[SEAL]

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00453-CV

DAVID CHRISTOPER [sic] **HESSE, APPELLANT**

V.

JASON KANE HOWELL, APPELLEE

On Appeal from County Court at Law Number 1
Potter County, Texas Trial Court No. 105,728-1;
Honorable W.F. Roberts, Presiding

June 7, 2018

MEMORANDUM OPINION

Before CAMPBELL, PIRTLE, and PARKER, JJ.

Appellant, David Christopher Hesse, appeals from the trial court's order granting the motion to dismiss of Appellee, Jason Kane Howell, filed pursuant to chapter 27 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001-.009 (West 2015).[1] Chapter 27, known as the Texas Citizens

[1] All further references throughout this opinion to "chapter 27," "section," or "§" are references to the Texas Civil Practice and Remedies Code, unless otherwise designated.

Participation Act (TCPA), is often characterized as an "anti-SLAPP" (Strategic Lawsuits Against Public Participation) statute.[2] By six issues, Hesse questions whether (1) Howell is entitled to any immunity for swearing to facts, abusing process, and committing crimes foreign to the duties of a prosecutor; (2) the Code of Criminal Procedure or the Rules of Civil Procedure control issuance of a writ of attachment; (3) the anti-SLAPP statute applies to preclude suit against a prosecutor who falsely swears to an *Application for a Writ of Attachment* that results in the arrest of a person who was never served with a notice to appear; (4) the anti-SLAPP statute applies to preclude a suit brought against a prosecutor under 42 U.S.C. § 1983; (5) a trial court may take judicial notice of non-existent facts; and (6) the trial court abused its discretion in overruling his objections to Howell's motion to dismiss. We affirm.

BACKGROUND

Hesse is a private practice attorney and Howell is an assistant prosecutor for the 47th Judicial District Attorney's Office. This civil tort action stems from a previous criminal contempt proceeding arising out of an underlying criminal prosecution. Hesse, while in the course of representing a criminal defendant, was held in contempt by the trial judge of the 251st District Court in and for Potter County, Texas, for using, what

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[2] *See KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 710, 713 n.6 (Tex. 2016).

the trial court deemed to be, inappropriate language in a courtroom proceeding. The trial court sought to punish Hesse's conduct by the imposition of a fine, jail time, or both. *See* TEX. GOV'T CODE ANN. § 21.002(b) (West 2004) (providing that punishment for contempt of a district court is by a fine of up to $500, or confinement in the county jail for not more than six months, or by both fine and confinement).

In that contempt proceeding, the trial judge signed a *Notice of Allegations of Contempt* in which she ordered that Hesse be notified "by certified mail, return receipt requested, at his current address according to the records of the District Clerk," to appear and show cause why he should not be held in contempt. Pursuant to section 21.002(d) of the Texas Government Code, the Honorable Kelly Moore, presiding judge of the administrative region encompassing Potter County, appointed the Honorable Paul Davis to preside and determine Hesse's guilt or innocence in that contempt proceeding. *See* TEX. GOV'T CODE ANN. § 21.002(d) (West 2004) (requiring that an officer of the court held in contempt by a trial court shall, upon request, be released on personal recognizance until a *de novo* hearing can be held by another judge assigned by the regional administrative judge). A contempt hearing was scheduled for July 29, 2016, at 1:30 p.m., and service was attempted by certified mail, return receipt requested. The record reflects that a certified mail return receipt "green card," signed by "Cathy Bears," was filed with the Potter County District Clerk. The signature line on the green card was not restricted to the

"addressee only" and nowhere did the receipt depict Hesse's signature.

On the day of the scheduled hearing, Howell appeared for the State of Texas, but Hesse failed to appear at the appointed time. Attempts were made to reach Hesse by phone and by email, but he did not respond. Judge Davis finally commenced the hearing at 2:30 p.m. and announced he was taking judicial notice of the file in the criminal case, which included the *Notice of Allegations of Contempt* and the green card pertaining to service of the notice of hearing. Because Hesse did not appear, Judge Davis directed Howell to prepare a capias for his detention. Howell complied and signed an *Application for Attachment* in which he swore upon his oath that "**David Christopher Hesse** was served with [Notice of a Due Process Hearing] by Certified Mail. . . ." At 2:35 p.m. that same day, the judge ordered the Clerk of the Court to issue a *Writ of Attachment* for Hesse and he was arrested and detained in the Potter County Jail on July 31, 2016.

On August 1, 2016, the trial judge held a telephonic arraignment in which Hesse informed him that he had missed the scheduled contempt hearing because he was unaware of the hearing due to lack of personal service of the contempt allegations and notice of hearing. The judge authorized his court coordinator to send Hesse a copy of the *Notice of Allegations of Contempt* and set a hearing date for him to answer the allegations. Hesse was then released on bond.

Several weeks later, Hesse filed the underlying suit against Howell individually, and in his official capacity as an assistant district attorney, for numerous causes of action, both state and federal. Howell invoked the TCPA and filed a motion to dismiss the suit as permitted by section 27.003. He alleged that his *Application for Attachment,* the very basis of Hesse's lawsuit, implicated his right to petition which was protected under the TCPA.

In his response to the motion to dismiss, Hesse alleged that the TCPA did not apply and that even if it did, Howell was not immune from suit or liability. Hesse also filed numerous objections to Howell's motion, which the trial court overruled. Following a hearing, the trial court granted Howell's motion to dismiss and Hesse now appeals that ruling.

The threshold question before us is whether the TCPA applies under the circumstances of this case. *Youngkin v. Hines*, ___ S.W.3d ___, No. 16-0935, 2018 Tex. LEXIS 348, at *7-8 (Tex. April 27, 2018). Thus, we will address Hesse's issues in a logical rather than sequential order beginning with issue three by which he questions the applicability of the TCPA.

Issue Three—Texas Citizens Participation Act

The stated purpose of the TCPA is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the extent permitted by

law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." *See* § 27.002; *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam); *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding) (observing that the TCPA's purpose "is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits"). The Legislature has instructed that the TCPA "shall be construed liberally to effectuate its purpose and intent fully." *See* § 27.011(b). To effectuate the purpose of the TCPA, the Legislature included an expedited, two-step procedure for the dismissal of claims brought to intimidate or to silence a defendant's exercise of an enumerated First Amendment right. *See* § 27.003. *See also Coleman*, 512 S.W.3d at 898.

First, a defendant moving to dismiss must show by a preponderance of the evidence[3] that the plaintiff's claims are based on, relate to, or are in response to the defendant's exercise of: (1) the right of free speech, (2) the right to petition, or (3) the right of association. § 27.005(b); *Coleman*, 512 S.W.3d at 898; *In re Lipsky*, 460 S.W.3d at 586-87. If the defendant demonstrates that the plaintiff's suit implicates one of these rights, then the second step shifts the burden to the plaintiff

[3] Preponderance of the evidence means the greater weight and degree of credible evidence that would create a reasonable belief in the truth of the matter. *Herrera v. Stahl*, 441 S.W.3d 739, 741 (Tex. App.—San Antonio 2014, no pet.).

to "establish[] by clear and specific evidence[4] a prima facie case[5] for each essential element of the claim in question." § 27.005(c); *Coleman*, 512 S.W.3d at 899; *In re Lipsky*, 460 S.W.3d at 587.

Even if the plaintiff satisfies this second step by meeting its burden of establishing a prima facie case, the trial court must still dismiss the lawsuit if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense to the [plaintiff's] claims." § 27.005(d); *Coleman*, 512 S.W.3d at 899. In determining whether to dismiss a suit, the trial court shall consider the pleadings as well as supporting and opposing affidavits. § 27.006.

Under the TCPA, "exercise of the right to petition" is defined as a "communication in or pertaining to" a judicial proceeding. § 27.001(4)(A)(i). A "communication" includes the "making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic."

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[4] Proof by clear and specific evidence is more than "mere notice pleading." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). A party must "provide enough detail to show the factual basis for its claim." *Id.* at 590-91.

[5] The legal meaning of a prima facie case is "evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted." *In re Lipsky*, 460 S.W.3d at 590 (citing *Simonds v. Stanolind Oil & Gas Co.*, 134 Tex. 348, 136 S.W.2d 207, 209 (1940)). It is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re Lipsky*, 460 S.W.3d at 590 (citing *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004)).

§ 27.001(1); *Deaver v. Desai*, 483 S.W.3d 668, 672 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

Recently, the Texas Supreme Court addressed the "right to petition" in *Youngkin*, 2018 Tex. LEXIS 348, at *7-8, and confirmed that the statutory definition of the phrase is expansive. Youngkin, an attorney representing clients in a real estate dispute, recited a Rule 11 agreement into the record. *Id.* at *2. Based on transactions that occurred post the Rule 11 agreement, Hines, the opposing party to the suit, believed he received less ownership of certain property than expected from the Rule 11 agreement. He filed suit against Youngkin and his clients for fraud. *Id.* at *3-4.

Youngkin moved to dismiss the suit under the TCPA alleging that recitation of the Rule 11 agreement into the record constituted the exercise of his right to petition. He also raised the defense of attorney immunity. *Id.* at *5. The Supreme Court held that based on a common understanding of the legislative definitions of terms supplied in the TCPA, Youngkin's conduct was the making of a statement, i.e., a "communication," in a judicial proceeding and, therefore, the TCPA applied. *Id.* at *8.

ANALYSIS

Howell claims the TCPA applies to the facts and circumstances surrounding this case because his *Application for Attachment* was an exercise of his right to petition in the course of Hesse's contempt proceeding. He argues that it falls within the TCPA's definition of

a "communication" and it pertains to a judicial proceeding. In response, Hesse argues that the TCPA does not apply because the "legal action" involved is a contempt proceeding. Specifically, he contends that section 27.010(a) exempts "enforcement" actions from the application of the TCPA.

Addressing Hesse's counter-argument first, the TCPA does provide four exceptions to the application of the TCPA. *See* § 27.010(a)-(d). Relevant to the facts of this case, the TCPA "does not apply to an *enforcement action* that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney." § 27.010(a) (emphasis added). The nonmovant of the motion to dismiss (Hesse) bears the burden of proving that a statutory exemption is applicable to the facts of his case. *Moldovan v. Polito,* ___ S.W.3d ___, No. 05-15-01052-CV, 2016 Tex. App. LEXIS 8283, at *8 (Tex. App.—Dallas Aug. 2, 2016, no pet.). Therefore, before deciding whether the trial court erred in granting Howell's motion to dismiss, we must first address Hesse's contention that *his lawsuit* is exempt from the application of the TCPA and thus Howell is not entitled to file a motion to dismiss under its provisions.

Hesse contends that because Howell's allegedly offensive conduct took place during a proceeding brought by a political subdivision of the state seeking the enforcement of a contempt allegation against him, it is exempt from the provisions of the TCPA. In that regard, Hesse completely misreads section 27.010(a). In

determining the applicability of section 27.010(a), the question is not whether the proceeding *giving rise to* a lawsuit is an enforcement action; the question is whether *the lawsuit* in which the motion to dismiss was filed is an enforcement action.

Section 27.010(a) exempts enforcement actions from the application of the TCPA. Under that section, an enforcement action is one in which the State is seeking to compel the compliance of the movant of the motion to dismiss. *See Harper v. Best*, 493 S.W.3d 105, 111 (Tex. App.—Waco 2016, pet. granted June 23, 2017). In the instant lawsuit, the State is not seeking to compel or enforce the compliance of the movant—the State is the movant. Therefore, because the lawsuit at issue in this case is not an enforcement action, the exemption provisions of section 27.010(a) are inapplicable. In other words, this lawsuit is not exempt from the provisions of the TCPA by virtue of section 27.010(a).

Therefore, applying the "first step" in the analysis of a TCPA motion to dismiss, we note that Howell's allegedly offensive conduct took place in the course of his official duties as an assistant district attorney, at the direction of Judge Davis, seeking to enforce the directives of the trial court to compel Hesse's appearance at a criminal contempt show cause proceeding arising out of his conduct in the trial of a criminal prosecution. As such, it was a "communication in or pertaining to" a judicial proceeding. § 27.001(4)(A)(i). Given the broad statutory definitions supplied in the TCPA and the Supreme Court's decision in *Youngkin*, we conclude the *Application for Attachment* signed by Howell was a

communication in a judicial proceeding that falls under the TCPA.

Accordingly, because Howell has established by a preponderance of the evidence that Hesse's claims are based on, relate to, or are in response to his exercise of the right to petition, we proceed to the second step of our analysis. Here, the burden shifts, and we must now determine whether Hesse has established by clear and specific evidence a prima facie case for each element of at least one of his claims.

In that regard, Hesse alleges numerous claims, both civil and criminal, in his suit against Howell. All of those claims relate, in one fashion or another, to Howell's allegedly false statement under oath in the *Application for Attachment* that Hesse had been properly served with notice of the contempt allegations and the time and date of the show cause proceeding. Those allegations include perjury, aggravated perjury, tampering with a governmental record, malicious civil prosecution, false imprisonment, abuse of process, and intentional infliction of emotional distress, as well as a constitutional due process violation.

After reviewing the pleadings and Howell's affidavit, we conclude that Hesse met his burden to establish, by clear and specific evidence, a prima facie case of at least one of his claims—false imprisonment. False imprisonment requires (1) willful detention of the plaintiff by the defendant (2) without the plaintiff's consent and (3) without legal authority or justification. *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506

(Tex. 2002). As to that cause of action, Howell maintains there is insufficient evidence to support elements one and three. We disagree.

Willful detention, the first element, occurs when conduct that is intended to cause one to be detained—referred to as the "instigation" of false imprisonment—causes the complaining party to be detained. *Id.* at 507. Albeit at the trial judge's direction, Howell swore out the *Application for Attachment* with the intent that it be used to obtain a capias or writ of attachment that would then be used to detain Hesse. *See id.* As such, Howell's conduct was instrumental in the "instigation" of Hesse's ultimate imprisonment. As to the second element, the absence of Hesse's consent to imprisonment, a transcription of Hesse's arraignment hearing establishes he was arrested and held without his consent.

Finally, as to the final element concerning the absence of legal authority to imprison, Hesse contends there was no legal authority to arrest him because due process requires personal service of a notice of contempt allegations and the attempted service by certified mail in this case was insufficient to satisfy due process requirements. Notice in the context of a criminal contempt proceeding requires two distinct types of notice: (1) a full and unambiguous notice of the contempt allegations and (2) timely notice by personal service of the show cause hearing. *See Ex parte Adell*, 769 S.W.2d 521, 522 (Tex. 1989); *In re Gabrielova*, 527 S.W.3d 290, 295 (Tex. App.—El Paso 2016, orig. proceeding). Assuming *arguendo* that the *Notice of*

Allegations of Contempt sufficiently met the first requirement, Hesse insists that because he was not personally served with that notice, he was not provided constitutional due process, and was, therefore, not obligated to appear. Due process does require that notice of a contempt proceeding be "personally served on the alleged contemnor." *In re Gabrielova,* 527 S.W.3d at 295. Therefore, in the absence of constitutionally sufficient notice, a contempt order is void. *See Ex parte Adell*, 769 S.W.2d at 522.

In *Gabrielova*, the respondent issued a bench warrant for the relator's arrest because she failed to appear for a show cause hearing. The evidence presented by the relator showed that she was not personally served with notice of the show cause proceeding because the respondent had served the notice by certified mail addressed to the relator's employer resulting in the relator not personally signing the return receipt. The court held that in order to satisfy the personal service requirement, the respondent was required to take steps to cause the show cause order to be delivered to the relator *in person. See In re Gabrielova,* 527 S.W.3d at 295. The court held that, in the absence of personal service of the show cause order, the relator was not required to attend the show cause hearing, nor could she be held in contempt for her failure to do so. *Id.*

Here, the return receipt was not signed by Hesse but was instead signed by "Cathy Bears." Howell contends that Hesse failed to establish a prima facie case that he did not receive notice of the show cause hearing because there was no indication or pleading that he

was not associated with "Cathy Bears." Howell postulates that it is reasonable to deduce that Cathy Bears would have conveyed the notice to Hesse regardless of whether she was employed by him. Not only is this postulation unreasonable, it is constitutionally insufficient because personal service is still required. *Id.* Even in a civil proceeding, service by certified or registered mail requires the return of the officer or authorized person to include the return receipt *with the addressee's signature. See* TEX. R. CIV. P. 107(c) (emphasis added). As such, because Hesse was not personally served, nor did he personally sign the return receipt green card, we conclude Hesse presented clear and specific evidence sufficient to establish a prima facie case of false imprisonment.

Because Hesse established a prima facie case regarding at least one cause of action, the burden again shifted to Howell to establish an affirmative defense by a preponderance of the evidence. *See* § 27.005(d); *Coleman*, 512 S.W.3d at 899. In that regard, in his motion to dismiss, Howell raised the defenses of absolute prosecutorial immunity, derived judicial immunity, and attorney immunity to insulate himself from all of Hesse's claims.

Absolute prosecutorial immunity applies when a chief prosecutor or an assistant prosecutor is performing his prosecutorial functions. *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *Brown v. Lubbock County Comm. Court*, 185 S.W.3d 499, 505 (Tex. App.—Amarillo 2005, no pet.). Even allegations that a prosecutor acted criminally,

maliciously, wantonly, or negligently are insufficient to destroy absolute prosecutorial immunity. *Clawson v. Wharton County*, 941 S.W.2d 267, 272 (Tex. App.—Corpus Christi 1996, writ denied).

Derived judicial immunity applies when a judge delegates or appoints another person to perform services for the court or when a person otherwise serves as an officer of the court. *Hawkins v. Walvoord*, 25 S.W.3d 882, 891 (Tex. App.—El Paso 2000, pet. denied); *Delcourt v. Silverman*, 919 S.W.2d 777, 781 (Tex. App.—Houston [14th Dist.] 1996, no writ). In other words, a party is entitled to derived judicial immunity when the party is acting as an integral part of the judicial system or as an arm of the court. *Delcourt*, 919 S.W.2d at 782. The person acting in such a capacity also enjoys absolute immunity. *Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex. 1992).

Finally, attorneys are immune from civil liability for claims brought by non-clients "for actions taken in connection with representing a client in litigation." *Cantey Hanger*, *LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). This defense extends to all conduct—even if "wrongful in the context of the underlying suit"—that occurs when a lawyer discharges his duties in representing a client and an attorney acting in that capacity enjoys immunity. *Id.* "The only facts required to support an attorney-immunity defense are the type of conduct at issue and the existence of an attorney-client relationship at the time. A court would then decide the legal question of whether the said conduct was within

the scope of representation." *Youngkin*, 2018 Tex. LEXIS 348, at 16.

With his motion to dismiss, Howell included his affidavit in which he averred the following:

> At all relevant times . . . I was employed as an Assistant District Attorney with the 47th Judicial District Attorney's Office in Amarillo, Potter County, Texas.
>
> * * *
>
> At Judge Davis' request, I prepared paperwork to facilitate enforcement of that order [that Mr. Hesse be arrested and brought before the court] through the statutory procedure that seemed most applicable to the situation; specifically an application for attachment. . . .

As such, Howell provided sufficient evidence to establish his affirmative defense of absolute immunity to Hesse's false imprisonment claim. He was performing his prosecutorial functions and the trial judge delegated his authority to him to perform a service for the court. Furthermore, Howell was representing the State of Texas in litigation with a non-client. The greater weight and degree of credible evidence of immunity left the trial court with no discretion but to dismiss Hesse's suit pursuant to section 27.005(d) of the Act. Issue three is overruled.

ISSUE FOUR—APPLICATION OF TCPA TO CLAIMS BROUGHT UNDER 42 U.S.C. § 1983

Relying on *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990), and the Supremacy Clause of the United States Constitution, Hesse contends the State of Texas cannot refuse to enforce federal law nor can it immunize state actors from federal law. Howell disagrees, as do we.

ANALYSIS

In *Howlett*, a former high school student filed suit under 42 U.S.C. § 1983 against the local school board and three school officials for violating his constitutional rights by searching his car on school premises. In a lengthy discussion, the Court held that a state court may not deny a federal right when the parties and controversies are properly before it. The Court concluded that "[f]ederal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations." *Id.* at 377-78.

As discussed hereinabove, Howell, a prosecutor representing an arm of the State, is entitled to immunity and section 1983 claims do not override traditional sovereign immunities of the states. *Id.* at 365. Regardless of whether the TCPA applies to claims brought under 42 U.S.C. § 1983, a prosecutor acting in his official capacity is entitled to absolute immunity (judicial and derived judicial immunity) in such an action. *See Imbler*, 424 U.S. at 430 (holding that a prosecutor is

immune from a civil suit for damages brought under section 1983). *See also Woodard v. Andrus*, 419 F.3d 348, 353 (5th Cir. 2005); *Rocha v. Potter County*, 419 S.W.3d 371, 380 (Tex. App.—Amarillo 2010, no pet.). No private cause of action, even one based on federal law, may lie against a prosecutor entitled to immunity. *Peay v. Ajello*, 470 F.3d 65, 68 (2d Cir. 2006). A prosecutor enjoys absolute immunity despite allegations of using perjured testimony. *Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005). Without immunity, the frequency with which criminal defendants bring retaliatory suits would "impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Lampton v. Diaz*, 639 F.3d 223, 228 (5th Cir. 2011) (quoting *Imbler*, 424 U.S. at 425-26). Issue four is overruled.

ISSUE ONE—IS A PROSECUTOR ENTITLED TO IMMUNITY FOR ACTS FOREIGN TO HIS DUTIES?

Hesse claims that Howell is not entitled to immunity for acts foreign to his duties as a prosecutor. He argues that immunity should not apply when a prosecutor commits fraudulent or criminal acts. He also posits that Howell became a witness and was no longer acting as a prosecutor when he swore out the *Application for Attachment* which he contends stripped Howell of any type of immunity. We disagree.

ANALYSIS

Howell was acting in his role as a public prosecutor acting on behalf of the State of Texas and following the direction of Judge Davis in swearing out the application. *See Rehberg v. Paulk*, 566 U.S. 356, 365, 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012). As such, he was entitled to immunity as previously discussed. *See B.K. v. Cox*, 116 S.W.3d 351, 357 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (noting that the cloak of immunity covers all acts, both good and bad). Issue one is overruled.

ISSUE TWO—LAW APPLICABLE TO A WRIT OF ATTACHMENT

Hesse further asks this court to clarify whether the Texas Code of Criminal Procedure or the Texas Rules of Civil Procedure dictate the procedure for issuing a writ of attachment in a contempt proceeding. He questions whether a writ of attachment should ever have been issued based on the procedure followed by Howell.

ANALYSIS

Having already decided that Hesse was not properly served, making the notice of contempt allegations and writ of attachment both void; *Ex parte Adell*, 769 S.W.2d at 522, we need not decide whether the proper statute or rule was followed. To do so would be tantamount to issuing an advisory opinion. *See Valley*

Baptist Med. Ctr. [sic] *Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000). Issue two is overruled.

ISSUE FIVE—JUDICIAL NOTICE

Hesse further contends Judge Davis could not have taken judicial notice that he had been properly served when the record showed "NO" proof of service. He then alleges that Howell lead [sic] Judge Davis into error by not correcting him on the lack of personal service. Again, we disagree with Hesse's assessment of the facts.

ANALYSIS

Rule 201(b) of the Texas Rules of Evidence provides the kinds of facts that may be judicially noticed—i.e., those which are not subject to reasonable dispute. Here, Judge Davis took judicial notice that the court's file contained a green card return of service indicating service of process by certified mail, return receipt requested, signed by someone other than the addressee. Because that fact is not subject to reasonable dispute, it was the proper subject of judicial notice. What Hesse really seeks to contest is the legal significance of that notice. Hesse contends that because the return receipt was signed by someone other than the addressee, it is legally insufficient to constitute proper service of process. While that legal conclusion is true, it is just that—a legal conclusion, not a judicially noticed fact. Notwithstanding the erroneous legal conclusion that Hesse was properly served, as previously discussed,

both Judge Davis and Howell enjoy absolute immunity from any claim that Hesse was injured by that error. That absolute immunity forecloses any claim for relief that Hesse might bring. Issue five is overruled.

ISSUE SIX—RULING ON OBJECTIONS TO MOTION TO DISMISS

Finally, Hesse contends the trial court committed an abuse of discretion by overruling various evidentiary objections to Howell's motion to dismiss. Again, we disagree.

Evidentiary rulings of a trial court are committed to the sound discretion of the judge. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). We will not reverse a trial court's erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a); *Brewer v. Lennox Hearth Prods. LLC*, ___ S.W.3d ___, No. 07-16-00121-CV, 2018 Tex. App. LEXIS 2127, at *39 (Tex. App.—Amarillo March 26, 2018, pet. filed May 10, 2018).

ANALYSIS

In his response to Howell's motion to dismiss, Hesse requested that the following exhibits or paragraphs in the motion be struck:

(1) Exhibit A, a settlement offer letter from Hesse's counsel to Howell's counsel as not falling under the prescribed permissible

uses of a settlement offer under Rule 408(b) of the Texas Rules of Evidence;

(2) the statement that "Plaintiff failed to appear" in Defendant's Statement of Facts because he was never served with notice;

(3) specific paragraphs for failing to include the word "fraud" which he alleged Howell committed;

(4) paragraph 8(h) for including a discussion of the Eighth Amendment when he had omitted the Eighth Amendment from his amended petition.

Here, the burden was on Hesse to establish that error, if any, in the trial court's rulings resulted in an improper judgment. *In re Marriage of Scott*, 117 S.W.3d 580, 584 (Tex. App.—Amarillo 2003, no pet.). In light of our conclusion regarding the applicability of the TCPA, the propriety of Howell's motion to dismiss, and his affirmative defense of absolute immunity, Hesse has not demonstrated that any evidentiary ruling caused him harm. *In the Interest of M.S.*, 115 S.W.3d 534, 538 (Tex. 2003). Issue six is overruled.

CONCLUSION

The trial court's order dismissing Hesse's suit is affirmed.

Patrick A. Pirtle
Justice

[SEAL]

Court of Appeals

Seventh District of Texas
Potter County Courts Building
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PATRICK A. PIRTLE
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July 13, 2018

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RE: Case Number: 07-16-00453-CV Trial Court
Case Number: 105,728-1

Style: David Christopher Hesse v. Jason Kane Howell

Dear Counsel:

By Order of the Court, Appellant's Motion for Rehearing is this day denied.

Very truly yours,

/s/ Vivian Long
VIVIAN LONG, CLERK

xc: Honorable W. F. (Corky) Roberts
(DELIVERED VIA E-MAIL)
Caroline Woodburn (DELIVERED VIA E-MAIL)

NO 105,728 – 1

DAVID CHRISTOPHER HESSE,	*	IN THE COUNTY COURT AT LAW 1
Plaintiff	*	IN AND FOR
VS.	*	POTTER COUNTY,
JASON KANE HOWELL,	*	TEXAS
Defendant	*	

ORDER GRANTING

DEFENDANT'S MOTION TO DISMISS

UNDER TEXAS CIVIL PRACTICE AND REMEDIES CODE CHAPTER 27

(Filed Nov. 22, 2016)

On this day came on to be heard DEFENDANT'S MOTION TO DISMISS UNDER TEXAS CIVIL PRACTICE AND REMEDIES CODE CHAPTER 27. Defendant appeared in person and by his counsel of record, C. Scott Brumley and Tad Fowler. Plaintiff appeared in person and by his counsel of record, L.T. Bradt.

The court, having examined Defendant's motion and Plaintiff's response thereto, and having heard the arguments of counsel, finds that Defendant's motion should be and is hereby GRANTED.

IT IS THEREFORE ORDERED that this case be and is hereby dismissed with prejudice as to all claims asserted by Plaintiff herein. Costs of court are charged to Plaintiff.

It further appearing that Defendant chose not to pursue his request for sanctions and attorney's fees as stated in his motion, IT IS ORDERED that Defendant's request for sanctions and attorney's fees be and is hereby DENIED. All relief sought in this cause and not expressly granted hereby is hereby denied.

Signed this 21st day of November, 2016.

/s/ W.F. Roberts
W.F. Roberts, Judge Presiding

RE: Case No. 18-0743 DATE: 11/2/2018
COA #: 07-16-00453-CV TC#: 105,728-1
STYLE: HESSE v. HOWELL

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