NUMBER 13-19-00201-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

SALVADOR ZAVALA, TDCJ NO. 1447730, **Appellant,**

v.

SVEN STRACK, ET AL., **Appellees.**

On appeal from the 36th District Court of Bee County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Chief Justice Contreras

Appellant Salvador Zavala, a Texas inmate proceeding pro se and *in forma pauperis*, appeals the dismissal of his lawsuit against appellees Sven Strack, David M. Rios, Christie L. Garcia, Corey Furr, Claudia Y. Becerra, Braulio Sanchez, Melissa J. Stengel, M. Blalock, Gene E. Miller, Grievance Investigator ID #1950, Grievance

Investigator ID #1312, and the Texas Department of Criminal Justice–Institutional Division (TDCJ). By two issues, appellant argues the trial court erred when it (1) dismissed his suit under chapter 14 of the Texas Civil Practice and Remedies Code and (2) declared him a vexatious litigant. We affirm.

I. BACKGROUND

Appellant is an inmate at the McConnell Unit of TDCJ in Beeville, Texas. On May 7, 2018, appellant filed suit against appellees in their official and individual capacities. In his petition, appellant alleged that he was given a false disciplinary charge by Strack and that the hearing on the disciplinary charge did not comply with TDCJ policy and rules, denying him due process of law. Appellant also alleged Strack broke his typewriter and illegally confiscated it in retaliation for filing grievances. Appellant sought judicial review of the disciplinary ruling and asserted claims for "denial [of] a fair disciplinary hearing," retaliation, breach of contract, "participatory liability – assisting and encouraging," conspiracy, common law fraud, declaratory relief, and injunctive relief.

Appellant submitted to the trial court the report from his disciplinary hearing, his level 1 and 2 grievances, a declaration of previously filed suits, and a "Request to pay for suit through my inmate trust fund." The report from the hearing on the disciplinary charge stated that appellant possessed contraband, "namely, freeworld pens, markers, and highlighters, which are items no [sic] allowed or assigned to an offender, and not bought by [appellant] for his use from the commissary." Appellant lost recreation and commissary privileges for thirty days as punishment. In his level 1 grievance, appellant complained that: the alleged violation was not investigated within the time frame provided by TDCJ's

rules; he was never in possession of contraband or it did not belong to him; and Strack falsified the disciplinary case to justify the illegal confiscation of his typewriter.

The Texas Attorney General filed an amicus curiae brief advising the trial court to dismiss appellant's suit because his claims had no arguable basis in law or in fact and recommending that the trial court declare appellant a vexatious litigant. The attorney general submitted copies of nine civil judgments rendered against appellant in the preceding three years. After a hearing at which appellant participated via telephone, the trial court dismissed appellant's lawsuit with prejudice and declared him a vexatious litigant. This appeal followed.

II. DISMISSAL UNDER CHAPTER 14

By his first issue, appellant argues that the trial court erred when it dismissed his claims under chapter 14.[1]

A. Applicable Law & Standard of Review

Chapter 14 of the Texas Civil Practice and Remedies Code applies to any action brought by an inmate in which an affidavit or unsworn declaration of inability to pay costs has been filed, other than one brought under the family code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.002; *Thomas v. Knight*, 52 S.W.3d 292, 294 (Tex. App.—Corpus Christi–Edinburg 2001, pet. denied).[2] A trial court may dismiss a suit under chapter 14 if it is frivolous, considering 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

[1] Appellant does not specifically argue on appeal that the trial court erred by dismissing his request for judicial review of the disciplinary ruling. *See* TEX. R. APP. P. 38.1. Accordingly, we do not address that claim.

[2] "The legislature enacted [Chapter 14] to control the flood of frivolous lawsuits being filed in Texas courts by prison inmates; these suits consume many valuable judicial resources with little offsetting benefits." *Jackson v. Tex. Dep't of Criminal Justice–Inst'l Div.*, 28 S.W.3d 811, 813 (Tex. App.—Corpus Christi–Edinburg 2000, pet. denied).

> 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).

Generally, we review a trial court's dismissal of a lawsuit under chapter 14 for an abuse of discretion. *In re Douglas*, 333 S.W.3d 273, 293 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). The trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.3d 238, 341–42 (Tex. 1985). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Id.* at 242.

In our review of whether a claim has an arguable basis in law, we take the inmate's allegations as true and determine whether, as a matter of law, the petition stated a cause of action that would authorize relief. *Brewer v. Simental*, 268 S.W.3d 763, 770 (Tex. App.—Waco 2008, no pet.); *see Hamilton v. Williams*, 298 S.W.3d 334, 339 (Tex. App.—Fort Worth 2009, pet. denied). We review pro se pleadings "by standards less stringent than those applied to formal pleadings drafted by lawyers." *Brewer*, 268 S.W.3d at 770; *see Minix v. Gonzalez*, 162 S.W.3d 635, 637 (Tex. App.—Houston [14th Dist.] 2005, no pet.). A claim has no arguable basis in law only if it is based on (1) wholly incredible or irrational factual allegations, or (2) an indisputably meritless legal theory. *Nabelek v. Dist. Attorney of Harris Cty.*, 290 S.W.3d 222, 228 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). An inmate's claim may not be dismissed merely because the court considers the allegations "unlikely." *Id.*

B. Chapter 14 Applies to Appellant's Suit

Appellant first argues that Chapter 14 does not apply to him because he filed a "request to pay for suit through my inmate trust fund unable to pay court costs upfront." Chapter 14 applies to an action brought by an inmate "in which an affidavit or unsworn declaration of inability to pay costs is filed by the inmate." TEX. CIV. PRAC. & REM. CODE ANN. § 14.002(a). In the event that an inmate files such a declaration—and, thus, chapter 14 applies—the trial court may order an inmate to pay the total amount of court fees and costs from an inmate's trust account. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 14.006(a), (c), (d).[3]

Here, appellant is an inmate who filed an unsworn declaration of his inability to pay court costs and submitted a copy of his inmate trust account indicating that his balance at the time he filed suit was $2.78. The record indicates that the court costs and fees incurred were $309. Appellant requested that the trial court assess court costs against his inmate trust account, and the trial court did, as provided by chapter 14. *See id.* Finally, appellant's suit does not arise under the family code. Therefore, chapter 14 applies, and we reject appellant's argument. *See id.* § 14.002; *Thomas*, 52 S.W.3d at 294.

Appellant next challenges the dismissal of his claims for violation of his due process rights, retaliation, conspiracy, breach of contract, "participatory liability – assisting and encouraging," common law fraud, declaratory relief, and injunctive relief.

[3] The trial court may also order that the inmate instead pay twenty percent of the preceding six months' deposits to the inmate's trust account. TEX. CIV. PRAC. & REM. CODE ANN. § 14.006(b).

C. Due Process

Appellant argued in his petition that he was not allowed to confront his accuser, cross-examine or present witnesses, or provide any documentary evidence at his disciplinary hearing, in violation of his Fourteenth Amendment rights.

The Fourteenth Amendment of the United States Constitution protects against deprivation of life, liberty, or property by the State "without due process of law." *Covarrubias v. Tex. Dep't of Criminal Justice–Inst'l Div.*, 52 S.W.3d 318, 324 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.) (citing *Parratt v. Taylor*, 451 U.S. 527, 531 (1981)). The opportunity to be heard is the fundamental requirement of due process; it is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Id.* The Due Process Clause promotes fairness by requiring the government to follow appropriate procedures when its agents decide to deprive a person of life, liberty, or property. *Id.* (citing *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

However, not all penalties imposed on inmates implicate due process rights. *See Malchi v. Thaler*, 211 F.3d 953, 958 (5th Cir. 2000) ("Clearly, Malchi's thirty-day loss of commissary privileges and cell restriction do not implicate due process concerns."); *Madison v. Parker*, 104 F.3d 765, 767–68 (5th Cir. 1997) (evaluating inmate's claimed denial of due process at disciplinary hearing based on the allegation that he was refused opportunity to offer documentary evidence and concluding that loss of commissary privileges and imposition of cell restrictions do not implicate due process concerns); *Hamilton v. Williams*, 298 S.W.3d 334, 341 (Tex. App.—Fort Worth 2009, pet. denied) (concluding that inmate's due process claim had no arguable basis in law because his punishment, cell restrictions and loss of commissary privileges, did not implicate due

process concerns). Here, appellant's punishment was the loss of recreation and commissary privileges for thirty days; therefore, his due process rights were not implicated. *See Malchi*, 211 F.3d at 958; *Madison*, 104 F.3d at 767–68; *Hamilton*, 298 S.W.3d at 341.

On appeal, appellant argues that a liberty interest was implicated because he could be denied parole as a result of the guilty TDCJ violation finding. We disagree. This also does not implicate his due process rights. *See Malchi*, 211 F.3d at 958–59; *see also Vargas v. Tex. Dep't of Criminal Justice*, No. 03-12-00119-CV, 2012 WL 5974078, at *4 (Tex. App.—Austin Nov. 30, 2012, pet. denied) (mem. op.) ("Texas law does not create a liberty interest in being released on parole that is protected by the Due Process Clause, and Texas prisoners have no constitutional expectation of release on parole."). Accordingly, the trial court did not err when it dismissed this claim.

D. Retaliation

To prevail on a claim of retaliation, an inmate must establish (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation. *Inst'l Div. of Tex. Dep't of Criminal Justice v. Powell*, 318 S.W.3d 889, 892 (Tex. 2010) (per curiam). In his petition, appellant states:

> Defendant[4] retaliated when he broke my typewriter and illegally confiscated it, defessing [sic] issues for defendant conduct before this write up via grievance No. 2018041865 and civil action No. B-18-1189-CV-B. In violation of his 1st Amendment rights to the United States Constitution and 14th and Texas Constitution.

[4] In the factual background of his petition, appellant alleged Strack broke and illegally confiscated the typewriter.

"Prisoners have a First Amendment right to be free from retaliation for complaining about a prison official's misconduct, and a violation of this right is actionable under 42 U.S.C. § 1983."[5] *Id.* at 891 (citing *Woods v. Smith*, 60 F.3d 1161, 1164 (5th Cir. 1995)). However, retaliation against a prisoner is actionable only if it is capable of deterring a person of ordinary firmness from further exercising his or her constitutional right. *Brunson v. Nichols*, 875 F.3d 275, 277–78 (5th Cir. 2017) (quoting *Morris v. Powell*, 449 F.3d 682, 686 (5th Cir. 2006)); *see also Conely v. Tex. Bd. of Criminal Justice*, No. 03-10-00422-CV, 2011 WL 3890404, at *3 (Tex. App.—Austin Aug. 31, 2011, no pet.) (mem. op.). In other words, the alleged retaliatory acts must be more than *de minimis* in order to support a constitutional claim. *Morris*, 449 F.3d at 684–86 ("Some acts, though maybe motivated by retaliatory intent, are so *de minimis* that they would not deter the ordinary person from further exercise of his [or her] rights.").

Here, appellant alleged that Strack broke and illegally confiscated his typewriter in retaliation for his filing of grievances. Thus, the question is whether the alleged adverse act would chill or silence a person of ordinary firmness from future First Amendment activities. *See id.* We conclude that, even accepting the alleged facts as true, confiscating and breaking appellant's typewriter would not deter the ordinary person from further exercise of his or her rights. *See id.*; *see also Mukoro v. Jackson*, No. 01-17-00466-CV, 2018 WL 1864630, at *4–5 (Tex. App.—Houston [1st Dist.] Apr. 19, 2018, pet. denied) (mem. op.) (collecting cases and concluding that the damaging and seizing of inmate's typewriter and fan were *de minimis* acts and inmate could therefore not show actionable

[5] "Every person who, under color of any statute [or] of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983. Appellant's due process and conspiracy claims were also brought pursuant to this statute.

retaliation claim). Accordingly, the trial court did not abuse its discretion when it dismissed this claim.

E. Conspiracy

A conspiracy claim under § 1983 is not actionable without an actual violation of § 1983. *Leachman v. Dretke*, 261 S.W.3d 297, 313 (Tex. App.—Fort Worth 2008, no pet.) (op. on reh'g); *Denson v. T.D.C.J.–I.D.*, 63 S.W.3d 454, 463 (Tex. App.—Tyler 1999, pet. denied); *see Brunson v. Nichols*, 875 F.3d 275, 278–79 (5th Cir. 2017). Additionally, conclusory statements suggesting conspiracy are not enough to state a claim. *Denson*, 63 S.W.3d at 463; *see also Mukoro*, 2018 WL 1864630, at *5.

As previously concluded, appellant did not allege any actionable violation of his rights. Furthermore, appellant did not specify which of the other defendants allegedly conspired with Strack or how they did so; instead, appellant made general conclusory assertions that "Strack in combination with defendants agreed to allow the bogus disciplinary case to stand" and that "defendants used their official position and office to violate [appellant's] rights." Because appellant cannot show an actionable claim under § 1983, and because he made only conclusory allegations of conspiracy, his retaliation claim lacked a basis in law and in fact, and the trial court did not err when it dismissed this claim. *See Leachman*, 261 S.W.3d at 313; *Denson*, 63 S.W.3d at 463.

F. Breach of Contract

Generally, the term "contract" refers to an agreement between two or more persons that creates an obligation to do or not do a particular thing. *Frady v. May*, 23 S.W.3d 558, 565 (Tex. App.—Fort Worth 2000, pet. denied). The elements of a breach of contract claim are: (1) there is a valid enforceable contract, (2) the plaintiff is a proper

party to sue for breach of the contract, (3) the plaintiff performed, tendered performance of, or was excused from performing his or her contractual obligations; (4) the defendant breached the contract; and (5) the defendant's breach caused the plaintiff injury. *See Davis v. Tex. Farm Bur. Ins.*, 470 S.W.3d 97, 104 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Doss v. Homecomings Fin. Network, Inc.*, 210 S.W.3d 706, 713 (Tex. App.—Corpus Christi–Edinburg 2006, pet. denied); *Zuniga v. Wooster Ladder Co.*, 119 S.W.3d 856, 862 (Tex. App.—San Antonio 2003, no pet.) (en banc) (op. on reh'g). To prove a valid and enforceable contract, a party must establish the following elements: (1) an offer, (2) an acceptance, (3) mutual assent, (4) execution and delivery of the contract with the intent that it be mutual and binding, and (5) consideration supporting the contract. *See Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) (per curiam); *Tex. Gas Utils. Co. v. Barrett*, 460 S.W.2d 409, 412 (Tex. 1970); *2001 Trinity Fund, LLC v. Carrizo Oil & Gas, Inc.*, 393 S.W.3d 442, 449 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). The elements of an enforceable contract are the same for both express and implied contracts. *Plotkin v. Joekel*, 304 S.W.3d 455, 476 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)

In his petition, appellant argued that he entered into a contract with appellees, but he failed to allege facts supporting a conclusion that he and appellees entered into an enforceable contract or that any contractual relationship existed. Appellant pointed to the Texas Government Code in support of his breach of contract claim and argued that appellees failed to follow and abide by the rules provided for a disciplinary hearing; however, the government code does not provide any rules for an inmate's disciplinary hearing. *See* TEX. GOV'T CODE ANN. subtitle G (titled "Corrections"); *see also id.*

§§ 501.008 (providing for inmate grievance system), 2001.226 ("This chapter does not apply to a rule or internal procedure of the Texas Department of Criminal Justice or Texas Board of Criminal Justice that applies to an inmate or any other person under the custody or control of the department or to an action taken under that rule or procedure."). Therefore, his claim has no arguable basis in law or in fact, and the trial court did not abuse its discretion when it dismissed this claim. *See Johnson v. Franco*, 893 S.W.2d 302, 303 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd w.o.j.) (concluding inmate's breach of contract claim had no basis in law because there was no contract between the inmate and the defendant and "[n]either the inmate handbook nor the cited statutes constitute one"); *see also Smith v. Rayford*, No. 13-18-00395-CV, 2019 WL 5444392, at *2 (Tex. App.—Corpus Christi–Edinburg Oct. 24, 2019, no pet.) (mem. op.) (concluding breach of contract claim was frivolous because it did not allege a binding contract between inmate and defendants); *Horton v. Cooper*, No. 06-02-00001-CV, 2002 WL 1285097, at *4 (Tex. App.—Texarkana June 12, 2002, no pet.) (mem. op.) (affirming dismissal of inmate's breach of contract claim which failed to identify a binding contract between the parties).

G. Assisting & Encouraging

Appellant states in his brief that he is appealing the dismissal of his claim for "Participatory liability – assisting and encouraging." However, appellant does not cite any case law or statute in support of this claim in his petition or on appeal. *See* TEX. R. APP. P. 38.1(i). Moreover, there is no civil cause of action for "assisting and encouraging" claim, as appellant alleges in his original petition. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996).

On appeal, appellant argues that "at any time this supervisor had an opportunity to correct the matter, stop the miscarriage of justice in the bogus case but failed to correct the matter." Under § 1983, a supervisor may be held liable for a constitutional violation carried out by his subordinates. *See Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987). At a minimum, to establish supervisory liability under § 1983, a plaintiff must show that the supervisor at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. *Leo v. Trevino*, 285 S.W.2d 470, 490 (Tex. App.—Corpus Christi–Edinburg 2006, no pet.); *see Thompkins*, 828 F.2d at 304 ("a supervisor may be held liable if there exists either (1) his [or her] personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation"). Further, a prerequisite of supervisory liability under § 1983 is unconstitutional conduct by a subordinate of the supervisor. *Id.*

Here, appellant did not allege that any of the defendants is a supervisor and did not explain how a supervisor, if any, "at least implicitly authorized, approved or knowingly acquiesced" in the alleged unconstitutional conduct of Strack. *See Thompkins*, 828 F.2d at 304; *Leo*, 285 S.W.2d at 490. And as previously concluded, appellant did not allege any actionable unconstitutional conduct. Thus, any such claim has no arguable basis in law or in fact, and the trial court did not abuse its discretion when it dismissed this claim.

H. Common Law Fraud

The elements of a cause of action for common law fraud are: (1) the defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation, the defendant

knew the representation was false or made the representation recklessly, as a positive assertion, and without knowledge of its truth; (5) the defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff relied on the representation; and (7) the representation caused the plaintiff injury. *See Zorrilla v. Aypco Const. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015); *Italian Cowboy Partners v. Prudential Ins.*, 341 S.W.3d 323, 337 (Tex. 2011).

Appellant argued in his petition that appellees made a false representation to him because the disciplinary hearing was not conducted "according to TDCJ–CID rules and guidelines issued by the Texas Government Code." Contrary to appellant's argument, the government code does not issue any rules and guidelines to TDCJ regarding disciplinary hearings for an inmate's violation of TDCJ's jail rules and policies. *See* TEX. GOV'T CODE ANN. subtitle G (titled "Corrections"); *see also id.* § 501.008 (providing for inmate grievance system). Therefore, appellant has not alleged an actual misrepresentation, his claim has no basis in fact, and the trial court did not err when it dismissed this claim.

I. Declaratory Relief

In his petition, appellant sought declarations that appellees violated his First and Fourteenth Amendment rights and that appellees applied the rules of the disciplinary hearing in an arbitrary and unreasonable manner.

As previously concluded, appellant did not plead any actionable violation of his First and Fourteenth Amendment rights. To the extent appellant seeks a declaration of his rights under the government code, his claim is explicitly excluded. *See* TEX. GOV'T CODE ANN. § 2001.026 ("This chapter does not apply to a rule or internal procedure of the Texas Department of Criminal Justice or Texas Board of Criminal Justice that applies to

an inmate or any other person under the custody or control of the department or to an action taken under that rule or procedure."); *see also Davis v. Tex. Dep't of Criminal Justice*, No. 11-16-00281-CV, 2018 WL 4496463, at *2 (Tex. App.—Eastland Sept. 20, 2018, no pet.) (mem. op.). Furthermore, the Texas Declaratory Judgments Act (TDJA) does not entitle appellant to declaratory relief. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.003(a) (providing that a person "interested under a deed, will, written contract, or other writings constituting a contract or whose rights . . . are affected by a statute, municipal ordinance, contract, or franchise may have determined any question . . . arising under the instrument, statute, ordinance, contract, or franchise"); *Bohannan v. Tex. Bd. of Criminal Justice*, 942 S.W.2d 113, 117 (Tex. App.—Austin 1997, writ denied) (per curiam) (concluding that an inmate may not use the TDJA to obtain a declaration regarding the validity of a rule applicable to an inmate); *see also Ford v. Tex. Dep't of Crim. Justice*, No. 07-03-00355-CV, 2005 WL 1893247, at *2 (Tex. App.—Amarillo Aug. 9, 2005, no pet.) (mem. op.) (concluding that an inmate was not entitled to declaratory relief regarding the application of a rule enacted by TDCJ). Therefore, appellant's claim for declaratory relief had no basis in law or in fact, and the trial court did not err when it dismissed this claim.

J. Injunctive Relief

In his petition, appellant sought "an injunction to correct/remove [the] disciplinary case from plaintiffs TDCJ–ID file." Because appellant alleged only a past injury and did not seek to restrain appellees' future actions in any way, we conclude that appellant's claim is not injunctive in nature. *See Butnaru v. Form Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (noting that the applicant for an injunction must plead he or she will suffer a

probable injury); *Harbor Perfusion, Inc. v. Floyd*, 45 S.W.3d 713, 716 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.) (noting that probable injury requires a showing that the harm is imminent, the injury would be irreparable, and the applicant has no other adequate legal remedy); *see also Zavala v. De Hoyos*, No. 13-18-00612-CV, 2019 WL 3227535, at *3 (Tex. App.—Corpus Christi–Edinburg July 18, 2019, no pet.) (mem. op.). Accordingly, appellant's claim for injunctive relief has no arguable basis in law or fact, and the trial court did not err when it dismissed it.

K. Conclusion

We overrule appellant's first issue.

III. VEXATIOUS LITIGANT FINDING

By his second issue, appellant argues that the evidence was legally insufficient to support a finding that he is a vexatious litigant.

A. Applicable Law & Standard of Review

"Vexatious litigants are persons who abuse the legal system by filing numerous, frivolous lawsuits." *Jackson v. Bell*, 484 S.W.3d 161, 166 (Tex. App.—Amarillo 2015, no pet.) (citing *Drake v. Andrews*, 294 S.W.3d 370, 373 (Tex. App.—Dallas 2009, pet. denied)). A court may find a plaintiff a vexatious litigant if there is not a reasonable probability that the plaintiff will prevail in the litigation and the plaintiff has maintained at least five litigations as a pro se litigant in the preceding seven years that have been determined adversely to the plaintiff. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 11.051(1)(A).

A legal sufficiency challenge will be sustained if (1) there is a complete absence of a vital fact, (2) the court is barred by the rules of law or evidence from giving weight to the

only evidence offered to prove a vital fact, (3) there is no more than a scintilla of evidence proving a vital fact, or (4) the evidence conclusively establishes the opposite proposition of a plaintiff's proffered vital fact. *Marincasiu v. Drilling*, 441 S.W.3d 551, 557 (Tex. App.—El Paso 2014, pet. denied) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005)).

B. Analysis

As discussed above, there was not a reasonable probability that appellant would prevail in the litigation, and the record further indicates that nine lawsuits in which appellant proceeded pro se were adversely determined against him since 2016. The evidence is legally sufficient to support a vexatious litigant finding. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 11.051(1)(A); *Marincasiu*, 441 S.W.3d at 557.

We overrule appellant's second issue.

IV. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Chief Justice

Delivered and filed the
11th day of June, 2020.