NUMBER 13-16-00567-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

PETER CATLAND, **Appellant,**

v.

MARTHA BLACKWELL, KENDRA LONG, ISAAC KWARTENG, WILLIE JARRETT, AND JOSE CHAPA, **Appellees.**

On appeal from the 343rd District Court of Bee County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Contreras

Appellant, Peter Catland, an inmate proceeding pro se and *in forma pauperis*, appeals from an order dismissing his lawsuit against five employees of the Texas Department of Criminal Justice, Correctional Institution Division (TDCJ), Martha

Blackwell, Kendra Long, Isaac Kwarteng, Willie Jarrett, and Jose Chapa,[1] as frivolous.[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001–.014 (West, Westlaw through Ch. 49, 2017 R.S) (Inmate Litigation statute). Appellant did not sue the TDCJ. By a single issue, appellant contends the trial court erred in dismissing his lawsuit as frivolous. We affirm.

I. BACKGROUND

Appellant filed his original petition with the district court asserting that appellees unlawfully appropriated $100 from his inmate trust fund as a medical co-payment. Appellant also asserted that appellees committed fraud by falsely representing that he was required to pay the fee because he was not a chronic care allergy patient and was therefore not entitled to the exemption applicable to chronic care allergy patients. In response, the Office of the Attorney General (OAG) filed an amicus curiae advisory, in which it argued that the trial court had not abused its discretion in dismissing appellant's claims as frivolous. The advisory urged that appellant's lawsuit should be dismissed because: (1) appellant only named Long in his Step One and Step Two grievance procedures and thus failed to exhaust his administrative remedies as to the other four

[1] Chapa is spelled variously in appellant's petition and appellate brief as "Chappa" and "Chapa." Kendra Long was the Practice Manager of the TDCJ McConnell Unit in Beeville, Texas, where appellant resided. Martha Blackwell was a nurse who was assigned to review appellant's Step One grievance procedure. The other appellees are not identified by their positions, and appellant does not identify any specific allegedly wrongful conduct attributed to them.

[2] Appellant's petition alleged that a $100 charge was unlawfully appropriated from his trust fund account in payment of an annual health care service fee for medical treatment appellant received for seasonal allergies. Appellant argued he was exempt from paying the fee as a chronic care allergy patient. Appellant's Step One and Step Two grievances were rejected because TDCJ personnel determined that he was not a chronic care patient for allergies. Appellant's petition alleged that the $100 fee was unlawfully appropriated from his account pursuant to the Texas Theft Liability Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134.001–.005 (West, Westlaw through Ch. 49, 2017 R.S.). However, because appellant filed a declaration of indigence, the requirements of chapter 14 of the Texas Civil Practice and Remedies Code govern his lawsuit. *See Lopez v. Serna*, 414 S.W.3d 890, 896 (Tex. App.—San Antonio 2013, no pet.) (applying chapter 14 to inmate proceeding asserting claims under Theft Liability Act and citing TEX. CIV. PRAC. & REM. CODE ANN. § 14.001 (West, Westlaw through Ch. 49, 2017 R.S.)). Appellant also alleged that appellees "committed fraud by false representation" by charging him $100 for the medical fee. Appellant sought actual damages of $100, statutory damages of $1,000, and unspecified exemplary damages.

appellees; (2) appellant's claims have no arguable basis in law because under section 101.106 of the civil practice and remedies code, appellant's suit could have been brought against TDCJ, and is therefore a suit against an employee in the employee's official capacity only, *see id*. § 101.106(f) (West, Westlaw through Ch. 49, 2017 R.S.); and (3) appellant's claims are claims against appellees in their official capacity, and are therefore barred by sovereign immunity. The trial court dismissed appellant's claims as frivolous pursuant to chapter 14 of the civil practice and remedies code. *See id.* §§ 14.001–.014. This appeal followed.

II. Standard of Review and Applicable Law

Chapter 14 of the Texas Civil Practice and Remedies Code governs inmate litigation in which an affidavit or unsworn declaration of inability to pay costs is filed by the inmate. *See id.* A trial court may dismiss a suit under chapter 14 if it is frivolous, considering whether: (1) the claim's realistic chance of ultimate success is slight; (2) the claim has no arguable basis in law or in fact; (3) it is clear that the party cannot prove facts in support of the claim; or (4) the claim is substantially similar to a previous claim filed by the inmate because the claim arises from the same operative facts. *Id*. § 14.003(b). The trial court has broad discretion to dismiss an inmate's claim as frivolous. *Spurlock v. Schroedter*, 88 S.W.3d 733, 736 (Tex. App.—Corpus Christi 2002, no pet.). Generally, we review a trial court's dismissal of a lawsuit under chapter 14 for an abuse of discretion. *In re Douglas*, 333 S.W.3d 273, 293 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). However, when, as here, a trial court dismisses a claim as frivolous without a hearing, the issue on appeal is limited to whether the claim had no arguable basis in

law. *Moreland v. Johnson*, 95 S.W.3d 392, 394 (Tex. App.—Houston [1st Dist.] 2002, no pet.). This is a legal issue which we review de novo. *Id.*

In reviewing the pleadings, we take the inmate's allegations as true and must determine "whether, as a matter of law, the petition stated a cause of action that would authorize relief." *Brewer v. Simental*, 268 S.W.3d 763, 770 (Tex. App.—Waco 2008, no pet.). We review pro se pleadings "by standards less stringent than those applied to formal pleadings drafted by lawyers." *Id*. A claim has no arguable basis in law only if it is based on (1) wholly incredible or irrational factual allegations, or (2) an indisputably meritless legal theory. *Nabelek v. Dist. Attorney of Harris Cnty.*, 290 S.W.3d 222, 228 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). An inmate's claim may not be dismissed merely because the court considers the allegations "unlikely." *Id.* The judgment of the trial court will be affirmed if that judgment can be upheld on any reasonable theory supported by the evidence. *Hamilton v. Pechacek*, 319 S.W.3d 801, 809 (Tex. App.—Fort Worth 2010, no pet.).

III. DISCUSSION

Appellant's claims against appellees Blackwell, Kwarteng, Jarrett, and Chapa must be dismissed because appellant failed to exhaust his administrative remedies against them. As noted, appellant exhausted his administrative remedies only against appellee Long by naming her in his Step One and Step Two grievances. Appellant named appellee Blackwell in his Step Two grievance, but failed to name her in his Step One grievance. Appellant did not name any of the other three appellees in either grievance procedure, nor did he identify in his petition any specific allegedly wrongful acts or omissions attributable to them.

Section 501.008 of the Texas Government Code establishes a statutory requirement that inmate grievance procedures be exhausted against all named parties before a subsequent suit is initiated in court. TEX. GOV'T CODE ANN. § 501.008(d) (West, Westlaw through Ch. 49, 2017 R.S.). Section 14.005 of the civil practice and remedies code allows the trial court to ensure that an inmate proceeding *in forma pauperis* has first exhausted the grievance procedure, if applicable. *See Smith v. Tex. Dep't of Crim. Justice-Inst'l Div.*, 33 S.W.3d 338, 341 (Tex. App.—Texarkana 2000, pet. denied). A trial court shall dismiss a claim if an inmate fails to exhaust the grievance procedures and fulfill all procedural requirements prior to filing a claim. TEX. CIV. PRAC. & REM. CODE ANN. § 14.005. An inmate has not exhausted the grievance procedures for individuals named in his petition who were not named in his grievance. *See Leachman v. Dretke*, 261 S.W.3d 297, 311 (Tex. App.—Fort Worth 2008, no pet.) (holding that, to satisfy the exhaustion requirement of section 14.005, an inmate must file both a Step 1 and a Step 2 grievance against each defendant); *see also Riddle v. TDCJ-ID*, No. 13-05-054-CV, 2006 WL 328127, at *2 (Tex. App.—Corpus Christi Feb. 9, 2006, pet. denied) (mem. op.). Here, appellant failed to exhaust his administrative remedies as to appellees Blackwell, Kwarteng, Jarrett, and Chapa, and the trial court did not err in dismissing appellant's claims against them as frivolous.

As to appellee Long, appellant asserted that a $100 annual health care service fee was "unlawfully appropriated" from his trust fund account. Appellant contended that he was exempt from paying the $100 fee because he was a "chronic care" allergy patient with a documented medical history of treatment for allergies. Appellant contended that Long failed to review his medical history of prior visits. In his petition, appellant

characterized his theft claim as a violation of the Theft Liability Act (TLA). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 134.001–.005 (West, Westlaw through Ch. 49, 2017 R.S.). Appellant also asserted that appellees committed fraud by falsely representing that he was not entitled to an exemption for the annual health care service fee.

A suit against an employee of a government agency that is based on acts within the general scope of the agency's employment relationship is the equivalent of a suit against the agency's employee in his official capacity regardless of whether the defendant can recover on the claim. *See Franka v. Velasquez*, 332 S.W.3d 367, 382 n.68 (Tex. 2011). In this case, the trial court apparently concluded that appellant was seeking to sue Long under the TLA for activities that allegedly occurred that fell within the scope of her employment as a TDCJ employee. However, the TLA does not include a waiver of immunity for a state agency of the agency's employees for conduct that was within the course of the employees' employment. *See Lopez*, 414 S.W.3d at 896. Because appellant cannot sue Long under the TLA for acting within the scope of her employment as a TDCJ employee, the trial court properly concluded that appellant's theft claim, as alleged, was frivolous.

Even if we construed appellant's allegations as arising under the TTCA, they would lack merit. Section 101.106(f) of the Texas Tort Claims Act (TTCA) provides:

> 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 under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f). In *Franka*, the supreme court held that under section 101.106 of the TTCA, "a suit against a government employee acting within the general scope of his employment must be dismissed if it could have been brought under [the TTCA] against the governmental unit." 332 S.W.3d at 369. The court in *Franka* clarified section 101.106(f)'s three-pronged test for determining whether a suit against a government employee is considered a suit against the employee in her official capacity only. *Id*.; *see Lopez v. Serna*, 414 S.W.3d 890, 893–94 (Tex. App.—San Antonio 2013, no pet.); *Anderson v. Bessman*, 365 S.W.3d 119, 124 (Tex. App.—Houston [1st Dist.] 2011, no pet.). The first prong is whether the defendant is an employee of a governmental unit. *Lopez*, 414 S.W.3d at 894. The second prong is whether a defendant is acting within the general scope of her employment. *Id*. And the third is whether suit could have been brought under TTCA against the agency. *Id*. The statute strongly favors dismissal of governmental employees. *Id*.

In the present case, it is undisputed that Long is a TDCJ employee. Therefore, the trial court could have properly determined that appellant's petition met *Franka's* first prong. *See id.* The trial court also could have determined that Long was acting within the general scope of her employment. The TTCA defines "scope of employment as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in and about the performance of a task lawfully assigned to an employee by a competent authority." *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(5) (West, Westlaw through Ch. 49, 2017 R.S.)). Appellant's Step Two grievance form identifies Long as the "practice manager" and asserts that she did not review his medical history of previous visits. It is therefore clear from the record that Long was acting

within the scope of her employment in reviewing appellant's medical history and past treatment for allergies. Finally, the trial court could have properly determined that appellant could have brought his claims against TDCJ. *See id.* at 894–95 (holding inmate's theft claims, arising out of property confiscation, could have been brought against TDCJ); *see also Mason v. Wood*, No. 09-12-00246-CV; 2013 WL 1088735, at *3 (Tex. App.—Beaumont Mar. 14, 2013, no pet.) (mem. op.) (same).

Appellant's fraud claim states that appellees committed fraud by falsely representing that he did not qualify for an exemption from paying the fee. Appellant's fraud claim was also subject to section 101.106(f) dismissal because the actions allegedly taken by Long—failing to review his medical records and find that he was entitled to an exemption to the $100 fee—were within the scope of her employment. *See Fink v. Anderson*, 477 S.W.3d 460, 468 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The trial court properly concluded that appellant's fraud claim was frivolous.

Accordingly, we conclude that the trial court did not err in dismissing appellant's claims as frivolous under section 14.003. We overrule appellant's sole issue.

IV. CONCLUSION

We affirm the trial court's judgment.

DORI CONTRERAS
Justice

Delivered and filed the
30th day of August, 2017.