



NUMBER 13-19-00182-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

HORACE DEMAR,

Appellant,

v.

G. GARCIA, ET AL.,

Appellees.

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

MEMORANDUM OPINION

**Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Hinojosa**

Appellant Horace Demar, a Texas prison inmate, appeals from two trial court orders dismissing his suit against appellees, the Texas Department of Criminal Justice (TDCJ) and multiple correctional officers.¹ In two issues, Demar argues the trial court

¹ The individual appellees are G. Garcia, Rafael Menchaca, and Grievance Investigators 1950 and

erred in: (1) dismissing his tort claims against the correctional officers in their individual capacity; and (2) dismissing his due process claim against the TDCJ. We affirm.

I. BACKGROUND

Demar, an inmate at the McConnell Unit in Beeville, Texas, filed this action pro se and *in forma pauperis* under Texas Civil Practice & Remedies Code Chapter 14. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001–.014. In his live pleading, Demar alleges that correctional officer G. Garcia left a shoe print on his prayer rug and damaged his Quran and photographs while searching Demar’s cell. Garcia confiscated Demar’s radio and placed it in the custody of the unit property officer, Rafael Menchaca. Demar asked Menchaca to return the radio, but he refused. Demar filed a step 1 and step 2 grievance, which were both denied. According to Demar, the grievance investigators did not adequately investigate his complaint.

Demar sued the individual defendants for conversion and conspiracy. Demar alleged that the TDCJ was negligent in protecting his property and that it failed to provide Demar a meaningful administrative process in violation of his due process rights. The Texas Office of the Attorney General (OAG) filed an amicus curiae advisory and motion to dismiss urging the trial court to dismiss Demar’s suit as frivolous pursuant to Chapter 14 of the civil practice and remedies code. See *id.* The OAG contended that the tort claims against the correctional officers in their individual capacity were foreclosed by the election-of-remedies provision of the Texas Tort Claims Act (TTCA). See *id.* § 101.106(f). The OAG further contended that the tort claims against the correctional officers in their

1722. Demar sued each employee in their individual and official capacities.

official capacity were barred by sovereign immunity. Finally, the OAG argued that Demar failed to state a claim regarding the TDCJ's investigation of his grievance because prisoners have no constitutionally protected interest in the outcome of their grievances. The trial court signed two separate orders dismissing Demar's suit against the individual appellees and the TDCJ. Demar now appeals.

II. STANDARD OF REVIEW AND APPLICABLE LAW

To control frivolous, malicious, and excessive inmate litigation, the Legislature enacted Chapter 14 of the civil practice and remedies code. *See id.*; *Hamilton v. Pechacek*, 319 S.W.3d 801, 809 (Tex. App.—Fort Worth 2010, no pet.). Chapter 14 governs inmate litigation in which an affidavit or unsworn declaration of inability to pay costs is filed by the inmate. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001–.014. A trial court may dismiss a suit under Chapter 14 if it is frivolous, and may consider 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—Edinburg 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, where, as here, a trial court dismisses a claim 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 Cty.*, 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.*

III. INDIVIDUAL CAPACITY CLAIMS

By his first issue, Demar argues the trial court erred in dismissing his individual capacity claims against the correctional officers. Demar maintains that governmental employees sued in their individual capacity are not entitled to sovereign immunity. He further argues that the conversion of his personal property was an ultra vires act, for which sovereign immunity is not applicable. Finally, Demar argues that the correctional officers were not acting within the scope of their employment; therefore, the election-of-remedies provision is inapplicable.

A. Applicable Law

Demar sued the correctional officers in their official and individual capacities. Government employees are individually liable for their own torts, even when committed

in the course of employment; therefore, suit may be brought against a government employee in his individual capacity. *Franka v. Velasquez*, 332 S.W.3d 367, 383 (Tex. 2011). However, under the election-of-remedies provision of the TTCA,

[i]f 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f). Under this provision, a governmental employee is entitled to a dismissal when the plaintiff's suit (1) is based on conduct within the scope of the defendant's employment with a governmental unit and (2) could have been brought against the governmental unit under the TTCA. See *Franka*, 332 S.W.3d at 369. The statute strongly favors dismissing governmental employees. *Anderson v. Bessman*, 365 S.W.3d 119, 124 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

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.” TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(5). “The scope-of-employment analysis [is] fundamentally objective: Is there a connection between the employee's job duties and the alleged tortious conduct?” *Laverie v. Wetherbe*, 517 S.W.3d 748, 753 (Tex. 2017). Such a connection can exist “even if the employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities.” *Id.*

B. Analysis

First, the correctional officers are all employees of TDCJ, a state agency. Demar pleaded that the officers were TDCJ employees, and he does not contend otherwise on appeal. Second, the allegations relate to actions taken within the scope of the officers' employment. Scope of employment "extends to job duties to which the official has been assigned, even if the official errs in completing the task." *Lopez v. Serna*, 414 S.W.3d 890, 894 (Tex. App.—San Antonio 2013, no pet.). Demar's allegations all relate to tasks lawfully assigned to the correctional officers—searching inmate cells, confiscating contraband, and processing inmate grievances.² The fact that the correctional officers may have acted negligently or with personal animus is not relevant to our inquiry. See *Laverie*, 517 S.W.3d at 753; see also *Lopez*, 414 S.W.3d at 894 (concluding TDCJ employees were acting within the scope of their employment where the inmate alleged that the defendants committed theft by taking money from his inmate trust fund account).

Finally, we note that "if a state employee is alleged to have committed negligence or other 'wrongful conduct' in the general scope of employment, then the suit is subject to section 101.106(f) because it could have been brought against the state agency." *Lopez*, 414 S.W.3d at 895. This principle applies to both unintentional torts, such as negligence, and intentional torts, such as conversion. See *id.* (holding that a suit for theft against TDCJ employees satisfied the *Franka* test).

We conclude that the election-of-remedies provision applies to Demar's tort claims.

² Demar presents no argument regarding the dismissal of any claims relating to the alleged damaging of his Quran, prayer rug, and family photos. Therefore, we do not consider those actions in our analysis as it is inadequately briefed. See TEX. R. APP. P. 38.1(i).

Therefore, those claims are against the correctional officers in their official, not individual, capacity.³ See *id.* Because Demar’s individual capacity claims lack an arguable basis in law, we conclude that the trial court did not err in dismissing those claims. See *Moreland*, 95 S.W.3d at 394. We overrule Demar’s first issue.

IV. DUE PROCESS CLAIM

In his second issue, Demar argues the trial court erred in dismissing his due process claim against the TDCJ. Demar argues that the TDCJ violated his due process rights by not providing him a “meaningful post-deprivation remedy” and that sovereign immunity does not bar § 1983 claims.

United States Code Title 42, § 1983 provides a private cause of action against persons acting under color of state law who violate rights secured by the United States Constitution or federal law. See 42 U.S.C. § 1983; *Haver v. Coats*, 491 S.W.3d 877, 881 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty or property without due process of law.” U.S. CONST. amend. XIV. However, a state prison official’s unauthorized intentional act that deprives an inmate of property is not a constitutional violation if there exists an adequate post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 535 (1984); *Pechacek*, 319 S.W.3d at 814. The Texas Legislature

³ Demar does not contest the trial court’s dismissal of his official capacity tort claims on the basis of sovereign immunity. He does argue, however, that the correctional officers were acting ultra vires. Sovereign immunity provides broad protection to the state and its officers; however, it does not bar a suit against a government officer for acting outside his authority—i.e., an ultra vires suit. See *Tex. Parks & Wildlife Dep’t v. Sawyer Trust*, 354 S.W.3d 384, 393 (Tex. 2011). The ultra vires exception does not apply in this case because Demar’s suit is for damages. See *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Furthermore, as noted above, the correctional officers were acting within their legal authority with respect to the alleged search of Demar’s cell, confiscation of his radio, and processing of his grievance.

has provided an administrative remedy to compensate inmates for property lost or damaged by prison officials. See TEX. GOV'T CODE ANN. §§ 501.007–.008 (addressing compensation process for inmate claims of lost or damaged property and establishing an inmate grievance system).

Demar has not pleaded a viable § 1983 due process claim for the wrongful seizure of his property because the legislature has provided for a meaningful post-deprivation remedy. See *Pechacek*, 319 S.W.3d at 814; *Spurlock*, 88 S.W.3d at 736–37; *Aguilar v. Chastain*, 923 S.W.2d 740, 744 (Tex. App.—Tyler 1996, writ denied). Further, to the extent Demar bases his due process claim on the outcome of his grievance, we note that a prisoner does not have a federally protected liberty interest in having their grievances resolved to their satisfaction. See *Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005); see also *McBride v. Tex. Dep't of Crim. Justice—Inst. Div.*, No. 13–12–00003–CV, 2012 WL 3133814, *2 (Tex. App.—Corpus Christi–Edinburg 2012, pet. denied) (mem. op.).

For the foregoing reasons, we conclude that Demar's due process claim has no arguable basis in law. See *Moreland*, 95 S.W.3d at 394. Therefore, the trial court did not err in dismissing the claim as frivolous. See *id.* We overrule Demar's second issue.

V. CONCLUSION

We affirm the trial court's judgment.

LETICIA HINOJOSA
Justice

Delivered and filed the
18th day of June, 2020.