NO. 12-17-00207-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

HERRON KENT DUCKETT, APPELLANT	*§*	***APPEAL FROM THE 3RD***
V.		
TEXAS DEPARTMENT OF CRIMINAL JUSTICE CORRECTIONAL INSTITUTIONS DIVISION,	*§*	***JUDICIAL DISTRICT COURT***
APPELLEE	*§*	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

Herron Kent Duckett 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. Duckett raises two issues on appeal. We affirm.

BACKGROUND

Duckett, an inmate, claims that he was injured on December 27, 2016, while working in the prison kitchen. A few days later, Duckett filed a Step 1 Offender Grievance Form with TDCJ-CID. According to Duckett's grievance, he was "attempting to place food in inserts into the warming table when [his] finger got caught in between the insert and warming table," which broke his right index finger. Duckett complained that neither an officer nor supervisor was present when his injury occurred and that he had not been properly trained to perform his work duties. According to Duckett, the negligent training and supervision violated TDCJ-CID's policies. He further alleged that the kitchen does not provide warming gloves with which he is to handle food. Duckett also complained that he received inadequate medical treatment following

his initial hospital visit. His grievance requested “proper training and proper treatment and therapy.” In response to his grievance, TDCJ-CID told Duckett that he had been trained to work in the food service department and that it was his job to take proper safety precautions while working.

Dissatisfied with the response, Duckett filed his Step 2 Offender Grievance Form with TDCJ-CID. Duckett again claimed that he was not properly supervised. However, for the first time, he claimed that he should “have been provided adequate tangible personal property (insert) that was not cracked, bent up and having jagged edges.” He further complained that “the kitchen does not provide (insert replacement protector) to remove or replace the (hot) food inserts, nor are we provided (warming gloves).”

Duckett then brought a pro se in forma pauperis suit as an indigent inmate alleging violations of the Texas Tort Claims Act (TTCA). According to Duckett’s petition, a TDCJ-CID employee was negligent in furnishing him with “Defective Inadequate tangible Personal Property (Defective Insert) and (Insert Replacement Protector)” and the employees failed to comply with TDCJ-CID safety policies. Duckett further alleged that TDCJ-CID breached its duty when its employees failed to follow TDCJ-CID policies and procedures.

TDCJ-CID did not answer the suit. Acting sua sponte, the trial court dismissed Duckett’s case without prejudice under Chapter Fourteen of the Texas Civil Practices and Remedies Code. The order of dismissal states the following:

> On April 7, 2017, Plaintiff filed Civil Rights Lawsuit, Pursuant to 42 U.S.C. section 1983. It is obvious to the Court that this civil action is not brought under the Family Code and is a cause of action governed by Chapter 14 of the Texas Civil Practice and Remedies Code.
>
> The Court finds [] all claims to be frivolous or malicious.

This appeal followed.

DISMISSAL OF SUIT

In his first issue, Appellant argues the trial court abused its discretion when it dismissed his suit. In his second issue, Appellant contends the trial court erred when it mischaracterized his suit as a civil rights proceeding under section 1983 of the United States Code.

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); ***Birdo 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 2017); ***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 2017). 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–Institutional 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).

Texas Tort Claims Act

Duckett brought his claims under Section 101.021 of the TTCA, particularly subsection (2) addressing the use of tangible personal property. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011). We must determine whether the trial court correctly dismissed Duckett'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 TTCA 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); ***Hurd v. Tex. Dep't of Criminal Justice***, No. 12-11-00174-CV, 2012 WL 759016, at *3 (Tex. App.—Tyler Mar. 7, 2012, pet. denied) (mem. op.). "A governmental unit does not 'use' personal property merely by allowing someone else to use it and nothing more." ***Cowan*** 128 S.W.3d 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).

When the governmental unit's liability under Section 101.021(2) is based on respondeat superior for an employee's negligence, the liability is derivative. ***DeWitt v. Harris Cty.***, 904 S.W.2d 650, 654 (Tex. 1995). An employee of a political subdivision is not liable for damages

arising from an act or failure to act in connection with an inmate activity if the act or failure to act was not intentional, wilfully or wantonly negligent, or performed with conscious indifference or reckless disregard for the safety of others. TEX. GOV'T CODE ANN. § 497.096 (West 2012). Recklessness requires a subjective awareness of, and indifference to, the risk posed by the defendant's conduct. ***Moncada v. Brown***, 202 S.W.3d 794, 802 (Tex. App.—San Antonio 2006, no pet.). Not only must the actor have actually known of the peril but also his acts or omissions must demonstrate subjectively that he did not care about it. ***Id***.

We have reviewed Duckett's petition for claims that potentially fall within the waiver of immunity provided by the TTCA. Duckett makes no allegations that TDCJ-CID is vicariously liable for the gross negligence, if any, of its employees. In his petition, Duckett claims that TDCJ-CID was negligent because he was provided with inadequate "tangible personal property." However, Duckett further explains that no TDCJ-CID employee was supervising his work on the day of his accident. Accordingly, because negligent supervision alone is not a tangible use of personal property and because TDCJ-CID's allowing Duckett to use tangible personal property does not amount to use by TDCJ-CID, we conclude that TDCJ-CID did not "use" the allegedly defective insert for purposes of the TTCA, and its act of providing the insert did not result in a waiver of sovereign immunity. *See* ***Bishop***, 156 S.W.3d at 583; ***Hurd***, 2012 WL 759016, at *3.

Duckett's claims under Section 101.021 fail for yet another reason. The alleged failure of TDCJ-CID to follow its policies does not waive sovereign immunity. ***Turner v. TDCJ-CID***, No. 06-10-00100-CV, 2011 WL 334509, at *2 (Tex. App.—Texarkana Jan. 7, 2011, no pet.) (mem. op.). The Texas Supreme Court has held "that information is not tangible personal property." ***Tex. Dep't of Pub. Safety v. Petta,*** 44 S.W.3d 575, 580 (Tex. 2001). The Texas legislature has not waived the State's sovereign immunity for the use, misuse, or non-use of information in policy manuals. *See* ***id***. Thus, before a plaintiff may complain of negligent implementation of policy, he must first establish a waiver of immunity under some other provision of the Act. ***Guadalupe-Blanco River Auth. v. Pitonyak***, 84 S.W.3d 326, 342 (Tex. App.—Corpus Christi 2002, no pet.).

In ***Petta,*** the Texas Supreme Court concluded "information contained in the [Texas Department of Public Safety's] policy and training manuals in this case is not tangible personal property and, accordingly, does not give rise to a claim under the Tort Claims Act." ***Id.*** at 581. Similarly, Duckett's allegations, which complain about the use of information in the TDCJ-

CID's policy manuals, do not qualify as use of personal property. *See* ***Turner***, 2011 WL 334509, at *2. Because information is not tangible personal property, Duckett's claim regarding policy cannot, standing alone, support a waiver of immunity. Duckett has failed to establish that the Texas Tort Claims Act waives sovereign immunity concerning his state law claims.

To the extent Duckett's claims may be construed as an action brought under Section 1983, those claims were also properly dismissed. Sovereign immunity under the Eleventh Amendment protects a state agency from a suit under 42 U.S.C.A. § 1983. Duckett brought suit against only the TDCJ-CID. A state agency is not a "person" who can be held liable under 42 U.S.C.A. § 1983. *See* ***Will v. Mich. Dep't of State Police,*** 491 U.S. 58, 66, 109 S. Ct. 2304, 2309–10, 105 L. Ed. 2d 45 (1989) ("Section 1983 ... does not provide a federal forum for litigants who seek a remedy against a State ...."); *see* U.S. CONST. amend. XI; ***Turner v. Tex. Dep't of Mental Health & Mental Retardation,*** 920 S.W.2d 415, 418 (Tex. App.—Austin 1996, writ denied). Sovereign immunity under the Eleventh Amendment bars Duckett's Section 1983 claims against TDCJ-CID in this case. *See* ***Will,*** 491 U.S. at 66, 109 S. Ct. at 2309–10; *see also* ***Turner,*** 920 S.W.2d at 418.

For the above reasons, the trial court did not err in finding Duckett's claims frivolous. Thus, Appellant's first and second issues are overruled.

DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered April 25, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 25, 2018

NO. 12-17-00207-CV

HERRON KENT DUCKETT,
Appellant
V.
TEXAS DEPARTMENT OF CRIMINAL JUSTICE CORRECTIONAL INSTITUTIONS DIVISION,
Appellee

Appeal from the 3rd District Court

of Houston County, Texas (Tr.Ct.No. 17-0097)

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**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.