COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00313-CV

THOMAS FLORENCE — APPELLANT

V.

K. ROLLINGS AND A. FRANCO (ASST WARDEN) — APPELLEES

FROM THE 78TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 186,279-B

MEMORANDUM OPINION[1]

Thomas Florence, a pro se indigent inmate at the Texas Department of Criminal Justice Allred Unit, sued TDCJ Officer K. Rollings and Assistant Warden A. Franco for due-process violations. On Rollings and Franco's motion, the trial court signed orders declaring Florence a vexatious litigant, requiring him to post security, and prohibiting him from filing any new pro se litigation without first

[1]*See* Tex. R. App. P. 47.4.

getting the local administrative judge's permission. Florence appeals from these orders, raising five issues. We will affirm.

Background

According to Florence, Rollings filed a report falsely accusing him of being in a prison dayroom without authorization and lying to Rollings about why he was there. After an administrative hearing, the hearing officer found Florence guilty and assessed punishment.[2] Florence claims that the hearing officer refused to look at video-surveillance footage showing that Florence was in his cell at the time of the alleged incident.

Florence appealed the decision by filing a Step I grievance requesting the video-surveillance footage and seeking to have the case overturned based on the footage. Franco reviewed the case and determined that there were no procedural errors, that sufficient evidence supported the charge and the guilty finding, that there were no apparent due-process errors, and that the assessed punishment was within agency guidelines. Based on these findings, Franco concluded that there was no reason to warrant overturning the case and that no further action was necessary.

Florence then filed a Step II grievance complaining that the hearing officer did not review the surveillance footage, that Franco just "rubber-stamped" the hearing officer's decision, and that Florence's Step I grievance was not resolved

[2]The nature of Florence's punishment is not in the record.

on the merits. Florence asked again that the surveillance footage be reviewed. M. Blalock reviewed the case and determined that the hearing records supported the guilty findings, that the punishment was within established guidelines, and that there were no due-process errors. Like Franco, Blalock concluded that no further action was warranted.

Florence responded by suing Rollings and Franco[3] in April 2017 for due-process violations, seeking declaratory and injunctive relief, a new hearing, and production of the video-surveillance footage. Florence alleged that Rollings filed a false disciplinary case against him and that Franco "turned a blind eye" towards Rollings's actions and denied Florence a "mandatory full impartial review of [his] claims via the TDCJ . . . grievance system, which creates a liberty interest."

Rollings and Franco moved the trial court to dismiss Florence's claims under chapter 14 of the civil practice and remedies code, to declare Florence a vexatious litigant, and to enter a prefiling order. On September 7, 2017, the trial court granted their vexatious-litigant motion and signed two orders: (1) "Order Declaring Plaintiff Vexatious" and (2) "Prefiling Order." The vexatious-litigant order declared Florence a vexatious litigant; required him to post a $5,000 security by November 1, 2017, to avoid dismissal of the case; and prohibits him from filing new litigation in any Texas court without getting the local

[3]Florence does not specify whether he is suing Rollings and Franco in their official or individual capacities. We will assume, as Rollings and Franco do, that Florence is suing them in both capacities. Florence also sued Blalock but never properly served him with citation.

administrative judge's permission. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 11.051–.057 ("Vexatious Litigants"), 11.101–.104 ("Prohibiting Filing of New Litigation") (West 2017). Like the vexatious-litigant order, the prefiling order also prohibits Florence from filing, pro se, any new litigation in any Texas court without getting the local administrative judge's permission and states that if Florence files any new litigation violating the order, the suit will be subject to dismissal and Florence will be subject to sanctions. Each order directs the trial-court clerk to send a copy of the order to the Office of Court Administration so that the order can be added to the statewide vexatious-litigants list. *See id.* § 11.104.

The day after the trial court signed the orders, Florence appealed. The trial-court clerk has informed us that even though Florence has not posted the $5,000 security, his claims have not been dismissed.

Appellate Jurisdiction

Because Florence's claims remain pending in the trial court, we begin with the threshold issue of our jurisdiction. Before the record was filed in this case, we sent a letter to the parties questioning our jurisdiction because the vexatious-litigant order does not appear to be a final judgment or an appealable interlocutory order. After neither party responded, we decided to continue the appeal but requested that the parties' briefs discuss whether the prefiling order is appealable.

Chapter 11 of the civil practice and remedies code provides two different methods for restricting vexatious litigation. *See id.* §§ 11.051–.104. *See generally Leonard v. Abbott*, 171 S.W.3d 451, 457 (Tex. App.—Austin 2005, pet. denied) ("The purpose of chapter eleven is to restrict frivolous and vexatious litigation."); *Devoll v. State*, 155 S.W.3d 498, 501 (Tex. App.—San Antonio 2004, no pet.) ("Chapter Eleven of the Texas Civil Practice and Remedies Code provides a framework for courts and attorneys to curb vexatious litigation."). The first, available under section 11.051, provides that a defendant may—within 90 days of filing an original answer or making a special appearance—move for an order determining that the plaintiff is a vexatious litigant and requiring him to furnish security. Tex. Civ. Prac. & Rem. Code Ann. § 11.051. If, after notice and hearing, the trial court determines that the plaintiff is vexatious, the trial court must order the plaintiff to furnish security "for the benefit of the moving defendant" and must "determine the date by which the security must be furnished." *See id.* §§ 11.053–.055. If the plaintiff fails to furnish the ordered security, the trial court must dismiss the plaintiff's claims as to the moving defendant.[4] *Id.* § 11.056. There is no interlocutory appeal available from an order declaring a plaintiff to be a vexatious litigant and requiring him to furnish security. *See, e.g.*, *Restrepo v. Alliance Riggers & Constructors, Ltd.*, No. 08-15-00011-CV, 2015 WL 999950, at

[4]As noted, Florence has not furnished the ordered security. The record is silent as to why the trial court has not dismissed Florence's claims. Rollings and Franco do not challenge the trial court's failure to dismiss Florence's claims; they ask us only to affirm the trial court's prefiling order.

*1 (Tex. App.—El Paso Mar. 4, 2015, no pet.) (mem. op.); *Lagaite v. Boland*, No. 07-12-0422-CV, 2012 WL 6213259, at *1–2 (Tex. App.—Amarillo Dec. 13, 2012, no pet.) (mem. op.); *Douglas v. Honorable Tex. Bd. of Pardons & Paroles*, No. 14-11-00527-CV, 2012 WL 1154367, at *1 (Tex. App.—Houston [14th Dist.] Apr. 5, 2012, no pet.) (mem. op.); *Almanza v. Keller*, 345 S.W.3d 442, 443 (Tex. App.—Waco 2011, no pet.). Accordingly, we do not have jurisdiction over Florence's appeal from the portion of the vexatious-litigant order ordering him to furnish security based on the trial court's finding that he is a vexatious litigant.[5]

The second method for restricting vexatious litigants, available under section 11.101(a), allows a trial court—on a party's motion or the court's own motion—upon finding a person to be a vexatious litigant, to enter an order prohibiting that person from filing, pro se, any new litigation without the local administrative judge's permission. Tex. Civ. Prac. & Rem. Code Ann. § 11.101(a). Section 11.101(c) expressly permits an appeal from a prefiling order: "[a] litigant may appeal from a prefiling order entered under [section 11.101(a)] designating the person a vexatious litigant." *Id.* § 11.101(c); *see id.* § 11.103(d) (permitting appellate-court clerk to file an appeal from a prefiling order entered under section 11.101). Several courts have interpreted section

[5]Because the trial judge signed two orders containing prefiling restrictions, our conclusion does not apply to the part of the vexatious-litigant order that includes prefiling language. Our analysis of the prefiling order applies equally to the prefiling language in the vexatious-litigant order.

11.101(c) as providing for an interlocutory appeal.[6] *See Margetis v. Bayview Loan Servicing, LLC*, No. 10-18-00128-CV, 2018 WL 2727862, at *1 (Tex. App.—Waco June 6, 2018, no pet. h.); *Jones v. Carter*, No. 09-16-00081-CV, 2016 WL 2941412, at *1 (Tex. App.—Beaumont May 19, 2016, no pet.) (mem. op.); *Restrepo*, 2015 WL 999950, at *1–2. *But see Diaz v. A.M. Stringfellow Unit*, No. 14-15-00253-CV, 2015 WL 1870251, at *1 (Tex. App.—Houston [14th Dist.] Apr. 23, 2015, no pet.) (mem. op.) (stating, in dictum, in a case involving a vexatious-litigant order—but not a prefiling order—that "[t]here is no statutory provision authorizing an appeal . . . of an order prohibiting a person from filing new litigation without permission of the local administrative judge"); *Miller v. State*, No. 05-01-00115-CV, 2001 WL 462811, at *1 (Tex. App.—Dallas May 3,

[6]In an appeal from a prefiling order before section 11.101(c)'s enactment, the Texarkana court rejected the notion that the prefiling order in that case was an interlocutory order. *Pandozy v. Beaty*, 254 S.W.3d 613, 618 (Tex. App.—Texarkana 2008, no pet.); *see* Act of June 29, 2011, 82d Leg., 1st C.S., ch. 3, § 9.02, sec. 11.101, 2011 Tex. Sess. Law Serv. 117, 157 (codified at Tex. Civ. Prac. & Rem. Code Ann. § 11.101(c)) (enacting section). There, the trial court—four years after the underlying case was dismissed—found Pandozy to be a vexatious litigant based on evidence that he "had instituted (and either lost or had dismissed) at least seven separate actions in Dallas and in New York, as well as continuing proceedings under the present cause number." *Pandozy*, 254 S.W.3d at 615, 619. The appellate court determined that the prefiling order was not interlocutory but was an order that existed apart and separate from any existing action and likened the order to a permanent injunction "[b]ecause of the nature of the relief, the method in which it is obtained, and (in this instance) the fact that the order stands alone without reference to an ongoing lawsuit or appealable judgment in a lawsuit." *Id.* at 618. *Pandozy* is not controlling here because it predated section 11.101(c) and involved a prefiling order that was entered after final judgment in the underlying case. But even if it were, it would support our holding that we have jurisdiction over Florence's appeal.

2001, no pet.) (not designated for publication) (stating, in case predating section 11.101(c), that order finding plaintiff vexatious, requiring security, and limiting the filing of new litigation was not an appealable interlocutory order). Based on the statutory language, we conclude that we have jurisdiction over Florence's appeal from the prefiling order and the remaining portion of the vexatious-litigant order, which is essentially a prefiling order.[7]

The Trial Court's Vexatious-Litigant Finding

Florence asks us to review the trial court's rulings de novo. But we instead must review a trial court's vexatious-litigant determination[8] for an abuse of discretion. *1901 NW 28th St. Tr. v. Lillian Wilson, LLC*, 535 S.W.3d 96, 99 (Tex. App.—Fort Worth 2017, no pet.).

[7]We recognize that, unlike other statutes authorizing interlocutory appeals, section 11.101(c) does not specify that the appeal may be interlocutory. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a) (West Supp. 2017) (listing appealable interlocutory orders), § 51.016 (West 2015) (expressly permitting an interlocutory appeal from arbitration orders appealable under federal law). But other statutes allowing interlocutory appeals from certain orders do not expressly state that such an appeal is interlocutory. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 171.098 (West 2011) (allowing appeals from certain arbitration orders in cases governed by the Texas Arbitration Act); Tex. Fam. Code Ann. § 56.01(c)(1)(A)–(B) (West Supp. 2017) (permitting appeals from certain orders in juvenile proceedings).

[8]Because a vexatious-litigant finding is the only statutory prerequisite to a prefiling order, we review the propriety of that finding in the appeal of the prefiling order and of the prefiling portion of the vexatious-litigant order even though we are dismissing the appeal from the part of the vexatious-litigant order ordering Florence to furnish security.

A trial court may find that a plaintiff is a vexatious litigant if the defendant demonstrates that there is no reasonable probability (1) that the plaintiff will prevail in the litigation against the defendant and (2) that

> the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been:
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> (A) finally determined adversely to the plaintiff;
>
> (B) permitted to remain pending at least two years without having been brought to trial or hearing; or
>
> (C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure.

Tex. Civ. Prac. & Rem. Code Ann. § 11.054(1).

Rollings and Franco moved the trial court to declare Florence a vexatious litigant under section 11.054(1)(C). *See id.* § 11.054(1)(C). The trial court granted the motion without giving a reason. On appeal, Florence does not challenge the trial court's determination that Rollings and Franco satisfied the second prong: that Florence filed at least five pro se lawsuits determined to be frivolous or groundless in the last seven years. *See id.* We thus turn our attention to the first prong: whether Florence has a reasonable probability of winning this case. *See id.* § 11.054.

Rollings and Franco alleged that there was no reasonable probability that Florence will prevail because his claims are frivolous or malicious under chapter 14 of the civil practice and remedies code. That chapter permits a trial court to

dismiss an indigent inmate's claim if the court finds that the claim is frivolous or malicious. *See id.* §§ 14.002, .003(a)(2) (West 2017). In making this determination, the trial 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 fact, (3) it is clear that the inmate cannot prove facts to support the claim, or (4) the claim is substantially similar to a previous claim filed by the inmate because it arises from the same operative facts. *Id.* § 14.003(b). Here, Rollings and Franco contended that Florence's claims were frivolous or malicious under chapter 14 because they are barred by *Heck v. Humphrey*,[9] *Hamilton v. Williams*,[10] sovereign immunity, and official immunity.[11]

[9]512 U.S. 477, 486–87 114 S. Ct. 2364, 2372 (1994) (holding that to recover damages caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus).

[10]298 S.W.3d 334, 340–41 (Tex. App.—Fort Worth 2009, pet. denied) (holding that appellant's due-process claim based on allegations that TDCJ employees failed to follow the TDCJ's disciplinary-proceeding policies and procedures had no arguable basis in law because appellant's punishments—cell restrictions and loss of commissary privileges—are not constitutionally protected property interests and therefore do not implicate due-process concerns).

[11]Rollings and Franco also alleged that Florence's claims should be dismissed under chapter 14 because Florence had failed to file documents showing that he had exhausted his remedies within the prison grievance system and had failed to file an affidavit of previous filings. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 14.004, .005(a)–(b) (West 2017). But during a hearing, their counsel conceded that Florence had filed these documents.

Construing Florence's brief liberally (as we must), four of his five issues—his first, second, fourth, and fifth—challenge the trial court's implicit finding that there is no reasonable probability that he will prevail in this case: (1) the trial court erred by not liberally construing his pleadings, which showed that his claims were not frivolous because they had an arguable basis in law or in fact; (2) because Rollings and Franco's motions were frivolous and filed in bad faith, the trial court erred by granting their vexatious-litigant motion; (3) due process and due course of law require that the TDCJ preserve surveillance videos for more than 21 days and that a disciplinary-hearing officer review surveillance videos if a prisoner so requests; and (4) he has liberty and property interests in the TDCJ's disciplinary procedures, and Rollings's and Franco's failure to follow those disciplinary procedures not only violated Florence's due-process rights but violated state law and constituted a breach of contract. But nowhere in Florence's brief does he challenge whether sovereign and official immunity bar his claims against Rollings and Franco, as they argued.

Generally, an appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment. *Oliphant Fin. LLC v. Angiano*, 295 S.W.3d 422, 423–24 (Tex. App.—Dallas 2009, no pet.). If an independent ground would fully support the complained-of ruling or judgment, but the appellant assigns no error to that independent ground, we must accept the validity of that unchallenged independent ground, and any error in the grounds challenged on appeal is harmless. *Id.*

Because Florence failed to attack all the independent grounds supporting the trial court's vexatious-litigant finding—specifically that his claims are barred by sovereign and official immunity—we must accept those grounds' validity. *See Cooper v. McNulty*, No. 05-15-00801-CV, 2016 WL 6093999, at *6 (Tex. App.—Dallas Oct. 19, 2016, no pet.) (mem. op.); *Lagaite v. Pittman*, No. 01-10-00554-CV, 2012 WL 1649850, at *6 (Tex. App.—Houston [1st Dist.] May 10, 2012, no pet.) (mem. op.); *Retzlaff v. GoAmerica Commc'ns Corp.*, 356 S.W.3d 689, 698–99 (Tex. App.—El Paso 2011, no pet.). Thus, any error in the grounds Florence *has* challenged on appeal is harmless because the unchallenged grounds fully support the trial court's ruling. *See Cooper*, 2016 WL 6093999, at *6; *Lagaite*, 2012 WL 1649850, at *5. Because Florence did not attack all the independent grounds for the trial court's ruling, we must uphold it. *See Cooper*, 2016 WL 6093999, at *6; *Lagaite*, 2012 WL 1649850, at *5; *Retzlaff*, 356 S.W.3d at 698–99.

We overrule Florence's first, second, fourth, and fifth issues. Because our ruling on these issues disposes of this appeal, we do not address Florence's third issue, in which he claims that the trial court erred by not taking judicial notice of documents he filed with his original petition[12] and with his response to Rollings and Franco's motions.[13] *See* Tex. R. App. P. 47.1.

[12]With his petition, Florence filed an "Application to Proceed in Forma Pauperis," a certified copy of his trust-account statement, an affidavit of previous filings, and an affidavit averring that he had exhausted his administrative

Conclusion

Because we lack jurisdiction over Florence's appeal from the portion of the vexatious-litigant order ordering him to furnish security based on the trial court's finding that he is a vexatious litigant, we dismiss that part of the appeal for lack of jurisdiction. *See* Tex. R. App. P. 43.2(f). Having overruled Florence's dispositive issues, we affirm the prefiling portion of the vexatious-litigant order and the prefiling order.[14] *See* Tex. R. App. P. 43.2(a).

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: SUDDERTH, C.J.; WALKER and KERR, JJ.

DELIVERED: August 30, 2018

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remedies, with copies of the incident report and step 1 and step 2 grievances attached.

[13]In his brief, Florence asks us to take judicial notice of an alleged admission by state officials in another case that he has a state-created right to have the TDCJ follow its disciplinary policies and procedures. We deny this request. We also dismiss as moot Florence's currently pending "Motion for Leave of Court in Good Faith to File Disp. Case #20180323282 Under T.R.E. 201 Relevant to the Pending Appeal and Should be Considered by Court."

[14]It appears from Florence's brief that he believes his claims have been dismissed. To be clear, according to the record before us and the information provided to us by the trial-court clerk, his claims remain pending in the trial court.