COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-13-00357-CV

MATTHEW JAMES LEACHMAN — APPELLANT

V.

WILLIAM STEPHENS AND KARRI L. HANSFORD — APPELLEES

FROM THE 78TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 160,142-B

MEMORANDUM OPINION[1]

Appellant Matthew James Leachman, an inmate, appeals a take-nothing summary judgment. When prison authorities prohibited Appellant from receiving some of his mail, he brought a civil suit against them on March 17, 2004. Subsequently, when the prison authorities prohibited Appellant from contacting

[1]*See* Tex. R. App. P. 47.4.

the four victims of his convictions, Appellant expanded his pleadings to attack that prohibition as well. After over a decade of litigation, the trial court signed a final judgment on August 12, 2015. Appellant brings seven points of error: (1) the trial court erred by granting summary judgment on his victim-contact issues, (2) the trial court erred by granting summary judgment on his issues attacking the procedures for appealing denied mail, (3) the trial court erred by dismissing his state-law claims against the mailroom supervisor at his prison facility, (4) the trial court erred by granting summary judgment on his improper-denial-of-mail issues, (5) the trial court erred in its discovery rulings, (6) the trial court erred in failing to resolve his objections to the summary judgment evidence, and (7) the trial court erred in assessing costs against him. We affirm the trial court's judgment.

I. BACKGROUND

A. Appellant and His Extensive Inmate Litigation History

Appellant is a pro se inmate. In 1998, he was convicted of aggravated sexual assault of a child and received a forty-year sentence. We can follow Appellant's remarkable attempts—representing himself pro se—to reverse this 1998 conviction. Appellant initially lost in the court of appeals, but he later won in the Texas Court of Criminal Appeals. *See Leachman v. State*, No. 01-98-01255-CR, 2004 WL 744820 (Tex. App.—Houston [1st Dist.] Apr. 8, 2004) (mem. op. on reh'g, not designated for publication), *vacated*, No. PD-0517-05, 2005 WL 2990698 (Tex. Crim. App. Nov. 9, 2005) (not designated for publication). On

remand to the court of appeals, Appellant lost a second time, and he contested that loss unsuccessfully all the way to the United States Supreme Court. *Leachman v. State*, No. 01-98-01255-CR, 2006 WL 2381441 (Tex. App.—Houston [1st Dist] Aug. 17, 2006, pet ref'd) (mem. op. on remand, not designated for publication), *cert. denied*, 554 U.S. 932 (2008). Seeking habeas relief in federal court, Appellant lost in the district court, won a partial victory in the Fifth Circuit Court of Appeals, and sought without success additional relief from the United States Supreme Court. *Leachman v. Stephens*, 581 Fed. Appx. 390, 405 (5th Cir. 2014) (affirming in part and vacating in part denial of habeas corpus and remanding), *cert. denied*, 135 S. Ct. 2315 (2015). On remand to the federal district court, Appellant successfully obtained a reversal of his 1998 conviction for aggravated sexual assault of a child. *Leachman v. Stephens*, No. 4:11-CV-212, 2015 WL 5730378 (S.D. Tex. Sept. 30, 2015). Ironically, his conviction was reversed because in 1998, the trial court had refused Appellant's request to represent himself pro se at trial. *Id.* at *5. Appellant is presently awaiting a new trial in Houston.

In addition to his 1998 conviction for aggravated sexual assault of a child, Appellant received three separate convictions in 1999 for indecency with a child and, for each offense, he received a twenty-year sentence. Nothing in our record suggests Appellant appealed any of his three convictions for indecency with a child.

B. Appellant Brings a Civil Suit While in Prison

On March 17, 2004, while serving the above sentences, Appellant brought this civil suit against a mailroom supervisor and the Director's Review Committee (DRC) of his penitentiary unit. The DRC has the final authority over whether inmates receive their mail. Appellant complained that some of his incoming mail was being improperly withheld from him because it purportedly contained child pornography, which Appellant denied.

Because Appellant was an inmate filing a civil suit under a claim of indigence, he had to comply with Chapter 14 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001–.014 (West 2002 & Supp. 2016). Appellant included a declaration of prior litigation as required by section 14.004 of Chapter 14. *See id.* § 14.004. Appellant provided an unsworn declaration of inability to pay costs.[2] Appellant captioned his unsworn declaration, "Plaintiff's Rule 145 Declaration," which is a reference to the Texas Rules of Civil Procedure. Tex. R. Civ. P. 145 ("Affidavit on Indigency").[3] He included a "Plaintiff's Statement on Exhaustion of Remedies," as required by section 14.005 of Chapter 14. *See* Tex. Civ. Prac. & Rem. Code

[2]An unsworn declaration of an inability to pay costs, provided it complies with Chapter 132 of the Texas Civil Practice and Remedies Code, functions as an affidavit of indigence. *See id.* §§ 14.001(6), 14.002(a), 132.001 (West Supp. 2016).

[3]All references to rule 145 are to the version that existed prior to September 1, 2016.

Ann. § 14.005. Appellant also provided a "Texas Department of Criminal Justice In-Forma-Pauperis Data" printout showing the current balance in his trust account (fifteen cents) and the activity in the account for the previous six months, and, in Appellant's case, it showed that the total amount of money deposited into his inmate trust account in the previous six months was $390. Under Chapter 14 of the Texas Civil Practice & Remedies Code, this information was required by sections 14.004(c) and 14.006(f). *Id.* §§ 14.004(c), 14.006(f).

C. Appellant Successfully Litigates His Suit Twice in the Court of Appeals

Over the years, this case has previously come before this court twice. It initially came up as an appeal. *Leachman v. Dretke*, 261 S.W.3d 297, 302 (Tex. App.—Fort Worth 2008, no pet.) (op. on reh'g). Later it came up as a mandamus proceeding. *In re Leachman*, No. 02-11-00368-CV, 2011 WL 5515498 (Tex. App.—Fort Worth Nov. 10, 2011, orig. proceeding) (mem. op.). In each instance, we sent the matter back to the trial court for further proceedings.

D. Appellant's Sixth Amended Petition

On November 13, 2012, more than eight years after Appellant first filed this suit, he filed his Sixth Amended Petition. Appellant sued (1) Rick Thaler in his official capacity as director of the Criminal Institutions Division of the Texas Department of Criminal Justice and (2) Karri L. Hansford in both her personal and official capacity as the mailroom supervisor at the Allred Unit. When referring to Hansford in her official capacity, we identify her as "the mailroom

supervisor," and when referring to her in her personal capacity, we refer to her as "Hansford." Thaler retired on May 31, 2013, and William B. Stephens replaced him as director. When referring to either Thaler or Stephens, we simply use the term "the director."

In his Sixth Amended Petition, Appellant continued to complain about incoming mail being withheld from him. Over the years, the number of items seized by the mail room expanded to twenty, which Appellant identified in an attachment, Exhibit A, to his Sixth Amended Petition. The list describes the items withheld as follows:

- Item 1: Enclosures in a letter from Peter Reed received on 12/19/03 that the mailroom staff withheld allegedly because there were three pictures containing child pornography.

- Item 2: *Tekkonkinkreet*, a graphic novel by Taiyo Matsumoto, received on 8/29/09 that was denied because pages 112, 113, 117, and 118 contained photos of a nude child and because pages 220 and 221 contained sexually explicit images.

- Item 3: Enclosures in a letter from Peter Reed received on 9/25/09 that were denied because page thirteen contained (or because there were thirteen pages containing) a graphic depiction of indecency with a child, sex with a minor, and rape.

- Item 4: A letter from A.J. Oxton received on 10/7/09 that was denied because the letter contained a graphic depiction of sex with a minor.

- Item 5: Enclosures in a letter from Peter Reed received on 2/11/10 that were denied because they contained four stories involving sadomasochism or bondage.

- Item 6: *These Were My Realities*, a memoir by J.H. received on 3/12/10 that was denied because pages thirteen and fourteen contained indecency with a child.

- Item 7: *Let the Right One In*, a novel by John Ajvide Lindquist received on 4/8/10 that was denied because pages forty-one and forty-five contained sex with a minor.

- Item 8: Enclosures in a letter from Daisuke Ogo received on 6/15/10 that were denied because four pages contained sexually explicit images of a child, sex with a minor, and indecency with a child.

- Item 9: Enclosures in a letter from Peter Reed received on 7/29/10 that were denied because they were publications from an individual that attempted to circumvent the correspondence rules.

- Item 10: Enclosures in a letter from Peter Reed received on 9/27/10 that were denied because there was one story containing bondage and incest between two brothers and other stories containing sadomasochism or bondage.

- Item 11: Enclosures in a letter from Peter Reed received on 11/9/10 that were denied because there were two stories containing sadomasochism or bondage.

- Item 12: An enclosure in a letter from Peter Reed received on 1/11/11 because it was written in German and was, therefore, incomprehensible to the screener.

- Item 13: An enclosure in a letter from Peter Reed received on 7/15/11 that was denied because it was a publication from an individual.

- Item 14: Enclosures from Casey Nall received on 8/24/11 that were denied because they contained five sexually explicit or digitally altered photographs.

- Item 15: *The White Road*, a novel by John Connolly received on 10/31/11 that was denied because pages fourteen, fifteen, twenty-one, twenty-six, twenty-seven, and twenty-nine contained racial material.

- Item 16: Enclosure from Peter Reed received on 12/8/11 that was denied because it contained one bondage story.

- Item 17: Entire letter from Sandra Sanders received on 12/8/11 that was denied because it attempted to circumvent TDCJ correspondence rules.

- Item 18: *The Puzzle*, a nonfiction/educational work by Louis Berman, received on 2/28/12 that was denied because pages sixty-three and 175 contained sexually explicit images.

- Item 19: *A Quiet Belief in Angels*, a novel by R.J. Ellory, received on 4/23/12 that was denied because pages twenty-eight and 101 contained material of a racial nature and because pages 202 and 203 contained the rape of a child.

- Item 20: *The Glister*, a novel by John Burnside, received on 4/23/12 that was denied because pages seventy-six and seventy-seven contained a graphic description of a murder and because page seventy-seven contained offensive and defensive fighting techniques.

After an in camera review, the trial court denied Appellant's request to have them produced to him during discovery. Appellant has never seen any of the items.

Additionally, beginning with his Fourth Amended Petition, filed on May 16, 2011, and continuing through his Sixth Amended Petition, Appellant attacked the prohibitions against contacting the victims of his four convictions. Accordingly, at their simplest, Appellant's complaints consisted of the withholding of his mail and of the prohibition against contacting his victims.

In his Sixth Amended Petition, Appellant articulated these complaints in seventeen separate "counts" that roughly correspond to causes of action. A single count, however, may not be limited to a single cause of action. Accordingly, for purposes of this opinion, we have retained Appellant's nomenclature. Appellant abandoned three of his counts—his sixth, sixteenth, and seventeenth. Fourteen counts in his Sixth Amended Petition remained.

E. Motions for Summary Judgment

Appellees filed a no-evidence motion for summary judgment and a traditional motion for summary judgment. Appellant filed a response and cross-motion for partial summary judgment. Appellees filed a response that, for reasons explained later in the opinion, doubled as an amended motion for summary judgment.

F. The Trial Court Signs Multiple Interlocutory "Final" Judgments

On July 11, August 20, and December 19, 2013, the trial court signed a series of interlocutory "final" judgments in which it consistently granted Appellees' motions for summary judgment, consistently awarded Appellees' attorney's fees, but consistently failed to specify the amount of Appellees' attorney's fees. Appellees had sought $240,000 in attorney's fees for the years of litigation. The trial court, however, awarded Appellees their attorney's fees prospectively only but failed to determine the amount awarded. On August 3, 2015, we abated the appeal and remanded the cause to the trial court to dispose of the attorney's fees issue. *See In re Educap, Inc.*, No. 01-12-000546-CV, 2012 WL 3224110, at *3–4 (Tex. App.—Houston [1st Dist.] Aug. 7, 2012, orig. proceeding) (mem. op.) (holding award of unspecified amount of attorney's fees rendered judgment interlocutory); *Chado v. PNL Blackacre, L.P.*, No. 05-04-00312-CV, 2005 WL 428824, at *1 (Tex. App.—Dallas Feb. 24, 2005, no. pet.) (mem. op.) (same); *Howell v. Mauzy*, 774 S.W.2d 274, 275–76 (Tex. App.—Austin 1989, writ denied) (same). On August 12, 2015, the trial court signed a final judgment in which it

removed any award of attorney's fees. Additionally, however, the trial court revoked Appellant's *in forma pauperis* status and ordered Appellant "to pay all of his costs of court incurred to date and attributable to either the trial court or appellate court."

II. INDIGENCE AND COSTS

In his seventh point, Appellant complains that the trial court erred in revoking his status as a pauper and in requiring him to pay all his court costs. Although Appellant's seventh point is his last point, we address it first. We address it first because, unlike his other points, it is the only one having a direct financial impact on Appellant. We address it first also because it shows how Chapter 14 of the Texas Civil Practice and Remedies Code functions. Finally, we address it first because if Chapter 14 had been applied to Appellant from the outset in 2004, it may have saved years of litigation or, at the very least, abbreviated the litigation considerably.

A. Appellant's Arguments

In his seventh point, Appellant complains that the trial court erred in revoking his status as a pauper. Appellant contends that once an inmate is found to be indigent, he is not thereafter required to report any changes in his financial status and, further, that there is no statute or rule allowing the trial court thereafter to review or reconsider his status as an indigent in light of later information. *But see* Tex. R. Civ. P. 145(d) (authorizing contest but not

specifying time limit); Tex. R. App. P. 20.1(m).[4] Appellant concludes that the trial court had no authority to change his status as a pauper. Appellant concedes the trial court can assess costs under section 14.006 of the Texas Civil Practice and Remedies Code but contends that nothing therein authorizes the trial court to change its indigence decision. Tex. Civ. Prac. & Rem. Code Ann. § 14.006. Appellant maintains that although Appellees filed a motion to revoke his pauper status, they later withdrew their motion but, notwithstanding the withdrawal, the trial court nevertheless proceeded to change his status. Appellant contends most of the court costs were accrued before his first appeal, and because he won his first appeal, he should instead be entitled to recover those court costs. Tex. R. Civ. P. 139, 141.

Appellant notes that Appellees requested but the trial court declined to award Appellees $240,000 in attorney's fees. He complains that the trial court nevertheless awarded Appellees their attorney's fees prospectively. As noted earlier, the trial court's failure to specify Appellees' award of attorney's fees prevented its judgments from being final, and the trial court later resolved this problem, in its last and final judgment, by deleting any award of attorney's fees in favor of Appellees. *See Educap, Inc.*, 2012 WL 3224110, at *3–4; *Chado*, 2005

[4]Rule 20.1(m) provides, "*Later Ability to Pay*. If a party who has proceeded in the appellate court without having to pay all the costs is later able to pay some or all of the costs, the appellate court may order the party to pay costs to the extent of the party's ability." *Id.* All references to rule 20.1 are to the version that existed prior to September 1, 2016.

WL 428824, at *1; *Howell*, 774 S.W.2d at 275–76. Accordingly, to the extent that Appellant continues to complain about an award of attorney's fees to Appellees, his complaint is moot.

B. Appellant's 2004 Unsworn Declaration of Inability to Pay Costs

In his 2004 unsworn declaration of his inability to pay costs, which was uncontested, Appellant disclosed that he had been incarcerated since March 13, 1996, and had "no government entitlement income, no employment income, nor any other income." Appellant stated that the only money he received was in the form of gifts from family and correspondents and that the gifts were unpredictable. He explained, "In one month, I might receive $20, $50, $100 dollars [sic]; in other months, I might receive nothing. At times, I have gone four to six months with no money deposited for me in the Inmate Trust Fund." His monthly expenses for postage, hygiene products, and sundries from the prison store were between $20 and $50. Appellant asserted he was not able to pay court costs. Appellant provided a summary of his trust account from September 1, 2003, through March 12, 2004. As of March 12, 2004, Appellant had fifteen cents in his trust account, and over the previous six months, a total of $390 had been deposited into his trust account.

C. Procedural Prelude to the Revocation of Appellant's Pauper Status

The trial court's first "Order and Final Judgment" was signed July 11, 2013. This first judgment provided, "All costs are taxed against [Appellant]. [Appellees] are awarded reasonable attorney fees to be subsequently determined."

Appellant complains that it was not until after he filed his notice of appeal that Appellees filed their motion to revoke his status as an indigent. Appellant filed his notice of appeal on October 10, 2013. Appellees filed their motion to revoke Appellant's *in forma pauperis* status on October 15, 2013. However, our review of Appellees' motion to revoke Appellant's *in forma pauperis* status suggests that it was not filed in response to Appellant's notice of appeal but was filed, instead, in response to Appellant's earlier motion for sanctions against Appellees. In any event, Appellant is correct to assert that Appellees put his status as an indigent in play.

D. Appellees' Motion to Revoke

In Appellees' motion to revoke Appellant's pauper's status, they asserted that since the inception of Appellant's case in 2004, approximately $27,036 had been deposited into his trust account. Over nine years, this worked out to approximately $3,000 per year. Appellees also provided an "Inmate Banking – Transaction History" running from January 7, 2004, through October 8, 2013.

E. Appellees Did Not Withdraw Their Motion to Revoke

Appellant asserts that Appellees withdrew their request to change his status as a pauper on December 11, 2013. We disagree. Appellees withdrew their request for costs "except for any costs that the Court may award in its discretion." Appellees added, "What the Court may determine that is outstanding and owed by [Appellant] to the Court, is a matter between the Court and [Appellant]." As we construe Appellees' document, they withdrew their request that Appellant pay their costs, subject to the trial court's discretion to do otherwise, and they left the matter of whether Appellant had to pay his own costs up to the trial court's discretion as well. Put another way, they kept Appellant's status as an indigent in play but informed the court they were not going to push the matter. Accordingly, we disagree with Appellant that Appellees withdrew their motion to revoke from the trial court's consideration. Ultimately, however, whether Appellees withdrew their motion is a moot question.

Under Chapter 14, to dismiss an inmate's suit because he is not indigent requires that the court, a party, or the clerk move for a dismissal. Tex. Civ. Prac. & Rem. Code Ann. § 14.003(c). Appellees were not seeking a dismissal; Appellees had already won on their motions for summary judgment.

Rather, Appellees wanted the issue of whether Appellant should pay for costs resolved. To implement draws on an inmate's trust account as authorized under section 14.006, there is no comparable requirement for a motion; the trial court simply orders the draws to start. *Id.* § 14.006(a). As will be shown below,

the fact that an inmate claims indigence under Chapter 14 does not shield him from paying costs; just the opposite, when an inmate claims indigence, Chapter 14 authorizes the trial court to make draws on his trust account to help pay costs to the extent of his ability and, if possible, in full.

F. The Trial Court's Judgment

The final judgment provides:

> 4. That each party shall bear their own respective costs incurred to date. The Court further finds that Plaintiff is not entitled to *in forma pauperis* status. Plaintiff is hereby ORDERED to pay all of his costs of court incurred to date and attributable to either the trial court or appellate court. The District Clerk of Wichita County, Texas, shall submit the proper orders of the Texas Department of Criminal Justice (TDCJ) as may be necessary to effectuate such payment. No other restrictions shall be placed on Plaintiff's Texas Department of Criminal Justice (TDCJ) Inmate Trust Account at the present time.
>
> 5. The Order to assess against Plaintiff (1) all costs incurred by Plaintiff prior to the date hereof; and (2) assess against Plaintiff all costs from this date forward, whether incurred by Plaintiff or Defendant, is made because (a) in over 9 years of litigation, Plaintiff has never produced any evidence in support of his claims; and (b) Defendants did not unnecessarily prolong these proceedings, did not unreasonably increase costs of these proceedings, and did not do anything that should be penalized.

The judgment does not order Appellant to pay Appellees' trial court costs; the judgment limits itself to Appellant's costs at trial. Appellant is not proceeding in

this court as indigent.[5] As for costs in this court, we will determine how to assess those.

G. Chapter 14 of the Texas Civil Practice and Remedies Code

Chapter 14 of the Texas Civil Practice and Remedies Code applies to inmate litigation in which the inmate seeks to proceed *in forma pauperis*, except for family law matters. Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001–.014; *Doyle v. Lucy*, No. 14-03-00039-CV, 2004 WL 612905, at *1 (Tex. App.—Houston [14th Dist.] Mar. 30, 2004, no pet.) (mem. op.) (citing *Hines v. Massey*, 79 S.W.3d 269, 271 (Tex. App.—Beaumont 2002, no pet.)); *Thomas v. Knight*, 52 S.W.3d 292, 294 (Tex. App.—Corpus Christi, 2001, pet. denied), *cert. denied*, 537 U.S. 890 (2002).

The legislature enacted Chapter 14 to control the flood of frivolous lawsuits being filed in Texas courts by prison inmates; these suits consumed valuable judicial resources with little offsetting benefits. *Doyle*, 2004 WL 612905, at *1 (citing *McCollum v. Mount Ararat Baptist Church, Inc.*, 980 S.W.2d 535, 537 (Tex. App.—Houston [14th Dist.] 1998, no pet.) and *Hickson v. Moya*, 926 S.W.2d 397, 399 (Tex. App.—Waco 1996, no pet.)); *Thomas*, 52 S.W.3d at

[5]When this court confronted Appellant about his failure to pay the $195 filing fee, Appellant identified Peter Reed as his agent and described Mr. Reed as eighty-one years old and hard of hearing. Appellant maintained that Mr. Reed's check for the filing fee, apparently after having been received by the court, was returned to Mr. Reed for unknown reasons and that Mr. Reed's attempts to resolve the matter over the telephone were unfruitful because of his hearing handicap, but, in any event, Appellant assured the court that Mr. Reed had re-sent the check for the filing fee. Our records show Mr. Reed paid $195 in fees.

294. The chapter is intended to deter prisoners from filing frivolous lawsuits. *Doyle*, 2004 WL 612905, at *1 (citing *Sanders v. Palunsky*, 36 S.W.3d 222, 226 (Tex. App.—Houston [14th Dist.] 2001, no pet.)). In *Hickson,* the Waco court of appeals observed: "Prisoners have everything to gain and little to lose by filing frivolous suits. It costs them almost nothing; time is of no consequence to a prisoner; threats of sanctions are virtually meaningless; and the prisoner can look forward to a day trip to the courthouse." 926 S.W.2d at 399 (quoting *Spellman v. Sweeney*, 819 S.W.2d 206, 209 (Tex. App.—Waco 1991, no writ) (internal citations omitted)).

The rules set out in Chapter 14 may not be modified or repealed by a rule adopted by the supreme court. Tex. Civ. Prac. & Rem. Code Ann. § 14.014 ("Conflict with Texas Rules of Civil Procedure"); *see Douglas v. Moffett*, 418 S.W.3d 336, 341 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (holding that rule 20.1(a)(1)–(3) of the rules of appellate procedure does not supersede Chapter 14); *Thomas*, 52 S.W.3d at 294.[6]

Under Chapter 14, an inmate who files an affidavit or unsworn declaration of inability to pay costs must also file a certified copy of his trust account statement. Tex. Civ. Prac. & Rem. Code Ann. § 14.004(a), (c). An inmate's pauper status does not, however, excuse him from paying costs, as it might in

[6]Chapter 13 of the Civil Practice and Remedies Code ("Affidavit of Inability to Pay Costs"), which applies to other civil litigation, does not apply to Chapter 14 claims. Tex. Civ. Prac. & Rem. Code Ann. § 13.004 (West 2002).

other civil or criminal proceedings. Rather, an inmate's pauper status dictates how court costs are assessed and collected. *See Robinson v. Larrew*, No. 12-03-00361-CV, 2005 WL 736839, at *2 (Tex. App.—Tyler Mar. 31, 2005, no pet.) (mem. op) (stating that a court may order an inmate who has filed a claim to pay court fees, court costs, and other costs in accordance with section 14.006); *Obadele v. Johnson*, 60 S.W.3d 345, 350–51 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (holding that an assessment of costs pursuant to section 14.006 did not deny the inmate of his indigent status); *Thomas v. Skinner*, 54 S.W.3d 845, 847 (Tex. App.—Corpus Christi 2001, pet. denied) (holding that section 14.006 authorized the trial court to assess costs against inmate and order them paid by draws on his trust account notwithstanding inmate's having filed his suit *in forma pauperis*); *Thomas*, 52 S.W.3d at 296 (overruling inmate's complaint that because he filed his suit *in forma pauperis* he was excused from paying costs and holding that a court can assess and order costs against an inmate who filed a claim under Chapter 14 pursuant to section 14.006); *see also Hughes v. Massey*, 65 S.W.3d 743, 746 (Tex. App.—Beaumont, 2001, no pet.) (overruling inmate's complaint that trial court abused its discretion by ordering him to pay costs "as if he were being sanctioned" where trial court's order complied with section 14.006(b)(1)). In other words, Chapter 14 does not anticipate giving inmates carte blanche to litigate in civil courts; rather, Chapter 14 allows trial courts to order inmates to pay for costs in full, if possible, or to the extent of their

ability. Chapter 14 anticipates inmates shouldering some of the financial burden of their litigation even when the inmate claims indigence.

Section 14.006 provides:

> (a) A court may order an inmate who has filed a claim to pay court fees, court costs, and other costs in accordance with this section and Section 14.007. The clerk of the court shall mail a copy of the court's order and a certified bill of costs to the department or jail, as appropriate.
>
> (b) On the court's order, the inmate shall pay an amount equal to the lesser of:
>
> (1) 20 percent of the preceding six months' deposits to the inmate's trust account; or
>
> (2) the total amount of court fees and costs.
>
> (c) In each month following the month in which payment is made under Subsection (b), the inmate shall pay an amount equal to the lesser of:
>
> (1) 10 percent of that month's deposits to the trust account; or
>
> (2) the total amount of court fees and costs that remain unpaid.
>
> (d) Payments under Subsection (c) shall continue until the total amount of court fees and costs are paid or until the inmate is released from confinement.
>
> (e) On receipt of a copy of an order issued under Subsection (a), the department or jail shall withdraw money from the trust account in accordance with Subsections (b), (c), and (d). The department or jail shall hold the money in a separate account and shall forward the money to the court clerk on the earlier of the following dates:
>
> (1) the date the total amount to be forwarded equals the total amount of court fees and costs that remains unpaid; or
>
> (2) the date the inmate is released.

(f) The inmate shall file a certified copy of the inmate's trust account statement with the court. The statement must reflect the balance of the account at the time the claim is filed and activity in the account during the six months preceding the date on which the claim is filed. The court may request the department or jail to furnish the information required under this subsection.

(g) An inmate may authorize payment in addition to that required by this section.

(h) The court may dismiss a claim if the inmate fails to pay fees and costs assessed under this section.

(i) An inmate may not avoid the fees and costs assessed under this section by nonsuiting a party or by voluntarily dismissing the action.

Tex. Civ. Prac. & Rem. Code Ann. § 14.006.

H. The Parties Fail to Address Appellant's Indigence under Chapter 14

In the trial court and even in this appeal, both Appellant and Appellees fail to analyze the question of Appellant's indigence in terms of Chapter 14. They rely, instead, on the Texas Rules of Civil Procedure, the Texas Rules of Appellate Procedure, and even the Texas Code of Criminal Procedure.

I. The Parties' Arguments in the Context of Chapter 14

1. To Be Indigent, Does An Inmate Need to Have No Money?

a. Appellees' Reliance on *McClain v. Terry*, and *McClain v. Terry*'s Reliance on *Allred v. Lowry*

Relying on *McClain v. Terry*, Appellees assert that only inmates with no money qualify as indigent. *See* 320 S.W.3d 394, 397 (Tex. App.—El Paso 2010, no pet.) ("A prisoner [in the] Texas Department of Criminal Justice who has no money or property is considered indigent."). For that proposition, *McClain* relied

on *Allred v. Lowry*. *Id.* (citing 597 S.W.2d 353, 355 (Tex. 1980) (orig. proceeding)).

In *Allred*, the court wrote that the inmate "had no money or property, and was incapable of working for pay." 597 S.W.2d at 355. Regarding charity, the court wrote that the inmate "was not required to show that his sister and brother-in-law were unable or unwilling to extend charity to him." *Id.* Because the trial judge had sustained a contest to the inmate's affidavit of indigence, the supreme court granted the inmate's petition for a writ of mandamus and ordered the trial judge to enter an order overruling the contest. *Id.*

It follows that a penniless inmate is indigent, but it does not follow that only penniless inmates are indigent. We do not construe *Allred* to require that before an inmate may qualify as indigent, the inmate must not have any money, and to the extent *McClain* construes *Allred* to require an inmate to be penniless to be indigent, we disagree with *McClain*. The court in *Allred* (decided before Chapter 14 was enacted in 1995[7]) stated that the "test for determining entitlement to proceed in forma pauperis is whether the record shows the appellant would be unable to pay 'if he really wanted to and made a good-faith effort to do so.'" *Id.* (quoting *Pinchback v. Hockless*, 139 Tex. 536, 539, 164 S.W.2d 19, 20 (1942)).

[7]Act of May 19, 1995, 74th Leg., R.S., ch. 378, § 2, 1995 Tex. Gen. Laws 2922–25 (codified at Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001–.014; *see In re Sims*, No. 12-15-00190-CV, 2016 WL 4379490, at *1 (Tex. App.—Tyler Aug. 17, 2016, orig. proceeding) (mem. op.) (distinguishing authority decided before the enactment of Chapter 14 in 1995).

b. *McClain v. Terry*'s Reliance on Section 14.006(b)(1)

Citing section 14.006(b)(1) of the Texas Civil Practice and Remedies Code, *McClain* also wrote, "An inmate who has funds in his trust account is not indigent." 320 S.W.3d at 397. We disagree with *McClain*'s reliance on section 14.006(b)(1) as well.

Chapter 14 applies to inmates who file an action "in which an affidavit or unsworn declaration of inability to pay costs is filed by the inmate." Tex. Civ. Prac. & Rem. Code Ann. § 14.002(a). And section 14.006(a) authorizes the trial court to order the initial trust account draw on "an inmate who has filed a claim," which, contextually, can only be an inmate who has filed a claim under Chapter 14. Tex. Civ. Prac. & Rem. Code Ann. § 14.006(a). Section 14.001(b)(1) necessarily anticipates the inmate having some money in his trust account. *See id.* § 14.006(b)(1). Nothing in section 14.006(b)(1) makes the draw contingent on the inmate's indigence status having been revoked. *Id.*

c. *McClain v. Terry* and Other Cases Similar to It

In *McClain*, the inmate disclosed that during the previous twelve months he received $2,000 from family or friends, that family and friends were his only source of income, and that he had $800 available in cash, a checking or savings account, or in a prison account. 320 S.W.3d at 396. The court in *McClain* held that because the inmate had $2,800 (assuming the $800 was in addition to the $2,000 instead of assuming $800 was what was left of the $2,000), the inmate's allegation of indigence was false, and because the allegation of indigence was

false, the trial court did not abuse its discretion by dismissing the inmate's case under section 14.003(a) of the Texas Civil Practice and Remedies Code, which authorized the dismissal of an inmate's suit if the inmate filed a false allegation of poverty. *Id.* at 398 (citing Tex. Civ. Prac. & Rem. Code Ann. § 14.003(a)).

We note that numerous other cases have followed either *McClain* or *McClain*'s reasoning and held that an inmate who had money in his trust account and who filed an affidavit or unsworn declaration of indigence had filed a false allegation of poverty, which authorized the trial court to properly dismiss the inmate's suit:

- *Mendoza v. Livingston*, No. 09-12-00594-CV, 2014 WL 670119, at *3 (Tex. App.—Beaumont Feb. 20, 2014, no pet.) (mem. op.) (holding that trial court did not abuse its discretion by dismissing the inmate's suit for filing a false allegation of poverty where the inmate had a current balance of $6.15, a six-month average balance of $32.21, and total deposits of $690.00 over six months).

- *McGoldrick v. Velasquez*, No. 13-12-00766-CV, 2013 WL 3895315, at *2 (Tex. App.—Corpus Christi July 25, 2013, no pet.) (mem. op.) (citing *McClain*, the court held that an inmate whose six-month average balance was $36.18 and who had total deposits of $453.42 over the preceding six-month period filed a false allegation of poverty and that, therefore, the trial court did not abuse its discretion by dismissing the inmate's suit).

- *Vega v. Tex. Dep't of Criminal Justice–Correctional Insts. Div.*, No. 12-10-00149-CV, 2011 WL 3273256, at *2–3 (Tex. App.—Tyler July 29, 2011, no pet.) (mem. op.) (citing *McClain*, the court held that the trial court did not abuse its discretion by dismissing the inmate's suit for filing a false allegation of poverty where $530.00 had been deposited into the inmate's account over the preceding six months and where the inmate had a balance of $118.70).

- *Foster v. Comal Cnty. Sheriff*, No. 03-08-00539-CV, 2009 WL 2476652, at *2 (Tex. App.—Austin Aug. 13, 2009, no pet.) (mem.

op.) (citing rule 145(a) for the proposition that an indigent is a person who has "no ability to pay costs," the court held that the trial court did not abuse its discretion by dismissing the inmate's suit for filing a false allegation of poverty where the inmate's current balance was $400.85 and the bill of costs was $273.00).

- *McCullough v. Dretke*, No. 02-07-00294-CV, 2008 WL 4180365, at *3 (Tex. App.—Fort Worth Sept. 11, 2008, no pet.) (mem. op.) (holding that because the trial court dismissed the inmate's claim for filing a false allegation of poverty (the inmate had a current balance of $103.92 and a six-month average balance of $184.92) and that because the inmate on appeal did not complain about the dismissal on that basis, the trial court's dismissal could be affirmed on that basis).

Implicit in those cases is that an inmate can give totally accurate information about his financial status or, more specifically, the status of his trust account, but may nevertheless be found to have given a false "allegation of poverty" if the trial court disagrees with the inmate regarding whether his financial status constitutes "indigence" for purposes of paying costs. Those inmates' suits were dismissed under section 14.003(a)(1) not because they gave the trial court false information regarding their financial status but because they incorrectly concluded their financial status qualified them as "indigent."

Moreover, those cases are distinguishable here because the trial court in Appellant's case did not dismiss his case for filing a false affidavit of poverty.[8]

[8]We will note, however, that under rule 145(d) of the rules of civil procedure, in contrast to the above cases decided under Chapter 14, in the event a contest to the claim of indigence is sustained, the consequence is "the party must pay the costs of the action" and "[e]xcept with leave of court, no further steps in the action will be taken by a party who is found able to afford costs until payment is made." Tex. R. Civ. P. 145(d). The consequence of incorrectly claiming indigence under rule 145 is not initially a dismissal but is, instead, that

And to the extent those cases hold that an inmate must have no money to qualify as an indigent, we disagree with them for the following reasons.

d. Rule 145 Does Not Define Indigence as Someone Having No Money

In contrast to the above cases, rule 145 provides, "A 'party who is unable to afford costs' is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs." Tex. R. Civ. P. 145(a).[9] Rule 145 defines indigence in terms of the ability to pay and not in terms of the absence of any money.

e. The Texas Supreme Court has not Defined Indigence as Someone Having No Money

In the context of inmate litigation, the Texas Supreme Court has stated that firmly embedded in Texas jurisprudence is that courts should be open to all, "including those who cannot afford the costs of admission." *Higgins v. Randall Cnty. Sheriff's Office*, 257 S.W.3d 684, 686 (Tex. 2008).[10] The option of filing an

---

"the party must pay the costs of the action." We also note that even under section 14.003(a) of Chapter 14, dismissal is discretionary, not mandatory. Tex. Civ. Prac. & Rem. Code Ann. § 14.003(a).

[9]The parties have not briefed and we will not address whether inmates qualify as persons "receiving a governmental entitlement based on indigency." Although inmates are involuntarily incarcerated, they are nevertheless relying on the government for their housing, food, and healthcare.

[10]Chapter 14 encompasses appeals as well as trial proceedings. Tex. Civ. Prac. & Rem. Code Ann. § 14.002(a). Despite that, although *Higgins* involved an inmate suit, neither the majority nor dissenting opinion made any reference to Chapter 14.

affidavit of indigence in lieu of a filing fee has been available for more than a century. *See id.* The supreme court wrote that throughout this time, the fundamental requirement for asserting indigence remained the same—the applicant had to declare to the court, by affidavit, an inability to pay any, or the ability to pay only some, of the costs. *See id.* Complete destitution is not a prerequisite to establishing indigence.

f. Chapter 14 does not Define "Indigence" but Anticipates Indigent Inmates Having Funds to Draw upon to Pay for or to Help Pay for Costs

Chapter 14 has a section devoted to definitions. Tex. Civ. Prac. & Rem. Code Ann. § 14.001. "Indigence," however, is not one of the terms defined. From other provisions in Chapter 14, however, we conclude that indigence does not mean penniless. Section 14.006 anticipates that an inmate will have some money in his trust account that the trial court can draw upon to pay court costs. *Id.* § 14.006(b)–(c). Section 14.006 even anticipates an inmate being able to pay court costs in full without taking the inmate out of Chapter 14. *Id.* Section 14.006 necessarily does not equate indigence with an inmate's having no money.

g. Conclusion

For all the above reasons, we reject Appellees' argument that only inmates with no money are considered indigent.

2. Chapter 14 Authorizes Draws on Inmates' Trust Accounts Who Claim to Be Indigent

Chapter 14 provides a vehicle for drawing money out of an inmate's trust account when the inmate files an unsworn declaration of inability to pay costs. *See Sims*, 2016 WL 4379490, at *1; *Hamilton v. Livingston*, No. 13-12-00707-CV, 2013 WL 4769450, at *4 (Tex. App.—Corpus Christi Sept. 5, 2013, no pet.) (mem. op.); *Hutchinson v. TDCJ-ID*, No. 10-11-00042-CV, 2011 WL 2937482, at *4 (Tex. App.—Waco July 13, 2011, no pet.) (mem. op.); *In re Hearn*, 137 S.W.3d 681, 684 (Tex. App.—San Antonio 2004, orig. proceeding); *Thomas*, 54 S.W.3d at 847. The triggering mechanism is the filing of an affidavit or an unsworn declaration, not the "finding" of any indigence or the sustaining of any contest to an affidavit (or an unsworn declaration) of indigence. *See* Tex. Civ. Prac. & Rem. Code Ann. § 14.006(a). Section 14.006 authorizes full payment of costs initially if full payment is less than 20% of the funds in the inmate's trust account. *Id.* § 14.006(b). Subsequently, section 14.006(c) authorizes full payment of the remaining balance if full payment is less than 10% of the funds in the inmate's trust account. *Id.* § 14.006(c). If the inmate cannot pay in full, the 10% draws are to "continue until the total amount of court fees and costs are paid or until the inmate is released from confinement." *Id.* § 14.006(d). In short, section 14.006 is less about the indigence of an inmate and more about how funds from his trust account will be pulled to pay for costs.

3. Chapter 14 Does Not Contemplate "Contests" to Pauper's Oaths as That Term is Used in the Rules of Civil and Appellate Procedure

Chapter 14 does not provide a mechanism for a contest to a pauper's oath as contemplated under rule 145 of the rules of civil procedure or rule 20.1 of the rules of appellate procedure. *See* Tex. R. Civ. P. 145(d); Tex. R. App. P. 20.1(e). Rather, it contemplates a hearing "held on motion of the court, a party, or the clerk of the court." Tex. Civ. Prac. & Rem. Code Ann. § 14.003(c).

4. No Time Limit for Filing a Motion Questioning an Inmate's Indigence

Chapter 14 provides no deadline for filing such a motion. By comparison, rule 145(d) of the rules of civil procedure sets no deadline for filing a contest either. Tex. R. Civ. P. 145(d). And although rule 20.1(e) of the rules of appellate procedure provides a deadline, rule 20.1(m) unequivocally anticipates revisiting the issue of indigence. Tex. R. App. P. 20.1(e), (m). We are not persuaded that Appellant's status as an indigent was irrevocably set in stone in 2004.

5. The Inmate's Trust Account

Chapter 14 requires an inmate to provide information regarding his trust account when initially filing his pauper's affidavit or unsworn declaration. Tex. Civ. Prac. & Rem. Code Ann. §§ 14.004(c), .006(f). This not only gives the trial court something other than an inmate's affidavit or unsworn declaration of inability to pay costs to go on regarding the question of indigence, but, more importantly, in the context of Chapter 14, it informs the trial court how much a 20% draw on the inmate's trust account will be. *See id.* § 14.006(b)(1). Chapter

14 does not require any follow up filings. That is, Chapter 14 does not contemplate the inmate volunteering that he lied about his status as an indigent when he filed his suit or volunteering that although he may have been indigent when he filed his suit, he is no longer indigent. This is consistent with requiring "the court, a party, or the clerk of the court" to file a motion questioning an inmate's indigence. On the other hand, for purposes of the subsequent 10% monthly draws authorized under section 14.006(c)(1), some sort of follow-up would appear to be implied. *See id*. § 14.006(c)(1). Because the trial court did not order Appellant to pay costs until the case was over, we do not have to decide precisely how the process works, and in the context of this case where no one challenged Appellant's indigence until after the case was over, we agree with Appellant that in his case he was not required to file updates regarding his status as an indigent.

6. Remedies under Chapter 14

Chapter 14 provides the court may dismiss a claim under specified circumstances. *Id.* § 14.003(a). We note three circumstances.

a. The Inmate Lies in His Affidavit

One circumstance is when "the inmate filed an affidavit or unsworn declaration required by this chapter that the inmate knew was false." *Id.* § 14.003(a)(3). This appears to cover the situation where the information in the affidavit was knowingly false when the inmate filed it. Dismissal could be seen

as a form of sanction. However, in this case, no one is disputing that Appellant had only fifteen cents in his trust account when he filed his suit in 2004.

b. The Inmate Does Not Lie But Circumstances Change

A second circumstance is when "the allegation of poverty in the affidavit or unsworn declaration is false." *Id.* § 14.003(a)(1). This appears to cover the situation where the information in the affidavit, although true when filed, subsequently becomes inaccurate. Appellees' complaints were along these lines. In Appellees' motion to revoke Appellant's pauper's status, they asserted that since the inception of Appellant's case in 2004, approximately $27,036 had been deposited into his trust account.

c. The Inmate Has Insufficient Funds in His Trust Account to Meet the Minimum Draws

The third basis for dismissal is if an inmate does not have sufficient funds in his trust account to satisfy the minimum draws; if that occurs, the trial court is authorized to dismiss the inmate's suit. *See id.* § 14.006(h). Even the indigent defendant is expected to reserve enough of his deposits to meet the minimum draws. *See id.*; *see also Hearn*, 137 S.W.3d at 684 ("In most cases, a litigant who cannot pay court-ordered costs suffers the dismissal of his suit due to lack of prosecution.").

d. Other Options

If it turns out an inmate is not indigent, the trial court "may dismiss a claim" but is not required to. *See* Tex. Civ. Prac. & Rem. Code Ann. § 14.003(a); *see*

also McLeon v. Livingston, 486 S.W.3d 561, 564 (Tex. 2016) ("[A]n inmate must be afforded the . . . opportunity to amend his appellate filings to cure Chapter 14 filing defects, prior to dismissal of the appeal."). The trial court has other options.

If the trial court has already been making draws on the inmate's trust account from the very start, any influx of money accelerates the payment of costs. As a practical matter, initiating the draws early would appear to moot the issue of indigence. However, if it later turns out that the inmate is not indigent, the trial court under Chapter 14 has the authority to continue making draws on an inmate's trust account to pay costs precisely because the inmate claimed to be indigent. *Id.* § 14.006(a). Chapter 14 authorizes the trial court to make the draws by virtue of the inmate's filing an affidavit or unsworn declaration of inability to pay costs. *Id.* The authorization is not based on the fact that the inmate is indigent; rather, the authorization is based on the fact the inmate filed a document claiming he was indigent. *Id.*

Put another way, if an inmate files a civil suit and claims indigence, the inmate will find himself under Chapter 14, and if it later turns out the inmate is not indigent, the inmate remains under Chapter 14 for purposes of addressing costs. Nothing in section 14.006 links the trial court's authorization to make draws on the inmate's trust account under section 14.006(b), (c), and (d) to the inmate's maintaining his status as indigent. *See id.* § 14.006(a)–(d). The inmate is not allowed to initiate a suit by claiming indigence under Chapter 14 and later, when

the trial court determines the inmate is not indigent, shield his trust account from costs already incurred by claiming Chapter 14 no longer applies.

If the inmate turns out not to be indigent but nevertheless manages to keep current on his court costs from sources other than his trust fund, the trial court would presumably allow the inmate to proceed like any other civil litigant. As long as costs are getting paid, the basis of any dispute is mooted.

7. Appellees' Motion to Revoke Appellant's Status as Indigent

In Appellees' motion to revoke Appellant's status as indigent, they were not seeking a dismissal under section 14.003(a). Appellees already had a judgment on the merits when they filed their motion questioning Appellant's status as indigent. Rather, Appellees wanted Appellant to have to pay for costs. Appellees looked specifically at Appellant's trust account for the proposition that Appellant was in a positon to pay for costs.

In the context of Chapter 14, what Appellees effectively were seeking was an order under section 14.006 authorizing an initial draw on Appellant's trust account as authorized under section 14.006(b) and subsequent draws on Appellant's trust account as authorized under section 14.006(c) "until the total amount of court fees and costs are paid or until the inmate is released from confinement." *Id.* § 14.006(b)–(d). In the context of Chapter 14, because the trial

court did not dismiss Appellant's suit pursuant to section 14.003, we hold that the finding that Appellant was not indigent is harmless.[11] *See id.* § 14.006(a)–(d).

8. Whether Appellant's Indigence Status is Irrevocable, and Whether Appellant is Entitled to Proceed at No Cost to Him Indefinitely?

Appellant insists that since he was "found" indigent in 2004, that his status was thereafter irrevocably fixed, that there is no procedural means to contest his status as an indigent nine years after the initial determination, and that he should be allowed to proceed at no cost, just as he had from 2004 until 2013. For the reasons discussed above, we disagree. From the moment Appellant filed his unsworn declaration of inability to pay costs in 2004, Appellant himself gave the trial court the key to his trust account and the authority to draw funds from his trust account pursuant to section 14.006(b) and (c). Tex. Civ. Prac. & Rem. Code Ann. § 14.006(b)–(c). Nothing in Chapter 14 restricts the trial court on when to start the payment process. A motion to dismiss had to originate with the court, a party, or the clerk. *Id.* § 14.003(c). There is no comparable prerequisite for draws on an inmate's trust account as authorized under section 14.006—the trial court may simply order the draws to start. *Id.* § 14.006(a).

9. The Actual Award

Appellant contends most of the court costs were accrued before his first appeal, and because he won his first appeal, he should instead be entitled to

[11]The trial court's final judgment orders Appellant's claims dismissed but does so in the context of granting Appellees' amended motion for summary judgment.

recover those court costs. Tex. R. Civ. P. 139. Appellant contends that the record does not show good cause for deviating from rule 139. Tex. R. Civ. P. 141.

Rule 131 of the rules of civil procedure, the general rule governing recovery of costs, provides that "[t]he successful party to a suit shall recover of his adversary all costs incurred therein, except when otherwise provided." Tex. R. Civ. P. 131; *see May v. Ticor Title Ins. Co.*, 422 S.W.3d 93, 102 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Rule 139 addresses the award of costs after an appeal. Tex. R. App. P. 139. Rule 141 provides, "The court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules." Tex. R. App. P. 141. Appellate courts review a trial court's allocation of costs under an abuse-of-discretion standard. *See May*, 422 S.W.3d at 102.

The trial court ordered Appellant to pay his own costs through August 12, 2015. Because Appellant ultimately lost, good cause was not required to be shown because the costs were not awarded other than as provided by law or the civil rules. We hold that the trial court did not abuse its discretion by ordering him to pay his own costs. The trial court did not order Appellant to pay Appellees' costs through August 12, 2015. Because Appellees were the successful parties, the trial court deviated from rule 131 by not ordering Appellant to pay their costs, but Appellant is not complaining of that ruling. Tex. R. Civ. P. 131.

Regarding rule 139, Appellant argues that all of his trial court costs (which he states were $1,104 without specifying how he arrived at that number) that accrued before his first appeal should be excused because he succeeded in his first appeal. Appellant's previous appeal resulted in an affirmance in part and a reversal and remand in part. *See Leachman*, 261 S.W.3d at 316. Appellant makes no attempt to show how rule 139 applies to a case in his procedural posture. Appellant bears the burden of showing reversible error. *See Daniels v. Blodgett*, No. 05-04-00626-CV, 2005 WL 1120010, at *3 (Tex. App.—Dallas May 12, 2005, no pet.) (mem. op.). Ultimately, we do not have to resolve the rule 139 analysis because we can rely on rule 141.

Rule 141 allows the trial court to deviate from the other rules regarding costs for good cause that is stated on the record. Tex. R. Civ. P. 141. Appellant cites rule 141 for the proposition rule 139 is inescapable because the record does not show good cause. We disagree. The trial court stated in its judgment that it was assessing costs as it did "because (a) in over 9 years of litigation, [Appellant] has never produced any evidence in support of his claims; and (b) [Appellees] did not unnecessarily prolong these proceedings, did not unreasonably increase the costs of these proceedings, and did not do anything that should be penalized." We hold that this language provides good cause stated on the record under rule 141. *See id.* Appellant does not address this

language in his brief.[12] Because Appellant has not challenged this basis for upholding the trial court's allocation of costs, we cannot conclude that the trial court abused its discretion. *See Daniels*, 2005 WL 1120010, at *3.

10. Conclusion

Even if the trial court ordered Appellant to pay his costs for the wrong reason, a proper basis exists; accordingly, we will not overturn the trial court's decision to assess costs against Appellant. *See Slicker v. Slicker*, 464 S.W.3d 850, 857 (Tex. App.—Dallas 2015, no pet.).

We overrule Appellant's seventh point.

III. THE SUMMARY JUDGMENT

Appellant's first through fourth issues address Appellees' traditional motion for summary judgment, Appellees' no-evidence motion for summary judgment, and Appellant's cross-motion for summary judgment. Accordingly, we set out the standard of review for each.

[12]The trial court's July 11, 2013 interlocutory judgment ordered all costs taxed against Appellant. The trial court's August 20, 2013 interlocutory judgment did as well. However, the trial court's December 19, 2013 interlocutory judgment ordered the parties to pay their own costs and contained this identical quoted language. Appellant filed his brief over four months later on April 25, 2014. The trial court's August 12, 2015 judgment repeated the quoted language. This is not an instance where language appeared for the first time in the judgment after Appellant filed his brief.

A. Standard of Review

1. No-Evidence Motion for Summary Judgment

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. Tex. R. Civ. P. 166a(i). The motion must specifically state the elements for which there is no evidence. *Id.*; *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(i) & cmt.; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). We review a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton*, 249 S.W.3d at 426 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). We credit evidence favorable to the nonmovant if reasonable jurors could, and we disregard evidence contrary to the nonmovant unless reasonable jurors could not. *Timpte Indus.*, 286 S.W.3d at 310 (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). If the nonmovant brings forward more than a scintilla of probative evidence that

raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003), *cert. denied*, 541 U.S. 1030 (2004).

2. Traditional Motion for Summary Judgment

In a traditional summary judgment case, the issue on appeal is whether the movant met the summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

We take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort*, 289 S.W.3d at 848. We must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented. *See Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 568 (Tex. 2006); *City of Keller*, 168 S.W.3d at 822–24. The summary judgment will be

affirmed only if the record establishes that the movant has conclusively proved all essential elements of the movant's cause of action or defense as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). If uncontroverted evidence is from an interested witness, it does nothing more than raise a fact issue unless it is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. Tex. R. Civ. P. 166a(c); *Morrison v. Christie*, 266 S.W.3d 89, 92 (Tex. App.—Fort Worth 2008, no pet.).

A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence that raises a fact issue. *Van v. Pena*, 990 S.W.2d 751, 753 (Tex. 1999).

3. Cross-Motions for Summary Judgment

When both sides move for summary judgment and the trial court grants one motion and denies the other, appellate courts should review both sides' summary judgment evidence and determine all questions presented. *Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex. 1999). The appellate court should render the judgment that the trial court should have rendered. *Id.* When the trial court's order granting summary judgment does not specify the grounds

upon which it relied, the appellate court must affirm summary judgment if any of the summary judgment grounds raised are meritorious. *Id.*

B. Prohibition Against Contacting Victims

In his first point, Appellant contends the trial court erred by granting summary judgment in favor of Appellees on the victim-contact issues. Appellant allegedly wants to contact one of his victims with the hope that this victim will provide him with information enabling him to attack one of his convictions. Appellant claims he wants to contact the other three victims to apologize and express his remorse.

Appellant's arguments under his first point cover his fourth, eleventh, and thirteenth counts in his Sixth Amended Petition. In his fourth count, he alleged that the director violated his First, Sixth, and Fourteenth Amendment rights under the United States Constitution by forbidding him from contacting his victims. In his eleventh count, he asserted that both the director and the mail room supervisor violated his rights under article I, section 29, of the Texas constitution by enforcing section 498.0042 of the Texas Government Code, which forbids inmates from contacting victims if the victims were under seventeen years of age at the time of the commission of the offense. Tex. Gov't Code Ann. § 498.0042(a)(1) (West 2012). In his thirteenth count, he sought a declaratory judgment under chapter 37 of the Texas Civil Practice and Remedies Code in conjunction with his quest to contact his victims.

1. Statutory Scheme

Section 38.111 of the penal code makes it a third degree felony for an inmate convicted of aggravated sexual assault or indecency with a child, among other offenses, to contact a victim or a member of the victim's family if the victim was younger than seventeen at the time of the commission of the offense for which the person is confined, absent consent. Tex. Penal Code Ann. § 38.111(a)(1), (d) (West 2011). Section 498.0042 of the government code requires the department to adopt policies that prohibit an inmate from contacting a victim or a member of the victim's family if the victim was younger than seventeen years of age at the time of the commission of the offense, absent consent. Tex. Gov't Code Ann. § 498.0042(a)(1). The penitentiary's internal rule regarding inmate correspondence, implemented pursuant to section 498.0042 of the government code and comporting with section 38.111 of the penal code, is found in Board Policy rule 03.91, which the parties refer to as BP-03.91.

2. Preservation of Federal Constitutional Claims

Appellant asserts Appellees failed to seek summary judgment on his United States Constitution issues in their motion for summary judgment. It is true that, in their motion, Appellees asserted they would not address the claims that Appellant raised under the United States Constitution in his Sixth Amended Petition because those issues had been disposed of by the trial court in its

August 23, 2011 order.[13] And it is also true the trial court subsequently vacated its August 23, 2011 order on November 14, 2011. Accordingly, Appellees could no longer rely on the August 23, 2011 order to dispose of Appellant's claims under the United States Constitution.

However, in Appellant's response to Appellees' motion for summary judgment, Appellant pointed out that Appellees' motion did not encompass his claims under the United States Constitution. Appellees' reply to Appellant's response, in turn, corrected their error and expressly expanded their motion to encompass Appellant's claims under the United States Constitution. Although not captioned an amended motion for summary judgment, Appellees' reply unequivocally expanded the scope of their motion to encompass Appellant's claims under the United States Constitution. Consequently, we hold that the Appellees' motion, by virtue of their reply, which was effectively an amended motion, encompassed the United States Constitutional issues. *See In re Brookshire Grocery Co.*, 250 S.W.3d 66, 77 (Tex. 2008) (orig. proceeding) ("The nature of a motion is determined by its substance, not its caption."); *see also Bradshaw v. Sikes*, No. 02-11-00169-CV, 2013 WL 978782, at *3 (Tex. App.—Fort Worth Mar. 14, 2013, pet. denied) (mem. op.).

[13]Appellees incorrectly identified the order as the trial court's August 11, 2011 order. The order in question was the subject of this court's mandamus opinion. *See Leachman*, 2011 WL 5515498, at *2.

3. The Sixth Amendment Claim

Regarding Appellant's Sixth Amendment claim, Appellant appears to be asserting that Appellees are interfering with his right to confront witnesses and his right to have compulsory process for obtaining witnesses in his favor. U.S. Const. Amend. VI. The Sixth Amendment, however, applies only to criminal prosecutions. *Id.* Because Appellant's dispute with Appellees is a civil matter, his Sixth Amendment contention has no merit. U.S. Const. Amend. VI; *see Carmell v. Director, TDCJ–CID*, No. 6:14CV104, 2015 WL 1951748, at *8 (E.D. Tex. Apr. 28, 2015) (holding that where inmate had a civil proceeding pending, not a criminal one, the Sixth Amendment did not apply to inmate's complaint that prison disciplinary rules were interfering with his right to obtain witnesses). Appellant indicates his motivation for contacting one of the victims is his hope that he will obtain information from that victim that will enable him to attack one of his convictions. To the extent Appellant relies on the Sixth Amendment because the prohibition was purportedly interfering with his federal habeas application, his federal habeas case is over. Furthermore, in the context of Appellant's federal habeas application, the federal courts were the proper ones in which to assert his Sixth Amendment rights.

4. Free Speech

Appellant argues that his rights to free speech under the United States Constitution and Texas constitution are being infringed by the statutory and prison regulatory prohibitions against contacting his victims. We disagree that

Appellant's rights to free speech are at issue. "Speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *Garcia v. State*, 212 S.W.3d 877, 887 (Tex. App.—Austin 2006, no pet.) (citing *Frieling v. State*, 67 S.W.3d 462, 473 (Tex. App.—Austin 2002, pet. ref'd)). Appellant's contacting his victims without their consent constitutes a crime. Tex. Penal Code Ann. § 38.111(a)(1), (d). The prohibition protects the victims and the victims' families from any contact with the perpetrators because any contact, regardless of the purported motivations of the perpetrator, might be perceived as threatening or harassing. "[T]hreats and harassment are not entitled to First Amendment protection." *Garcia*, 212 S.W.3d at 888.

Appellant points out that none of his victims are on his negative mail list. This proves nothing. Because they are already protected by statute, they would not need to ask to be on Appellant's negative mail list. If victims want contact with Appellant, section 38.111(a)(2) of the penal code provides the means to allow contact. Tex. Penal Code Ann. § 38.111(a)(2). Section I(B)(3) of BP-03.91 (the penitentiary's internal rule regarding inmate correspondence implemented pursuant to section 498.0042 of the government code and comporting with section 38.111 of the penal code) specifically prohibits "unauthorized contact." If the victims had consented to contact but Appellees were still blocking Appellant's attempts to communicate with them, Appellant's case would be in a different procedural posture. There is no evidence in the record that any of the victims or their families have desired or consented to contact.

Furthermore, when a party attacks the constitutionality of a statute, courts presume the statute is valid. *Garcia*, 212 S.W.3d at 887. Appellant argues that it was Appellees' burden to show the provisions are constitutional. We disagree. Appellant characterizes his attempts to contact his victims as generic outgoing mail. The United States Supreme Court has held that the strict scrutiny test applies for outgoing mail, that is, mail leaving the prison. *Procunier v. Martinez*, 416 U.S. 396, 413–14, 94 S. Ct. 1800, 1811 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413, 109 S. Ct. 1874, 1881 (1989) (limiting *Procunier* to outgoing mail); *see Thornburgh*, 490 U.S. at 413, 109 S. Ct. at 1881 (writing that the logic of the analysis in *Procunier* should be limited to regulations concerning outgoing correspondence). But we are not talking about generic outgoing mail. We are talking about speech that is the vehicle of the crime itself. *See Garcia*, 212 S.W.3d at 887. The individual who challenges the statute bears the burden of establishing its unconstitutionality. *Id.* It is an appellant's burden to show a restriction is unreasonable or arbitrary when balanced against the purposes and basis of the provisions. *See Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988) (citing *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983)); *see also Prison Legal News v. Livingston*, 683 F.3d 201, 216 (5th Cir. 2012) (citing *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 2168 (2003) ("The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it."). We uphold a statute if we can

determine a reasonable construction that renders it constitutional and carries out its intent. *Garcia*, 212 S.W.3d at 887.

The prohibitions have limited applicability. They apply only to persons convicted of certain offenses. *Id.* at 888. Regarding the prohibition's duration of time, that depends on the victim and the victim's family. Although these prohibitions apply to any manner of communication, they only prohibit communications in the context of preexisting felony convictions. *See id.* at 889. The prohibitions have a narrowly-defined scope, limited to persons whose prior actions toward the protected individual were of such a nature that the legislature felt justified in protecting any further contact between that person and the protected individual and that individual's family. *Id.*

Appellees argue these provisions preventing offenders from having unlimited contact with victims were rationally related to the legitimate interest of protecting crime victims and their families from unwanted communications and harassment by offenders. When a perpetrator selects children for his victims, these provisions allow the victims and the victims' families to decide when, if ever, any contact should occur. Precluding perpetrators from having the final say on when and whether contact should occur with their victims or their victims' families is neither irrational nor arbitrary.

We note that section 38.111 has withstood constitutional due process and equal protection challenges in *Schlittler v. State*, 476 S.W.3d 496, 498–500 (Tex. App.—Tyler 2014), *aff'd*, 488 S.W.3d 306 (Tex. Crim. App. Apr. 27, 2016). The

Tyler court of appeals wrote, "It seems indisputable that protecting children is a legitimate government interest." *Id.* at 499. The court asserted that the State had a compelling interest in protecting victims of criminal activity and their families. *Id.* The court observed, "The crimes carved out by Section 38.111 all involve physical and emotional harm of a particularly sensitive nature." *Id.* at 500.

Appellant asserts that enough time has passed that all of his child victims are now adults. The child as an adult may, nevertheless, find contact from a perpetrator emotionally traumatizing and socially destabilizing to say the least. Consequently, that this decision remains with child victims and their families even after the child victims become adults is neither unreasonable nor arbitrary. There are rational reasons why a perpetrator's desire to contact his child victims should not trump the child victims' desire to be left alone. The record is barren of any indication that this reasonable basis does not apply to Appellant. *See McGowan v. State of Maryland*, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

We overrule Appellant's first point.

C. Constitutionality of the Administrative Process When the Prison Authorities Refuse to Deliver Mail to Inmates

In his second point, Appellant contends the trial court erred by granting summary judgment for Appellees regarding the constitutionality of the

administrative process within the penitentiary for denied mail. Appellant asserts that this point encompasses his third, ninth, and tenth counts of his Sixth Amended Petition.

In his third count in his Sixth Amended Petition, Appellant alleged the director violated his due process rights under the United States Constitution and chilled access to the courts by the manner in which the administrative policy worked after mail was denied as set out in BP-03.91. Appellant complained that the policies under BP-03.91 provided no opportunity to be heard and no opportunity to review the material being denied and that, for magazine appeals, the same entities that made the initial denials were considering the appeal. Appellant complained that because the inmate could not make an informed decision whether to litigate, the inmate risked various penalties, including loss of good time, by filing a suit if it were deemed frivolous, which he argued acted to chill access to the courts.

In his ninth count in his Sixth Amended Petition, Appellant alleged both the director and the mailroom supervisor violated the due course of law provision of article I, section 19, of the Texas constitution by not providing an adequate review process when an inmate has been denied publications and correspondence. His complaints here are essentially the same as in his third count attacking BP-03.91 and the administrative process. He complains that the inmates do not have a meaningful opportunity to be heard, are required to appeal blindly (because they cannot review the denied material), and because in some

instances, the people who made the initial decision to deny are the same people who resolve the merits of the appeal.

In his tenth count in his Sixth Amended Petition, Appellant alleged both the director and the mailroom supervisor violated article I, section 29, of the Texas constitution by denying inmates the opportunity to review denied material, which he asserted chilled inmates' exercise of the right to access the courts because they cannot determine whether resorting to litigation would result in filing frivolous litigation.

In his brief, Appellant again argues that Appellees failed to present the United States Constitution issues in their motion. Appellant wants the officials reviewing mail to be identified to promote accountability.[14] He wants to be allowed to review the items being denied. He wants an opportunity to be heard and asserts writing a letter in response is insufficient. Appellant complains that the Mail System Coordinators Panel (MSCP) acts to deny magazines in the first instance and then, in its capacity as a substitute for the DRC, effectively acts as to review its own decision when an inmate contests its original ruling. He argues that the reviewing entity should not be the same entity that issued the original denial. By virtue of this lawsuit, Appellant asserts that he learned that Items 1, 5, 9, 12, and 15 were improperly denied and that Item 4 was properly denied. He

[14]This argument does not appear in Appellant's Sixth Amended Petition but does appear in his cross-motion for summary judgment. In the absence of an objection by Appellees, it was tried by consent. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494–95 (Tex. 1991).

does not, however, explain how he arrived at these conclusions. His record reference, which simply directs us to his list of denied items, provides no substantive help.

1. Preservation of Federal Constitutional Claims

Appellant relies on the same arguments he presented in his first point to support his contention that Appellees never sought summary judgment on his claims under the United States Constitution in their motions for summary judgment. We rely on our discussion in our ruling in the first point.

2. Due Process

There is no difference between the due course of law provision of the Texas constitution and the Due Process Clause of the United States Constitution. U.S. Const. amend. XIV; Tex. Const. art. 1, § 19; *Tex. Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 658 (Tex. 2004). Both contain substantive and procedural components. *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex. 1995). Procedural due process mandates that any government action depriving a person of life, liberty, or property be implemented in a fair manner. *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068 (1992). Substantive due process bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785 (1992).

In order to understand Appellant's arguments and to put them into the context of the relevant regulations, we first present a summary of BP-03.91. BP-03.91 is not a model of clarity. An appendix to this opinion provides relevant portions of it.

There are categories of correspondents. There are "Permissible Correspondents," "Restricted Correspondents," and "Publications." BP-03.91(I)(A), (B), & (D). For reference, Appellant's first point, which addressed his inability to communicate with his victims, fell within the category of "Restricted Correspondents." BP-03.91(I)(B)(3). Appellant's second point addresses restrictions on "Permissible Correspondents" and "Publications."

There are categories of correspondence. "Offender Correspondence" is subdivided into "General Correspondence," "Legal, Special and Media Correspondence," and "Publications." BP-03.91(IV)(A), (D), & (E). Appellant's second point falls within the categories of "General Correspondence" and "Publications."

Within "General Correspondence," there is a laundry list of items that the mailroom staff can reject based upon their content. BP-03.91(IV)(A)(1)–(12). "Contraband" is number (3) on this list of "General Correspondence" that mailroom staff may reject based upon content. BP-03.91(IV)(A)(3). "'Contraband,' in relation to correspondence, is any physical item that presents a threat to the safety or security of the staff, offenders, institution or public, and does not include any written material disapproved for its content." BP-03.91

(Definitions). This formal definition of "contraband" (excluding any written material based on its content) conflicts with the laundry list of items-including "contraband"-prohibited specifically based on their content.

However, under a separate provision, mailroom staff may also reject "General Correspondence" if it contains "contraband." BP-03-91(IV)(B). This prohibition anticipates excluding written material based on its content because it discusses removing the contraband from "the incoming letter or publication, if possible," but not delivering the incoming letter or publication at all if removal is not possible. *Id.* This use of "contraband" (including written material based on its content) also contradicts the formal definition of "contraband" under the "Definitions" section of BP-03.91, which excludes written material based on its content.

Publications are not treated the same way. For publications, under the heading, "Rejection Due to Content," there is only a laundry list. BP-03.91(IV)(E)(1)(a)–(f). There is no supplemental prohibition based on "contraband," that is, there is no subsection corresponding to BP-03.91(IV)(B). First on the list of prohibited content is "contraband." BP-03.91(IV)(E)(1)(a). Once again, however, the use of the word "contraband" is used to encompass written material based on its content, which repeats the inconsistency seen before with the formal definition of "contraband" that specifically excludes written material based on its content.

We will not construe a statute to create an absurd result. *Am. Home Prods. Corp. v. Adams*, 22 S.W.3d 121, 124 (Tex. App.—Fort Worth 2000, pet. dism'd by agr.). It would be absurd for a prison not to prohibit certain written material based upon its content, and it would be absurd for a prison not to prohibit nonwritten items, such as knives, coming into the prison through the mail. Construing BP-03.91 as a whole, we construe the formal definition of "contraband" found in the "Definitions" section of BP-03.91 to encompass nonwritten contraband coming into the prison via the mail, and we construe the other provisions to encompass written "contraband" coming into the prison through the mail. In that manner, both manners of contraband are covered.

Regarding the appeal process itself, BP-03.91 provides the "Uniform Offender Correspondence Rules." There are three players implementing BP-03.91. These three players are the MSCP, the DRC, and the mailroom staff. The MSCP is defined as:

> the body designated to assist in the maintenance and coordination of the Uniform Offender Mail System. The MSCP serves to bring uniformity to the decisions of the various units by providing technical assistance and rule interpretation; serves as the centralized authority for the review of publications for initial unit acceptance or denial; provides training for mailroom staff; conducts in-depth monitoring of all unit mailrooms; and submits periodic reports pertaining to the offender mail systems.

BP-03.91 (Definitions). The DRC is defined as "the body of appointed Agency administrators with the authority to hear all appeals related to rejected correspondence, publications[,] and placements on negative mailing lists." BP-

03.91 (Definitions). The mailroom staff consists of the persons actually reviewing the mail and making the initial decision whether to reject the correspondence as set out under BP-03.91.

Regarding "Contraband in General Correspondence," the rejection mechanism is expressly made the same as the rejection mechanism outlined elsewhere in the rules. BP-03.91(IV)(B). The mechanism for rejection of general correspondence based on content, that is, rejected under the laundry list provided under BP-03.91(IV)(A), states:

> The offender and the sender or addressee shall be provided a written statement of the disapproval and a statement of the reason within 72 hours of the receipt of said correspondence. This notice shall be given on Correspondence Denial Forms. The offender shall be given a sufficiently detailed description of the rejected correspondence to permit effective use of the appeal procedures. The offender, sender[,] or addressee may appeal the mailroom officer's decision through the procedures outlined in these Rules.

BP-03.91(IV)(A). The rejection mechanism for publications works the same way:

> If a publication is rejected, the offender, the editor and/or the publisher shall be provided a written notice of the disapproval and a statement of the reason within 72 hours of receipt of said publication on a Publication Denial Form. Within the same time period, the offender, the editor and/or the publisher shall be notified of the procedure for appeal. The offender shall be given a sufficiently detailed description of the rejected publication to permit effective use of the appeal procedures. The offender, the editor or the publisher may appeal the rejection of the publication through procedures provided by these Rules.

BP-03.91(IV)(E)(2).

The appellate procedure itself works as follows:

B. Correspondence Appeal Procedure

> Any offender or other correspondent, or editor or publisher of a publication may appeal the rejection of any correspondence or publication. . . .
>
> 1. How to Appeal
>
>   A written notice of appeal shall be sent to the DRC within two (2) weeks of notification of rejection. Upon receipt of notification, the correspondence or publication in question shall be sent to the DRC.
>
> 2. Final Decision
>
>   The DRC shall render its decision within two (2) weeks after receiving the appeal, and shall issue written notification of the decision to the parties involved within 48 hours.
>
> 3. Delegation
>
>   The DRC Chairman may delegate decisions regarding correspondence and publication denials to the MSCP, which will be bound to the guidelines applicable to the DRC regarding appeals.

BP-03.91(V)(B).

The United States Supreme Court has stated that a prisoner retains "those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804 (1974); *Thompson v. Patteson*, 985 F.2d 202, 206 (5th Cir. 1993). The Supreme Court more recently affirmed that courts effect the proper balance by scrutinizing regulations dealing with incoming personal correspondence and publications only under a reasonableness standard; "[s]uch regulations are 'valid if [they are] reasonably related to legitimate penological interests.'" *Thornburgh*, 490 U.S. at 413, 109

S. Ct. at 1881 (quoting *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261 (1987)); *Thompson*, 985 F.2d at 207.

In 2009 alone, the Allred Unit (in which Appellant was incarcerated before being transferred to Houston for his new trial) processed 554,980 pieces of correspondence. Of the 554,980 pieces of correspondence, 4,666 were denied (or less than one percent), and of those denied, there were 525 appeals to the DRC. A "Summary of DRC Activity," apparently for the entire prison system, shows that in the calendar year 2009, there were 20,706 appeals of which 1,454 resulted in reversals. This is a reversal rate of approximately seven percent.

In 2010, the Allred Unit processed 761,407 pieces of correspondence, of which 3,657 were denied (or less than one-half of one percent), and for which there were 343 appeals. A "Summary of DRC Activity," apparently for the entire prison system, shows that in the calendar year 2010, there were 21,694 appeals of which 3,777 resulted in reversals. This is a reversal rate of over seventeen percent.

When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89, 107 S. Ct. at 2261. Such a standard is necessary if prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations. *Id.*at 89, 107 S. Ct. at 2261. Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt

innovative solutions to the difficult problems of prison administration. *Id.* at 89, 107 S. Ct. at 2262. The strict scrutiny analysis would distort the decision-making process; for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving that particular problem. *Id.* at 89, 107 S. Ct. at 2262. Courts would inevitably become the final arbiters of what constitutes the best solution to every administrative problem and would thereby unnecessarily perpetuate the involvement of the courts in the affairs of prison administration. *Id.* at 89, 107 S. Ct. at 2262.

Several factors are relevant when determining the reasonableness of a regulation. First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest justifying it. *Id.* at 89, 107 S. Ct. at 2262. A regulation will not be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. *Id.* at 89–90, 107 S. Ct. at 2262. Furthermore, the governmental objective must be a legitimate and neutral one. *Id.* at 90, 107 S. Ct. at 2262.

A second factor when determining the reasonableness of a prison restriction is whether there are alternative means of exercising the right that remains open to prison inmates. *Id.* at 90, 107 S. Ct. at 2262. When other avenues remain available for the exercise of the asserted right, courts should be

particularly conscious of the measure of judicial deference owed to corrections officials when gauging the validity of the restriction. *Id.* at 90, 107 S. Ct. at 2262.

A third factor is the impact that accommodating the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally. *Id.* at 90, 107 S. Ct. at 2262. In the closed environment of a correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order. *Id.* at 90, 107 S. Ct. at 2262. When accommodating an asserted right will have a significant ripple effect on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials. *Id.* at 90, 107 S. Ct. at 2262.

Finally, the absence of ready alternatives shows the reasonableness of a prison regulation. *Id.* at 90, 107 S. Ct. at 2262. The existence of obvious, easy alternatives may be evidence that the regulation is not reasonable but is, instead, an exaggerated response to prison concerns or possibly a retaliation to an inmate's conduct, such as filing a suit. *See id.* at 90, 107 S. Ct. at 2262. The test is not a least-restrictive-alternative one. *Id.* at 90, 107 S. Ct. at 2262. Prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. *Id.* at 90–91, 107 S. Ct. at 2262. But if an inmate can point to an alternative that fully accommodates his rights at *de minimis* cost to valid penological interests, a court

may consider that as evidence that the regulation does not satisfy the reasonable relationship standard. *Id.* at 91, 107 S. Ct. at 2262.

Regarding Appellant's request to have the identities of the officials reviewing the mail identified to promote accountability, Appellant has managed to sue the prison system without knowing the identities of the mailroom clerk who made the initial determination to reject his mail, the DRC members, and the MSCP members. Appellant is an inmate in a prison. The need for safety is obvious. The mailroom staff, the DRC members, and the MSCP members answer to the Texas Department of Criminal Justice, not to the prison inmates, if they fail to follow proper procedures. *See* Tex. Civ. Prac. & Rem Code Ann. § 101.106(f) (West 2011); *Franka v. Velasquez*, 332 S.W.3d 367, 369–85 (Tex. 2011); *Montgomery v. Bataille*, No. 4:10-CV-73, 2012 WL 3544867, at *8–9 (E.D. Tex. July 26, 2012), magistrate report adopted, No. 4:10-CV-73, 2012 WL 3544746 (E.D. Tex. Aug. 16, 2012).

Regarding Appellant's request to review the items being denied, the prohibitions against inmates reviewing disputed mail become meaningless if he is allowed to review the contested material simply by filing an appeal. Appellant contends that writing a response without actually reviewing the disputed item is insufficient and wants to review the disputed mail to better articulate his response. Appellant wants an opportunity to be heard, that is, a hearing. Ultimately, though, we disagree with Appellant. The prison officials are in the best position to determine whether particular mail potentially undermines the

safety and efficient running of the penitentiary. The disputed mail items will speak for themselves.

Furthermore, in Appellant's case, Appellees delivered the disputed documents in question to the trial court, and the trial court reviewed the documents in camera. As noted earlier, Appellant's prison facility alone receives hundreds of thousands of pieces of mail each year, rejects thousands of pieces of mail each year, and has hundreds of appeals each year. Appellant has now litigated his disputes over his mail for over a decade in the courts. Odysseus's Odyssey took less time than that. Appellant—in one inmate's dispute with the mailroom staff at his facility—has deposed prison employees, has cost the taxpayers hundreds of thousands of dollars in attorneys' fees, and has consumed enormous amounts of time in the trial court and in this court. Appellant's case is the best evidence of why allowing protracted litigation over mail would allow prison inmates to overwhelm prison officials, the taxpayers, and the courts. Regarding hearings, the United States Supreme Court wrote,

> We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts." The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial

> weight must be given to the good-faith judgments of the individuals charged by Congress with the administrations of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.

Mathews v. Eldridge, 424 U.S. 319, 348–49, 96 S. Ct. 893, 909 (1976) (citations deleted). In *Mathews*, the Supreme Court held that an evidentiary hearing was not necessary for the termination of disability benefits. *Id.* at 349, 96 S. Ct. at 910. We decline to hold that an inmate is entitled to a hearing when prison officials reject his mail.

Regarding Appellant's argument that the MSCP effectively acts to review its own decisions regarding publications when the DRC delegates publication appeals to the MSCP, we are not persuaded that this denies Appellant a meaningful appeal. The MSCP is not reviewing its own decision to reject a publication. The MSCP reviews a mail clerk's decision to reject a publication. It is true that the mail clerks would base their decision upon a list provided by the MSCP, but the appellate process itself provides the inmate with an opportunity to persuade the MSCP to remove the publication from that list. The DRC would not have that authority. Appellant is in no different position than a litigant who requests an appellate court to reconsider an earlier decision.

We hold that there is a valid, rational connection between BP-03.91 and the legitimate governmental interest justifying it. *See Turner*, 482 U.S. at 89, 107 S. Ct. at 2262. In his brief, Appellant articulates additional procedures he would like to see implemented. Those additional procedures, however, are

designed to accommodate not only him but also the other inmates; Appellant has no basis to determine how his alternate measures would impact the prison system as a whole. Appellant's focus is on the twenty pieces of mail addressed to him. His focus is not on how to process hundreds of thousands of pieces of mail each year. Allowing a more permissive and elaborate administrative process might serve only to increase the number of appeals. According deference to the corrections officials, we hold that BP-03.91 is rationally related to the legitimate governmental interests of the safety of the prison itself and the efficient processing of hundreds of thousands of pieces of mail each year. *See id.* at 90, 107 S. Ct. at 2262. In the closed environment of a correctional institution, a more permissive attitude about what comes in could have an impact on guards and other inmates, and a more permissive approach to disputes over mail could have dire ramifications for the prison's limited resources. *See id.* at 90, 107 S. Ct. at 2262.

The Supreme Court wrote:

> [P]rison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison. Acknowledging the expertise of these officials and that the judiciary is "ill-equipped" to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.
>
> . . . .

> We deal here with incoming publications, material requested by an individual inmate but targeted to a general audience. Once in the prison, material of this kind reasonably may be expected to circulate among prisoners, with the concomitant potential for coordinated disruptive conduct. Furthermore, prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly. . . . "The problem is not . . . in the individual reading the materials in most cases. The problem is in the material getting into the prison." . . . In the volatile prison environment, it is essential that prison officials be given broad discretion to prevent such disorder.

Thornburgh, 490 U.S. at 407–08, 412–13, 109 S. Ct. at 1878–79, 1881.

The Fifth Circuit wrote:

> Access to sexually explicit materials is restricted not merely in order to promote the rehabilitation of the particular recipient from his past offenses, but to maintain order and safety in an overall environment in which sex offenses are a continuing threat. [The rule] calls only for a finding that the material would encourage deviate sexual criminal behavior; it does not require a finding that the particular recipient is likely to engage in such behavior.

Thompson, 985 F.2d at 206 n.1 (citations omitted).

BP-03.91 may not be the best drafted or the best conceived regulation, but it is not required to be the best. It is only required to be rationally related to legitimate governmental interests. BP-03.91 may not always result in a correct decision, but due process does not require perfection. The Constitution requires due process; it does not require error-free decision making. *See Carmell*, 2015 WL 1951748, at *3.

We overrule Appellant's second point.[15]

D. Denial of Appellant's State Law Claims Against Hansford

1. Appellant's Counts against Hansford Individually

In Appellant's third point, he contends the trial court erred by dismissing his state law claims against Hansford. He asserts that in his Sixth Amended Petition, he initially had four counts against Hansford, (counts fourteen through seventeen), but he abandoned counts sixteen and seventeen, which left counts fourteen and fifteen.

In count fourteen of his Sixth Amended Petition, Appellant sued Hansford for conversion for wrongfully exercising dominion over his personal property, specifically over the items (the disputed documents) listed in Exhibit A to his Sixth Amended Petition. Additionally, Appellant asserts there was other correspondence that the DRC had ordered her to return to him that she kept for over a week despite two separate demands for release of that correspondence. Appellant further alleged that Hansford acted in bad faith and with malice with the intent to harass him.

[15]The disputed mail documents are not part of our appellate record. The trial court reviewed the disputed mail documents in camera, but the documents themselves were never filed in the trial court. As we understand Appellant's arguments, he is attacking BP-03.91 and, in the process, section 38.111 of the Texas Penal Code. He has no points specifically complaining of the failure to admit any one of the disputed documents. Accordingly, we are not concerned with whether any of the twenty pieces of mail were properly rejected. Rather, we are concerned with the process by which they were rejected.

In count fifteen of his Sixth Amended Petition, Appellant sued Hansford under the Theft Liability Act. He alleged Hansford unlawfully appropriated property to which he had a possessory right without his effective consent and with the intent to deprive him of his property. Appellant asserted he had a greater right of possession than Hansford to all the property listed in Exhibit A and that his consent was rendered ineffective when Hansford violated BP-03.91 and continued to withhold his property notwithstanding the fact that he was entitled to his property under BP-03.91.

2. Analysis

Appellees sought to have all claims against Hansford in her individual capacity dismissed pursuant to section 101.106(f) of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem Code Ann. § 101.106(f); *Franka*, 332 S.W.3d at 367. Appellant argued section 101.106(f) did not apply to intentional torts. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (West 2011); *contra Montgomery*, 2012 WL 3544867, at *8–9. He asserted that whether it applied to a claim under chapter 134 of the Texas Theft Liability Act was a question for first impression. Appellant argued Hansford was not acting within the scope of her employment.

Section 101.106(f) of the Texas Tort Claims Act provides that if a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment, and if it could have been brought against the governmental unit, the suit is considered to be against the employee

in the employee's official capacity only. Tex. Civ. Prac. & Rem Code Ann. § 101.106(f); *Franka*, 332 S.W.3d at 369–85; *Montgomery*, 2012 WL 3544867, at *8–9. Upon the employee's motion, the court must dismiss the suit against the employee unless the plaintiff amends and substitutes the governmental unit in the place of the employee on or before the thirtieth day after the date the motion is filed. Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f); *Montgomery*, 2012 WL 3544867, at *8–9.

In *Franka*, the supreme court explained that section 101.106(f) of the Texas Tort Claims Act was intended to preclude suits against government employees in their individual capacities if they were acting within the scope of their employment. *Franka*, 332 S.W.3d at 381; *Montgomery*, 2012 WL 3544867, at *8; *Bordges v. City of Flower Mound, Tex.*, No. 4:11-CV-310, 2011 WL 5600339, at *5 (E.D. Tex. Oct. 14, 2011), *magistrate report adopted*, No. 4:11-CV-310, 2011 WL 5599925 (E. D. Tex. Nov. 16, 2011). The supreme court reasoned that in waiving governmental immunity for the governmental unit, "the Legislature correspondingly sought to discourage or prevent recovery against an employee." *Franka*, 332 S.W.3d at 384; *Montgomery*, 2012 WL 3544867, at *8–9; *Bordges*, 2011 WL 5600339, at *5. "Under the *Franka* rule, all tort claims, including intentional torts, 'could have been brought' against the governmental unit, regardless of whether the governmental unit's immunity from suit is expressly waived by the TTCA for those claims." *Montgomery*, 2012 WL 3544867, at *8–9 (citing *Franka*, 332 S.W.3d at 385); *Bordges*, 2011 WL

5600339, at *5. In *Montgomery*, the court held that the police officer was not off-duty during the incident in question and ordered the plaintiff's tort claims against him dismissed. *Montgomery*, 2012 WL 3544867, at *8–9. In *Bordges*, the plaintiff argued the police officers' motives took their actions outside the scope of their employment. *Bordges*, 2011 WL 5600339, at *6. The court disagreed:

> Plaintiff's argument is misplaced. [The two individual defendants] were police officers for the Town, and during the incident in question, [the two individual defendants] were not off-duty. Although Plaintiff asserts that the officers' acts were illegal, Plaintiff asserts that the actions were interrogating and arresting Plaintiff, which would clearly fall within their duties as police officers for the Town. Plaintiff alleges that the officers' motives somehow take the officers' actions outside of the scope of their duties with the Town. However, as Defendants correctly point out, Plaintiff offers no authority that supports this position. The Court finds that Plaintiff failed to demonstrate that section 101.106(f) of the TTCA does not apply, and Plaintiff's tort claims against [the two individual defendants] under Texas common law should be dismissed.

Id.

The only exception the supreme court wrote that applied was if the action alleged the employee acted *ultra vires*. *Franka*, 332 S.W.3d at 382. "[P]ublic employees (like agents generally) have always been individually liable for their own torts, even when committed in the course of employment, and suit may be brought against a government employee in his individual capacity." *Id.* at 383 (footnotes omitted). "To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to

perform a purely ministerial act." *Id.* at 382 n.69 (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009)).

Appellant produced no evidence showing Hansford acted *ultra vires*. The evidence was that Appellant's mail was withheld from him as part of the mailroom screening process and, correctly or incorrectly, pursuant to prison procedures. There was no evidence Hansford appropriated Appellant's property on any other basis or for her own personal benefit.

If the denial of the correspondence was unreasonable, Hansford is still entitled to immunity despite any subjective motives, even malice. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817–18, 102 S. Ct. 2727, 2738 (1982) ("[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."); *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993) ("As the Court repeated, the qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'") (citation omitted), *cert. denied sub nom. Vanover v. Lampkin*, 511 U.S. 1019 (1994); *Valencia v. Wiggins*, 981 F.2d 1440, 1448 (5th Cir.) ("It is therefore irrelevant whether the defendants in this case acted with intent to injure as long as their conduct was objectively reasonable."), *cert. denied*, 509 U.S. 905 (1993).

Regarding Appellant's cause of action under the Texas Theft Liability Act, Appellant would have to show that Hansford unlawfully appropriated the property

listed in Exhibit A. Tex. Civ. Prac. & Rem. Code § 134.002(2) (West Supp. 2016). One court had held that sovereign immunity does not apply to claims against prison employees in their individual capacities on causes of action alleging violations of the Texas Theft Liability Act. *See Minix v. Gonzales*, 162 S.W.3d 635, 639 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Once again, however, there was no evidence that Hansford stole or otherwise appropriated any of Appellant's property for her own personal benefit. The evidence is that Appellant's mail was withheld from him as part of the mailroom screening process and, correctly or incorrectly, pursuant to prison procedures. Even if Appellant's mail was erroneously withheld, that would not amount to an unlawful appropriation.

We overrule Appellant's third point.

E. Improper Denial of Mail

In Appellant's fourth point, he maintains the trial court erred in granting summary judgment in favor of the director and Hansford on his "Improper-denial-of-mail issues," which he identifies as counts one, two, and five in his Sixth Amended Petition.

In his first count, Appellant alleged the director violated his rights under the United States Constitution by denying him access to the correspondence and publications listed in Exhibit A of his Sixth Amended Petition. Appellant relied on the First Amendment and on a violation of due process because, he asserted, he

had a protected property interest in the withheld correspondence and publications under the mandatory provisions of BP-03.91.

In his second count, Appellant alleged the director violated his rights under the United States Constitution. He alleged the failure of the prison mailrooms and the DRC to abide by the clear and proper terms of BP-03.91 created a culture of pervasive institutional disregard of the policies set out in BP-03.91. Appellant contended this constituted a violation of his due process rights and an institution-wide disregard of the First Amendment.

In his fifth count, Appellant alleged Hansford violated his rights under the United States Constitution by denying him access to the correspondence and publications listed in Exhibit A in disregard of due process and in violation of BP-03.91. Appellant alleged that Hansford acted "with the express purpose of harassment and retaliation, and to deter [him] from exercising his right to receive material protected by the First Amendment."

1. Multifarious

An issue is multifarious when it generally attacks the trial court's order with numerous arguments. *Rich v. Olah*, 274 S.W.3d 878, 885 (Tex. App.—Dallas 2008, no pet.). Courts may disregard any assignment of error that is multifarious. *Id.* Alternatively, courts may consider a multifarious issue if it can determine, with reasonable certainty, the error about which the appellant wants to complain. *Id.* Appellant brings a multifarious point. *See id.* This point addresses three separate counts, and Appellant's arguments are numerous. *See id.* We hold

that Appellant's first point is multifarious. *See id.* Courts may disregard any assignment of error that is multifarious. *Id.*

2. We Decline to Order Additional Briefing

Rule 38.9 of the Texas Rules of Appellate Procedure provides that substantial compliance with the rules is sufficient; however, even that rule has qualifications. Tex. R. App. P. 38.9. In the case of formal defects, if the court determines that the rules have been flagrantly violated, it may—but is not required to—instruct the party to amend, supplement, or redraft the brief. Tex. R. App. P. 38.9(a). In the case of substantive defects, the court may—but again is not required to—order additional briefing or "make any other order necessary for a satisfactory submission of the case." Tex. R. App. P. 38.9(b). For the reasons given below, we decline to order rebriefing.

Appellant devotes approximately nine pages to his arguments but supports his arguments with only three record references—all three to the same page. The unsealed clerk's record consists of five volumes and 1878 pages. The sealed clerk's record consists of another three volumes and another 359 pages. Appellant bears the burden of providing appropriate citations to the record. Tex. R. App. P. 38.1(i). Given the scope of his complaints and the size of the record, this is inadequate. *See id.* Not counting the introductory portions or the appendix, Appellant has already filed an eighty-one-page opening brief and a twenty-three-page reply brief. We decline to order additional briefing. Tex. R. App. P. 38.9.

3. Redundant

Additionally, these arguments all fall within the ambit of Appellant's first three points and are, therefore, redundant. We rely on our analysis of Appellant's first three points.

We overrule Appellant's fourth point.

IV. DISCOVERY RULINGS

In Appellant's fifth point, he maintains that the trial court erred in its discovery rulings. Once again, as will be shown below, Appellant brings a multifarious point. *See Rich*, 274 S.W.3d at 885. Additionally, although Appellant's fifth point is ten pages long, he provides but two record references. Without proper record references, we cannot tell if Appellant preserved his complaints or whether he is presenting the same argument on appeal as argued at trial, and assuming he preserved his complaints, we cannot tell whether the record supports or contradicts his assertions. Without proper record references, we are left with numerous complaints but a woefully inadequate procedural and substantive context in which to place them.

To the extent Appellant has record references, they are not particularly helpful. The first is to Appellees' "Supplemental Response to Plaintiff's First Request for Production . . . and Objection to Plaintiff's Notice of Deposition *Duces Tecum*," wherein Appellees asserted that Appellant was simply arguing with the exercise of their discretion while carrying out their duties as mail room employees. In his brief, Appellant dismisses this as "nonsensical."

The second record reference was to a document Appellees' produced. Paradoxically, however, Appellant argues this document was actually evidence of Appellees' attempts to conceal evidence. The second record reference itself is to an exhibit attached to Appellant's "Sixth Amended Petition."[16]

Appellant requested his classification file.[17] Our understanding is that Appellant thought his classification file might contain evidence of malice by the mailroom employees or the mailroom supervisor. Specifically, Appellant maintains the trial court erred in sustaining Appellees' relevance objection and threat-to-security objection, but he provides us no record references to support these propositions. Appellant has not shown his complaint was preserved. Tex. R. App. P. 33.1. Our review of the record shows that the trial court ordered thirty-two items from the classification file produced to Appellant. There is no showing that the documents ordered produced to Appellant were inadequate for his needs. There is no showing that the documents not ordered produced prejudiced Appellant where, as here, the trial court reviewed the classification file and specifically ordered portions of it produced to Appellant. Assuming, without

[16]If readers of this opinion find this confusing, we ourselves find it confusing. Try as we may, we are not always successful in following Appellant's train of thought. To the extent we can, we will nevertheless attempt to address Appellant's complaints.

[17]Appellant's classification file consists of three sealed volumes of the clerk's record. The classification file corresponds to a personnel file.

deciding, that error was preserved, Appellant has not shown harm. Tex. R. App. P. 44.1.

Appellant complains that he was not allowed to depose Jennifer Smith and that Appellees were allowed to withhold the items that he had requested be produced at the depositions. Appellant maintains he needed to "question Smith and the remaining deponents about the Items, and their individual reasoning related to the Items[.]" The documents that Appellant requested produced as part of the depositions were the "items listed in Exhibit A to [Appellant's] Sixth Amended Petition," that is, the disputed mail; the trial court denied Appellant's production request.

Once again, however, Appellant fails to assist us with record references. Our review of the record shows that the trial court ordered depositions for Hansford and four other individuals. It denied depositions for Smith, the director, and four other individuals. Regarding the trial court's refusal to allow Appellant to depose Smith, we note that the trial court's order provided the following:

> Consistent with this Order, [Appellant] is ordered to make a good faith attempt to obtain the discovery he alleges that he requires from Jennifer Smith through less intrusive methods. If [Appellant] can show to the satisfaction of the Court that less intrusive methods of discovery are unsatisfactory, insufficient or inadequate, and [Appellant] can show the Court that (1) that [sic] there is a reasonable indication that Jennifer Smith, and/or any other official has unique, or superior, personal knowledge of discoverable information, and that Jennifer Smith's, and/or any other official's oral deposition, is calculated to lead to the discovery of admissible evidence, and (2) that the information obtained from Jennifer Smith, through discovery, other than oral deposition, is insufficient, then the Court will revisit the issue.

Appellant has not shown that he has preserved error. Tex. R. App. P. 33.1. Assuming, without deciding, that error was preserved, Appellant has not shown harm. Tex. R. App. P. 44.1.

Appellant asserts he requested discovery sanctions against (1) Hansford based on her misrepresentations and perjury and (2) the mailroom supervisor based on spoliation of the evidence. Appellant complains that Item 1 was lost or destroyed. The only record reference Appellant provides is an instance where a document was produced, and that particular document had nothing to do with Item 1. Although Appellant provided us a record reference, we do not find it helpful. Appellant has not shown that he has preserved error. Tex. R. App. P. 33.1. Assuming, without deciding, that error was preserved, Appellant has not shown harm. Tex. R. App. P. 44.1.

As shown above, our review of the record suggests that the trial court allowed Appellant discovery in the areas most likely to produce the evidence that Appellant believed existed but denied Appellant carte blanche to look everywhere and anywhere. Discovery may not be used as a fishing expedition or to impose unreasonable discovery expenses on the opposing party. *See In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (original proceeding); *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (orig. proceeding) ("We reject the notion that any discovery device can be used to 'fish'."). We hold that the trial court did not err.

We overrule Appellant's fifth point.

V. OBJECTIONS TO SUMMARY JUDGMENT EVIDENCE

In his sixth point, Appellant contends the trial court erred by failing to resolve his objections to Appellees' summary judgment evidence. His complaints are fourfold.

First, Appellant refers to the clerk's record to support his contention that he objected to the mailroom forms that Appellees used to explain why Appellant's mail was being denied. Appellant contends they contained inadmissible hearsay and were not originals. Tex. R. Evid. 801(a), (d), 802, 1002.

Appellant then refers to the clerk's record to support his contention that he objected to the Teresa Brewer affidavit. Appellant complains that Brewer was an interested witness, gave conclusory information, and lacked personal knowledge. Appellant also contends that her testimony regarding Hansford's character was mere "fluff" and was not susceptible to being readily controverted.

Next, Appellant refers to the clerk's record to support his contention that he objected to the joint affidavit signed by the Allred Unit mailroom employees. Appellant complains that the affidavit is conclusory and not susceptible to being readily controverted.

Finally, Appellant refers to the clerk's record to support his contention that he objected to portions of the Jennifer Smith affidavit. He contends that Smith had no personal knowledge regarding the prospective version of BP-03.91 and that she gave conclusory statements.

Appellant bears the burden of showing harm from an erroneous evidentiary ruling. *Mira Mar Dev. Corp. v. City of Coppell, Tex.*, 421 S.W.3d 74, 84 (Tex. App.—Dallas 2013, no pet.). This differs from the criminal appellate standard with which Appellant is probably more familiar. In criminal appeals, neither the State nor the defendant shoulder the burden of showing harm; rather, the appellate court has the duty to assess harm after a proper review of the record. *See Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001). Despite his sizeable brief and reply brief, Appellant never addresses harm. Assuming, without deciding, that the trial court erred, Appellant has not shown us what difference it makes. Appellant has not shown harm. *See* Tex. R. App. P. 44.1.

We overrule Appellant's sixth point.

VI. CONCLUSION

Having overruled all of Appellant's points, we affirm the trial court's judgment.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: DAUPHINOT, GARDNER, and WALKER, JJ.

DELIVERED: November 10, 2016

APPENDIX

BOARD POLICY

SUBJECT: UNIFORM OFFENDER CORRESPONDENCE RULES

AUTHORITY: . . . .

APPLICABILITY: Texas Department of Criminal Justice (TDCJ or Agency)

POLICY:

The TDCJ shall facilitate offenders keeping in touch with families and friends. All incoming and outgoing correspondence, except as otherwise provided here, is subject to delivery, inspection and rejection in accordance with the following rules.

DEFINITIONS:

"Contraband," in relation to correspondence, is any physical item that presents a threat to the safety or security of the staff, offenders, institution or public, and does not include any written material disapproved for its content.

"Director's Review Committee" (DRC) is the body of appointed Agency administrators with the authority to hear all appeals related to rejected correspondence, publications and placements on negative mailing lists.

. . . .

"Mail System Coordinators Panel" (MSCP) is the body designated to assist in the maintenance and coordination of the Uniform Offender Mail System. The MSCP serves to bring uniformity to the decisions of the various units by providing technical assistance and rule interpretation; serves as the centralized authority for the review of publications for initial unit acceptance or denial; provides training for mailroom staff; conducts in-depth monitoring of all unit mailrooms; and submits periodic reports pertaining to the offender mail systems.

. . . .

"Sexually Explicit Image" is material that shows the frontal nudity of either gender, including the exposed female breast(s) with nipple(s) or areola(s), or the genitalia or anus of either gender. The chests of infants and pre-pubescent children are not considered breasts.

. . . .

PROCEDURES:

I. General Rules and Instructions Regarding Correspondence

A. Permissible Correspondents

An offender may correspond with as many persons as the offender chooses, except as restricted by this policy (Uniform Offender Correspondence Rules).

B. Restricted Correspondents

1. Other Offenders

. . . .

2. Negative Mailing List

Offenders shall be denied permission to correspond with persons on the offender's negative mailing list. . . .

. . . .

3. Victims

Pursuant to AD-04.82, "Forfeiture of Good Conduct Time for Contacting a Victim without Authorization," Section 38.111 of the Texas Penal Code and Section 498.0042 of the Texas Government Code, the TDCJ prohibits unauthorized contact with a victim or a member of a victim's family by offenders who are confined in the TDCJ CID if the following criteria are met:

a. The offender is currently serving time for committing a crime against that victim;

b. The victim was younger than 17 years of age at the time of the offense; and

c. Written authorization for the contact was not obtained prior to the initiation of the contact.

Offenders making unauthorized contact with victims shall be charged with a major disciplinary offense and, if the charge is sustained, may forfeit all or any part of accrued good conduct time credit if the offender is not a state jail offender. A state jail offender shall be assessed a major disciplinary penalty if the charge is sustained. An offender may also be subject to criminal charges for improper contact with a victim.

C. How to Correspond

. . . .

D. Publications

An offender may receive publications in the mail only from the publisher or publication supplier, including bookstores. Offenders ordering publications shall forward payments for subscription to individual publications with the order. Offenders shall not receive publications of any kind on a trial basis with payment postponed. Persons desiring to give publications directly to individual offenders may have the publication mailed directly to the offender only from the publisher or publications supplier, including bookstores. Publications received by offenders may be in languages other than English.

II. Special and Media Correspondence

. . . .

III. Legal Correspondence

. . . .

IV. Handling Offender Correspondence

A. Content Inspection of General Correspondence

All general correspondence shall be subject to the right of inspection and rejection by unit mailroom staff. All outgoing or incoming letters to and from offenders and enclosures such as clippings, photographs or the like shall be disapproved for mailing or receipt only if the content

falls as a whole or in significant part into any of the categories listed below:

1. Contains threats of physical harm against any person or place or threats of criminal activity;

2. Threatens blackmail or extortion;

3. Concerns sending contraband in or out of the institutions;

4. Concerns plans to escape or unauthorized entry;

5. Concerns plans for activities in violation of institutional rules;

6. Concerns plans for future criminal activity;

7. Uses code and its contents are not understood by the person inspecting the correspondence;

8. Solicits gifts of goods or money under false pretenses or for payment to other offenders;

9. Contains a graphic presentation of sexual behavior that is in violation of the law;

10. Contains a sexually explicit image;

11. Contains information, which if communicated would create a clear and present danger of violence or physical harm to a human being; or

12. Contains records or documentation held by TDCJ which are not listed in the attachment to the TDCJ *Open Records Act Manual* Chapter 2.

The offender and the sender or addressee shall be provided a written statement of the disapproval and a statement of the reason within 72 hours of the receipt of said correspondence. This notice shall be given on Correspondence Denial Forms. The offender shall be given a sufficiently detailed description of the rejected correspondence to permit effective use of the appeal procedures. The offender, sender or addressee may

appeal the mailroom officer's decision through the procedures outlined in these Rules.

B. Contraband in General Correspondence

If contraband is found in an incoming letter or publication, the contraband should be removed from the letter or publication, if possible. If the contraband cannot be removed from the letter or publication, the letter or publication shall not be delivered to the offender. A rejection as contraband is subject to the appeal procedures outlined in these Rules.

C. Contraband in Legal, Media or Special Correspondence

. . . .

D. Record of Legal, Special and Media Correspondence

. . . .

E. Content Inspection of Publications

All publications are subject to inspection by the MSCP in Huntsville and by unit staff. The MSCP has the authority to accept or reject a publication for content, subject to review by the DRC. Publications shall not be rejected solely because the publication advocates the legitimate use of the Offender Grievance Procedure, urges offenders to contact public representatives about prison conditions or contains criticism of prison authorities.

1. Rejection Due to Content

A publication may be rejected if:

a. It contains contraband that cannot be removed;

b. It contains information regarding the manufacture of explosives, weapons or drugs;

c. It contains material that a reasonable person would construe as written solely for the purpose of communicating information designed to achieve the

breakdown of prisons through offender disruption such as strikes, riots or security threat group activity;

d. A specific determination has been made that the publication is detrimental to offenders' rehabilitation because it would encourage deviant criminal sexual behavior;

e. It contains material on the setting up and operation of criminal schemes or how to avoid detection of criminal schemes by lawful authorities charged with the responsibility for detecting such illegal activity; or

f. It contains sexually explicit images. Publications shall not be prohibited solely because the publication displays naked or partially covered buttocks. Subject to review by the MSCP and on a case-by-case basis, publications constituting educational, medical/scientific or artistic materials, including, but not limited to, anatomy medical reference books, general practitioner reference books and/or guides, *National Geographic* or artistic reference material depicting historical, modern and/or post modern era art, may be permitted.

2. Notice

If a publication is rejected, the offender, the editor and/or the publisher shall be provided a written notice of the disapproval and a statement of the reason within 72 hours of receipt of said publication on a Publication Denial Form. Within the same time period, the offender, the editor and/or the publisher shall be notified of the procedure for appeal. The offender shall be given a sufficiently detailed description of the rejected publication to permit effective use of the appeal procedures. The offender, the editor or the publisher may appeal the rejection of the publication through procedures provided by these Rules.

3. List of Disapproved Publications

A list of publications disapproved for receipt by offenders during the last two (2) months shall be noted

on the Law Library Holdings List on each institution. The list shall be updated every month.

F. Processing Incoming and Outgoing Offender Mail

All mail shall be processed, including delivery, pick-up or notifications, by TDCJ employees or private facility staff only and during waking hours whenever possible. No offender is to handle another offender's mail, either incoming or outgoing.

. . . .

G. Forwarding Mail

. . . .

H. Mailrooms

. . . .

I. Treatment Programs

. . . .

V. Review Procedures for Denied Items

A. Handling of Denied Items

Any incoming or outgoing correspondence or publications that are rejected shall not be destroyed, but shall remain with the mailroom officer subject to examination and review by those involved in the administration of appeal procedures outlined herein. Upon completion of the appeal procedures, if the correspondence or publication is denied, the offender may request that it continue to be held in the custody of the mailroom officer for use in any legal proceeding contemplated by the offender, or that it be disposed of in one (1) of the following manners unless security concerns mandate the offender not have a choice in the disposition:

1. Mail the publication or correspondence to any person at the offender's expense;

2. Destroy the publication or correspondence, only with the offender's written permission; or

3. Any item (i.e., free gifts) received as a result of a subscription purchase or renewal shall be disposed of in accordance with AD-03.72, "Offender Property."

B. Correspondence Appeal Procedure

Any offender or other correspondent, or editor or publisher of a publication may appeal the rejection of any correspondence or publication. An offender or a correspondent may appeal the placement of the correspondent on the offender's negative mailing list. An offender or a correspondent may apply to the DRC for reconsideration of the negative mailing list placement after the passage of six (6) months.

1. How to Appeal

A written notice of appeal shall be sent to the DRC within two (2) weeks of notification of rejection. Upon receipt of notification, the correspondence or publication in question shall be sent to the DRC.

2. Final Decision

The DRC shall render its decision within two (2) weeks after receiving the appeal, and shall issue written notification of the decision to the parties involved within 48 hours.

3. Delegation

The DRC Chairman may delegate decisions regarding correspondence and publication denials to the MSCP, which will be bound to the guidelines applicable to the DRC regarding appeals.