

Affirmed and Opinion filed November 15, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00796-CV

R. WAYNE JOHNSON, Appellant

V.

HEMANT PATEL, ALLAN POLLUNSKY AND DOMINIC JOSEPH, Appellees

**On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 111,309**

OPINION

This is an appeal from the trial court's order dismissing appellant R. Wayne Johnson's suit against appellees Hemant Patel, Allan Pollunsky and Dominic Joseph, employees of the University of Texas Medical Branch and the Texas Department of Criminal Justice. Johnson, an inmate of the Texas Department of Corrections-Institutional Division, brought suit under 42 U.S.C. § 1983, alleging violation of his right to be free from cruel and unusual punishment under the Eighth Amendment of the United States Constitution. He claimed that appellees "willfully and maliciously denied" him psychiatric treatment and requested actual and punitive damages, along with injunctive relief. Appellees filed a motion to dismiss based upon Johnson's failure to comply with sections 14.004 and 14.005 of the Texas Civil

Practice and Remedies Code. The trial court dismissed Thomas' claims as frivolous. On appeal, Johnson contends that the trial court abused its discretion in dismissing the suit, and raises several constitutional challenges to section 14.005. We affirm.

Johnson does not contend on appeal that he filed an affidavit or declaration describing each suit that he has previously brought, as required by section 14.004, or that he filed copies of his grievances demonstrating exhaustion of administrative remedies, as required by section 14.005.¹ Instead, he urges that the dismissal of his suit as frivolous under section 14.003 is improper because (1) the trial court dismissed his claim as frivolous rather than on statutory grounds; (2) he did not have adequate notice of the basis for a dismissal under section 14.003 because appellees moved for dismissal under sections 14.004 and 14.005; and (3) dismissal with prejudice on procedural grounds is inappropriate.

Johnson also urges that he was not required to comply with the grievance procedure of section 14.005 because his claims of irreparable injury, constitutional violations, and for damages could not be addressed in the grievance procedure. Additionally, he contends that section 14.005 (1) violates the "due course of law" provision of the State Constitution as well as Article I, section 29;² (2) is a prior restraint of free speech rights in violation of Article I, section 8 of the Texas Bill of Rights; and (3) violates the First Amendment and the Supremacy Clause of the United States Constitution.

We begin with Johnson's claims that the trial court abused its discretion in dismissing his suit as frivolous. Effective June 8, 1995, the dismissal of inmate lawsuits is governed

¹ An "Affidavit of Previous Litigation" appears in the record in which Johnson states that the requirement of Chapter 14 applies only to lawsuits filed after the effect date of the act, and he has filed no other actions "after this suit or after June 1995 the effective date of this action." However, section 14.004(a) does not state that it requires an inmate to list only the cases the inmate has filed since the date of the act. It is evident from appellant's brief that he has filed at least one previous lawsuit. *See Johnson v. Lynaugh*, 796 S.W.2d 705 (Tex. 1990).

² Article 1, section 29 of the Texas Constitution provides as follows: "[t]o guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void." TEX. CONST. art. I, § 29. Johnson makes no argument regarding the applicability of this provision.

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 under section 14.003. *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)). Indeed, the trial court's discretion is so broad, it may dismiss a claim even before service of process if it finds that the claim is frivolous or malicious. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(2) (Vernon Supp. 2001).

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 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(b) (Vernon Supp. 2001).

In making its determination under section 14.003, the trial court is authorized to take into consideration the requirements imposed by section 14.004. *See Thomas v. Wichita General Hospital*, 952 S.W.2d 936, 939 (Tex. App.—Fort Worth 1997, pet. denied); *Hickson v. Moya*, 926 S.W.2d at 398. Because Johnson did not comply with the mandatory requirements of section 14.004, the trial court could have properly assumed that he had previously filed substantially similar suits and, that his suit was, therefore, frivolous. *Hall v. Treon*, 39 S.W.3d 722, 724 (Tex. App.—Beaumont 2001, no pet.); *Samuels v. Strain*, 11 S.W.3d 404, 405, 406- 07 (Tex. App.—Houston [1st Dist.] 2000, no pet.). We therefore hold that, given the broad statutory authority of the trial court to dismiss inmate cases as frivolous, the trial court did not abuse its discretion in dismissing Johnson's claims as frivolous based on Johnson's failure to comply with the requirements of section 14.004. In so holding, we note that the trial court's broad statutory authority renders this case

distinguishable from those cases in which it has been held generally that a party must be provided with notice and an opportunity to be heard before a court may dismiss a party's claims. *See, e.g., Villareal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630-31 (Tex. 1999); *3V, Inc. v. JTS Enter., Inc.*, 40 S.W.3d 533, 543-44 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Consequently, Johnson's first two issues are without merit.

Johnson's third issue is likewise without merit because the trial court's order dismissing his suit does not indicate that the dismissal is "with prejudice" as Johnson appears to assert. We hold that the trial court did not abuse its discretion in dismissing Johnson's claims as frivolous.³

Because the dismissal of Johnson's claims as frivolous under section 14.004 was proper, we need not address Johnson's remaining issues relating to section 14.005.

The trial court's order is affirmed.

/s/ Wanda McKee Fowler
 Justice

Judgment rendered and Opinion filed November 15, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).

³ We note that while Johnson states in a conclusory fashion that the factual allegations of his suit are not frivolous and have a basis in law and fact, he does not present any argument or authority in support of that claim; indeed, his brief does not even identify the nature of his claims below or refer to any evidence in the record in support of his claims. Accordingly, Johnson has waived any argument that his claims have a basis in law or fact. *See Trenholm v. Ratcliff*, 646 S.W.2d 927, 934 (Tex. 1983) (holding that points of error must be supported by argument and authorities, and if not so supported, the points are waived); *see also Martinez v. Thaler*, 931 S.W.2d 45, 46 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (holding that dismissal of inmate's suit is proper if the claims lodged therein have no basis in law or fact).