brown, 80 S.W.3d 549, 554 (Tex. 2002)
- Texas Department of Transportation v. Able, 35 S.W.3d 608, 611 (Tex. 2000)
- Reata Construction Corp. v. City of Dallas, 197 S.W.3d 371, 374 (Tex. 2006)
- Texas Department of Transportation v. Jones, 8 S.W.3d 636, 638 (Tex. 1999)
- State ex rel. State Department of Highways & Public Transportation v. Gonzalez, 82 S.W.3d 322, 326 (Tex. 2002)
- Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 161 (Tex. 2004)
- Tri-Steel Structures, Inc. v. Baptist Foundation of Texas, 166 S.W.3d 443, 447-48 (Tex. App.—Fort Worth 2005, pet. denied)
- Villegas v. Carter, 711 S.W.2d 624, 626 (Tex. 1986)

OPINION

PER CURIAM.

Opinion filed August 8, 2013 In The Eleventh Court of Appeals _____ No. 11-11-00221-CV _____ LARRY R. MILLER, Appellant V. ECTOR COUNTY HOSPITAL DISTRICT D/B/A MEDICAL CENTER HOSPITAL, Appellee On Appeal from the 161st District Court Ector County, Texas Trial Court Cause No. B-128,999 MEMORANDUM OPINION Larry R. Miller, a former Medical Center Hospital 1 pharmacist, appeals the trial court's order in which it granted Medical Center's plea to the jurisdiction.

In the order, the trial court dismissed Miller's libel, slander, defamation, and intentional-infliction-of-emotional-distress claims that he alleged arose because Medical Center fired him or forced him to resign. We affirm. 1 Ector County Hospital District d/b/a Medical Center Hospital. Miller alleged that Medical Center fired or forced him to resign in March 2009 after it received a letter from an anonymous person who alleged that Miller had come to work intoxicated and had stolen prescription medication.

Miller claimed that the allegations were false, that another employee instigated the investigation, that Medical Center published false statements, and that he suffered damages based on lost income, vacation, and retirement; he also sought his attorneys' fees. Medical Center included a general denial in its answer.

The parties began discovery, and nearly a year later, Medical Center filed a plea to the jurisdiction and motion for summary judgment claiming sovereign immunity because Miller's claims did not fall within the narrow waiver under the Texas Tort Claims Act (TTCA). TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–.109 (West 2011 & Supp. 2012). “The Tort Claims Act expressly waives sovereign immunity in three general areas: ‘use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property.’” 2 Cnty of Cameron v. Brown, 80 S.W.3d 549, 554 (Tex.

2002) (quoting *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 611 (Tex. 2000)). Public hospitals are immune from suit unless the TTCA expressly waives immunity. See CIV. PRAC. & REM. § 101.001(3)(D). A governmental unit is not liable for intentional torts. *Id.* § 101.057.

The trial court granted the plea to the jurisdiction and entered a final judgment dismissing Miller's claims with prejudice. 2 Sovereign immunity is immunity from suit and liability. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006) (citing *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999)).

The TTCA waives sovereign immunity in limited circumstances. TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a) (West 2011); *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 326 (Tex. 2002). 2 In his brief, Miller alludes to several issues but only challenges the trial court's failure to grant a continuance. Miller mentioned in his brief that the trial court erred in granting the plea to the jurisdiction because (1) Medical Center failed to comply with his discovery requests, (2) the trial court failed to grant his motions to compel and for sanctions, (3) the trial court failed to grant a continuance, and (4) Medical Center's motions were premature because more discovery was needed.

However, Miller only briefed and cited authority for his complaint that the trial court abused its discretion when it granted Medical Center's plea to the jurisdiction "without allowing plaintiff to complete discovery." Specifically, Miller contends that the trial court abused its discretion because it did not analyze the three factors related to motions for continuance "or even address on the record Plaintiff's request for a continuance." We review the denial of a motion for continuance for an abuse of discretion.

Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 161 (Tex. 2004). In conducting our review, we consider the length of time the case has been on file, the materiality of the discovery sought, and the due diligence exercised to obtain the evidence. *Id.* But we must first address the requirements that a motion for continuance must be in writing, verified, and supported by affidavit.

TEX. R. CIV. P. 251; TEX. R. CIV. P. 166a(g); *Tri-Steel Structures, Inc. v. Baptist Found. of Tex.*, 166 S.W.3d 443, 447–48 (Tex. App.—Fort Worth 2005, pet. denied). If the motion is not verified, we will presume that the trial court did not abuse its discretion. See *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986).

Although Miller did not file a motion for continuance and does not argue that he filed one, we do note that he did request a continuance in his response to the plea to the jurisdiction and that he did attach an affidavit. Miller stated, in his response to the summary judgment motion and plea to the jurisdiction, that "he would be able to satisfy the exception for sovereign immunity for personal injury 3 caused by the condition or use of tangible personal property." But Miller did not outline

anything in his response or affidavit that, if produced, would support any claim under the TTCA, and Medical Center was immune from suit for all of his intentional tort claims.

Miller states that, in his motion to compel, he “stated that he could not adequately answer a pending motion for summary judgment until MCH had answered his second request for production.” Miller argues that, in his motion for sanctions and frivolous pleadings, he “again mentioned the pending motion for summary judgment and the need for discovery.” Although Miller identified (1) in his affidavit, “Medicare/Medicaid billing records,” and “prescription inventories” and (2) in his appeal brief, “records of swipe-card activity and camera images,” respectively, as “material” evidence needed in additional discovery, he never explained to the trial court in his plea response how any of that information, if produced, waived immunity under the TTCA; he also never filed a motion for continuance.

He, only now, attempts to make the argument for the first time on appeal. Thus, we hold that the trial court did not abuse its discretion in denying Miller’s “request for a continuance.” Miller’s single issue is overruled. This Court’s Ruling We affirm the judgment of the trial court. TERRY McCALL JUSTICE August 8, 2013 Panel consists of: Wright, C.J., McCall, J., and Willson, J. 4