

NOTICE
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2014 IL App (5th) 140040-U

NO. 5-14-0040

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

TODD FORT,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Saline County.
)	
v.)	No. 13-L-30
)	
MICHAEL J. HENSHAW,)	Honorable
)	Mark R. Stanley,
Defendant-Appellee.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Cates and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* This cause is remanded to the circuit court because the court did not make a substantive ruling on the issue of sovereign immunity, which determines whether the Court of Claims has exclusive jurisdiction over the plaintiff's claims.

¶ 2 The plaintiff, Todd Fort, filed a four-count complaint against the defendant, Michael Henshaw, after Henshaw released taped telephone conversations between Fort and his friends and family members to Disclosure Newsmagazine while Fort was incarcerated. Henshaw moved to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)) and section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)), arguing, among other things, that under the

doctrine of sovereign immunity, the Court of Claims had exclusive jurisdiction over Fort's claims and the circuit court lacked jurisdiction to hear the case. Henshaw also argued, in pertinent parts, that assuming, *arguendo*, that the circuit court had jurisdiction, Fort's suit was barred by absolute and public official immunity. The trial court dismissed Fort's complaint, finding, in pertinent parts, that Henshaw was protected by absolute immunity. The court did not determine whether, under sovereign immunity, the Court of Claims had exclusive jurisdiction over Fort's cause of action. For the reasons which follow, we remand this matter to the circuit court to address the issue of sovereign immunity.

¶ 3 Fort was arrested in Saline County and was incarcerated in the Jackson County jail while awaiting trial. Henshaw was the Saline County State's Attorney at the time of Fort's arrest and incarceration. During his incarceration, Fort made a series of telephone calls from jail to members of his family and close, personal friends. In February 2012, the taped conversations were posted on Disclosure Newsmagazine's website.

¶ 4 In June 2013, Fort filed a four-count complaint against Henshaw based on the recordings being released to Disclosure. The complaint alleged that Henshaw provided the recordings to Disclosure for the purpose of "ridiculing, embarrassing, humiliating, and otherwise making Fort, his family, and his friends suffer extreme emotional distress." The complaint alleged that Henshaw and Fort had known each other for more than 20 years and that Henshaw had developed an "antipathy and enmity toward Fort."

¶ 5 Count I sought damages for intrusion upon seclusion and alleged that Fort suffered extreme anguish and anxiety and became depressed when he learned about the

publication of the tapes and that he still experienced suffering and anguish. The complaint alleged that such an intrusion would be highly offensive to a reasonable person, the conversations were private and not of public concern, and Fort had a reasonable expectation that said conversations would not be widely disseminated as other incarcerated individuals had not had their conversations leaked to the media. Count II sought damages for public disclosure of private facts and alleged that the conversations concerned the "physical and mental health as well as emotional well-being of Fort, Fort's mother, Fort's sister, and Fort's family and friends." Count III sought damages for intentional infliction of emotional distress and alleged that Henshaw's action in providing the recordings to Disclosure was extreme and outrageous and was done with the intent to cause Fort emotional distress. The complaint alleged that Fort suffered severe emotional distress as a result of Henshaw's conduct. Count IV sought an award of punitive damages and alleged that Henshaw acted with actual malice, which was directed at Fort, when he released the recordings to Disclosure.

¶ 6 On July 31, 2013, Henshaw filed a combined motion to dismiss Fort's complaint under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) and under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)). As the section 2-615 motion is not relevant to our disposition, we will only discuss the section 2-619 motion.

¶ 7 In the section 2-619 motion, Henshaw argued that Fort's action against Henshaw was barred by sovereign immunity as it was an action filed against the State in that a judgment in favor of Fort could operate to control the actions of the State. The motion explained that Fort sought an order compelling the State's Attorney to pay a judgment for

money damages based on actions that were taken in his state office, *i.e.*, releasing information pursuant to a request under the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2012)). Therefore, the motion argued that Fort's action must be brought in the Court of Claims, which has exclusive jurisdiction over tort claims for damages against the State. Attached to the motion was an affidavit of Angela Howser, a member of the media who writes publications for Disclosure. According to the affidavit, on October 18, 2011, Howser submitted a written FOIA request to the Saline County State's Attorney for the release of the recordings.

¶ 8 Furthermore, the motion argued that Henshaw was entitled to the protections of absolute immunity and public official immunity because, in his capacity as the State's Attorney, he determined whether to comply with the FOIA request, the recordings were in the possession and control of his office, and he was performing an official function of his public office when he made the decision to release the taped conversations.

¶ 9 In response, Fort argued that Henshaw was not entitled to the protection of absolute immunity because the State's Attorney's office was not subject to FOIA. Alternatively, Fort argued that even if the State's Attorney was subject to FOIA, the authenticity of the written FOIA request was in dispute, and there was some evidence that Henshaw had voluntarily released the recordings without a FOIA request. Fort also argued that Henshaw had failed to protect his interests by not claiming an applicable FOIA exemption. Further, Fort argued that Henshaw was not entitled to the protection of sovereign immunity because his actions exceeded the scope of his official duties as

State's Attorney in that he had engaged in tortious conduct for the purpose of embarrassing Fort.

¶ 10 Following a hearing on Henshaw's motion to dismiss, the trial court granted the motion and made the following findings. The court found that the State's Attorney was not subject to FOIA. However, the court noted that the State's Attorney is not forbidden to release public information. The court found that the information requested in this case was public and that it was no longer needed for trial. The court concluded that the information could properly be released at the State's Attorney's discretion and that determining whether to release the information was part of the State's Attorney's official duties. The court noted that the purpose of FOIA was to require the government to release public information in its possession and "not to require the government to not release public information." The court concluded that Henshaw was protected by absolute immunity as the decision whether to release public information was within his discretion as the State's Attorney and that he was acting within his official capacity when he released the recordings. The court then determined that it did not need to address the issues of sovereign immunity or public official immunity.

¶ 11 On appeal, Henshaw requests that this court address the sovereign-immunity issue, which determines whether the circuit court had subject matter jurisdiction. Henshaw requests that we affirm the dismissal of Fort's complaint based on sovereign immunity, citing *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1983), for the proposition that the reviewing court may affirm a circuit court's judgment based on any basis apparent from the record.

¶ 12 The Illinois Constitution of 1970 abolished sovereign immunity, but permitted the legislature to restore it. Ill. Const. 1970, art. XIII, § 4; *Toth v. England*, 348 Ill. App. 3d 378, 386 (2004). The General Assembly thereafter enacted the State Lawsuit Immunity Act, which prohibits the State from being named a defendant in any court except as provided in the Court of Claims Act (705 ILCS 505/1 *et seq.* (West 2012)). 745 ILCS 5/1 (West 2012). Under section 8(d) of the Court of Claims Act (705 ILCS 505/8(d) (West 2012)), the Court of Claims has exclusive jurisdiction over tort claims for damages against the State. "The purpose of sovereign immunity is to protect the [S]tate from interference with the performance of governmental functions and to preserve and to protect [S]tate funds." *People ex rel. Manning v. Nickerson*, 184 Ill. 2d 245, 248 (1998). Thus, an action nominally against an individual State employee will be considered an action brought against the State for sovereign-immunity purposes when a judgment in favor of plaintiff could operate to control the actions of the State or subject it to liability. *Id.*

¶ 13 The doctrine of sovereign immunity instructs that if plaintiff's tort claim is against the State, then plaintiff must bring the suit in the Court of Claims. *Kawaguchi v. Gainer*, 361 Ill. App. 3d 229, 249 (2005). "Where sovereign immunity applies, the circuit court is without jurisdiction to entertain the litigation." *Toth*, 348 Ill. App. 3d at 387. Because the circuit court did not make a substantive ruling on the issue of whether the Court of Claims had exclusive jurisdiction over Fort's cause of action under the doctrine of sovereign immunity, we remand this case back to that court.

¶ 14 For the reasons stated, we remand this matter to the circuit court of Saline County for a determination on the issue of sovereign immunity. If the court determines that sovereign immunity is applicable, then it is without jurisdiction to entertain the litigation and Fort's action must be brought in the Court of Claims.

¶ 15 Remanded.