No. 13-23-00225-CV
Court of Appeals of Texas, Thirteenth District, Corpus Christi-Edinburg

Hernandez v. Axtell

Decided May 2, 2024

13-23-00225-CV

05-02-2024

LEILA HERNANDEZ, Appellant, v. ROBERT AXTELL, Appellee.

DORI CONTRERAS CHIEF JUSTICE

ON APPEAL FROM THE 206TH DISTRICT COURT OF HIDALGO COUNTY, TEXAS

Before Chief Justice Contreras and Justices Longoria and Peña

MEMORANDUM OPINION

DORI CONTRERAS CHIEF JUSTICE

Appellant Leila Hernandez challenges an order dismissing a defamation suit she brought against appellee Robert Axtell. By three issues, Hernandez contends the trial court erred by (1) granting Axtell's amended motion for summary judgment, (2) granting Axtell's plea to the jurisdiction, and (3) ruling on several post-judgment motions. We affirm. *2

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I. Background

In 2003, Hernandez was hired by the University of Texas-Pan American (UTPA) as an assistant professor in graphic design. In 2008, she received tenure and was promoted to associate professor, and in 2014, she was promoted to full professor. In 2015, UTPA was abolished and was succeeded by the University of Texas Rio Grande Valley (UTRGV). *See generally* Tex. Educ. Code Ann. § 79.02. Hernandez applied for employment at UTRGV but was not hired. Accordingly, her last day of employment at UTPA was August 31, 2015.[1]

[1] Hernandez sued UTPA, UTRGV, and several university officers for sex and national origin discrimination in 2015, but a federal district court granted the defendants' motion for judgment on the pleadings and dismissed the suit. *See Hernandez v. Bailey*, 716 Fed.Appx. 298, 302 (5th Cir. 2018) (affirming federal district court's ruling because "Hernandez had no constitutionally protected interest in employment at UTRGV or the UT system at large, and she was afforded procedural and substantive due process with respect to the termination of her employment at UTPA"). Hernandez filed another suit against UTPA and UTRGV in state court in 2017; this suit was removed to federal district court and was also dismissed. *See Hernandez v. Univ. of Tex.-Pan Am.*, 729 Fed.Appx. 340, 342 (5th Cir. 2018) (per curiam) (affirming federal district court's ruling because Hernandez's notice of appeal was untimely).

Hernandez filed her original petition alleging defamation on October 24, 2019. According to the petition, Axtell was a "lab technical service supervisor" at UTPA in 2015 when he "began harassing [Hernandez] by constantly showing up to her classes unannounced, unduly supervising her students, and [] scrutinizing and questioning her endeavors, or practices." The petition specifically alleged that Axtell "unduly questioned"

Hernandez regarding her purchase of supplies for an art project supporting the Edinburg Boys and Girls Club, a non-profit organization. The project entailed Hernandez and her students painting forty-five doors which were to be exhibited at an event celebrating the organization's forty-fifth anniversary. Hernandez alleged in her petition that she "received the required approval" to purchase the materials necessary for the project, and she
3 "used *3 the budget given to her" to do so. However, she claimed that Axtell sent an email to her and others on July 10, 2015, "accus[ing] her of having misrepresented the purchase order used to get approval to buy the paint materials and supplies and of having unlawfully taken home some of the materials and/or supplies she had bought for the project." She asserted that Axtell later filed a report with university police alleging theft on July 21, 2015, which led to the issuance of a search warrant for Hernandez's home.[2] Hernandez claimed that, in executing the search warrant, police officers took her "own personal painting materials" and never returned them or compensated her. She further claimed that, because of the investigation, the Boys and Girls Club project was never completed, and her ability to find future employment was "impacted." According to the petition, police records show that Hernandez was "exceptionally cleared" of any criminal wrongdoing and "no further investigation [was] warranted."

> 2 Despite alleging that Hernandez "received the required approval" and "used the budget given to her" to make the purchase, the petition also alleged that "[t]he funds used by [Hernandez] to purchase the materials were not University funds, and [Axtell] was aware of that when he made the report."

Hernandez alleged that Axtell committed defamation per se by falsely accusing her of a crime. She also pleaded the discovery rule, asserting that limitations did not require dismissal of her suit because she "could have first learned of some of [Axtell]'s defamatory statements against her" only when she received documents pursuant to a public records request on October 26, 2018.[3]

> 3 Hernandez later filed two amended petitions which made substantially the same factual allegations and alleged the same causes of action.

Axtell, represented by the Office of the Attorney General, answered the suit on November 24, 2019, and he filed a combined "Motion for Summary Judgment and Plea to the Jurisdiction" on June 24, 2020. Axtell alleged
4 in each of these pleadings that *4 Hernandez's suit is barred by the statute of limitations because it "was filed four and [a] half years after the alleged 'defamatory' statements were made" and because the discovery rule does not apply. Axtell further argued that the suit is barred: (1) due to the election-of-remedies provision in the Texas Tort Claims Act (TTCA); and (2) because Axtell was not a proper defendant and UTPA is immune to defamation claims. Finally, Axtell requested summary judgment on grounds that Hernandez has no evidence showing that his statements were defamatory or that he was negligent regarding the truth of the statements. *See In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (setting forth elements of a defamation claim).

In support of the combined motion and plea, Axtell filed a declaration in which he stated, in relevant part:

> 2. As part of my job duties, I prepare and submit requests from faculty for art supplies. In July 2015 I checked a faculty purchase order made to Sherwin Williams by a member of the art faculty, Leila Hernandez. I noticed that there were irregularities and that the cost for the paint was too high, based on my prior experience with UTPA purchases of paint. I had suspicions that the paint was purchased for personal use, rather than for UTPA's use.

> 3. I reported my suspicions to the Chair of the Art Department, Professor Susan Fitzsimmons. She directed me to discuss my suspicions with Wilson Ballard in UTPA's Institutional Compliance office. In late July 2015, I report[ed] to Wilson Ballard that given the irregularities in the purchase order from Sherwin Williams, I had suspicions that the purchases were made for personal use rather than UTPA's use.
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> 4. Afterwards in early August 2015, I was contacted by UTPA's audit department. As a UTPA employee, I responded to their questions about the suspicious purchase order. I gave the audit department the same information I provided Ballard.
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> 5. Sometime afterwards, I was contacted by the University's police department. Again, as a University employee, I responded to their questions about the suspicious purchase order, and gave the same information I had previously provided to Ballard.

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> 6. The information that I gave Ballard, the University's audit department, and the University's police department was all based on my good faith belief that there was something suspicious about the purchase order. I did not know for fact whether any crime had been committed by Hernandez, and I did not state that Hernandez had committed any theft. I gave my opinion that there were suspicious circumstances regarding the purchase order.

The pleading also included other evidence, including a letter from UTRGV's chief legal officer dated March 23, 2017, providing records in response to a request made by Hernandez's attorney. The records included a redacted police incident report, dated August 13, 2015, which detailed all of the factual allegations Axtell made to police but did not identify Axtell as the individual who made the report.

On September 28, 2022, Axtell filed an "Amended Motion for Summary Judgment and Plea to the Jurisdiction" making the same arguments as the original combined motion and plea, but additionally arguing that his statement to police was "absolutely privileged" and constituted "an exercise of the right to petition" under the Texas Citizens Participation Act (TCPA).[4] The amended motion further specifically argued that the discovery rule does apply because (1) Hernandez was aware of Axtell's emailed statements when he made them in 2015, and (2) she was provided with "Axtell's e[]mails and the redacted police report more than two years before filing this suit."

> 4 Axtell did not file a motion to dismiss pursuant to the TCPA.

Hernandez filed a response to the amended motion which included a declaration in which she stated, in relevant part:

> 16. . . . I have sued Robert Axtell for defamation. He accused me of committing theft of goods and services in relation to the Edinburg Boys and Girls Club project. I did not become aware of his statements until October 26, 2018, and January 18, 2019, when UTRGV finally produced documents and video recordings to me that I had requested in a Texas Open Records Request dated December

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> 13, 2016. UTRGV deemed confidential the documents and video recordings that were produced. They were not public information or of public record.

> 18. Prior to receiving the documents and video recordings on October 26, 2018, and January 18, 2019, I was not aware that Robert Axtell had made statements to a police department, a peace officer, employees at UTPA, and others that I had committed theft of goods and services in relation to the Edinburg Boys and Girls Club project.
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> 25. I did not become aware that Robert Axtell reported to Ethics and Compliance and others at UTPA that I had committed theft of goods/services until October 26, 2018. On that date, UTRGV produced to my counsel 199 pages of documents and a video recording. Included within those documents and video recording was a report made by Mr. Axtell that I had committed theft of goods/services. I did not commit theft of goods/services. I was never charged or arrested for theft of goods/services.
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> 26. Robert Axtell reported to a police department and a Texas peace officer that I had committed theft by stealing painting materials and supplies from UTPA. I did not become aware of the foregoing until October 26, 2018, and January 18, 2019. On the aforementioned dates, UTRGV produced to my counsel documents and video recordings, including an interview on September 1, 2015, of Mr. Axtell at the police department. Included within the documents and video recordings produced on October 26, 2018, and January 18, 2019, was information that Mr. Axtell represented to the police department and Texas peace officer that I had impermissibly used UTPA funds to purchase painting materials and supplies for my personal use and that I had unlawfully taken painting materials and supplies from UTPA totaling over $500. The funds I used to purchase the materials were not UTPA funds, and Mr. Axtell was aware of that when he made the report because I had told him that UTPA funds were not used. I did not steal painting materials and supplies from UTPA or misappropriate UTPA funds. I did not commit a crime.

Axtell filed a reply to the response.

On February 13, 2023, the trial court signed an order granting Axtell's "Motion for Summary Judgment and Plea to the Jurisdiction" without a hearing, and dismissing [7] *7 Hernandez's suit with prejudice. Two days later, Hernandez filed a motion for new trial arguing that the court erred by granting Axtell's original motion because it was "not a 'live document' at the time of its granting." In response, Axtell filed a "Motion to Correct Judgment" to reflect that the trial court had actually granted the amended motion. On April 17, 2023, the trial court denied Hernandez's motion for new trial, granted Axtell's motion to correct the judgment, and issued a nunc pro tunc order granting Axtell's "Amended Motion for Summary Judgment and Plea to the Jurisdiction" and dismissing Hernandez's suit with prejudice. This appeal followed.

II. Discussion

A. Summary Judgment

By her first issue, Hernandez argues the trial court erred by granting Axtell's motion for summary judgment.

1. Standard of Review and Applicable Law

A movant for traditional summary judgment has the burden to establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Tex.R.Civ.P. 166a(c); *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014). A defendant who conclusively establishes an affirmative defense is entitled to summary judgment on that claim. *Eagle Oil & Gas Co. v. TRO-X, L.P.*, 619 S.W.3d 699, 705 (Tex. 2021) (citing *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010)). If the movant meets its burden, "the burden shifts to the non-movant to raise a genuine issue of material fact

precluding summary judgment." *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). If the non-movant produces more than a scintilla of evidence to raise a fact issue on the challenged elements, then summary judgment is *8 improper. *Amedisys*, 437 S.W.3d at 511; *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

We review summary judgments de novo. *Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 790 (Tex. 2019). The evidence is viewed in the light most favorable to the non-movant. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009). When a trial court's order does not specify the grounds for its summary judgment, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

2. Analysis

Axtell argued in his "Amended Motion for Summary Judgment and Plea to the Jurisdiction" that he is entitled to judgment as a matter of law in part because Hernandez's suit is barred by limitations.

Defamation claims are subject to a one-year statute of limitations. *See* Tex. Code Crim. Proc. Ann. § 16.002 ("A person must bring suit for malicious prosecution, libel, slander, or breach of promise of marriage not later than one year after the day the cause of action accrues."). The limitations period begins when the cause of action accrues, and "[g]enerally, a cause of action accrues when a wrongful act causes a legal injury." *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 623 (Tex. 2011); *Childs v. Haussecker*, 974 S.W.2d 31, 36-37 (Tex. 1998); *see Provident Life & Accident Ins. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003) ("In most cases, a cause of action accrues when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur."). "[F]or defamation suits, accrual generally occurs the date *9 the publication is made." *Hogan v. Zoanni*, 627 S.W.3d 163, 172 (Tex. 2021).

The discovery rule defers accrual of a cause of action "until the claimant knows or, by exercising reasonable due diligence, should know of the facts giving rise to the claim." *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734 (Tex. 2001). "An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence." *Id.* at 734-35. A defendant moving for summary judgment on the affirmative defense of limitations has the burden to negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury. *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

In her suit originally filed on October 24, 2019, Hernandez complained of two distinct allegedly defamatory statements: (1) the email sent by Axtell to her and others on July 10, 2015; and (2) the report Axtell filed with UTRGV police on July 21, 2015. Both statements occurred more than four years prior to the filing of Hernandez's original petition. In her petition, in her response to Axtell's summary judgment motion, and on appeal, Hernandez claims that the limitations period was tolled by the discovery rule, thereby rendering her original petition timely.[5] We address the application of the discovery rule to each alleged defamatory statement in turn. *10

[5] The Texas Supreme Court noted that "[it has] never held that the discovery rule applies to defamation claims except in the narrow circumstance involving a person's discovery of allegedly libelous information filed with a credit agency." *Hogan v. Zoanni*, 627 S.W.3d 163, 172 (Tex. 2021) (citing *Kelley v. Rinkle*, 532 S.W.2d 947, 949 (Tex. 1976)). We

assume for purposes of this opinion that the discovery rule would generally apply to a defamation claim, to the same extent it applies to other tort claims, if the elements of the rule are established.

First, as to Axtell's email, it is undisputed that Hernandez was actually aware of the email on or about the time it was sent to her, on July 10, 2015. There is no allegation or evidence that the email was inherently undiscoverable or could not have been timely discovered with the use of due diligence. Accordingly, the discovery rule was negated, and Hernandez's defamation claim is time-barred, as it relates to this specific alleged defamatory statement.

Second, as to Axtell's report to police, Hernandez stated in her declaration that she was only made aware that Axtell made the report when she received documents pursuant to a records request on October 26, 2018. However, as Axtell notes, the injuries which Hernandez alleges were caused by the report-such as damage to her reputation and ability to obtain future employment-were sustained prior to that date. "Once a claimant learns of a wrongful injury, the statute of limitations begins to run even if the claimant does not yet know 'the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it.'" *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 207 (Tex. 2011) (quoting *PPG Indus., Inc. v. JMB/Hous. Cntrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93 (Tex. 2004)); *see Etan Indus., Inc.*, 359 S.W.3d at 623; *Childs*, 974 S.W.2d at 36-37; *Knott*, 128 S.W.3d at 221. Hernandez notes correctly that *Exxon* was not a defamation case. However, she does not cite any authority limiting the applicability of the rule set forth in *Exxon*, nor does she argue that her legal injury was itself inherently undiscoverable. Instead, the summary judgment record conclusively establishes that Hernandez's attorney was made aware of the factual allegations in the police report on March 23, 2017; the fact that Hernandez was not advised of "the party responsible" for making those allegations does not mean the limitations period was tolled. *11 *See Exxon Corp.*, 348 S.W.3d at 207; *PPG Indus., Inc.*, 146 S.W.3d at 93. We conclude that the discovery rule was negated as to Axtell's report to police, and Hernandez's claim in this regard is barred by limitations.

With respect to both alleged defamatory statements, Axtell met his summary judgment burden to establish his entitlement to judgment as a matter of law, and Hernandez failed to produce evidence raising a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(c). Therefore, the trial court did not err in granting summary judgment in favor of Axtell. Hernandez's first issue is overruled.[6]

6 In light of our conclusion, we need not address whether summary judgment was proper on the other grounds argued by Axtell in the trial court, nor need we address Hernandez's second issue regarding Axtell's plea to the jurisdiction. *See* Tex. R. App. P. 47.1.

B. Corrected Judgment

By her third issue, Hernandez contends the trial court erred in denying her motion for new trial, granting Axtell's "Motion to Correct Judgment," and rendering its April 17, 2023 nunc pro tunc judgment. Hernandez claims, as she did in her new trial motion, that the trial court lacked authority to grant Axtell's original "Motion for Summary Judgment and Plea to the Jurisdiction" because it was not a live pleading at the time it was granted. She further argues on appeal that the court erred by rendering the nunc pro tunc order (which specified that the amended motion, not the original motion, was being granted) because "[t]he supposed error made was judicial and not clerical, and therefore, not correctable by an order nunc pro tunc."

After a trial court loses its plenary power over a judgment, it may correct only clerical errors in the judgment by a judgment nunc pro tunc. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986); *see* Tex. R. Civ. P. 316, 329b(f); *In re Dryden*, 52 S.W.3d 257, 262 *12 (Tex. App.-Corpus Christi-Edinburg 2001, orig. proceeding). A

clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered. *See Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986); *In re Dryden*, 52 S.W.3d at 262. A clerical error does not result from judicial reasoning or determination. *Andrews*, 702 S.W.2d at 585. Conversely, a judicial error arises from a mistake of law or fact that requires judicial reasoning to correct. *Butler v. Cont'l Airlines, Inc.*, 31 S.W.3d 642, 647 (Tex. App.-Houston [1st Dist.] 2000, pet. denied); *see Escobar*, 711 S.W.2d at 231 ("A judicial error occurs in the *rendering* as opposed to the *entering* of judgment."). If a trial court attempts to correct a judicial error by signing a judgment nunc pro tunc after its plenary power expires, the judgment is void. *Morris v. O'Neal*, 464 S.W.3d 801, 808 (Tex. App.-Houston [14th Dist.] 2015, no pet.). Whether an error is clerical or judicial is a matter of law; therefore, we review this question de novo. *Tex. Dep't of Pub. Safety v. Moore*, 51 S.W.3d 355, 358 (Tex. App.-Tyler 2001, no pet.); *see In re Dryden*, 52 S.W.3d at 262.

Here, the trial court's nunc pro tunc order specifically explains the circumstances surrounding its issuance as follows:

> The Court finds[] that it had reviewed the AMENDED Motion for Summary Judgment, NOT the original Motion for Summary Judgment, on February 13, 2023, when reviewing the relevant file information for its submission ruling. The Court further finds that it inadvertently did not interlineate "Amended" on the February 13, 2023 order ruling on the submission. The Court finds this is a clerical error and not substantive. The Court hereby enters this Nunc Pro Tunc Order to correct the clerical error.

Hernandez concedes that the trial court made this finding, but she asserts that "[t]here is nothing in the record to indicate what the trial court said occurred in fact occurred." We disagree. The above statement is itself something in the record indicating that the trial court's intent on February 13, 2023, was to grant the amended
13 motion, and Hernandez *13 points to nothing in the record to the contrary. Accordingly, the error corrected in the nunc pro tunc judgment was clerical, not judicial. *See Escobar*, 711 S.W.2d at 231.

In any event, Hernandez does not adequately explain how she was harmed by the entry of the nunc pro tunc order. *See* Tex. R. App. P. 38.1(i), 44.1(a). She does not explain how Axtell's original motion differed from his amended motion; instead, she merely asserts:

> The error was not harmless in that Hernandez's suit was dismissed with prejudice and Hernandez was not accorded the right to file a response to Axtell's Motion for Summary Judgment and Plea to the Jurisdiction prior to the trial court granting Axtell's Motion for Summary Judgment and Plea to the Jurisdiction.

This is false. Hernandez was indeed "accorded the right" to file a response to Axtell's original "Motion for Summary Judgment and Plea to the Jurisdiction," and she could have done so at any time between June 24, 2020 (when the original motion was filed) and September 28, 2022 (when the amended motion was filed). More importantly, Hernandez filed a comprehensive response to Axtell's amended motion, and it was that motion which was eventually granted and is the subject of this appeal. We overrule Hernandez's third issue.

III. Conclusion

The trial court's judgment is affirmed.