

Reversed and Remanded and Opinion filed February 21, 2002.



In The

**Fourteenth Court of Appeals**

---

**NO. 14-01-00260-CV**

---

**JERRY WAYNE WIGFALL, Appellant**

**V.**

**TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Appellee**

---

---

**On Appeal from the 278th District Court  
Walker County, Texas  
Trial Court Cause No. 20,301-C**

---

---

**OPINION**

Appellant Jerry Wayne Wigfall appeals the trial court's dismissal of his negligence claims against the Texas Department of Criminal Justice ("TDCJ"). We reverse the trial court's judgment and remand this case for further proceedings consistent with this opinion.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Appellant is an inmate of the TDCJ at the Holliday State Prison Unit in Walker County. In April of 1998, while stepping out of the shower, appellant slipped and fell in a puddle of water, injuring himself. In his petition, appellant alleges that the showers were

slippery and wet, with uneven floors and no floor mats or shower shields to prevent the water from running out of the showers onto the floor in front of the showers. Appellant asserts that, as a result of his fall, he suffers from neck injuries, inability to sleep, numbness and discomfort in his lower back, legs and hands, dizziness, and headaches. He alleges that Warden Watkins, Warden Mohr, Edmund Sheffield, the unit's maintenance worker, and Sherman Willey, the unit's safety officer, were present at the time he fell. Appellant also alleges that these individuals were aware of the dangerous condition caused by the showers.

On October 23, 1998, appellant filed a grievance with the TDCJ, which he marked himself, "denied." That same day, he filed suit against the TDCJ under the Texas Tort Claims Act, claiming the TDCJ's negligence caused his injuries. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(a) (Vernon 1997). Appellant also named as defendants Warden Richard Watkins, Warden Mohr, Unit Maintenance Officer Edmund Sheffield, and Unit Safety Officer Sherman Willey, individually (collectively, the "TDCJ Employees"), under section 497.096 of the Government Code. TEX. GOV'T CODE ANN. § 497.096 (Vernon 1998). Appellant alleged that the appellees acted in a grossly negligent manner and that the dangerous condition of the showers was known to the prison system. The appellees answered, claiming official and sovereign immunity and that the plaintiff had not properly pled "a condition or use of tangible personal or real property" that proximately caused his injuries.

In November 1998, the trial court held a hearing to determine whether appellant's claim was meritorious. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.008 (Vernon Supp. 2002). At the end of this hearing, the trial court entered an order allowing appellant to pursue his claims against the TDCJ and the TDCJ Employees. In July 1999, appellant moved for summary judgment, claiming the evidence produced through discovery proved the appellees' negligence as a matter of law. In September 2000, the trial court held a hearing and denied appellant's summary judgment motion.

Trial was set for February 26, 2001. On February 9, 2001, appellees filed a motion to dismiss contending that appellant had failed to exhaust all his remedies as required by section 14.005 of the Texas Civil Practice and Remedies Code. *See id.* § 14.005 (Vernon Supp. 2002). Just three days later, without waiting for a response, the trial court entered an order granting appellees' motion to dismiss.

## **II. ISSUES PRESENTED ON APPEAL**

Appellant brings sixteen issues for our review. In his first issue, appellant contends the trial court erred in dismissing his claim under section 14.005 when the record shows that the court, without objection from appellees, waived the statutory requirements. In issues two through fifteen, appellant alleges several grounds supporting his contention that the trial court erred in dismissing his claim under section 14.005. In his sixteenth issue, appellant contends the trial court erred in denying his motion for summary judgment. Because his first fifteen issues relate to whether the trial court erred in dismissing the claim under section 14.005, we address them together. However, we first address appellant's contention that the trial court erred in denying his summary judgment motion.

## **III. DENIAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT**

Generally, an order denying a motion for summary judgment is not appealable because it is an interlocutory order. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996). There are exceptions to this general rule when the parties have filed competing motions for summary judgment, with one being granted and the other denied, and when a statute permits appeal of an interlocutory denial of summary judgment. *See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5)&(6)* (Vernon Supp. 2002); *Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex. 1980). This is not an interlocutory appeal of a denial of summary judgment allowed by statute. A defendant might possibly file a motion for summary judgment to seek dismissal with prejudice based on the plaintiff's failure to comply with certain provisions of Chapter 14 of the Texas Civil Practice and Remedies Code. *See Samuels v. Strain*, 11

S.W.3d 404, 405 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (indicating that dismissal under Chapter 14 of the Texas Civil Practice and Remedies Code may be effected by a motion for summary judgment under certain circumstances). In this case, however, the TDCJ filed a motion to dismiss under section 14.005, based on appellant’s alleged failure to properly exhaust his administrative remedies under the grievance system. *See* § 14.005. This motion is not the equivalent of a motion for summary judgment. On this record, we conclude that there were no competing motions for summary judgment. Therefore, we may not review the trial court’s denial of appellant’s motion for summary judgment, and we do not address appellant’s sixteenth issue. *See Novak*, 596 S.W.2d at 849; *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966).

#### **IV. DISMISSAL OF APPELLANT’S CLAIM UNDER § 14.005**

In fifteen issues, appellant claims the trial court abused its discretion by dismissing his lawsuit. In his first issue, appellant asserts that, although he did not comply with section 14.005 of the Texas Civil Practice and Remedies Code, he was not required to do so because the trial court waived the requirement at the 1998 evidentiary hearing.

We review a trial judge’s dismissal under Chapter 14 for abuse of discretion. *Hickson v. Moya*, 926 S.W.2d 397, 398 (Tex. App.—Waco 1996, no writ). An inmate who files a claim that is subject to a grievance system must normally furnish the trial court with a written copy of the grievance system’s decision. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.005 (a)(1) & (2). A court shall dismiss a claim if the inmate fails to file the claim before the thirty-first day after the date the inmate receives the written decision from the grievance system. *Id.* § 14.005(b).

The clerk’s record reflects appellant filed his Step 1 grievance on October 23, 1998. However, it appears that no administrative decision was ever reached and appellant marked his own form, “denied.” The record also reflects that the trial court held an evidentiary hearing on appellant’s claims in November 1998. At this hearing, the fact that appellant had

failed to comply with section 14.005 was brought to the trial court's attention, and the trial court, with no objection from appellees, waived the requirements of section 14.005 and entered an order allowing appellant to pursue his claims without compliance with this statutory provision.

Following this ruling, appellant pursued his claim and filed a motion for summary judgment. The trial court denied this motion in September 2000. Five months later, appellees filed a motion to dismiss based on appellant's failure to comply with section 14.005. Without waiting for a response from appellant, and despite its earlier ruling waiving compliance with this statutory provision, the trial court dismissed appellant's suit. Appellant does not dispute that he failed to comply with the section 14.005's requirements; instead, he argues that the court affirmatively excused him from compliance and, having done so, could not later dismiss his claim for non-compliance. Appellant points to the court's comments at the 1998 hearing. In response to appellees' arguments, the trial court stated:

The Court: Do you - - you are not want to - - in view of the - - conflict between whether he filed or didn't file, we'll- - we'll waive the - -the requirement [sic] that he file again and allow this case to be filed, allow it to be filed under the Texas Tort Claim Act.

And then later, down the line they'll probably file, Mr. Wigfall, a Motion for Summary Judgment claiming that the Texas Tort Claim Act does not recognize that as a viable cause of action under those facts. I'm just telling you what will probably happen down the road.

You understand, sir? Yes, sir?

[Appellant:] Yes, sir. The - - the shower itself had a leakage up under that, so what would that cause [sic] anything?

The Court: I don't know.

...

The Court: . . . I don't [sic] neither one of us- - none of the three of us knows completely whether the law covers that or not, so we're going to let you file it and then down the line they'll probably file- - *we're going to waive exhaustion. We're going to waive your exhaustion in view of the evidence that you have.*

Appellees were present at the hearing and voiced no objection to the court's waiver. By failing to object to the court's ruling waiving appellant's compliance with the statute, appellees waived any complaint based on appellant's failure to exhaust all remedies before filing suit with the district court. Moreover, by failing to object or otherwise register opposition to the prescribed course, appellees have waived any objection on appeal. *See* TEX. R. APP. P. 33.1; *Coastal Chem, Inc. v. Brown*, 35 S.W.3d 90, 99 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Thus, we can only conclude that the trial court improperly dismissed appellant's suit. Accordingly, we sustain appellant's first issue. Because we sustain appellant's first issue, it is not necessary to address appellant's issues two through fifteen, which relate to the dismissal.

We reverse the trial court's judgment and remand the cause for further proceedings consistent with this opinion.

/s/      Kem Thompson Frost  
            Justice

Judgment rendered and Opinion filed February 21, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

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