

NO. 12-11-00174-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

*KENYON DEMAR HURD,
APPELLANT*

§

APPEAL FROM THE 87TH

V.

§

JUDICIAL DISTRICT COURT

*TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
APPELLEE*

§

ANDERSON COUNTY, TEXAS

MEMORANDUM OPINION

Kenyon Demar Hurd appeals from the trial court's dismissal of his civil suit against the Texas Department of Criminal Justice–Correctional Institutions Division (TDCJ-CID). The dismissal was rendered pursuant to Chapter Fourteen of the Texas Civil Practice and Remedies Code. Hurd raises two issues on appeal. We affirm.

BACKGROUND

Hurd, an inmate, claims that he was injured on August 7, 2009, while en route to work detail. A few days later, Hurd filed a Step 1 Offender Grievance Form with TDCJ-CID. According to Hurd's grievance, he was riding in a trailer that had low tire pressure and, along with several other trailers, was "improperly attached" to two "water wagons." Officer Downs was the supervising work detail officer. As the tractor pulling the trailers was travelling downhill, the tractor driver, an inmate, lost control, and the tractor and trailers began to slide into a ditch. Hurd attempted to jump to safety, but he was thrown from the trailer and injured. Hurd received medical attention after the incident, but he desired additional medical attention and medication. He also sought copies of accident reports from the incident and an investigation of

Officer Downs because of his poor judgment. In response to his grievance, TDCJ-CID told Hurd that he was being treated for his complaints.

Dissatisfied with the response, Hurd then filed his Step 2 Offender Grievance Form with TDCJ-CID. Hurd again claimed that he was not receiving proper medical attention to treat the injuries caused by the negligence of his work duty supervisor. TDCJ-CID responded to his Step 2 grievance, stating that he was receiving proper medical attention and that proper procedures were followed by his work duty supervisor.

Hurd then brought a pro se in forma pauperis suit as an indigent inmate alleging violations of the Texas Tort Claims Act. According to Hurd's petition, a trustee offender was driving the tractor "as directed and/or ordered by [TDCJ-CID's] officers." Hurd was riding in a trailer that was part of a chain of several trailers being pulled by the tractor. The trailers began to slide, skid, and flip, and Hurd was thrown from the trailer in which he had been riding and seriously injured. Hurd alleged that TDCJ-CID was negligent or grossly negligent in directing the trustee offender to drive the tractor while hauling so many trailers and in using outdated, unsafe trailers. Finally, he alleged that TDCJ-CID's officers were acting within the scope of their employment by their use of the tractor, which was a proximate cause of his injuries.

TDCJ-CID filed an original answer in which it generally denied Hurd's claims and raised several defenses, including that Hurd's suit is barred by TDCJ-CID's sovereign immunity. Hurd sent discovery requests to TDCJ-CID that went unanswered. Hurd then sought to compel TDCJ-CID to respond to the discovery. Before the trial court ruled on Hurd's motion to compel, TDCJ-CID filed a motion to dismiss. As part of that motion, TDCJ-CID requested a hearing by submission and sought a stay of discovery until the trial court ruled. The trial court found Hurd's claims frivolous and dismissed Hurd's lawsuit. This appeal followed.

DISMISSAL OF SUIT

In his first issue, Hurd argues that the trial court erred and abused its discretion when it dismissed his suit because his claims under Section 101.021 of the Texas Tort Claims Act have an arguable basis in law and fact.

Standard of Review

We review the trial court's dismissal of an in forma pauperis suit under an abuse of discretion standard. *Hickson v. Moya*, 926 S.W.2d 397, 398 (Tex. App.–Waco 1996, no writ). A trial court abuses its discretion if it acts arbitrarily, capriciously, and without reference to any guiding rules or principles. *Lentworth v. Trahan*, 981 S.W.2d 720, 722 (Tex. App.–Houston [1st Dist.] 1998, no pet.). We will affirm a dismissal if it was proper under any legal theory. *Johnson v. Lynaugh*, 796 S.W.2d 705, 706-07 (Tex. 1990) (per curiam); *Birido v. Ament*, 814 S.W.2d 808, 810 (Tex. App.–Waco 1991, writ denied). The trial courts are given broad discretion to determine whether a case should be dismissed because (1) prisoners have a strong incentive to litigate; (2) the government bears the cost of an in forma pauperis suit; (3) sanctions are not effective; and (4) the dismissal of unmeritorious claims accrue to the benefit of state officials, courts, and meritorious claimants. See *Montana v. Patterson*, 894 S.W.2d 812, 814-15 (Tex. App.–Tyler 1994, no writ).

Chapter 14

Chapter Fourteen of the Texas Civil Practice and Remedies Code controls suits brought by an inmate when the inmate filed an affidavit or unsworn declaration of inability to pay costs. TEX. CIV. PRAC. & REM. CODE ANN. § 14.002(a) (West 2002); *Hickson*, 926 S.W.2d at 398. A court may dismiss a suit brought pursuant to that chapter before or after process is served if the court finds that the claim is frivolous or malicious. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a) (2) (West 2002). To determine whether a claim is frivolous or malicious, among other potential factors, we consider whether the claim's realistic chance of ultimate success is slight or the claim has no arguable basis in law or in fact. *Id.* § 14.003(b). When, as here, the trial court dismisses without a fact hearing, it could not have determined the suit had no arguable basis in fact. *Harrison v. Tex. Dep't of Criminal Justice-Inst'al Div.*, 915 S.W.2d 882, 887 (Tex. App.–Houston [1st Dist.] 1995, no writ). Therefore, we must consider whether the trial court properly determined there is no arguable basis in law for the suit. *Id.* The issue as to whether there was an arguable basis in law is a legal question that we review de novo. *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994). We accept the facts as set forth in Appellant's petition as true. *Moore v. Henry*, 960 S.W.2d 82, 83 (Tex. App.–Houston [1st Dist.] 1996, no writ) (op. on reh'g).

Texas Tort Claims Act

Hurd's claims were brought under Section 101.021 of the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011). We must determine whether the trial court correctly dismissed Hurd's claims under this section as frivolous.

Pursuant to the doctrine of sovereign immunity, the State of Texas cannot be sued in her own courts without her consent and then only in the manner indicated by that consent. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003) (citing *Hosner v. De Young*, 1 Tex. 764, 769 (1847)). For the legislature to waive the State's sovereign immunity, a statute or resolution must contain a clear and unambiguous expression of the legislature's waiver of immunity. *Taylor*, 106 S.W.3d at 696. That means a statute that waives the State's immunity must do so beyond doubt. *Id.* at 697. Further, when construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities in favor of the State's retaining its immunity. *See id.*

The Texas Tort Claims Act provides a limited waiver of immunity, allowing suits against governmental units under certain narrow circumstances. *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). Those circumstances include "personal injury . . . caused by a condition or use of tangible personal . . . property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2). This section waives immunity for a use of personal property only when the governmental unit is the user. *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 245-46 (Tex. 2004). "A governmental unit does not 'use' personal property merely by allowing someone else to use it and nothing more." *Id.* at 246. Instead, "use" requires the governmental unit to put or bring the personal property into action or service or employ the personal property for or apply it to a given purpose. *Id.* Further, negligent supervision, without more, is not a use of personal property by a governmental unit. *Tex. A & M Univ. v. Bishop*, 156 S.W.3d 580, 583 (Tex. 2005).

We have reviewed Hurd's petition for claims that potentially fall within the waiver of immunity provided by the Texas Tort Claims Act. In his petition, Hurd claims that TDCJ-CID was negligent in allowing him to be pulled in the trailer because the tractor was pulling many trailers and the trailers were outdated and unsafe. However, Hurd further explains that no TDCJ-

CID employee was driving the tractor pulling the trailer. Accordingly, TDCJ-CID did not “use” the tractor or trailer for purposes of the Act, and its act of providing the tractor and trailer did not result in a waiver of sovereign immunity. *Bishop* forecloses these claims under the Texas Tort Claims Act. *See id.* at 583. Thus, Hurd’s claims under the Texas Tort Claims Act are frivolous because they have no arguable basis in law, and the trial court did not err in dismissing them.

Hurd’s claims under Section 101.021 fail for yet another reason. The Texas Tort Claims Act does not apply to a claim based on an act or failure to act as it pertains to work programs. *See* TEX. CODE CRIM. PROC. ANN. art. 42.20(b) (West 2006). As applicable to this case, Article 42.20(b) states, “[The Texas Tort Claims Act] does not apply to a claim based on an act or a failure to act of an individual [who is an officer or employee of a state agency or of a political subdivision other than a county] or a governmental entity the officer serves as an officer or employee if the act or failure to act is in connection with [a community service program or work program].” *See id.* Thus, Hurd cannot rely on TDCJ-CID’s conduct in implementing its work program as a basis for his claim under Section 101.021. *See Tex. Parks & Wildlife v. Garland*, 313 S.W.3d 920, 924-25 (Tex. App.–Tyler 2010, no pet.).

Because the trial court did not abuse its discretion in dismissing Hurd’s suit, we overrule Hurd’s first issue.

DISCOVERY

In his second issue, Hurd argues that the trial court erred by failing to compel TDCJ-CID to respond to Hurd’s discovery.

While determining whether a case should be dismissed pursuant to Chapter Fourteen, a trial court shall suspend discovery relating to the claim. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(d). The plain language of the statute indicates that a trial court has no discretion and must suspend discovery. *See id.* Because of this statutory mandate, the trial court did not err by failing to compel TDCJ-CID to respond to Hurd’s discovery. *Pohl v. Livingston*, No. 03-06-00625-CV, 2008 Tex. App. LEXIS 2626, at *6 (Tex. App.–Austin, Apr. 10, 2008, no pet.). Moreover, the issue is moot because Hurd’s claims were properly dismissed. *See Addicks v. Quarterman*, No. 12-09-00098-CV, 2011 Tex. App. LEXIS 1077, at *14 (Tex. App.–Tyler Feb. 16, 2011, no pet.).

We overrule Hurd's second issue.

DISPOSITION

Having overruled Hurd's first and second issues, we *affirm* the trial court's order of dismissal.

BRIAN HOYLE
Justice

Opinion delivered March 7, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)



**COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT**

MARCH 7, 2012

NO. 12-11-00174-CV

KENYON DEMAR HURD,

Appellant

V.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Appellee

Appeal from the 87th Judicial District Court
of Anderson County, Texas. (Tr.Ct.No. 87-11039)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, for which execution may issue, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

**THE STATE OF TEXAS
M A N D A T E**

TO THE 87TH DISTRICT COURT of ANDERSON COUNTY, GREETING:

Before our Court of Appeals for the 12th Court of Appeals District of Texas, on the 7th day of March, 2012, the cause upon appeal to revise or reverse your judgment between

KENYON DEMAR HURD, Appellant

NO. 12-11-00174-CV; Trial Court No. 87-11039

Opinion by Brian Hoyle, Justice.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Appellee

was determined; and therein our said Court made its order in these words:

“THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below be in all things affirmed, for which execution may issue, and that this decision be certified to the court below for observance.”

WHEREAS, WE COMMAND YOU to observe the order of our said Court of Appeals for the Twelfth Court of Appeals District of Texas in this behalf, and in all things have it duly recognized, obeyed, and executed.

WITNESS, THE HONORABLE JAMES T. WORTHEN, Chief Justice of our Court of Appeals for the Twelfth Court of Appeals District, with the Seal thereof affixed, at the City of Tyler, this the _____ day of _____, 201____.



CATHY S. LUSK, CLERK

By: _____
Deputy Clerk