FILE COPY

RE: Case No. 23-0883 DATE: 12/1/2023
COA #: 07-23-00146-CV TC#: 2232-21
STYLE: JOHNSON v. TEPPER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MR. PAUL JOHNSON
* DELIVERED VIA E-MAIL *

CASE NUMBER 07-23-00146-CV
STYLE
Paul E. Johnson, Appellant
v.
Matthew Tepper, Appellee

PETITION FOR REVIEW TO THE SUPREME COURT OF TEXAS

BY:
Paul Johnson, Appellant, Pro-se
130 Marcus Rd
McDade TX 78650
(512) 698-6827
pjpxmcd@earthlink.net

IDENTITY OF PARTIES AND COUNSEL

| | |
|---|---|
| Appellant | Paul Johnson<br>130 Marcus Rd |

5 – Judge's refusal to issue additional findings
6 – Appellant's Brief in the Third Court of Appeals
7 – Tepper's Motion for Extension to File Appellee's Brief
8 – Tepper granted extension to file Appellee's Brief
9 – Appellee's Brief in the Seventh Court of Appeals
10 – Appellant's Reply Brief in the Court of Appeals
11 – Opinion of the Seventh Court of Appeals
12 – Motion for Rehearing in Court of Appeals
13 – COA Request for Response
14 – Tepper's Response to Motion for Rehearing
15 – Order denying rehearing
16 – TRAP 38
17 – TRCP 299
18 – TRCP 94

RE: Case Number: 07-23-00146-CV
Trial Court Case Number: 2232-21

Style: Paul Johnson v. Matthew Tepper

Dear Mr. Johnson and Counsel:

By Order of the Court, Appellant's motion for rehearing is this day denied.

Sincerely,
Bobby Ramirez
Bobby Ramirez, Clerk

cc: Honorable Carson T. Campbell (DELIVERED VIA E-MAIL)

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-23-00146-CV

PAUL E. JOHNSON, APPELLANT
V.
MATTHEW TEPPER, APPELLEE

On Appeal from the 21st District Court
Bastrop County, Texas
Trial Court No. 2232-21, Honorable Carson T. Campbell, Presiding

August 7, 2023

**MEMORANDUM OPINION**

Before QUINN, C.J., and DOSS and YARBROUGH, JJ.

Like much of the law, the maxim, *"If at first you don't succeed, try, try again," comes with a disclaimer: except when repeatedly filing lawsuits is frivolous and abusive.* Recognizing a need for balance between preserving open courts and preventing abuse by pro se litigants, the Texas Legislature enacted Chapter 11 of the Texas Civil Practice and Remedies Code. *Leonard v. Abbott*, 171 S.W.3d 451, 455 (Tex. App.—Austin 2005, pet. denied). In this appeal, pro se Appellant Paul Johnson appeals from a trial court's order made pursuant to Chapter 11 that found him to be a vexatious litigant and required Johnson's

payment of security as a condition for proceeding with his suit against Appellee Matthew Tepper. After reviewing the arguments presented, we affirm.

## Background

For years, Johnson has been embroiled in a property tax dispute with the Bastrop Central Appraisal District; the record shows he has filed at least 17 BCAD-related lawsuits and appeals during the last seven years.1 In this iteration, Johnson sued Tepper because of statements allegedly made while under oath during a BCAD appraisal review board hearing. Johnson's petition alleges Tepper's false statements "contradicted Johnson's sworn testimony and thus defamed Johnson's reputation, honesty, and integrity," and caused the ARB to rule in favor of the Central Appraisal District (resulting in a higher property tax bill to Johnson). Zero of Tepper's complained-of statements actually refer to Johnson other than to identify him as the property owner.

1 We find no record evidence that any of these lawsuits have been successful.

Citing Johnson's litigation record, Tepper filed a motion requesting the trial court determine Johnson to be a vexatious litigant per Chapter 11. After an evidentiary hearing, the district court signed an order finding Johnson to be a vexatious litigant and requiring that he deposit $25,000 as security before he could proceed with his lawsuit. In response, Johnson filed a notice purporting to nonsuit his lawsuit, and brought this appeal.2

2 This appeal was originally filed in the Third Court of Appeals and was transferred to this Court by a docket-equalization order of the Supreme Court of Texas. See TEX. GOV'T CODE ANN. § 73.001. In the event of any

conflict, we apply the transferor court's case law. TEX. R. APP. P. 41.3.

**Jurisdiction**

On our own motion, we examine whether we possess jurisdiction to hear Johnson's appeal. We possess no order of nonsuit or final judgment, which suggests Johnson's appeal may be interlocutory. *See Barrientez v. Contreras*, No. 03-20-00570-CV, 2022 Tex. App. LEXIS 1704, at *2 (Tex. App.—Austin Mar. 11, 2022, no pet.) (per curiam, mem. op.). However, the Third Court of Appeals has previously held Chapter 11 permits interlocutory appeal from an order designating a vexatious litigant. *Serafine v. Crump*, 665 S.W.3d 93, 102 (Tex. App.—Austin 2023, pet. filed) (interpreting TEX. CIV. PRAC. & REM. CODE ANN. § 11.101(c) to mean appellate court has jurisdiction over interlocutory order making vexatious-litigant determination but not portion ordering pro se litigant to pay security). We therefore proceed with considering Johnson's vexatious litigant complaints.

**Analysis**

Chapter 11 authorizes a trial court to find that a pro se plaintiff is a vexatious litigant upon proof of two elements: (1) no reasonable probability the plaintiff will prevail in the present litigation, and (2) "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 finally determined adversely to the plaintiff[.]" TEX. CIV. PRAC. & REM. CODE ANN. § 11.054(1)(A).

An appellate court reviews a trial court's determination that a plaintiff is a vexatious litigant for an abuse of discretion. *Leonard*, 171 S.W.3d at 459. We begin

with Johnson's first and second issues, in which he urges the trial court's exercise of discretion was not supported by sufficient evidence. We accordingly review the trial court's findings under familiar legal and factual sufficiency standards.3

3 "In reviewing a legal sufficiency challenge, the no-evidence challenge fails if there is more than a scintilla of evidence to support the finding." When reviewing the evidence for factual sufficiency, "we set aside the trial court's decision only if its ruling is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust." *Leonard*, 171 S.W.3d at 459 (citations omitted).

1. Johnson's Status as Pro Se Litigant in Five Final Litigations

From our review of the record, we conclude the evidence demonstrates during the seven-year period preceding Tepper's motion that Johnson, appearing pro se, commenced, prosecuted, or maintained five or more litigations which were each finally determined adversely to him:4

4 Applying the methodology employed by the Third Court of Appeals in *Serafine*, 665 S.W.3d at 110–11, 114–19, we conclude that Tepper has shown more than five litigations for the purpose of the section 11.054(1) determination.

(a) Cause No. 1671-335 in the 335th District Court against the chief appraiser of BCAD in 2020;5

5 This suit was dismissed by order of the district court and the dismissal was affirmed on appeal. *Johnson v. Cullens*, No. 07-21-00093-CV, 2022 Tex. App. LEXIS

1556 (Tex. App.—Amarillo Mar. 7, 2022, pet. denied) (mem. op.). Records attached to Tepper's motion show Johnson as being self-represented in the trial court. Johnson also appeared pro se on appeal.

(b) Cause No. 223-335 in the 335th District Court against BCAD and several employees in 2016;6

6 Records attached to Tepper's motion show Johnson as being self-represented in the trial court. The trial court's dismissal of the individual defendants in their official capacities was affirmed, sub. nom. *Johnson v. Boehnke*, No. 03-19-00200-CV, 2019 Tex. App. LEXIS 8366 (Tex. App.—Austin Sept.18, 2019, no pet.) (mem. op.). The appellate court dismissed for lack of subject-matter jurisdiction the portion of the appeal pertaining to Johnson's claims against the individual defendants in their individual capacities. The opinion indicates that Johnson appeared pro se on appeal.

(c) Cause No. 2274-335 in 335th District Court in 2022 against BCAD;7

7 Records attached to Tepper's motion and Johnson's response show Johnson as being self-represented in the trial court.

(d) Cause No. 1498-21 in the 21st District Court in 2021 against BCAD;8

8 Records attached to Tepper's motion show Johnson as being self-represented in the trial court. A judgment against Johnson is currently on appeal. *See Johnson v. Bastrop Cent. Appr. Dist.*, 13-22-00031-CV (Tex. App.—Corpus Christi-Edinburg). Johnson is appearing pro se on appeal.

(e) Cause No. 1560-21 in the 21st District Court in 2020 against BCAD;9

9 Johnson's trial court mandamus petition was attached to Tepper's motion and indicates Johnson brought suit pro se. The trial court's decision was affirmed on appeal. Johnson v. Bastrop Cent. Appr. Dist., 657 S.W.3d 686 (Tex. App.—El Paso 2022, pet. denied), cert. denied, 143 S. Ct. 2497 (2023). The opinion of the court of appeals indicates that Johnson appeared pro se on appeal. Id. at 688.

and

(f) Cause No. 03-19-00200-CV original mandamus proceeding in the Third Court of Appeals.10

10 *In re Johnson*, No. 03-17-00253-CV, 2017 Tex. App. LEXIS 5296 (Tex. App.—Austin June 9, 2017, orig. proceeding) (mem. op.) (letter from the court to the parties indicates Johnson appeared pro se).

We find that Johnson has commenced, prosecuted, or maintained at least five litigations as a pro se litigant, and that each has been finally determined adversely to him. We overrule Johnson's complaint regarding insufficient evidence of at least five applicable pro se litigations.

2. Reasonable Probability that Johnson Will Prevail in Suit Against Tepper

We next look to whether Tepper presented sufficient proof there is no reasonable probability that Johnson would prevail in his slander suit. We may consider exhibits and testimony or decide the issue based on the plaintiff's

pleadings. *Serafine*, 665 S.W.3d at 107–08. For the reasons articulated below, we conclude the face of Johnson's petition demonstrates no probability that he would have prevailed in the underlying litigation.

"Defamation is generally defined as the invasion of a person's interest in her reputation and good name." *Hancock v. Variyam*, 400 S.W.3d 59, 63 (Tex. 2013) (citing W. Page Keeton et al., PROSSER & KEETON ON TORTS § 111, at 771 (5th ed. 1984 & Supp. 1988)). An essential element in an action for defamation is that the allegedly defamatory statement was referrable to the plaintiff or concerned the plaintiff. *Lilith Fund for Reprod. Equity v. Dickson*, 662 S.W.3d 355, 367 (Tex. 2023) (holding that statements cannot be defamatory unless they are "about the plaintiffs"); *Huckabee v. Time Warner Entm't Co., L.P.*, 19 S.W.3d 413, 429 (Tex. 2000) (holding that plaintiff failed to establish claim for defamation when it levied criticism of court in general but identified no specific judge). Johnson's list of statements attributed to Tepper do not refer to Johnson other than to state his property interest. The statements are about property value, not about Johnson.

Moreover, the face of Johnson's petition makes clear his alleged injuries arise out of sworn statements made by Tepper during the course of an official hearing before BCAD's appraisal review board. Texas recognizes an absolute privilege to communications made as part of a judicial proceeding. *See Shell Oil Co. v. Writt*, 464 S.W.3d 650, 655 (Tex. 2015). Thus, "[a] witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding." *Writt*, 464 S.W.3d at 654–55 (cleaned up); *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909, 912 (1942) ("Any communication, oral or written, uttered or published in the due course of a judicial

proceeding is absolutely privileged and cannot constitute the basis of a civil action in damages for slander or libel."). This privilege extends to statements made before governmental executive officers, boards and commissions who exercise quasi-judicial powers so long as the communication bears some relationship to a pending or proposed judicial proceeding. *Reagan*, 166 S.W.2d at 913; *Clark v. Jenkins*, 248 S.W.3d 418, 431 (Tex. App.—Amarillo 2008, pet. denied).

In the present matter, the ARB had quasi-judicial authority to decide Johnson's property tax issue. See TEX. TAX. CODE ANN. § 41.01 (specifying duties of appraisal review board); *Providence Town Square Hous., Ltd. v. Harris Cty. Appraisal Dist.*, No. 01-20-00835-CV, 2022 Tex. App. LEXIS 9519, at *16 (Tex. App.—Houston [1st Dist.] Dec. 29, 2022, pet. filed) (mem. op.). Johnson's petition acknowledges Tepper's sworn statements bear a relationship to the proceeding because he alleges Tepper testified as a witness "to try to get a favorable ruling from the ARB" and succeeded in causing Johnson's property tax bill to increase. Tepper's statements were therefore privileged and could not form the basis for viable defamation claims by Johnson.

We conclude the district court's compliance with section 11.054 was supported by legally and factually sufficient evidence. Johnson's first and second issues are overruled.

3. Alleged Denial of Equal Protection Rights

In his third issue, Johnson argues the vexatious litigant statute is facially unconstitutional because it creates a classification system unlawfully burdening pro se litigants. We hold that Johnson's complaint was not properly preserved for appeal. See TEX. R. APP. P. 33.1.

To properly preserve an error for review on appeal, appellate Rule 33.1 requires the record demonstrate (1) the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint, and (2) that the trial court expressly or implicitly ruled on the request, objection, or motion. See TEX. R. APP. P. 33.1; *Caviness v. High Profile Promotions, Inc.*, No. 03-17-00553-CV, 2019 Tex. App. LEXIS 2735, at *9 (Tex. App.—Austin Apr. 5, 2019, no pet.) (mem. op.) (stating preservation requirement). Johnson directs this Court to no portion of the record in which he presented this argument to the trial court and received an adverse ruling on the same. He has therefore failed to preserve this issue for appellate review.

Johnson's third issue is overruled.

## Conclusion

Having overruled Johnson's issues, we affirm the district court's prefiling order determining that Johnson is a vexatious litigant.

Lawrence M. Doss
Justice

Additional material from this filing is available in the Clerk's Office.