

Affirmed and Opinion filed May 3, 2001.



In The

**Fourteenth Court of Appeals**

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NO. 14-99-00691-CV  
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**KENNETH WAYNE HICKMAN, Appellant**

**V.**

**FRANK HOKE, CRAIG PRICE,  
ROBERT QUADA, AND UNDRA DAVIS, Appellees**

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**On Appeal from the 12<sup>th</sup> District Court  
Walker County, Texas  
Trial Court Cause No. 20,430**

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**OPINION**

Appellant, an inmate at the Estelle Unit in Huntsville, appeals from the trial court's dismissal of his lawsuit. We affirm.

**I. Background**

Appellant, proceeding *pro se, in forma pauperis*, filed suit against Frank Hoke, described as the administrator of access to courts for the Texas Department of Criminal Justice, Institutional Division; Craig Price, building major of the Estelle Unit; Robert Quada, Estelle Unit law librarian I; and corrections officer Undra Davis, in their individual and official

capacities. The suit alleged that the law library at the Estelle Unit was inadequate, that an appellee was responsible for the loss or theft of certain of appellant's personal property, and that an appellee threatened retaliation against appellant if he testified in court against a corrections officer.

On May 6, 1999, the court conducted a hearing pursuant to Chapter 14 of the Civil Practices and Remedies Code, governing inmate litigation. The hearing was held by teleconference, with the trial court in Walker County, the inmate at the Hughes Unit in Gatesville, and an assistant attorney general in Austin. The State made an oral motion to dismiss appellant's suit on grounds that appellant failed to comply with section 14.004 (Affidavit Relating to Previous Filings) of the Civil Practices and Remedies Code. At that hearing, the court dismissed the suit on the grounds advanced in the State's oral motion. On May 19, the court signed a written order dismissing the suit on grounds that (1) the complaint was frivolous because the claim's realistic chance of ultimate success was slight, (2) appellant failed to file a proper and complete affidavit relating to previous filings in violation of section 14.004 of the Civil Practices and Remedies Code; and (3) appellant failed to file a proper and complete affidavit relating to the Grievance System Decision; Exhaustion of Administrative Remedies, in violation of section 14.005 of the Code.

## **II. Discussion**

In his first two appellate issues, appellant complains that (1) his access-to-courts claim was improperly dismissed as frivolous and (2) his complaint of "witness tampering" in connection with an appellee stated a cause of action and was not subject to the prison's grievance procedure. We address these issues together.

Appellant's suit is governed by Chapter 14 of the Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.002 (Vernon Supp. 2000); *Hickman v. Adams*, 35 S.W.3d 120, 123 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2000, no pet.); *Thompson v. Henderson*, 927 S.W.2d 323, 324 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1996, no writ). A trial court has broad discretion to dismiss an inmate's suit if it finds the claim frivolous or malicious. *See Martinez v. Thaler*, 931

S.W.2d 45, 46 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1996, writ denied). We review a trial court’s decision to dismiss an inmate’s claim under an abuse-of-discretion standard. *Id.*

In determining whether a suit is frivolous or malicious, the court may consider whether the claim is substantially similar to a previous claim filed by the inmate because the claims arise from the same operative facts. Sec. 14.003(b)(4); *Hickman*, 35 S.W.3d at 123. To aid the trial court in determining whether an inmate’s suit is substantially similar to a previous suit, the inmate who files an affidavit or unsworn declaration of inability to pay costs must file a separate affidavit or declaration setting out information regarding certain previous lawsuits. *See* § 14.005(a). The inmate must state in his affidavit the “operative facts” for which relief was sought and the result of the suit. *See* § 14.004(a)(2)(A), (D). The purpose of sections 14.003 and 14.004 is to curb constant, duplicative inmate litigation, by requiring the inmate to notify the trial court of previous litigation and the outcome of the previous litigation. *See Bell v. Texas Dep’t of Criminal Justice Institutional Div.*, 962 S.W.2d 156, 158 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, pet. denied).

Here, in the court’s written dismissal order, one of the grounds listed was appellant’s failure to file a proper and complete affidavit relating to previous filings in violation of section 14.004 of the Code. In his affidavit, appellant lists two federal suits and two state suits, one of which was dismissed as frivolous. Appellant’s affidavit lists no operative facts for either the state or federal suits. Because appellant failed to list the operative facts for the previous suits, the trial court was entitled to assume the current suit was substantially similar to one previously filed by appellant. *See id.* The court, therefore, did not abuse its discretion in dismissing the claims regarding access to courts and witness tampering. We overrule appellant’s first and second issues.

In his third issue, appellant complains he should have been allowed to cure any defects in his affidavits before his claims were dismissed. We have previously determined that a trial court that dismisses an inmate’s suit for failure to comply with the requirements of section 14.004 does not abuse its discretion when it dismisses the claim without allowing the inmate

to cure any defects in the affidavit. *See Hickman*, 35 S.W.3d at 123.

In his fourth appellate issue, appellant complains that he was not given notice of the attorney general's motion to dismiss or an opportunity to review the motion, in violation of Texas Rules of Civil Procedure 21 and 72. In his fifth appellate complaint, he argues the trial court erred by not granting his motion for continuance. We address these issues together.

Appellant argues that on May 1, 1999, he was at the Hughes Unit in Gatesville to testify as a witness in a unrelated criminal case. Because he had been told that he would be in Gatesville for only a few days to testify, he did not bring from his assigned unit his personal property, including his legal research papers and books. When he was notified at the Hughes Unit of the May 6 hearing, he sought a continuance by mail. At the hearing, he orally reurged his continuance motion, which the trial court denied. On appeal, he argues that had he known of the state's dismissal motion and had access to his legal research material he could have argued against dismissal. He further complains that he was given no opportunity to present evidence in opposition to the dismissal.

We review a trial court's decision on a motion for continuance under an abuse of discretion standard. *See Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986).

We have previously dealt with a similar issue, with this appellant. *See Hickman*, 35 S.W.3d at 125-26. In the previous case, we determined that the order setting the evidentiary hearing gave sufficient notice of the substance of the matters to be considered by the trial court at the hearing. *Id.* Here, appellant complains, rather, that because he received notice while he was away from his assigned unit and thus had no access to his legal research materials, he was not prepared for the hearing. At the hearing, the trial court stated that it was dismissing the claims on grounds of failure to comply with section 14.004. Although on appeal appellant argues he was given no opportunity to present evidence, he filed no new-trial motion and on appeal has failed to state what evidence he would have offered to defeat the dismissal motion. Although appellant argues that the trial court erred in failing to grant the continuance, he advances no legal argument that would have defeated the dismissal motion. Appellant has

demonstrated no factual or legal error by the trial court requiring reversal. *See* TEX. R. APP. P. 44.1(a). Appellant has failed to demonstrate that the trial court abused its discretion by failing to grant his motion. We overrule appellant's fourth and fifth appellate issues.

Appellant filed a supplementary appellate brief in which he complains about the court's assessment of costs. In two complaints, appellant argues that (1) the inmate trust fund violated his rights to due process by excessive deductions from his account and (2) the trial court abused its discretion by failing to rule on appellant's motion to correct the bill of costs.

A court may order an inmate who has filed a claim to pay court fees, court costs, and other costs in accordance with section 14.006 and section 14.007. TEX. CIV. PRAC. & REM. CODE ANN. § 14.006(a) (Vernon Supp. 2000). The clerk of the court shall mail a copy of the court's order and a certified bill of costs to the Department of Criminal Justice. *Id.* On the court's order, the inmate shall pay an amount equal to the lesser of 20 percent of the preceding six months' deposits into the inmate's trust accounts or the total amount of court fees and costs. *Id.* § 14.006(b). In each month following the month in which payment is made under subsection (b), the inmate shall pay an amount equal to the lesser of 10 percent of that month's deposits to the trust account or the total amount of court fees and costs that remain unpaid. *Id.* § 14.006(c).

Appellant filed a plaintiff's motion to correct bill of costs in which he alleged that the trial court on May 20, 1999, entered a bill of costs against appellant in the amount of \$150. In his petition, he sought a "notation of 20% per subsection (b)(1)," presumably to limit the initial cost assessment to 20 percent of the preceding six months' deposits. On appeal, he complains the inmate trust fund withheld amounts in excess of that allowed by section 14.006(b) and that the trial court erred by not granting his motion to correct bill of costs.

The trial record does not contain a copy of the court's order assessing costs. We have only appellant's allegation that the court assessed costs at \$150 and failed to establish the statutory limits in the order. Even if we were to presume the trial court failed to establish the limits in the court order, we could not reverse the order. Generally, we must hear and

determine a case on the record filed with it. *Brooks v. Brooks*, 786 S.W.2d499, 501-02 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1990, writ denied). We cannot consider documents attached as exhibits or appendices to briefs or motions. *Id.* Nothing in the record before us shows that the excessive amounts were withdrawn from appellant’s inmate trust account. We have only appellant’s allegations. Although the trial record shows appellant asked the trial court to correct its original order assigning costs, the record does not show that appellant sought redress from the trial court for any presumed trust fund error. Appellant has attached to his appellate pleading uncertified, unverified photocopies that he argues demonstrate excessive amounts were withheld from this trust account. Such attachments do not constitute evidence. There being no evidence that appellant was harmed by any trial court action, we overrule appellant’s complains in his supplementary appellate brief.

Having overruled all of appellants issues, we affirm the trial court’s order dismissing the suit.

PER CURIAM

Judgment rendered and Opinion filed May 3, 2001.

Panel consists of Justices Edelman and Frost and Senior Chief Justice Murphy.<sup>1</sup>

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

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<sup>1</sup> Senior Chief Justice Paul C. Murphy sitting by assignment.