Affirmed in Part; Reversed and Remanded in Part and Opinion filed October 18, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00889-CV

HOWARD VANZANDT WILLIAMS, Appellant

V.

DALE DENAULT and TEXAS DEPARTMENT OF CRIMINAL JUSTICE-INSTITUTIONAL DIVISION, Appellees

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On Appeal from the 23rd Judicial District Court
Brazoria County, Texas
Trial Court Cause No. 11064*100

O P I N I O N

Appellant, Howard Vanzandt Williams, an inmate of the Texas Department of Criminal Justice-Institutional Division, sued appellee, Dale Denault, a corrections officer at the Darrington Unit where Williams is incarcerated, and the Texas Department of Criminal Justice-Institutional Division (TDCJ-ID). The trial court dismissed his suit, which was brought under the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1997 & Supp. 2001). Because Williams has pled a colorable claim under the Tort Claims Act against TDCJ-ID, we affirm as to Denault only and reverse as to

all other claims.

In his suit, Williams alleges that TDCJ-ID employees negligently used various cutting and grinding machines to remove lead-based paint from the hallways and living areas of the Darrington Unit. Williams alleges that this negligent use caused lead-based paint dust and lead oxide gas to be released and seriously injured him.

In Williams' original petition, he named only Dale Denault as a defendant. Later the same day, Williams filed an amended petition in which he also sued TDCJ-ID. Williams requested service on both defendants. Denault was served; however, the TDCJ-ID was not served because Williams had provided only a post office box address.

The Attorney General of Texas filed an answer on Denault's behalf. Williams filed a second amended petition in which he stated that, notwithstanding the fact that the TDCJ had "not answered or defended" the case, he was amending his petition to show the "nexus" that existed "between the negligent acts of officer Dale Denault and the Texas Department of Criminal Justice-Institutional Division, as to which makes the governmental unit liable for the acts of officer Dale Denault."

Shortly thereafter, Denault filed a motion to dismiss Williams' claims as frivolous.[1] Williams filed a response to Denault's motion in which he argued that he had filed an amended petition adding the TDCJ as a defendant, and that the case was not brought against Denault "standing alone," but was brought against TDCJ and Denault as an employee of TDCJ.

On June 26, 2000, The court below signed the following order:

> Be it remembered that on this day came to be heard Defendant Denalut's [sic] Motion to Dismiss as Frivolous, and the Court after considering the pleadings of the parties filed

[1] Although the motion does not appear in the record, neither party disputes its existence, and it is referred to in the court's order of dismissal.

herein is of the opinion that the following order should issue:

> It is hereby ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Dismiss as Frivolous be GRANTED in its entirety.
>
> This action is dismissed with prejudice in its entirety as frivolous pursuant to § 14.003 of the Texas Civil Practice and Remedies Code. Any and all claims not previously ruled upon are hereby denied.

ISSUES ON APPEAL

Williams appeals from this order. First, he claims that the trial court erred in dismissing his claims against Denault. Second, he alleges that the trial court abused its discretion in dismissing his claims against both defendants because he named both Denault and TDCJ-ID as defendants, and he pled a proper cause of action under the Tort Claims Act against the TDCJ-ID. As we explain below, we affirm the trial court's dismissal of Williams' claims against Denault, but reverse the trial court's order dismissing the TDCJ-ID.

As an initial matter, we note that we have jurisdiction to review this appeal even though TDCJ-ID was not served and has not filed an answer. Section 14.003(a) of the Texas Civil Practice & Remedies Code, under which the trial court dismissed Williams' claims, provides that a court may dismiss a claim "either before or after service of process." TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a) (Vernon Supp. 2001); *see also Onnette v. Reed*, 832 S.W.2d 450, 451 n.2 (Tex. App.—Houston [1st Dist.] 1992, no writ) (noting that judgment was final for purposes of appeal in case brought by inmate against TDCJ and employees even though TDCJ was not served and did not voluntarily file an answer because the relevant statute, Section 13.001(c) of the Texas Civil Practice & Remedies Code, permits dismissal "either before or after service of process"). Consequently, we have jurisdiction to address Williams' appeal.

Effective June 8, 1995, the dismissal of inmate lawsuits is governed by Sections 14.001- .014 of the Texas Civil Practice and Remedies Code. Under this Chapter, a trial

court has "broad discretion" to dismiss an inmate's suit if it finds that the claim is frivolous or malicious. *See Martinez v. Thaler*, 931 S.W.2d 45, 46 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *see also Lentworth v. Trahan*, 981 S.W.2d 720, 722 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(2)). A trial court's dismissal of an action as frivolous or malicious is subject to review under an abuse of discretion standard. *See Martinez*, 931 S.W.2d at 46. A trial court abuses its discretion if it acts arbitrarily, capriciously, and without reference to any guiding rules or principles. *Id.*

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*, 981 S.W.2d at 722; *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. *Lentworth*, 881 S.W.2 at 722. Consequently, we must construe appellant's petition liberally in the light most favorable to him. *Perales v. Kinney*, 891 S.W.2d 731, 732 (Tex. App.—Houston [1st Dist.] 1994, no writ).

Williams asserts, and his second amended pleading shows, that he brings his claims under Section 101.21 of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1997 & Supp. 2001). This section of the Act provides the following:

> A governmental unit in the state is liable for:
>
> > (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of his employment if:
> >
> > > (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real 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 (Vernon 1997).

In his second amended petition, Williams alleges that Denault's actions give rise to TDCJ-ID's liability under the Tort Claims Act. Williams makes three claims, each of which is alleged against TDCJ-ID under the Tort Claims Act. Williams further alleges in his prayer that Denault was acting "in the scope of his employment" at the time of the allegedly wrongful conduct. Whether or not Denault's actions form the basis for a claim against TDCJ-ID, the fact remains that Denault is an employee, not a governmental unit. *Harrison*, 915 S.W.2d at 890. The Tort Claims Act does not govern suits brought directly against an employee of the State, regardless of the capacity in which he acted. *Perales*, 891 S.W.2d at 733. Therefore, the dismissal of William's claims against Denault with prejudice was proper because the claims lack any basis in law. *See id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 101.102(b) (Vernon 1997) ("The pleadings of the suit must name as defendant the governmental unit against which liability is to be established.").

As Williams argues, however, Denault was not the only defendant – TDCJ-ID had been named along with Denault in both Williams' first and second amended petitions. Nonetheless, the trial court's order purports to dismiss the action "*with prejudice in its entirety* as frivolous" under § 14.003 of the Texas Civil Practice and Remedies Code. Further, the order provides that "[a]ny and all *claims* not previously ruled upon are hereby denied" (emphasis added). The order's language leaves no doubt but that the trial court intended to dismiss the entire case.[2] However, as Williams pointed out in his amended

[2] As the Texas Supreme Court explained recently in *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001), for purposes of determining the finality of a judgment for purposes of appeal, "if the language of the order is clear and unequivocal, it must be given effect despite any other indications that one

petitions, in response to Denault's motion to dismiss as frivolous, and in his appellate brief, Williams had added TDCJ-ID as a defendant. Because the trial court held no hearing on Denault's motion to dismiss, and did not reference TDCJ-ID in its dismissal order, we are unable to identify a basis for the trial court's dismissal of the entire case.

In response to Williams' argument that TDCJ was also a proper defendant, Denault responds in a single footnote in the appellee's brief (which we note was prepared by the Texas Attorney General on Denault's behalf) that TDCJ-ID was never served, and, therefore, "only Appellee Denault's brief will be presented." Additionally, Denault mentions that the trial court's order contained a "Mother Hubbard" clause, to which Williams never objected. Denault appears to suggest that the lack of service and the Mother Hubbard-type language in the order that "any and all claims not previously ruled upon are hereby denied" is somehow sufficient to dispose of the claims against TDCJ-ID without further reference or acknowledgment. On these facts, we do not agree.

With regard to the trial court's use of Mother Hubbard language in its order, such language is a factor in determining whether an order is final for purposes of appeal. *See Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 203-04 (Tex. 2001) (Mother Hubbard clause does not indicate that judgment rendered without conventional trial is final for purposes of appeal). It does not change the meaning of the order or grant additional substantive rights.

With regard to the fact that TDCJ-ID was never served, that fact in and of itself does not operate as an automatic dismissal on the merits. Had the trial court merely ordered that the claims against Denault were dismissed and simply omitted TDCJ-ID from a final judgment (for whatever reason), arguably in such a circumstance the case stands as if there had been a "discontinuance" as to TDCJ-ID. *See Youngstown Sheet & Tube Co. v. Penn*, 383 S.W.2d 230, 232 (Tex. 1962); *First Dallas Petroleum, Inc. v. Hawkins*, 715 S.W.2d

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or more parties did not intend for the judgment to be final." In such circumstances the order must be appealed and reversed. *Id*.

168, 170 (Tex. App.—Dallas 1986, no writ). A discontinuance, whether voluntary or involuntary, has been held to be, in practical effect, indistinguishable from a dismissal without prejudice. *First Dallas Petroleum*, 715 S.W.2d at 169-70.

Here, however, the trial court did not merely order that the claims against Denault were dismissed, it held that the *entire action* was dismissed *with prejudice*. Such an order cannot be said to operate as a dismissal on the merits of a defendant that has not yet been served or answered on the record before us. Because we find that Williams has stated a claim against TDCJ-ID under the Tort Claims Act, we hold that the trial court abused its discretion in ordering that the case was dismissed with prejudice and in its entirety as frivolous. *See Harrison*, 915 S.W.2d at 889-90 (holding that dismissal of appellant's Tort Claims Act suit against TDCJ employees was proper, but was error to dismiss the suit against TDCJ); *Onnette*, 832 S.W.2d at 452 (holding that it was error to dismiss inmate's claims under Tort Claims Act in case in which TDCJ was named as a defendant but was not served and did not voluntarily file an answer).

The Tort Claims Act provides that a governmental unit is liable for personal injury caused by a condition or use of tangible personal or real 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) (Vernon 1997). To state a cause of action under the Act, William's pleadings must allege facts showing that the employee's negligence was the proximate cause of his injuries and that the negligent conduct involved the use or condition of tangible personal property. *McBride v. TDCJ-ID*, 964 S.W.2d 18, 22 (Tex. App.—Tyler 1997, no writ). To allege a claim involving the "condition" of property, it is sufficient to allege that defective or inadequate property contributed to the injury. *Id.*

Here, Williams' amended petition includes allegations that TDCJ-ID, through the actions of its employees, was negligent in (1) failing to control, supervise, or train its employees in the removal of hazardous lead-based paint; (2) improperly using tangible personal property (*i.e.*, grinders, heat guns, and torches) to remove lead-based paint from the

hallways and living areas of the Darrington Unit, and (3) furnishing the grinders, heat guns, and torches for the removal of lead-based paint. Williams alleges that TDCJ-ID's negligence caused the release of a contaminated mixture of lead-based paint dust and lead oxide gas that caused him and others to suffer injuries as a result.[3] We conclude that Williams has sufficiently stated a claim under the Act. *See McBride*, 964 S.W.2d at 22; *see also Lowe v. Texas Tech University*, 540 S.W.2d 297, 300 (Tex.1976) (holding that the university was liable for injuries caused by the inadequate protective equipment it provided to a football player); *Texas Dept. of Corrections v. Jackson*, 661 S.W.2d 154, 158 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (holding that when an inmate plaintiff alleged his injuries were caused by the prison's negligence in furnishing a tool belt which was insufficient or inappropriate for the purpose for which it was used, his pleadings were sufficient to bring him within the waiver of governmental immunity created by the Act).

Accordingly, we affirm the court's order as to Denault only. We reverse the trial court's order to the extent that it purports to dismiss Williams' claims against TDCJ-ID, and order those claims severed and remanded to the trial court for other hearings and/or trial on the merits.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed October 18, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).

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[3] Williams also alleges that the lead-based paint was a "premises defect" throughout his amended petition. While we find that Williams meets the minimum requirements for alleging a claim under the Tort Claims Act involving the condition or use of tangible personal or real property, we find that Williams has not alleged facts that would support a premises defect theory because he does not allege any other of the elements necessary for a premises defect claim. *See Cobb v. Texas Department of Criminal Justice*, 965 S.W.2d 59, 62 (Tex. App.—Houston [1st Dist.] 1998, no writ); *Barker v. City of Galveston*, 907 S.W.2d 879, 884-85 (Tex. App.—Houston [1st Dist.] 1995, writ denied).