

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1734

BYRON ASMORE

VERSUS

OFFICER JONATHAN¹ CHAISSON,
LOUISIANA DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONS, B.B. "SIXTY" RAYBURN
CORRECTIONAL CENTER

Judgment Rendered: JUN 09 2014

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington, Louisiana
Trial Court Number 104,880

Honorable Scott Gardner, Judge

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through the Department of Public
Safety and Corrections, and
Jonathan Chaisson

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BEFORE: WHIPPLE, C.J., PARRO, AND WELCH, JJ.

¹ The record reflects that the correct spelling of defendant's name is Jonathan.

Whipple, C.J. concurs.

WELCH, J.

Plaintiff, Byron Asmore, an inmate in the custody of the Louisiana Department of Public Safety and Corrections (DPSC), appeals a judgment sustaining a peremptory exception raising the objection of prescription and an exception raising the failure to exhaust administrative remedies in favor of defendants, Jonathan Chaisson and the State of Louisiana, through DPSC, and dismissing this personal injury action with prejudice. We reverse that portion of the judgment sustaining the exception of prescription, affirm that portion of the judgment dismissing the lawsuit for failure to exhaust administrative remedies, but amend the judgment to reflect that the dismissal shall be without prejudice.

BACKGROUND

On July 26, 2012, Mr. Asmore, a DPSC inmate housed at the B.B. “Sixty” Rayburn Correctional Center (RCC), filed this personal injury lawsuit in the 22nd Judicial District Court against the State of Louisiana, through DPSC, and Officer Jonathan Chaisson, an employee of RCC. In the petition, Mr. Asmore alleged that on August 1, 2011, at approximately 10:00 a.m., an accident occurred while he was being transported on a DPSC prison bus driven by Officer Chaisson on Interstate 10 in Baton Rouge. Specifically, Mr. Asmore claimed that Officer Chaisson, who was travelling in the right lane of I-10 near Essen Lane, attempted to change lanes and/or veered into the adjacent left lane and struck another vehicle. Mr. Asmore alleged that the impact of the collision caused his body to jolt quickly, resulting in an injury to his back. Asserting that the accident was caused by Officer Chaisson’s negligence, Mr. Asmore sought to recover damages for pain and suffering, mental anguish, medical expenses, future lost wages, aggravation, and loss of the ability to participate in normal activities.

In the petition, Mr. Asmore further claimed that he was not required to exhaust administrative procedures prior to filing his lawsuit because he was

asserting a tort claim and alternatively, because he was approached by a claims adjuster who advised that he would be handling the claim. Mr. Asmore alleged that he relied on the adjuster's representation that the incident was being investigated and that his participation satisfied any relief requirements.

Mr. Asmore filed a motion in the trial court to proceed *in forma pauperis*. On October 23, 2012, the trial court granted Mr. Asmore's motion, permitting him to litigate the action without the payment of costs or furnishing security for costs. (R 6) The date "October 23, 2012" is stamped on the petition. The petition also bears a received-filed date of "July 26, 2012."

On January 9, 2013, the State of Louisiana, through DPSC and Officer Chaisson (sometimes collectively referred to as DPSC) filed exceptions raising the objections of prescription and the failure to initiate and exhaust administrative remedies. DPSC urged that the lawsuit was prescribed on its face because it was not filed until October 23, 2012, more than one year after the August 1, 2011 accident. It further asserted that this is a "prisoner suit" governed by the Prison Litigation Reform Act (PLRA), the Corrections Administrative Remedy Procedure (CARP), and DPSC's administrative remedy procedure established in Title 22 of the Louisiana Administrative Code, all of which require that inmates exhaust administrative remedies prior to filing suit in district court. DPSC pointed out that Mr. Asmore admitted in his petition that he did not initiate or complete the administrative remedy procedure. Asserting that Mr. Asmore's claims arising from the accident had been abandoned because he did not initiate the prison grievance process within 90 days of the accident, DPSC insisted that it was entitled to a dismissal of the lawsuit with prejudice.

In opposition to the exception, Mr. Asmore pointed out that the petition has a stamped date of July 26, 2012 on it, demonstrating that the lawsuit was filed within one year of the August 1, 2011 accident. He also claimed that he was not

required to initiate the administrative remedy process because the accident did not occur within the institution and because his claim had been handled through a claims adjuster.

In response thereto, DPSC argued that the lawsuit was prescribed because Mr. Asmore did not satisfy the requirements contained in the PLRA for proceeding *in forma pauperis* until after the one-year prescriptive period had run. DPSC asserted that the petition therefore could not be considered as having been “filed” within the one-year prescriptive period.

At the hearing on the exceptions, Mr. Asmore offered his affidavit into evidence, in which he stated that prior to the accident, RCC did not inform him of the administrative remedy process; however, he acknowledged that a handbook was issued to him about that process. He further attested that one week after the accident, an adjuster, Aaron Owens of Rester Claims Services, L.L.C. visited him at the prison, asked him questions regarding the accident, and asked him whether he had any injuries, to which Mr. Asmore responded that he had hurt his back. Mr. Asmore stated that Mr. Owens informed him that he would handle the matter. Mr. Asmore also offered into evidence a letter from Mr. Owens to Mr. Asmore’s attorney dated October 3, 2011, stating that Rester Claims Service, L.L.C., independent insurance adjusters, were investigating and handling the subject accident on behalf of the State of Louisiana, Office of Risk Management. The letter further explained that Risk Management instructed the adjusters to deny any and all claims presented by Mr. Asmore in connection with the accident and that no further consideration would be given to Mr. Asmore’s bodily injury claim.

Following a hearing, the district court granted the exceptions of prescription and failure to exhaust administrative remedies. The district court entered judgment on July 2, 2013, granting the exceptions and dismissing Mr. Asmore’s lawsuit with prejudice.

DISCUSSION

Where the law provides for an administrative remedy, a claim must be processed through the administrative process before a district court will have subject matter jurisdiction to entertain the claim. **Larrieu v. Wal-Mart Stores, Inc.**, 2003-0600 (La. App. 1st Cir. 2/23/04), 872 So.2d 1157, 1162. It is axiomatic that the party raising the objection of failure to exhaust administrative remedies has the burden of proving it is available and that the plaintiff failed to submit his claim before the administrative tribunal prior to filing suit. Once the existence of an administrative remedy is established, the burden shifts to the plaintiff to prove that he has exhausted his administrative remedies available to him or that the present situation is one of the exceptional situations where the plaintiff is entitled to judicial relief because any administrative remedy is irreparably inadequate. **Cheron v. LCS Corrections Services, Inc.**, 2002-1049 (La. App. 1st Cir. 2/23/04), 872 So.2d 1094, 1103, affirmed, 2004-0703 (La. 1/19/05), 891 So.2d 1250; **Mosley v. Louisiana Department of Public Safety & Corrections**, 2007-1501 (La. App. 3d Cir. 4/2/08), 980 So.3d 836, 837.

In this appeal, Mr. Asmore contends that RCC did not prove that it had a valid administrative remedy for accidents occurring outside the prison and submits that the district court erred in finding that RCC met its burden of proof on the exception. He contends that RCC never proved it had a published administrative remedy procedure and there was no showing that any procedure had been filed with the clerk of the district court in the parish where it is domiciled.² He also insists that RCC never showed that it had a valid administrative remedy procedure that provided a remedy for accidents that do not occur on the prison grounds.

² The PLRA contains a provision which requires a court to take judicial notice of administrative remedies adopted by a governmental entity that have been filed with the clerk of the district court in the parish where the governmental entity is domiciled. La. R.S. 15:1184A(3).

We find no merit to these assertions. DPSC has adopted and implemented, in all of its adult prison institutions, an administrative remedy procedure applicable to all inmates in its custody. This procedure is published in the Louisiana Administrative Code; thus, there was no need for DPSC to offer into evidence further proof of its administrative remedy procedure or that it had ever been filed with the clerk of court.

The provisions of CARP permit DPSC to adopt administrative remedy procedures at its correctional institutions for receiving, hearing, and disposing of “any and all” complaints and grievances by adult offenders against DPSC or any of its officials or employees. La. R.S. 15:1171B. The broad scope of such complaints and grievances include, but are not limited to:

[A]ny and all claims seeking monetary, injunctive, declaratory, or any other form of relief authorized by law and by way of illustration includes actions pertaining to conditions of confinement, personal injuries, medical malpractice, time computations, even though urged as a writ of habeas corpus, challenges to rules, regulations, policies, or statutes.

Id.

DPSC’s administrative remedy procedure, enacted in accordance with the Louisiana Administrative Procedure Act, La. R.S. 49:950, provides the mechanism for an offender to seek formal review of “a complaint which relates to any aspect of his incarceration.” LAC 22:I:325D(2). DPSC’s regulations require offenders to use the procedure before they can proceed with a suit in federal and state courts. LAC 22:I:325D(1). Such complaints and grievances subject to DPSC’s administrative remedy procedure “include, but are not limited to any and all claims seeking monetary, injunctive, declaratory or any other form of relief authorized by law and by way of illustration, includes actions pertaining to conditions of confinement, personal injuries, medical malpractice”..... LAC 22:I:325D(2) CARP deems the procedure published in LAC 22:I:325 to be in compliance with its provisions. La. R.S. 15:1172A. Like DPSC’s regulations, both CARP and the

PLRA require that prisoners exhaust the prison administrative remedy procedure prior to filing a claim for personal injuries against DPSC or its employees in state court. See La. R.S. 15:1172(C); La. R.S. 15:1184A.

DPSC demonstrated the existence of an administrative remedy procedure applicable to inmate claims confined to state institutions for damages for personal injuries. Mr. Asmore insists that the administrative remedy procedure does not apply to his claim because the subject accident occurred on Interstate 10 and not within the RCC institution. In support, he relies on a provision of DPSC's regulations which sets forth the "general policy" that "[o]ffenders may request administrative remedies to situations arising from policies, conditions or events **within the institution** that affect them personally." LAC 22:I:325F(1) (Emphasis added) He asks this court to read this provision as limiting the types of inmate complaints and grievances that must be initiated in the prison grievance process to only those arising on property of the institution. We decline to do so. It is clear that DPSC regulations, CARP, and PLRA are broad in scope and subject claims for personal injuries by an inmate against DPSC or its employees to the administrative remedy procedure. DPSC regulations and CARP provide that "any and all claims seeking monetary...relief", including claims for personal injuries, are subject to the administrative remedy procedure. LAC 22:I:325D(2); La. R.S. 15:1171B. Moreover, PLRA defines the term "administrative remedies" to include claims by prisoners with respect to "the effects of actions by government officials on the lives of persons confined in prison." La. R.S. 15:1184A(1)(a). We hold that the mere location of the incident giving rise to an inmate's claim for personal injuries against DPSC and its employees is not controlling on the exhaustion issue. In this case, an inmate in the custody of DPSC is asserting a claim for personal injuries against DPSC and its employee for the alleged negligence of the DPSC employee occurring during DPSC's transport of that inmate on a prison bus during his

confinement. Transporting prisoners is an aspect of incarceration and DPSC's administrative remedy procedure plainly applies to complaints relating to any aspect of an inmate's incarceration. Therefore, we find that DPSC's administrative remedy procedure applies to Mr. Asmore's claim for monetary damages against DPSC and its employee for injuries arising during his transportation by DPSC.

Additionally, we find no merit to Mr. Asmore's argument that he was somehow excused or exempt from initiating the applicable administrative remedy procedures because a claims adjuster contacted him, told him he was handling the matter, and there was never any mention that Mr. Asmore also needed to complete the administrative remedy process. Further, although Mr. Asmore insists that RCC had the burden of proving that the administrative remedy available to him is adequate, it was Mr. Asmore's burden to demonstrate, once the remedy was shown to be available, that the present situation is one in which he is entitled to judicial review because any administrative remedy is irreparably inadequate. Mr. Asmore failed to do so.

In his fifth assignment of error, Mr. Asmore contends that CARP and PLRA are unconstitutional as they apply to inmate tort suits. Mr. Asmore did not raise this issue in any pleading; he raised the constitutional issue in a memorandum filed in opposition to DPSC's exceptions. It has long been held that the unconstitutionality of a statute must be specifically pleaded and the grounds for the claim particularized. **State v. Hatton**, 2007-2377 (La. 7/1/08), 985 So.2d 709, 719. A memorandum is not a pleading recognized under the Code of Civil Procedure and is therefore not a proper method to challenge the constitutionality of a statute. **M.J. Farms, Ltd. v. Exxon Mobil Corporation**, 2007-0450 (La. 4/27/07), 956 So.2d 573, 574. Therefore, Mr. Asmore failed to properly confect a constitutional challenge to CARP and PLRA.

For the above reasons, we affirm that portion of the judgment sustaining DPSC's exception of failure to exhaust administrative remedies. Because Mr. Asmore failed to exhaust his administrative remedies through the prison grievance procedure prior to filing a tort suit arising from the accident, the district court lacked subject matter jurisdiction to entertain his claim. Since the district court lacked subject matter jurisdiction, its judgment sustaining DPSC's exception of prescription must necessarily be reversed. We amend the judgment dismissing the petition for failure to exhaust administrative remedies with prejudice to provide for dismissal of Mr. Asmore's claims without prejudice. See Walker v. Appurao, 2009-0821 (La. App. 1st Cir. 10/23/09), 29 So.3d 575, 577, writ denied, 2009-2822 (La. 3/5/10), 28 So.3d 1010; Rochon v. Young, 2008-1349 (La. App. 1st Cir. 2/13/09), 6 So.3d 890, 892-93, writ denied, 2009-0745 (La. 1/29/10), 25 So.3d 824.

CONCLUSION

Based on the foregoing, the judgment sustaining the peremptory exception raising the objection of prescription is reversed; the judgment sustaining the exception of failure to exhaust administrative remedies is amended to reflect that the dismissal is without prejudice and, as amended, that portion of the judgment is hereby affirmed.

REVERSED IN PART; AFFIRMED IN PART AS AMENDED.