Motion for Rehearing Granted. Opinion of December 23, 1999 withdrawn. Affirmed and Opinion of Rehearing filed August 17, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00793-CV

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HENRY F. HUDSON, Appellant

V.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE - INSTITUTIONAL DIVISION, Appellee

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On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 18,964

O P I N I O N ON R E H E A R I N G

This is an appeal from the granting of summary judgment against Henry F. Hudson, appellant, in favor of the Texas Department of Criminal Justice - Institutional Division (TDCJ-ID), appellee. Hudson, an inmate at TDCJ-ID, filed suit against appellee for injuries sustained in a motor vehicle accident while being transported by TDCJ-ID. As we find that the affirmative defense of limitations was established as a matter of law, we affirm.

On December 9, 1992, appellant was riding in a TDCJ-ID vehicle which collided with another vehicle. Appellant claimed he was injured in the accident and that TDCJ-ID was negligent in causing the accident. His suit against TDCJ-ID was filed in state court on December 22, 1994, more than two years after the date of the accident. The trial court granted summary judgment on the basis of limitations.

Under his first point, appellant alleges error by the trial court in granting summary judgment on the basis of limitations, as a previous judge had denied the same summary judgment motion three years earlier. Although the trial court's docket sheet does not allege reasons for denial of the first motion, TDCJ-ID's second motion states that at the time of the first motion, its answer on file had not pleaded limitations as an affirmative defense, and that its answer now raised the limitations defense.

Appellant has provided us with no authority for his argument that the trial court was precluded as a matter of law from considering the second motion for summary judgment. We are not aware of any case law, rule or statute that would support an argument that the *denial* of a summary judgment motion acts an affirmative finding against the issues raised in the motion. Appellant's first point of error is overruled.

By his second point, appellant argues that the trial court erred in granting summary judgment, as a trial judge has no authority or discretion to remove a case from a trial setting once the case has been set on the trial docket. This, he argues, violated appellant's constitutional guarantee of due course of law. Appellant does not claim that he was not given twenty-one days' notice under Rule 166b or that he was without adequate time to respond.

As with his first point, appellant has not provided us with any supportive authority for his argument, and we are unaware of any case law, rule or statute prohibiting a trial court from granting summary judgment merely because a case has been set on the court's general trial docket and agreed to by the other party, or that the granting of summary judgment in a civil case violates a party's constitutional guarantee of due course of law. Appellant's second point of error is overruled.

Appellant's third point alleges error by the trial court in denying his motion for new trial, which had raised the applicability of TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 to toll limitations on his case. Appellant contends that as he had filed a lawsuit in federal court against appellee within the two-year statute of limitations, limitations was tolled for an additional sixty days on his state court case such that his state court case was timely filed.

We disagree. TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 does not provide an additional sixty days for the filing of a state court case where a similar federal court case has been timely filed. The statute provides in pertinent part that

> (a) The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> > (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
> >
> > (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.

There is nothing in the record showing that appellant's federal court case was dismissed for lack of jurisdiction and that appellant filed his state court case within sixty days thereafter. TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 has no application to the facts of appellant's case, and his third point of error is overruled.

In his fourth and final point, appellant complains that the trial court erred in overruling his request for appointment of counsel pursuant to TEX. GOV'T CODE ANN. § 24.016 and § 26.049, as he was an indigent and was taking Benadryl and Elavil, which slowed his mental capabilities. Under TEX. GOV'T CODE ANN. § 24.016, a district judge may appoint counsel to attend to the cause of a party who makes an affidavit that he is too poor to employ counsel. It is well-established that this provision is discretionary, not mandatory. The Texas Supreme Court has held that an indigent civil litigant need not be represented by counsel in order for a court to carry on its essential, constitutional function, although "in some exceptional cases, the public and private interests at stake are such that

the administration of justice may best be served by appointing a lawyer to represent an indigent civil litigant." *Travelers Indemnity Co. v. Mayfield*, 923 S.W.2d 590, 594 (Tex.1996). Appellant did not show that his case was exceptional; thus, the trial judge did not abuse his discretion. *See also Coleman v. Lynaugh*, 934 S.W.2d 837, 839 (Tex.App.-Houston [1st Dist.] 1996, no writ). TEX. GOV'T CODE ANN. § 26.049, providing the same discretion to county judges, has no application to appellant's case.

While case law does exist recognizing a trial court's discretion to appoint counsel for mentally incompetent parties under TEX. GOV'T CODE ANN. § 24.016, nothing in the record shows that appellant has been found mentally incompetent, or that any medications he may be taking were effectively rendering him mentally incompetent. *See Thomas v. Anderson*, 861 S.W.2d 58 (Tex. App.–El Paso 1993, no pet.). No abuse of discretion has been shown by the trial court's refusal to appoint counsel for appellant, and the fourth point of error is overruled.

The judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed August 17, 2000.
Panel consists of Senior Justices Cannon, Draughn and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.