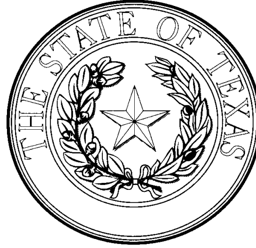
Opinion issued December 5, 2017



In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00338-CV

ARTIS CHARLES HARRELL, Appellant

V.

JEROME GODINICH JR., Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2014-63129

MEMORANDUM OPINION ON REHEARING

Appellant, Artis Charles Harrell, appearing as a pro se inmate, has filed a motion for rehearing of our October 19, 2017 opinion and judgment. We deny Harrell's motion for rehearing, withdraw our opinion and judgment of October 19, 2017, and issue the following opinion and new judgment in their stead.

Harrell challenges the trial court's judgment dismissing his suit against appellee, Jerome Godinich Jr., for breach of fiduciary duty. In two issues, Harrell contends that the trial court erred in sustaining the Harris County District Clerk's contest to his affidavit of indigence[1] and dismissing his suit with prejudice.

We modify the trial court's judgment and affirm as modified.

Background

In his amended petition, Harrell, an inmate of the Texas Department of Criminal Justice Institutional Division, alleged that Godinich, his former criminal defense attorney, breached his fiduciary duty by "refus[ing] to give Harrell" "the entire contents of his . . . client files" and "conceal[ing] exculpatory evidence from

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[1] *See* TEX. R. CIV. P. 145 (affidavit of indigency); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 14.001–.014 (Vernon 2017) (Chapter 14 governs district, county, justice of peace, or small claims court suits, other than suits brought under the Family Code, filed by inmate who claims indigence by filing affidavit or unsworn declaration of inability to pay costs). In this opinion, we will use the term "affidavit of indigence" to refer to either an affidavit or unsworn declaration of an inability to pay costs under Chapter 14. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.001(6) (defining "[u]nsworn declaration" (internal quotations omitted)), § 132.001 (Vernon Supp. 2016) (unsworn declaration may be used in lieu of affidavit); *see also* TEX. R. CIV. P. 145(a)–(b) (affidavit of indigency). Any reference to Texas Rule of Civil Procedure 145 is to the version that existed prior to September 1, 2016. *See* Supreme Court of Tex., *Final Approval of Amendments to the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure and of a Form Statement of Inability to Afford Payment of Court Costs*, Misc. Docket No. 16-9122 (August 31, 2016) (amending rule 145, effective September 1, 2016); *Leachman v. Stephens*, No. 02-13-00357-CV, 2016 WL 6648747, at *2 n.3 (Tex. App.—Fort Worth Nov. 10, 2016, pet. denied) (mem. op.) (referencing prior version of rule 145); *Allen v. City of Fort Worth*, No. 02-16-00299-CV, 2016 WL 5845931, at *1 (Tex. App.—Fort Worth Oct. 6, 2016, no pet.) (mem. op.) (amended rule 145 did not apply to case).

Harrell while [Godinich] represented [him] at [a] [p]reliminary [a]ssigned [a]ppearance and bond hearing and [two] [m]otion to [s]uppress [e]vidence hearing[s]." According to Harrell, Godinich's breach of his fiduciary duty "placed [him] at a disadvantage in other pending legal matters" and caused "severe emotional and mental distress."

Harrell attached to his original petition, filed on October 27, 2014, an application to proceed in forma pauperis/affidavit of indigence, declaring that he is unable to pay the costs and fees associated with the proceedings and is "entitled to [the] relief" sought in his petition. Harrell further stated:

> (1) I am not employed nor do I earn any income because I am an inmate of the Texas Department of Corrections; (2) I do not have a spouse; (3) I own no real or personal property; (4) I hold no cash nor any amounts on deposits; (5) I have no assests [sic]; (6) I have no dependents; (7) I have no debts; (8) I have no monthly expenses; (9) I do not have the ability to obtain a loan for court costs or fees; (10) No attorney is providing free legal services; and (11) No attorney has agreed to pay for advance court costs.

Harrell also attached to his original petition an "[a]ffidavit [r]elating [t]o [p]revious [f]ilings," stating that in January 2006, he brought suit against several defendants for

"wrongful termination of [a] lease agreement."[2] And he attached to his original petition "a current six (6) month history of [his] inmate trust account."[3]

On January 8, 2015, Harrell filed a Request for a Jury Trial and Oath of Inability to Pay Cost, asserting that he is unable to pay the fee for a jury trial. Harrell attached to his request an Application for Inability to Pay Cost for Jury Fee, declaring that he is unable to pay the costs and fees associated with the proceedings and is "entitled to [r]elief." Harrell stated that within the previous twelve months, he had not received "any money" from a "[b]usiness, profession[,] or [through] self-employment," nor had he received any money from "[r]ent payments, interests[,] or dividen[d]s," "[p]ensions, annuities[,] or life insurance," "[g]ifts or inheritances," or "[a]ny other source." He does not "own cash" or have any "money in a checking or savings account" or his "prison[] account," and he does not own "any real estate, stocks, bonds, notes, or other valuable property." He does, however, receive $30 "a month" from his mother. Harrell attached to his application, "[a] [c]urrent [s]ix (6) [m]onth [h]istory [o]f [his] [i]nmate [t]rust [a]ccount."

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[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.004; *see also Clark v. Unit*, 23 S.W.3d 420, 422 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) ("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.").

[3] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.004(c), 14.006(f).

On December 4, 2015, the Harris County District Clerk filed a contest to Harrell's affidavit of indigence, asserting that he did not comply with the pertinent requirements.[4]

On December 14, 2015, Harrell, in response to the district clerk's contest, filed a Supplemental Affidavit of Indigence, declaring that he is the plaintiff in this case, unable to pay the costs and fees associated with the proceedings, and "entitled to [the] relief" sought in his petition. He further stated:

> (1) Unrelated to the instant case, I previously filed a suit for breach of contract; (2) In the previous suit[,] . . . [t]he corporate defendants breach[ed] our contract by not giving me the required notice before terminating the lease agreement; (3) The case [was]: Conversion, Cause Number 2006-02867, District Court 189th, Artis Charles Harrell vs. Branch Brinson, et al., and the case was resolved by summary judgment[;] (4) The document that reflect[s] [my] inmate trust fund account during the six months preceeding [sic] the date upon which the instant claims w[ere] filed is on file already as to demonstrate the previous filings.

In his Supplemental Affidavit of Indigence, Harrell also "object[ed]" to the district clerk's contest to his affidavit of indigence, arguing that the trial court should not sustain the contest because he "is an inmate incarcerated in the Texas Department of Criminal Justice and does not earn any money, and his affidavit was filed in good faith." And Harrell asserted that his claims are meritorious, he is "able to maintain []his suit," and it is "probable" that he will "succeed at trial on all claims."

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4 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.004, 14.006; TEX. R. CIV. P. 145(b).

After a hearing, the trial court, on December 17, 2015, signed a Judgment and Order Sustaining Contest to Pauper's Oath. In its order, the trial court sustained the district clerk's contest to Harrell's affidavit of indigence, enjoined any further proceedings in the case until Harrell paid $355 in filing fees and other incurred costs, and ordered Harrell to pay the required fees and costs by January 4, 2016, noting that if he failed to do so, his suit would be dismissed without prejudice and a judgment would be entered against him in the amount of $355.

On April 11, 2016, the trial court signed its Final Judgment, stating that it had previously entered a Judgment and Order Sustaining Contest to Pauper's Oath in which it ordered Harrell "to pay in full all filing fees in the amount of $355[] plus any and all costs incurred in the process of th[e] case before January 4, 2016." After then finding that Harrell had "failed to comply with the [c]ourt's [previous] [o]rder," it entered "[a] [t]ake [n]othing [j]udgment" against Harrell and dismissed his suit against Godinich.

Following the trial court's Final Judgment, Harrell filed a motion for new trial, arguing that the trial court erred in sustaining the Harris County District Clerk's contest to his affidavit of indigence "because the trial court did not sign any written order extending the submission hearing date" for his application to proceed in forma pauperis/affidavit of indigence and the district clerk did not file the contest until December 4, 2015. Harrell further argued that trial court erred in entering, in its

Final Judgment, "[a] [t]ake-[n]othing [j]udgment by [d]ismissal" against him because, in doing so, it improperly entered a judgment "on the merits." (Internal quotations omitted.) No hearing was held on Harrell's motion, and it was overruled by operation of law.[5]

Standard of Review

We review the trial court's dismissal of an in forma pauperis suit under an abuse of discretion standard. *Donaldson v. Tex. Dep't of Criminal Justice-Corr. Insts. Div.*, 355 S.W.3d 722, 724 (Tex. App.—Tyler 2011, pet. denied); *Gross v. Carroll*, 339 S.W.3d 718, 723 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Clark v. Unit*, 23 S.W.3d 420, 421 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). A trial court abuses its discretion if it acts arbitrarily, capriciously, and without reference to any guiding rules or principles. *Lentworth v. Trahan*, 981 S.W.2d 720, 722 (Tex. App.—Houston [1st Dist.] 1998, no pet.). We will affirm a dismissal if it is proper under any legal theory. *Johnson v. Lynaugh*, 796 S.W.2d 705, 706–07 (Tex. 1990); *Donaldson*, 355 S.W.3d at 724.

Chapter 14 governs any district, county, justice of the peace, or small claims court suits, other than suits brought under the Family Code, filed by an inmate who claims indigence by filing an affidavit or unsworn declaration of an inability to pay

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5 *See* TEX. R. CIV. P. 329b(c).

costs.[6] TEX. CIV. PRAC. & REM. CODE ANN. § 14.002(a)–(b) (Vernon 2017); *see also id.* § 14.001(6) (Vernon 2017) (defining "[u]nsworn declaration" (internal quotations omitted)), § 132.001 (Vernon Supp. 2016) (unsworn declaration may be used in lieu of affidavit); TEX. R. CIV. P. 145(a)–(b) (affidavit of indigency). A trial court may dismiss an inmate's claim, either before or after service of process, on any number of grounds. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a) (Vernon 2017); *see also id.* §§ 14.004–.006 (Vernon 2017); *Gross*, 339 S.W.3d at 723; *Scott v. Gallagher*, 209 S.W.3d 262, 265 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("A trial court may dismiss an inmate's lawsuit for failing to comply with the procedural requirements of Chapter 14."). An appellant must attack all independent bases or grounds that fully support the complained-of ruling. *See Gross*, 339 S.W.3d at 723; *Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681–82 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see also Summers v. State Dep't of Criminal Justice*, 256 S.W.3d 752, 755 (Tex. App.—Beaumont 2008, no pet.) ("When the trial court's order dismissing an indigent inmate's claims does not state the grounds on which the trial court granted the dismissal, the inmate must show on appeal that each of the grounds alleged in the respective motion to dismiss is insufficient to support the trial court's order.").

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[6] We note that Chapter 14 also applies to appeals to an appellate court, including the supreme court and the court of criminal appeals. TEX. CIV. PRAC. & REM. CODE. ANN. § 14.002(a).

Indigency

In his second issue, Harrell argues that the trial court erred in sustaining the Harris County District Clerk's contest to his affidavit of indigence because "the trial court did not sign any written order extending the submission hearing date" for his "application to proceed in forma pauperis."[7]

Any party who is unable to afford costs associated with an original action must, in lieu of paying or giving security for such costs, file an affidavit that meets certain requirements. TEX. R. CIV. P. 145(a)–(b). An inmate who brings a suit in which he has filed an affidavit of indigence or an unsworn declaration of inability to pay costs must also comply with the procedural requirements set forth in Chapter 14. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.002(a)–(b); *Douglas v. Moffett*, 418 S.W.3d 336, 338–39 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *In re Yates*, No. 01-09-00031-CV, 2011 WL 6147768, at *1 (Tex. App.—Houston [1st Dist.] Dec. 8, 2011, no pet.) (mem. op.); *Lilly v. Northrep*, 100 S.W.3d 335, 336 (Tex. App.—San Antonio 2002, pet. denied).

This means that when an inmate litigant files an affidavit or unsworn declaration of inability to pay costs, Chapter 14 requires him to file an additional affidavit or unsworn declaration setting forth specific details on all previous actions

[7] When a trial court dismisses a plaintiff's suit, he may be able to appeal the trial court's order sustaining the contest to his affidavit of indigence. *See In re Ross*, 394 S.W.3d 262, 263 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding).

filed pro se, other than in a suit brought under the Texas Family Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.004; *Moffett*, 418 S.W.3d at 339. The inmate must also file with this affidavit or unsworn declaration of inability to pay costs a "certified copy of the [inmate's] trust account statement" that "reflect[s] the balance of the account at the time [his] claim is filed and activity in the account during the six months preceding the date on which [his] claim is filed."[8] TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.004(c), 14.006(f); *Moffett*, 418 S.W.3d at 339; *see also Jaxson v. Morgan*, No. 14-04-00785-CV, 2006 WL 914199, at *2 (Tex. App.—Houston [14th Dist.] Apr. 6, 2006, no pet.) (mem. op.).

The filings required by Chapter 14 are "an essential part of the process by which courts review inmate litigation," and failure to fulfill Chapter 14's procedural requirements[9] may result in the dismissal of the inmate's suit before or after service of process. *Moffett*, 418 S.W.3d at 339–40 (internal quotations omitted); *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.003(a), 14.004–.006; *see also In re Yates*, 2011 WL 6147768, at *2; *Scott*, 209 S.W.3d at 265 ("A trial court may dismiss an inmate's

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8 "The purpose of Chapter 14's procedural requirements . . . is to deter constant, often duplicative, inmate litigation." *Lilly v. Northrep*, 100 S.W.3d 335, 337 (Tex. App.—San Antonio 2002, pet. denied) (internal quotations omitted); *see also Lopez v. Serna*, 414 S.W.3d 890, 896 (Tex. App.—San Antonio 2013, no pet.) (primary purpose in enacting Chapter 14 "to provide trial courts with a mechanism to reduce the toll of frivolous inmate litigation on judicial and state resources"); *Clark*, 23 S.W.3d at 422.

9 *See Scott v. Gallagher*, 209 S.W.3d 262, 265 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (listing Chapter 14's procedural requirements).

lawsuit for failing to comply with the procedural requirements of Chapter 14."); *Lilly*, 100 S.W.3d at 336. A trial court may also dismiss an inmate's lawsuit if it finds that the allegation of poverty in the affidavit or unsworn declaration of inability to pay costs is false, his claim is malicious or frivolous, or the inmate filed an affidavit or unsworn declaration of inability to pay costs that he knew was false. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a); *Scott*, 209 S.W.3d at 265.

Here, Harrell argues that the "allegations [in his] affidavit [of indigence] had to be taken as true" because his "application to proceed in forma pauperis [was set] on the [trial] [c]ourt's October 19, 2015 submission docket," the district clerk had "sufficient notice of th[at] submission date," "the trial court did not sign any written order ex[t]ending th[at] submission . . . date," and the district clerk did not file the contest to his affidavit of indigence until after October 19, 2015.

On October 27, 2014, Harrell filed, attached to his original petition, an application to proceed in forma pauperis/affidavit of indigence, declaring that he is unable to pay the costs and fees associated with the proceedings and is "entitled to [the] relief" sought in his petition. He also attached to his original petition "a current six (6) month history of [his] inmate trust account."[10]

On January 8, 2015, Harrell filed a Request for a Jury Trial and Oath of Inability to Pay Cost, asserting that he is unable to pay the fee for a jury trial. Harrell

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[10] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.004(c), 14.006(f).

attached to his request an Application for Inability to Pay Cost for Jury Fee, declaring that he is unable to pay the costs and fees associated with the proceedings and is "entitled to [r]elief." Harrell attached to his application, "[a] [c]urrent [s]ix (6) [m]onth [h]istory [o]f [his] [i]nmate [t]rust [a]ccount."

The record further reflects that Harrell's application to proceed in forma pauperis/affidavit of indigence was set on the trial court's submission docket for October 19, 2015. However, the record does not indicate that Harrell's application to proceed in forma pauperis/affidavit of indigence was ever submitted that day or heard by the trial court. And the Harris County District Clerk's website shows that the submission date was "[p]assed."[11] *See Yazdchi v. JP Morgan Chase Bank, N.A.*, No. 01-17-00301-CV, 2017 WL 2255773, at *1 n.1 (Tex. App.—Houston [1st Dist.] May 23, 2017, no pet.) (mem. op.); *In re Thompson*, No. 14-14-00247-CV, 2014 WL 1482486, at *1 (Tex. App.—Houston [14th Dist.] Apr. 15, 2014, orig. proceeding) (mem. op.).

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[11] To "pass" a hearing simply means "to forego" the hearing. *Immobiliere Jeuness Estasblissement v. Amegy Bank Nat'l Ass'n*, 525 S.W.3d 875, 883 n.7 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (internal quotations omitted); *see also Pass*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "pass" as "[t]o forgo or proceed beyond"). It is commonly understood that a trial court can pass a hearing, but a party may also pass a hearing, for instance, when a conflict arises, the issue set becomes moot, or simply because the party no longer wishes to pursue the matter set. *Immobiliere Jeuness Estasblissement*, 525 S.W.3d at 883 n.7.

After the submission date for Harrell's application to proceed in forma pauperis/affidavit of indigence was passed, the Harris County District Clerk, on December 4, 2015, timely filed a contest to Harrell's affidavit of indigence, asserting that he did not comply with the pertinent requirements.[12] *See* TEX. R. APP. P. 145(d) (authorizing contest but not specifying time limit); *Leachman v. Stephens*, No. 02-13-00357-CV, 2016 WL 6648747, at *5 (Tex. App.—Fort Worth Nov. 10, 2016, pet. denied) (mem. op.). Although Harrell objected to the district clerk's contest to his affidavit of indigence, the trial court, after a hearing on December 17, 2015, signed a Judgment and Order Sustaining Contest to Pauper's Oath. In its order, the trial court sustained the district clerk's contest, enjoined any further proceedings in the case until Harrell paid $355 in filing fees and other incurred costs, and ordered Harrell to pay the required fees and costs by January 4, 2016. It noted that if he failed to do so, his suit would be dismissed without prejudice and a judgment would be entered against him in the amount of $355.

Harrell argues that the trial court erred in sustaining the Harris County District Clerk's contest to his affidavit of indigence because "the trial court did not sign any written order extending the [October 19, 2015] submission . . . date" for his "application to proceed in forma pauperis" and the district clerk did not file the contest to his affidavit of indigence until after October 19, 2015. However, the

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[12] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.004, 14.006; TEX. R. CIV. P. 145(b).

October 19, 2015 submission date for Harrell's affidavit of indigence was passed, the district clerk timely filed the contest to Harrell's affidavit of indigence, and Harrell cites no authority in his brief to support his argument that the trial court erred in sustaining the district clerk's contest.[13] *See* TEX. R. APP. P. 38.1(i) (brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities"); *Canton-Carter v. Baylor Coll. of Med.*, 271 S.W.3d 928, 931–32 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Failure to cite to appropriate legal authority or to provide substantive analysis of the legal issues presented results in waiver of a complaint on appeal. *Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 321 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) ("Issues on appeal are waived if an appellant fails to support his contentions by citations to appropriate authority." (internal quotations omitted)); *Canton-Carter*, 271 S.W.3d at 931–32 ("It is not th[e] court's duty to review the record, research the law, and then fashion a legal argument for appellant when []he has failed to do so.").

[13] We note that the limited authorities that are cited by Harrell in his brief relate to the purported standard of review, are not relevant to his argument, and do not support his argument. *See* TEX. R. APP. P. 38.1(i) (brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities"). Further, although we construe pro se pleadings and briefs liberally, a pro se litigant is still required to follow the same rules and laws as a litigant represented by a licensed attorney. *See Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978); *Cooper v. Circle Ten Council Boy Scouts of Am.*, 254 S.W.3d 689, 693 (Tex. App.—Dallas 2008, no pet.). Otherwise, a pro se litigant would have an unfair advantage over a litigant represented by a licensed attorney. *Mansfield*, 573 S.W.2d at 185; *Cooper*, 254 S.W.3d at 693.

Moreover, the Harris County District Clerk, in the contest to Harrell's affidavit of indigence, asserted that Harrell, *inter alia*, had not complied with certain procedural requirements of Chapter 14. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.004, 14.006; *see also In re Yates*, 2011 WL 6147768, at *2 (failure to fulfill Chapter 14 procedural requirements may result in dismissal of inmate's suit); *Scott*, 209 S.W.3d at 265 ("A trial court may dismiss an inmate's lawsuit for failing to comply with the procedural requirements of Chapter 14."); *Lilly*, 100 S.W.3d at 336. And Harrell has not argued on appeal that he satisfied the procedural requirements of Chapter 14. *See Gross*, 339 S.W.3d at 723; *Britton*, 95 S.W.3d at 681–82; *see also Summers*, 256 S.W.3d at 755.

Accordingly, we hold that the trial court did not err in sustaining the Harris County District Clerk's contest to Harrell's affidavit of indigence.

We overrule Harrell's second issue.

Modification of Judgment

In his first issue, Harrell argues that the trial court erred in entering, in its Final Judgment, "[a] [t]ake [n]othing [j]udgment by [d]ismissal" against him because, in doing so, it improperly entered a judgment "on the merits" and dismissed his case with prejudice.

A dismissal of a suit with prejudice constitutes an adjudication on the merits and operates as if the case has been fully tried and decided. *See Ritchey v. Vasquez*,

986 S.W.2d 611, 612 (Tex. 1999); *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991); *Garrett v. Williams*, 250 S.W.3d 154, 160 (Tex. App.—Fort Worth 2008, no pet.); *Hickman v. Adams*, 35 S.W.3d 120, 124 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Thus, an order dismissing a case with prejudice has full res judicata and collateral estoppel effect, barring subsequent relitigation of the case, causes of action, or issues between the same parties. *See Garrett*, 250 S.W.3d at 160.

However, a dismissal of a suit for failure to comply with the rules governing the filing of an in forma pauperis suit or Chapter 14[14] does not constitute a ruling on the merits, and a dismissal with prejudice under such circumstances is improper. *See Peña v. McDowell*, 201 S.W.3d 665, 665–66 (Tex. 2006); *Hickman*, 35 S.W.3d at 124–25; *Light v. Womack*, 113 S.W.3d 872, 874–75 (Tex. App.—Beaumont 2003, no pet.); *see also Williams v. Brown*, 33 S.W.3d 410, 412 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *Lentworth*, 981 S.W.2d at 722–23 (dismissal with prejudice for not complying with Chapter 14 improper); *but see Gross*, 339 S.W.3d at 723–24 (suit not timely filed pursuant to Texas Civil Practice and Remedies Code section 14.005(b) barred and may be dismissed with prejudice).

[14] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.002(a)–(b) (Chapter 14 governs district, county, justice of the peace, or small claims court suits, other than suits brought under Family Code, filed by inmate who claims indigence by filing affidavit or unsworn declaration of inability to pay costs).

Here, the trial court, in its Final Judgment, entered "[a] [t]ake [n]othing [j]udgment" against Harrell and dismissed his suit against Godinich for not paying the required filing fees and other costs. The use of the phrase "[a] [t]ake [n]othing [j]udgment" by the trial court constitutes a dismissal with prejudice on the merits of Harrell's claim for breach of fiduciary duty. *See Nguyen v. Desai*, 132 S.W.3d 115, 117–18 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding portion of trial court's judgment ordering plaintiffs take nothing constituted "a dismissal with prejudice on the merits of the [plaintiffs'] claims"); *see also Daniels v. Empty Eye, Inc.*, 368 S.W.3d 743, 754 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) ("[T]here is no difference between a dismissal with prejudice and a take-nothing judgment, and the terms frequently are used interchangeably."); *Lum v. Lacy*, 616 S.W.2d 260, 261 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) ("'[T]ake nothing' language in the judgment constitute[d] a ruling on the merits."). Such a disposition in this case is improper.

Accordingly, we modify the trial court's Final Judgment to delete the statement: "A Take Nothing Judgment by Dismissal is hereby entered against Artis Charles Harrell." Instead, we substitute the following statement: "Artis Charles Harrell's suit against Jerome Godinich Jr. is dismissed without prejudice."[15] *See*

[15] A dismissal without prejudice allows a plaintiff to file suit again on the same cause of action. *See McConnell v. Attorney Gen. of Tex.*, 878 S.W.2d 281, 283 (Tex. App.—Corpus Christi 1994, no writ).

TEX. R. APP. P. 43.2(b); *Hughes v. Massey*, 65 S.W.3d 743, 746 (Tex. App.—Beaumont 2001, no pet.) ("The proper remedy is to modify the judgment by deleting the words 'with prejudice' and by substituting the words 'without prejudice.'"); *Hickman*, 35 S.W.3d at 124–25.

We sustain Harrell's first issue.

Conclusion

We affirm the trial court's judgment as modified.

Terry Jennings
Justice

Panel consists of Justices Jennings, Bland, and Brown.