

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00299-CV

PHILIP J. POHL, Appellant

V.

**BILLEY HIRSCH, LINDA MARTIN,
WARREN WORTHY, ET AL, Appellees**

**On Appeal from the 258th District Court
Polk County, Texas
Trial Cause No. CIV 25015**

MEMORANDUM OPINION

Philip J. Pohl, an indigent inmate, appeals the dismissal of his lawsuit. The trial court ruled that the lawsuit is frivolous and dismissed it without prejudice. Pohl raises six issues in his appeal. We hold that the trial did not abuse its discretion. Accordingly, we affirm the judgment of the trial court.

Pohl's first two issues complain that the trial court abused its discretion in applying the statutory requirements for the affidavit of previous filings. *See* TEX. CIV. PRAC. & REM.

CODE ANN. § 14.004 (Vernon 2002). In his first issue, Pohl contends the trial court acted arbitrarily in dismissing his present suit because Pohl's affidavit of previous filings failed to state the operative facts for which relief was sought. Pohl's second issue contends the trial court arbitrarily dismissed his claim, without first providing an opportunity to amend, for failing to state the date of the final order of dismissal for each previous filing that was dismissed as frivolous or malicious.

Section 14.004, Texas Civil Practice and Remedies Code, provides in part, as follows:

(a) An inmate who files an affidavit or unsworn declaration of inability to pay costs shall file a separate affidavit or declaration:

(1) identifying each suit, other than a suit under the Family Code, previously brought by the person and in which the person was not represented by an attorney, without regard to whether the person was an inmate at the time the suit was brought; and

(2) describing each suit that was previously brought by:

(A) stating the operative facts for which relief was sought;

(B) listing the case name, cause number, and the court in which the suit was brought;

(C) identifying each party named in the suit; and

(D) stating the result of the suit, including whether the suit was dismissed as frivolous or malicious under Section 13.001 or Section 14.003 or otherwise.

(b) If the affidavit or unsworn declaration filed under this section states that a previous suit was dismissed as frivolous or malicious, the affidavit or unsworn declaration must state the date of the final order affirming the dismissal.

TEX. CIV. PRAC. & REM. CODE ANN. § 14.004. "The purpose of Section 14.004 is to curb the constant, often duplicative, inmate litigation, by requiring the inmate to notify the trial court of previous litigation and the outcome." *Thomas v. Bush*, 23 S.W.3d 215, 218 (Tex.

App.--Beaumont 2000, pet. denied). Stating the operative facts in an affidavit aids the trial court in determining whether the suit is substantially similar to a previously filed suit. *Williams v. Tex. Dep't of Criminal Justice-Inst. Div.*, 176 S.W.3d 590, 593 (Tex. App.--Tyler 2005, pet. denied).

The trial court found that Pohl failed to comply with Section 14.004(a)(2)(A) and Section 14.004(b). Pohl's affidavit of previous filings identified sixteen previous suits. Pohl identified several of the filings as habeas corpus proceedings or suits and related appeals concerning Pohl's right to be released from confinement. Other suits were identified as civil rights suits or tort claims. Pohl described those suits, as follows:

| | |
|-----------|---|
| Cause No. | 9:06-04-04 |
| What | Title 42 U.S.A. § 1983 |
| Where | U.S. District Court Lufkin, Texas |
| Who | Philip Pohl v. Brad Livingston, et al. |
| When | 2005-2006 |
| Grounds | Executive board failed a ministerial duty of due process mandated by must, shall and maximum, a duty that created liberty interest in a procedure--yet ignored the law and arbitrarily denied a priv[i]lege |
| Result | Denied as frivolous |

| | |
|-----------|---|
| Cause No. | 06-40850 |
| What | Appeal of above § 1983 |
| Where | Fifth Court of Appeals, New Orleans, LA |
| Who | Same Pohl v. Livingston, et al. |
| When | 2006-07 |
| Grounds | District Court failed to address the issues and reapplied the new statutes in an ex post facto violation just like the district court had |
| Result | Dismissed as frivolous with two strikes--!!! |

Cause No. CIV- 23,642
 What Complaint of severe abuse by Medical withdrawing and wit[h]holding so actors could receive a bonus and insure medical contractor and the state a higher profit and collusively save the state expense of keeping the wards-- BAD FAITH IN THE EXTREME!!!
 Where 258 District Court Polk County, Livingston, TX.
 Grounds Breach of duty, abuse of civil, human, and constitutional rights that did and is causing wrongful[] deaths and almost kill Pohl different times --
 When May 29 1:45 Pm 2007
 Result Dismissed without prejudice as frivolous -- (people being murdered by o[]mision is deemed frivolous by Judge Elizabeth Coker for a minor proc[e]dural fault that should have been allowed to amend--Court also 'cleaned out' the meager trust fund!!

Cause No. 09-07-00258-CV¹
 What Appeal of complaint # CIV-23,642 For a Mandamus
 Where Ninth Court of Appeals Be[a]umont, TX.
 Who Philip Pohl v. J. Chavers, et al. X Judge Coker
 When Sept. 2007
 Grounds Failure of Judge Coker to allow discovery
 Results Denied

Cause No. 09-07285CV
 What Appeal of CIV- 23,642
 Where Ninth Court of Appeals Beaumont, TX
 Who Philip Pohl et al. v. J. Chavers, et al (4)
 When Sept. 2007
 Grounds Failure to allow discovery, failure to allow amending minor procedural def[]iciency, deducted total trust fund balance instead of 20% average of 6 month's deposits --

¹The actual number for this mandamus proceeding is No. 09-07-284-CV. *See In re Pohl*, No. 09-07-284 CV, 2007 WL 2002890 (Tex. App.--Beaumont Jul. 12, 2007, orig. proceeding) (mem. op.).

| | |
|-----------|--|
| Result | Affirmed -- apparently prisoners have no right to redress government wrongs even when the state constitution says "ANY PERSON" and no bill of Attainder is allowed unless it can be done "ON THE COOL BY USING AN UNWRITTEN ONE BY COLLUSSION [sic] BY FELLOW STATE ACTORS." |
| Cause No. | CIV-24,362 |
| What | Complaint conta[in]ing 10 issues of official malfeasance under Texas Tort Claims Act and |
| Where | 258 District Court Polk County, Livingston, TX. |
| Who | Philip J. Pohl et al. v 16 named and 4 un[n]amed state officials and contract workers in their official and individual capacity |
| When | April 1, 2008 |
| Grounds | Assaults, deprivations of rights, thefts to cause fear to complain, due process abridgments , equal rights to law, right to redress, |
| Result | DISMISSED without prejudice because the Polunsky Unit officials would not let me EXHAUST THE UNIT GRIEVANCE SYSTEM by throwing AWAY MY GRIEVANCES BLOCKING THE REQUIR[E]D PROCESS!!!!!! ALL MOTIONS FOR DISCOVERY, AND REQUESTS FOR FURTHER PUBLIC FACT KNOWLEDGE WERE DENIED, ZERO LITIGATION. ... |
| Cause No. | 09-08-00367-CV |
| What | Appeal of Cause No. CIV-24,362 above for reasons stated in [] |
| Where | TEXAS NINTH COURT OF APPEAL, BEAUMONT |
| Who | Philip J. Pohl v Richard Alford, et al. |
| When | August 28, 2008 |
| Grounds | Obvious abuse of discretion, erronours [sic] advice from Attorney General[']s office, bias, prejudice, use of an undisclosed Bill of Attainder as inmates do not have any right to redress wrongs committed by officials.. |
| Result | April 27, 2009 after Attorney Gene[r]als' been granted |

extended time to file Brief of Appellees’ - court will consider the briefs as submitted..

| | |
|-----------|---|
| Cause No. | D-1-GN-003712 |
| What | Civil rights violations for Judicial Review of Ex-post-facto applications of law, hiding wrongful[] prejudice and bias behind the ‘complete Discretionaly [sic] Shield’ of capricious and hate-crime acts of personal vendet[t]a-trils [sic] constitutional violations of due process, equal protection and .. more |
| Where | 261 District Court, Travis County Austin.. |
| When | October 7, 2008 |
| Results | Pending service, answers to claims, discovery, etc. . . |

Pohl identifies a series of previous suits, not by their operative facts, but by the legal theories and issues present in the suits.² In particular, the recitals regarding the more recent of these suits cannot be excluded as duplications of the claim filed in this case. The trial court is justified in dismissing a case when it cannot determine from the statement of “operative facts” whether the prior lawsuits were duplicative of the present suit.³ *White v. State*, 37 S.W.3d 562, 564-65 (Tex. App.--Beaumont 2001, no pet.).

Pohl argues that his lawsuit should not be dismissed without first providing an

²Pohl stated a date or date range for each of the suits, but failed to state what each date represented.

³In addition, Pohl fails to identify all of the defendants in these cases. To comply with Section 14.004, the affidavit must name each defendant in each case. *See Carson v. Walker*, 134 S.W.3d 300, 302 (Tex. App.--Amarillo 2003, pet. denied). The trial court’s order does not indicate that the trial court dismissed the suit for failure to comply with Section 14.004(a)(2)(C).

opportunity to cure. An inmate-filed *in forma pauperis* suit may be dismissed without prejudice without first providing either notice or an opportunity to amend. *Hughes v. Massey*, 65 S.W.3d 743, 745 (Tex. App.--Beaumont 2001, no pet.). When an inmate files an affidavit that fails to comply with Section 14.004, “the trial court is entitled to assume that the suit is substantially similar to one previously filed by the inmate, and therefore, frivolous.” *Hall v. Treon*, 39 S.W.3d 722, 724 (Tex. App.--Beaumont 2001, no pet.). In determining whether a claim is frivolous, the trial court may consider whether “the claim is substantially similar to a previous claim filed by the inmate because the claim arises from the same operative facts.” TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(b)(4) (Vernon 2002). Pohl failed to meet the requirements for an *in forma pauperis* suit filed by an inmate. We overrule issues one and two.

Issue three contends the trial court abused its discretion by dismissing Pohl’s claim after Pohl filed a motion for default judgment. In his argument, Pohl complains that the trial court set too stringent a standard for Pohl’s Chapter 14 filings. Pohl’s petition alleges that Hirsch is an assistant warden with supervisory authority and that Martin and Worthy investigate claims. The petition alleges that the appellees have disposed of submitted grievance forms. The petition alleges that seven grievances on the same subject were filed on the same day, that only two were returned to the inmate, that those two grievances were denied, and that Pohl did not receive a response to the one grievance filed by him. Pohl also

alleged that Martin and Worthy ignored Pohl's informal requests for information.

Stating the operative facts in the affidavit of previous filings aids the trial court in determining whether the suit is substantially similar to a previously filed suit. *Williams*, 176 S.W.3d at 593. In this case, it cannot be determined by comparison to the affidavit of previous filings whether Pohl brought the present claims in his earlier lawsuits. *See id.* The defect in Pohl's affidavit of previous filings is more than a technicality, as he argues, but prevented the trial court from determining whether the prior suits were duplicative of the present one. *See White*, 37 S.W.3d at 565. Issue three is overruled.

Issue four complains that the trial court dismissed the petition without first allowing Pohl to engage in discovery to support his claims. A trial court may dismiss a lawsuit filed by an indigent inmate even before service of process if the court finds the claim is frivolous. *Mullins v. Estelle High Sec. Unit*, 111 S.W.3d 268, 271 (Tex. App.--Texarkana 2003, no pet.); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(2) (Vernon 2002). In this case, Pohl failed to identify the operative facts of his previous litigation. He did not need to conduct discovery to comply with Section 14.004. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.004. We overrule issue four.

Issue five contends the trial court engaged in a pattern and practice of dismissing his claims pursuant to Chapter 14, Texas Civil Practice and Remedies Code. Pohl argues that this case and previous cases filed in the trial court by Pohl were "well plead." The trial court

did not abuse its discretion in dismissing this lawsuit without prejudice. The dismissals in other cases cited by Pohl were likewise affirmed on appeal. *See Pohl v. Simmons*, No. 13-09-00406-CV, 2009 WL 3922018 (Tex. App.--Corpus Christi Nov. 19, 2009, no pet. h.) (mem. op.); *Pohl v. Polunsky Unit*, No. 09-08-00367-CV, 2009 WL 3199766 (Tex. App.--Beaumont Oct. 8, 2009, no pet.) (mem. op.); *Pohl v. Chavers*, No. 09-07-285 CV, 2007 WL 3393430 (Tex. App.--Beaumont Nov. 15, 2007, no pet.) (mem. op.). Although the trial court dismissed several of Pohl's lawsuits, Pohl has not shown that the trial court erred. We overrule issue five.

Issue six contends the inherent political power of the people, the inviolate nature of the rights granted in the bill of rights of the state constitution, and the statutory grant of rulemaking authority to the Supreme Court prohibit the dismissal of Pohl's lawsuit. *See* TEX. CONST. Art. I, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."); TEX. CONST. Art. I, § 29 ("To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions,

shall be void.”); TEX. GOV’T CODE ANN. § 22.004(a) (Vernon Supp. 2009) (“The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.”).

A litigant does not possess a “right” to file a frivolous lawsuit. *See Hines v. Massey*, 79 S.W.3d 269, 271 (Tex. App.--Beaumont 2002, no pet.); *Thomas v. Bilby*, 40 S.W.3d 166, 170-71 (Tex. App.--Texarkana 2001, no pet.). In this case, the trial court justifiably determined the suit was frivolous because Pohl failed to state the operative facts of his prior suits. *See Hall*, 39 S.W.3d at 724. Issue six is overruled.

The trial court’s order of dismissal without prejudice is affirmed.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on February 11, 2010
Opinion Delivered February 18, 2010

Before Gaultney, Kreger, and Horton, JJ.