

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-10-00091-CV**

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**CEDRIC NICKERSON, Appellant**

**V.**

**TDCJ-ID, ET AL., Appellees**

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**On Appeal from the 136th District Court**  
**Jefferson County, Texas**  
**Trial Cause No. D-182,242**

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**MEMORANDUM OPINION**

Cedric Nickerson, an inmate, filed suit *in forma pauperis* against the Texas Department of Criminal Justice and fifty-two TDCJ employees. The trial court dismissed Nickerson's lawsuit as frivolous pursuant to Chapter 14 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001-.014 (West 2002). Nickerson filed this appeal. We conclude that the trial court did not abuse its discretion in dismissing Nickerson's claims. We affirm the trial court's order of dismissal.

Nickerson filed his original petition on July 3, 2008.<sup>1</sup> The Attorney General, on behalf of several of the defendants, filed a motion to dismiss that relies on the inmate litigation provisions contained in Chapter 14 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 14.003. The Attorney General alleged, among other things, that Nickerson’s claims were frivolous because they were time-barred. After the Attorney General filed the motion to dismiss, the trial court notified the parties that “[h]aving reviewed the record, it is clear that [Nickerson’s] claims are barred by the applicable statute of limitations and, accordingly, cannot proceed as a matter of law.” *See id.* § 14.003(c). The trial court then dismissed Nickerson’s action with prejudice as frivolous pursuant to Chapter 14. *See id.* § 14.003(a)(2), (b)(2). On appeal, Nickerson asserts the trial court erred in dismissing his lawsuit.

Nickerson’s petition includes an unsworn declaration that he is unable to pay costs. Chapter 14 of the Civil Practice and Remedies Code applies to lawsuits filed by an inmate in district court in which the inmate files an affidavit or unsworn declaration of inability to pay costs. *Id.* § 14.002(a). Under Chapter 14, a trial court has the authority to dismiss a lawsuit, before or after service of process, as frivolous or malicious. *Id.* § 14.003(a)(2). Among the considerations involved in determining whether a claim is

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<sup>1</sup>Nickerson signed his original petition on July 3, 2008, and it was filed with the District Clerk on August 18, 2008. For the purpose of this appeal, we assume that Nickerson gave the petition to prison officials to be mailed on July 3, 2008. *See Warner v. Glass*, 135 S.W.3d 681, 684 (Tex. 2004) (“[A] pro se inmate’s claim under [Chapter 14 of the Texas Civil Practice and Remedies Code] is deemed filed at the time the prison authorities duly receive the document to be mailed.”).

frivolous or malicious, a trial court may consider whether the chance of succeeding on the claims is slight, and whether the claims have no arguable basis in law or in fact. *Id.* § 14.003(b)(1), (2). We review a Chapter 14 dismissal under an abuse of discretion standard. *Moore v. Zeller*, 153 S.W.3d 262, 263 (Tex. App.—Beaumont 2004, pet. denied).

Nickerson filed numerous common-law tort, conversion, negligence, and constitutional claims pursuant to the Texas Constitution, 42 U.S.C.A. § 1983 (West 2003), the Texas Tort Claims Act, and the Texas Theft Liability Act. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-.109 (West 2011), §§ 134.001-.005 (West 2011). Nickerson's complaint generally alleges that his property was confiscated or stolen, that he was unfairly subjected to disciplinary procedures, that he was subjected to the excessive use of force, that he was subjected to retaliation, that he was denied access to the courts, that he was denied his right to due process, and that he was denied the right to pursue his administrative remedies.

In general, constitutional claims that arise in Texas under the Texas Constitution and the United States Constitution, including section 1983 claims, are burdened by Texas's two-year tort statute of limitations. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West Supp. 2010); *Wallace v. Kato*, 549 U.S. 384, 387-88, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007) (holding that the statute of limitations for a section 1983 claim is governed by the personal injury tort statute of limitations of the state in which the cause

of action arose); *Jackson v. Houston Indep. Sch. Dist.*, 994 S.W.2d 396, 402 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Li v. Univ. of Tex. Health Sci. Ctr. at Houston*, 984 S.W.2d 647, 651 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Common-law claims of tort, negligence, and conversion must also be brought within two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 750 (Tex. 1999) (negligence claims).

While the claims Nickerson alleges in his petition are alleged to have occurred on various dates, Nickerson's most recent claim is based on an incident that he alleges occurred in January 2006. Even with respect to his newest claim, Nickerson failed to file his petition within two years of the date he alleges that it arose. Based on the dates of the events that are alleged in Nickerson's petition, the trial court could reasonably conclude that Nickerson's claims had no chance of succeeding as Nickerson's claims appear to be barred by the two-year statute of limitations.

On appeal, Nickerson argues that his claims were previously made in another civil suit he filed in 2005, Cause No. A-174,172. Nickerson's 2005 civil case was dismissed by the trial court, with prejudice, as frivolous, and we affirmed the dismissal on appeal, but we reformed the judgment by making the dismissal without prejudice. *Nickerson v. T.D.J.C.-I.D.*, No. 09-06-197 CV, 2007 Tex. App. LEXIS 8862, at \*3, \*13 (Tex. App.—Beaumont Nov. 8, 2007, no pet.) (mem. op.). As a result, Nickerson argues that the limitation period that applies to the claims advanced in his 2008 suit should be tolled.

However, Nickerson did not make this argument when his case was before the trial court. Rule 94 of the Texas Rules of Civil Procedure requires that matters of avoidance be raised affirmatively by the pleadings or they are waived. Tex. R. Civ. P. 94; *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988). Although the “history” section of Nickerson’s original petition recites that he had originally filed Cause Number A-174,172 in “January/February 2005,” Nickerson did not suggest that his claim was not time-barred based on any equitable tolling theory, nor did he suggest that his failure to timely file should be excused based on his having filed a suit in 2005.

Nevertheless, even if we were to liberally construe Nickerson’s pleadings to raise a theory to avoid limitations based on equitable tolling, Nickerson failed to prove that the claims in his 2008 suit are the same claims that he filed in the earlier 2005 suit. A party seeking to avoid the operation of limitations bears the burden of proving that circumstances require the statute of limitations be tolled. *See Woods*, 769 S.W.2d at 518 (holding that party seeking to avoid a statute of limitations bears the burden of proving a tolling provision once the initial bar is established as a matter of law). In this case, Nickerson did not ask that the trial court take judicial notice of the claims he made in 2005, nor did he present any proof to show that the claims advanced in his 2008 suit were the same as the claims he had made in 2005. Even had Nickerson pled a theory of equitable tolling, he failed to meet his burden of proving that the doctrine of equitable tolling applied.

Based on the record before us, we conclude the trial court did not abuse its discretion by determining that Nickerson's suit had no realistic chance of success and had no arguable basis in law or in fact. *See* Tex. Civ. Prac. & Rem. Code Ann. § 14.003(b)(1), (2); *Barnes v. Polk Cnty. Sheriff Dep't.*, No. 09-10-00221-CV, 2011 Tex. App. LEXIS 1907, at \*8 (Tex. App.—Beaumont March 17, 2011, no pet.) (mem. op.). We hold that the trial court did not err by dismissing Nickerson's lawsuit as frivolous under Chapter 14. *See* Tex. Civ. Prac. & Rem. Code Ann. § 14.003(a)(2), (b)(1), (b)(2); *Moore*, 153 S.W.3d at 263. We overrule Nickerson's sole issue and affirm the trial court's dismissal order.

AFFIRMED.

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HOLLIS HORTON  
Justice

Submitted on June 17, 2011  
Opinion Delivered July 14, 2011  
Before Gaultney, Kreger, and Horton, JJ.