

## **Exhibit 1**

*Van Dyke v. Retzlaff*, No. 18-40710, 781 Fed. Appx. 368 (5th Cir. 2019)

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

\_\_\_\_\_  
No. 18-40710  
Summary Calendar  
\_\_\_\_\_

United States Court of Appeals  
Fifth Circuit

**FILED**

October 22, 2019

Lyle W. Cayce  
Clerk

JASON LEE VAN DYKE,

Plaintiff - Appellee

v.

THOMAS CHRISTOPHER RETZLAFF, also known as Dean Anderson, doing  
business as BV Files, ViaView Files, L.L.C., and ViaView Files,

Defendant - Appellant

\_\_\_\_\_  
Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 4:18-CV-247  
\_\_\_\_\_

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:\*

Plaintiff Jason Lee Van Dyke sued Defendant Thomas Retzlaff, alleging various causes of action based upon allegedly false and harassing statements Retzlaff made about Van Dyke in state court; Retzlaff removed the case to federal court on diversity jurisdiction grounds. The district court opinion ably explains the facts of the case but, suffice it to say, Retzlaff moved to dismiss

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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the claims based upon the Texas Citizens Participation Act (TCPA)<sup>1</sup>, which is an “anti-SLAPP”<sup>2</sup> statute. The district court denied the motion to dismiss, concluding that the relevant portions of the TCPA did not apply in federal court. Retzlaff filed an interlocutory appeal to our court.

We first examine whether we have jurisdiction of this interlocutory appeal. The parties agree that the collateral order doctrine applies to this appeal. Based upon precedent, we agree that we have jurisdiction to address whether the Texas anti-SLAPP statute applies here. *Diamond Consortium, Inc. v. Hammervold*, 733 F. App’x 151, 154 (5th Cir. 2018) (per curiam); *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 747–48 (5th Cir. 2014). That jurisdiction is limited; we cannot address the underlying merits of the case outside the anti-SLAPP question. *See Mauze & Bagby*, 745 F.3d at 747 (“[T]he collateral order doctrine can confer *limited* appellate jurisdiction.” (emphasis added)).

The next question, then, is whether the district court correctly denied the motion to dismiss based upon the TCPA. At the time that the district court ruled, the application of the Texas anti-SLAPP statute in a federal court exercising diversity jurisdiction was an open question in our circuit. However, by the time the appeal was ripe for decision, we had decided the issue. *See Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019). We determined that “the TCPA does not apply to diversity cases in federal court.” *Id.*

After allowing the parties to submit supplemental briefing on this point, we conclude that *Klocke* is dispositive. In his supplemental brief, Retzlaff tries to distinguish the two cases by pointing out lapses in the defendant’s briefing in *Klocke* that are different from Retzlaff’s robust briefing. But the core of

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<sup>1</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 27.001.

<sup>2</sup> “SLAPP” is short for Strategic Litigation Against Public Participation.

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*Klocke* does not rest on such lapses, so we are bound by the rule of orderliness to follow its holding. See *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). Retzlaff's other procedural arguments are beyond the scope of this interlocutory appeal. We express no opinion on the ultimate merits of the case; nor do we opine on the validity of a motion to dismiss or for summary judgment based on arguments other than the TCPA.

AFFIRMED; the case is REMANDED for further proceedings in the district court.

## **Exhibit 2**

*Van Dyke v. Retzlaff*, No. 18-40710, (denial of petition for panel rehearing and rehearing en banc)

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 18-40710

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JASON LEE VAN DYKE,

Plaintiff - Appellee

v.

THOMAS CHRISTOPHER RETZLAFF, also known as Dean Anderson, doing  
business as BV Files, ViaView Files, L.L.C., and ViaView Files,

Defendant - Appellant

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Appeal from the United States District Court  
for the Eastern District of Texas

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ON PETITION FOR REHEARING EN BANC

(Opinion October 22, 2019, 5 Cir., \_\_\_\_\_, \_\_\_\_\_ F.3d \_\_\_\_\_ )

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel

Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

*Done 12-5-2019*

ENTERED FOR THE COURT:

*[Handwritten Signature]*

UNITED STATES CIRCUIT JUDGE