

Affirmed In Part, Reversed and Remanded In Part, and Opinion filed November 10, 1999.



In The
Fourteenth Court of Appeals

NO. 14-98-01209-CV

ERBEY FLORES, Appellant

V.

**JAMES W. WILLETT, ERIC CHRISTIE, TERRY DON HARRELL,
DESSMOND F. REDDEN, WILLIAM S. MIKULIN AND THE TEXAS
DEPARTMENT OF CRIMINAL JUSTICE-INSTITUTIONAL DIVISION**
Appellees

**On Appeal from the 278th District Court
Walker County, Texas
Trial Court Cause No. 20,015-C**

OPINION

Appellant, Erbey Flores, appeals from an order dismissing his *pro se, in forma pauperis* suit as frivolous. Because the trial court abused its discretion in dismissing some, but not all of appellant's claims, we reverse in part.

Appellant is an inmate in the Terrell Unit of the Texas Department of Criminal Justice - Institutional Division ("the TDCJ-ID"). He sued appellees, the TDCJ-ID and its employees, in their individual and official capacities, under the Texas Tort Claims Act, 42 U.S.C. § 1983, and common law negligence and assault and battery. Appellant alleged that on August 5, 1997, while transporting inmates in the transport van to the diagnostic unit, appellees "intentionally, maliciously and sadistically accelerated and braked repeatedly," causing appellant and other inmates to tumble and fall on one another. Appellant alleged that all times, he and other inmates were in full restraints.

Appellant also alleged that upon arrival at the diagnostic unit, appellees falsely singled him out for creating a disturbance and ordered him out of the van and "hogtied." Appellant alleged that while hogtied, he was subjected to physical injury, ridicule and humiliation as appellees picked him off the ground and shoved him back in the transport van. Appellant further alleged that certain TDCJ-ID employees "created a custom policy fostering such violations." Finally appellant alleged that the TDCJ-ID, was liable for his injuries caused "by the use of tangible personal property, "to wit: handcuffs, leg irons, chain, lock and black box,"and "by the negligent operation of a motor driven vehicle, namely, the transport van."

Claiming that appellees' conduct was negligent, grossly negligent, in bad faith, and with callous indifference, appellant sought unspecified monetary damages. Appellees answered the suit asserting a variety of affirmative defenses. They then filed a motion to dismiss the suit as frivolous under section 14.003(a)(2) of the Texas Civil Practice and Remedies Code. Without a hearing, the trial court granted appellees' unopposed motion and this appeal ensued.

Chapter 14 of the Texas Civil Practice and Remedies Code applies to suits brought by an inmate who has filed an affidavit or unsworn declaration of inability to pay costs. *See*

TEX. CIV. PRAC. & REM. CODE ANN. § 14.002(a) (Vernon Supp. 1999); *see also Hickson v. Moya*, 926 S.W.2d 397, 398 (Tex. App.--Waco 1996, no writ). Section 14.003(a) permits a court to dismiss an inmate's claim if it finds, among other things, that the claim is "frivolous or malicious." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(2). In determining whether a claim is frivolous or malicious, the court 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 to support 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 acts. *See id.* § 14.003(b); *Hickson*, 926 S.W.2d at 398.

We review a trial court's dismissal of an inmate's claim under section 14.003(a) under an abuse of discretion standard. *See Thomas v. Wichita General Hosp.*, 952 S.W.2d 936, 939 (Tex. App.--Fort Worth 1997, writ denied); *see also Hickson*, 926 S.W.2d at 398. To establish an abuse of discretion, the complaining party must show the trial court's action was arbitrary or unreasonable in light of all of the circumstances in the case. *See McCollum v. Mt. Arafat Baptist Church, Inc.*, 980 S.W.2d 535, 536 (Tex. App.--Houston [14th Dist.] 1998, no pet). In other words, a court abuses its discretion when it acts without reference to any guiding rules or principles. *See Thomas*, 952 S.W.2d at 939.

When, as here, the trial court dismisses a suit without a fact hearing, the only issue before the appellate court is whether the trial court properly determined that there was no arguable basis in law for the suit. *See Lentworth v. Trahan*, 981 S.W.2d 720, 722 (Tex. App.--Houston [1st Dist.] 1998, no pet.); *see also Harrison v. Texas Dept. of Criminal Justice-Institutional Div.*, 915 S.W.2d 882, 887 (Tex. App.--Houston [1st Dist.] 1995, no writ). *Pro se* pleadings are evaluated by standards less stringent than those applied to formal pleadings drafted by lawyers. *See Lentworth*, 881 S.W.2 at 722. Accordingly, appellant's petition must be construed liberally in the light most favorable to appellant. *See Perales v. Kinney*, 891 S.W.2d 731, 732 (Tex. App.--Houston [1st Dist.] 1994, no writ).

Texas Tort Claims Act

Appellant seeks relief under The Texas Tort Claims Act ("the Act"). The Act does not provide for recovery against individuals employed by the State, regardless of the capacity in which they acted. *See Lentworth*, 881 S.W.2 at 722; *see also Aguilar*, 923 S.W.2d at 744. Because the TDCJ-ID employees are not governmental units, they have no liability under the Act. *See Harrison*, 915 S.W.2d at 889-90. Thus, to the extent appellant seeks recovery under the Act against the TDCJ-ID employees, appellant fails to state a claim that has an arguable basis in law and the trial court properly dismissed those claims. As to the TDCJ-ID, it is a governmental unit and normally entitled to sovereign immunity. *See Sawyer v. Texas Department of Criminal Justice*, 983 S.W.2d 310, 311 (Tex. App.–Houston [1st Dist.] 1998, no pet). The Act, however, provides a limited waiver of sovereign immunity in three general areas: (1) the use of publicly-owned, motor driven vehicles or equipment, (2) the condition or use of tangible, personal property or real property; and (3) premises defects. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021, 101.022;¹ *see also Aguilar v. Chastain*, 923 S.W.2d 740, 744 (Tex. App.--Tyler 1996, no writ). The waiver of immunity does not extend to claims arising out of intentional torts. *See Medrano v. City Pearsall*, 989 S.W.2d 141, 144 (Tex. App.–San Antonio, 1999)(citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.057 (Vernon 1997)) (this chapter does not apply to a claim . . . arising out of assault, battery false imprisonment, or any other intentional tort . . .)

¹ We note that sovereign immunity embraces two principles: immunity from suit and immunity from liability. *See Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 405 (Tex. 1997). Immunity from suit bars a suit against the State unless the State expressly gives its consent to the suit. *See id.* Immunity from liability protects the State from judgments even if the Legislature has expressly given consent to the suit. *See id.* By enactment of the Tort Claims Act, the Legislature has consented to suit and waived immunity from liability under specified circumstances. *See Petta v. Rivera*, 985 S.W.2d 199, 205 (Tex. App.–Corpus Christi 1998, no pet.).

Here, appellant alleges that he suffered personal injuries caused not only by the TDCJ-ID's negligent misuse of tangible personal property, i.e., restraints, and by its negligent operation of a motor driven vehicle, i.e., the transport van, but also by its intentional conduct. To the extent appellant alleges that his injuries were the result of intentional acts by the TDCJ-ID, appellant failed to state claim that has an arguable basis in law and the trial court properly dismissed those claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057. However, to the extent appellant alleges that the negligent misuse of tangible personal property or the negligent operation of a motor driven vehicle caused him injury, appellant does state a claim that has an arguable basis in law. *See e.g., Harrison*, 915 S.W.2d at 889 (allegations that TDCJ-ID employees negligently restrained inmate with security devices was sufficient to state a claim against the TDCJ-ID under the Act). Because these allegations have an arguable basis in law, the trial court abused its discretion in dismissing appellant's negligence claims against the TDCJ-ID under the Act.

42 U.S.C. § 1983

Appellant also seeks relief under 42 U.S.C. § 1983. In order to state a claim under section 1983, a litigant must allege that a person acting under color of state law deprived him of rights, privileges or immunities secured by the Constitution or laws of the United States. *See Aguilar*, 923 S.W.2d at 743. Neither a State nor its officials acting in their official capacities are "persons" under section 1983. *See Harrison*, 915 S.W.2d at 889 (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989)); *see also Thomas v. Brown*, 927 S.W.2d 122, 125 (Tex. App.–Houston [14th Dist.] 1996, writ denied). In addition, section 1983 does not impose liability for violations of duties of care arising under tort law. *See Spacek v. Charles*, 928 S.W.2d 88, 93 (Tex. App.–Houston [14th Dist.] 1996, writ dism'd w.o.j.). Therefore, to the extent appellant seeks recovery under section 1983 for negligent conduct by the TDCJ-ID, an arm of the State, and its employees in their official capacities, appellant failed to state a claim

that has an arguable basis in law and the trial court properly dismissed those claims.² *See Harrison*, 915 S.W.2d at 889; *see also Thomas*, 927 S.W.2d at 125.

A section 1983 action does lie, however, against the TDCJ-ID employees in their personal rather than their official capacity. *See Harrison*, 915 S.W.2d at 889. Although appellant sued the TDCJ-ID employees in their individual capacities, nowhere in his twenty-five petition does appellant allege deprivation of any constitutional right. Thus, even when construed liberally and in a light most favorable to appellant, the petition does not state a claim under section 1983 and the trial court properly dismissed that claim. *See Thomas v. Arthur*, 836 S.W.2d 822, 824 (Tex. App.--Tyler, 1992,) (holding that dismissal of inmate's section 1983 action was proper where inmate failed to allege constitutional violation).

Common Law Claims

Finally, appellant sought relief under common law negligence and assault and battery. As we discussed, because the TDCJ-ID is a governmental unit and entitled to sovereign immunity, the TDCJ-ID may be liable to appellant only to the extent it waived its immunity from liability under the Tort Claims Act. *See Sawyer*, 983 S.W.2d 311; *see also Aguilar*, 923 S.W.2d at 744. Thus, the trial court did not abuse its discretion in dismissing appellant's common law claims against the TDCJ-ID.

As to appellant's claims against the TDCJ-ID employees, appellees asserted the affirmative defense of qualified immunity. Prison officials and officers may rely on qualified immunity in section 1983 actions. *See Thomas v. Collins*, 860 S.W.2d 500, 503

² Appellant's allegations of a "custom or policy fostering . . . violations" also do not state a claim. *See e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S.163, 165, 113 S.Ct. 1160, 1162, 122 L.Ed.2d 517 (1993) (a *municipality* may be liable under section 1983 if its policy or custom caused a constitutional injury) (emphasis added); *see also Will*, 491 U.S. at 65-70, 109 S.Ct.2309-12 (reaffirming that a municipality, not a State, is a "person" subject to liability under section 1983).

(Tex. App.--Houston [1st Dist.] 1993, writ denied); *Onnette v. Reed*, 832 S.W.2d 450, 452 (Tex. App.--Houston [1st Dist.] 1992, no writ). The elements of the defense are: (1) performance of a discretionary function; (2) in good faith; and (3) within the scope of the employee's authority. See *Harrison*, 915 SW.2d. at 888. Once a defendant has asserted qualified immunity *and* established that the alleged wrongful acts were taken within the scope of his discretionary authority, the burden then shifts to the plaintiff to show that qualified immunity does not bar recovery. See *Montana v. Patterson*, 894 S.W.2d 812, 816 (Tex. App.--Tyler 1994, no writ) (emphasis added).³

Here, appellees failed to establish that the TDCJ-ID employees were entitled to qualified immunity. Their motion to dismiss asserts they "were performing discretionary duties within the course and scope of their employment as a correctional officer," but mentions nothing about "good faith," an element clearly lacking according to the allegations in appellant's petition. Even if appellees had claimed that the TDCJ-ID employees performed a discretionary function in good faith within their authority, they offered no evidence with their unsworn motion to dismiss to support such a claim. See *e.g.*, *Harrison*, 915 S.W.2d at 889 (noting lack of evidence to support qualified immunity). Therefore, the trial court abused its discretion in dismissing appellant's common law claims against the TDCJ-ID's employees based on qualified immunity.

In summary, to the extent appellant alleges that the TDCJ-ID's negligent misuse of tangible personal property or the negligent operation of a motor driven vehicle caused him injury, we hold that appellant states a claim against the TDCJ-ID under the Texas Tort Claims Act and that the trial court abused its discretion in dismissing that claim. Likewise,

³ Ordinarily, to rebut the defense of qualified immunity, the plaintiff must sufficiently plead which "clearly established statutory or constitutional rights" were violated by the defendant. See *Thomas*, 860 S.W.2d at 503; see also *Onnette*, 832 S.W.2d at 452. There is no such pleading requirement, however, for a common law claim.

because appellees failed to establish that the TDCJ-ID employees were entitled qualified immunity, we hold that the trial court abused its discretion in dismissing appellant's common law claims against them. Accordingly, we reverse the portion of the trial court's order dismissing appellant's claims against the TDCJ-ID under the Texas Tort Claims Act, and against the TDCJ-ID employees under the common law, and remand those claims to the trial court for proceedings consistent with this opinion. However, we hold that the trial court did not abuse its discretion in dismissing appellant's remaining claims. Therefore, we affirm the remainder of the trial court's order.

PER CURIAM

Judgment rendered and Opinion filed November 10, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

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