2017 IL App (5th) 160023-U

NO. 5-16-0023

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's section 2-619 dismissal of the plaintiff's complaint is affirmed on the basis of sovereign immunity where the action was against the State.

¶ 2 The plaintiff, Todd Fort, appeals from the order of the circuit court of Saline County dismissing his complaint filed against the defendant, Michael Henshaw, the State's Attorney of Saline County. The complaint was dismissed pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)) on the basis that the court lacked subject matter jurisdiction because Henshaw was protected by sovereign immunity. For the reasons which follow, we affirm the dismissal.

¶ 3 Fort was arrested in Saline County for the criminal sexual assault of a minor. Henshaw was the Saline County State's Attorney at this time and had brought the charge against Fort. Following his arrest, Fort was incarcerated in the Jackson County jail for approximately one month and then he was incarcerated there again when the trial court increased his bail for contacting the alleged victim.

¶ 4 While in jail, Fort made a series of telephone calls from the jail to members of his family and close, personal friends. These conversations were recorded. A prerecorded message notified the recipients that the calls were subject to recording. At the time the calls were made, Fort's mother and sister were both suffering from terminal cancer and eventually succumbed to that disease. Henshaw, whose office was in possession of the recordings, released them to a news magazine called Disclosure Newsmagazine after Fort's case was concluded. On or about February 12, 2012, until August 2012, approximately 100 hours of the taped conversations were posted on the newsmagazine's website.

¶ 5 Thereafter, Fort filed a complaint against Henshaw, alleging that the vast bulk of the disclosed conversations were intensely private in nature in that Fort had discussed his state of well-being, the well-being of his family, and other matters of private, non-public concern, including, but not limited to, the health of his mother and sister. The complaint alleged that Henshaw and Fort had known one another for more than 20 years and that Henshaw had developed an "antipathy and enmity toward Fort." According to the complaint, Henshaw provided the taped conversations to Disclosure for the purpose of

"ridiculing, embarrassing, humiliating, and otherwise making Fort, his family, and his friends suffer extreme emotional distress."

¶ 6 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. Count II sought damages for public disclosure of private facts and alleged that a reasonable person would find it highly offensive to have conversations concerning the physical and mental health of himself, his family, and his friends published on the internet. Count III sought damages for intentional infliction of emotional distress and alleged that Henshaw's act was extreme and outrageous and was done with the intent to cause Fort severe emotional distress. Count IV sought an award of punitive damages and alleged that Henshaw acted with actual malice, which was directed at Fort.

¶ 7 On July 31, 2013, Henshaw filed a combined motion to dismiss Fort's complaint under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)). In the section 2-615 portion of the motion (735 ILCS 5/2-615 (West 2012)), Henshaw argued that Fort failed to plead sufficient facts to state a claim for intrusion upon seclusion, public disclosure of private facts, and intentional infliction of emotional distress. In the section 2-619 portion of the motion (735 ILCS 5/2-619 (West 2012)), Henshaw asserted that sovereign immunity, absolute immunity, and public official immunity barred Fort's action. Henshaw further argued that Fort had failed to file his claim for public disclosure of private facts within the applicable one-year statute of limitation period set forth in section 13-201 of the Code (735 ILCS 5/13-201 (West 2012)).

¶ 8 Attached to the motion was an affidavit of Angela Howser, a member of the media who writes publications for Disclosure. According to the affidavit, in early October 2011, Angela contacted the Jackson County jail and inquired as to how the media could obtain copies of the recordings. Angela was informed by Jackson County jail personnel that the Saline County State's Attorney's office had possession of them. Angela subsequently met with Henshaw and was informed that Disclosure could submit a written request pursuant to the Freedom of Information Act (FOIA) and Henshaw would determine whether the recordings were subject to release. On October 18, 2011, Howser submitted a written FOIA request to the State's Attorney's office. A copy of the request was attached to Angela's affidavit. The FOIA request asked for the following: "[a]ny available recordings made of conversations between Todd Fort and friends/family outside the Jackson Co. Jail, in particular those that were to be entered by the State as evidence in his trial." Thereafter, the State's Attorney's office provided Disclosure with two compact discs containing the recordings. According to the affidavit, Henshaw never voluntarily agreed to provide the recordings without a FOIA request.

¶ 9 Thereafter, Fort filed a response to the motion to dismiss and also a motion to strike Angela's affidavit. In his response, Fort questioned the authenticity of the FOIA request attached, arguing that the copy was not admissible under the best evidence rule. In support, Fort attached his affidavit, which stated that he had a conversation with Jack Howser, Angela's husband, in the presence of Angela, and that Jack had indicated Henshaw had voluntarily given him the audio recordings and instructed Jack to "run

them." The affidavit indicated that the Howsers did not have to submit a FOIA request for the disclosure of the recordings.

¶ 10 Following a hearing on Henshaw's combined motion to dismiss and Fort's motion to strike, the trial court made the following findings. First, the court denied Fort's motion to strike the affidavit, concluding that Angela's affidavit was in proper form in that it was based on personal knowledge, set forth facts, was signed, dated, and notarized and it complied with section 2-606 of the Code (735 ILCS 5/2-606 (West 2012)), which indicated that when a defense or claim was founded upon a written instrument, a *copy* of the written instrument must be attached to the pleading as an exhibit. The court determined that the best evidence rule was not applicable at this stage in the proceedings and that the rule applied when a party was offering evidence at an evidentiary hearing. The court found that the issue of whether Angela's affidavit was genuine was a discovery issue. The court concluded that Fort's counter-affidavit was not in proper form because it contained hearsay, was not based on personal knowledge, and did not contain any facts.

¶ 11 The trial court granted Henshaw's motion to dismiss, finding that Fort had failed to plead a cause of action for intrusion upon seclusion, public disclosure of private facts, or intentional infliction of emotional distress. The court also concluded that absolute immunity barred the action because Henshaw was acting within his official capacity as the State's Attorney and he was exercising discretion when he turned over the recordings. The court found it unnecessary to address Henshaw's sovereign immunity and public official immunity arguments. Fort appealed the order of dismissal.

¶ 12 On appeal, this court remanded to the trial court for consideration of the sovereign-immunity issue because the resolution of that issue determined whether the trial court had subject matter jurisdiction to hear Fort's tort claims against Henshaw or whether the claims had to be brought in the Court of Claims. *Fort v. Henshaw*, 2014 IL App (5th) 140040-U. This court made no ruling on the other grounds for dismissal.

¶ 13 Upon remand, Fort requested and was granted leave to file an amended complaint, which contained an additional allegation that Henshaw had fabricated the FOIA request to provide himself with a defense. In addition, the complaint alleged that the recordings of Fort's private conversations were public records of the Jackson County sheriff's office rather than the Saline County State's Attorney's office, that Henshaw had a duty to claim that the recordings were exempt under FOIA, and that Henshaw failed to appoint a FOIA officer as required by 5 ILCS 140/3.5 (West 2014).

¶ 14 On June 25, 2015, Henshaw filed a combined motion for summary judgment and a motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)) as well as a memorandum of law in support (combined motion). The motion for summary judgment portion asserted that Fort's action was barred by sovereign immunity and absolute immunity. The section 2-619.1 portion argued that Fort failed to state a cause of action for intrusion upon seclusion, public disclosure of private facts, and intentional infliction of emotional distress and that Fort failed to file his claim for public disclosure of private facts within the applicable one-year statute of limitations.

¶ 15 Attached to the combined motion were the following pertinent exhibits. Exhibit one consisted of Angela's affidavit asserting that she had submitted a FOIA request to the

Saline County State's Attorney's office on October 18, 2011, as well as a copy of the FOIA request. Exhibit two consisted of an affidavit from Eva Walker, who was an assistant State's Attorney in the Saline County State's Attorney's office between December 2008 and June 2013. Walker's affidavit asserted that Henshaw had her contact the Public Access Bureau of the Office of the Illinois Attorney General to ask whether the State's Attorney's office should provide the requested records to Disclosure. On October 19, 2011, Walker spoke with Assistant Attorney General, Matthew Rogina, in the Public Access Bureau about the FOIA request. During the conversation, Walker was told that the recordings in the possession of the State's Attorney's office should be released. Walker made a notation regarding the advice to disclose the records on a copy of the FOIA request.

¶ 16 On July 16, 2015, Fort filed a response to the motion for summary judgment and motion to dismiss, arguing that a copy of the FOIA request could not be considered as evidence and that portions of the Howser and Walker affidavits constituted inadmissible hearsay.

¶ 17 Following a hearing on the issue of sovereign immunity, the trial court entered an order dismissing Fort's complaint pursuant to section 2-619 of the Code. The court noted that pursuant to *Healy v. Vaupel*, 133 Ill. 2d 295 (1990), a claim based upon a tort in which damages are sought against a State official is barred by sovereign immunity where (1) the State official has not acted beyond the scope of his authority; (2) the official is alleged to have breached the duty by virtue of his State employment; and (3) the action is within the normal and official functions of the State employee.

¶ 18 The trial court concluded that Henshaw, as the Saline County State's Attorney, has discretion to release public documents including evidence regarding a crime to the public and the media and that such information was routinely disclosed. The court found that whether there was a FOIA request was of no consequence. It concluded that the first prong of the *Healy* test had been established in that Henshaw's act in releasing the conversations was within the discretionary powers of the State's Attorney.

¶ 19 The trial court also found that the second prong was satisfied because the decision of whether to release the recordings was decided by State's Attorney Henshaw by virtue of his State employment. The court further found that the third prong was met because the act of making the decision to release the recordings and the act of releasing the recordings were within the normal and official functions of Henshaw's employment as the State's Attorney. Thus, the court concluded that Henshaw was protected by sovereign immunity. The court also confirmed the other grounds for dismissal that were set forth in its December 27, 2013, order.

¶ 20 On appeal, Fort argues that the trial court erred in granting Henshaw's 2-619 motion to dismiss on the basis of sovereign immunity. Section 2-619 of the Code (735 ILCS 5/2-619(a)(1) (West 2014)) provides for a dismissal of a cause of action based on the trial court's lack of subject matter jurisdiction. *Carmody v. Thompson*, 2012 IL App (4th) 120202, ¶ 18. A motion to dismiss pursuant to section 2-619 admits the legal sufficiency of a complaint, but raises an affirmative matter outside the complaint that defeats the claim. *Wilson v. Quinn*, 2013 IL App (5th) 120337, ¶ 11. In ruling on a section 2-619 motion, the court will accept all well-pleaded facts in the complaint as true

and accord all reasonable inferences to the nonmoving party. *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶ 16. Our review of the trial court's ruling on the section 2-619 motion is *de novo*. *Carmody*, 2012 IL App (4th) 120202, ¶ 18.

¶ 21 The Illinois Constitution of 1970 abolished sovereign immunity, but granted the legislature the power to restore it. Ill. Const. 1970, art. XIII, § 4; *Carmody*, 2012 IL App (4th) 120202, ¶ 19. The General Assembly thereafter enacted the State Lawsuit Immunity Act, which prohibits the State from being named a defendant in any court except for the enumerated exceptions, one of which is the Court of Claims Act (705 ILCS 505/1 *et seq.* (West 2014)). *Carmody*, 2012 IL App (4th) 120202, ¶ 20. Section 8(d) of the Court of Claims Act (705 ILCS 505/8(d) (West 2014)) instructs that the Court of Claims has exclusive jurisdiction over tort claims for damages against the State. The circuit court lacks subject matter jurisdiction over claims where sovereign immunity applies. *Smith v. Jones*, 113 Ill. 2d 126, 130 (1986).

¶ 22 The determination of whether an action is against the State does not depend on the formal identification of the parties, but rather depends on the issues involved and the relief sought. *Wilson*, 2013 IL App (5th) 120337, ¶ 13. "The prohibition against making the State of Illinois a party to a suit cannot be evaded by bringing an action against a state employee in his individual capacity when the actual claim is against the State or when the State is directly and adversely affected by the suit." *Id.* An action against a State employee in his individual capacity will be found to be a claim against the State where a judgment for plaintiff could operate to control the actions of the State or subject it to liability. *Toth v. England*, 348 Ill. App. 3d 378, 387 (2004). Sovereign immunity affords

no protection, however, where the suit sufficiently alleges that the State's agent acted in violation of statutory or constitutional law or in excess of his own authority. *Carmody*, 2012 IL App (4th) 120202, ¶ 21. In such circumstance, the action may be brought in the circuit court. *Id.*

¶ 23 Our supreme court has adopted a three-factor test to determine whether an action brought nominally against a State official will be considered one against the State for sovereign-immunity purposes. *Healy*, 133 Ill. 2d at 309. An action is a suit against the State when the following factors are present: (1) there are no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State employment; and (3) where the complained-of actions involve matters ordinarily within that employee's normal and official functions of the State. *Id.* The three factors overlap to an extent, particularly the first and third, and all three must be present for sovereign immunity to apply. *Jackson v. Alverez*, 358 Ill. App. 3d 555, 560 (2005).

¶ 24 With regard to the scope of authority factor, allegations of tortious conduct on their own are not sufficient to remove the bar of sovereign immunity. *Id.* at 561. Instead, the relevant question is whether the State employee's actions are consistent with an intent to further the State's business. *Welch v. Illinois Supreme Court*, 322 Ill. App. 3d 345, 354 (2001).

¶ 25 Here, Henshaw argues that his actions were consistent with an intent to further the State's business in that he was responding to a FOIA request when he disclosed the

recordings. A State's Attorney is considered a "public body" under FOIA (5 ILCS 140/2(a) (West 2010)). *Nelson v. Kendall County*, 2014 IL 116303, ¶ 27. The office must make their public records available for inspection and copying unless an exemption applies. 5 ILCS 140/3(a) (West 2014). Thus, responding to FOIA requests and releasing public records are part of a State's Attorney's work-related activities. FOIA defines "public records" as "recordings *** and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body." 5 ILCS 140/2(c) (West 2014). The released records fell within this definition. In determining whether records should be released, the presumption is that all records in the custody or possession of a public body are open to inspection and copying. 5 ILCS 140/1.2 (West 2014); *Nelson*, 2014 IL 116303, ¶ 26.

¶ 26 Fort challenges the admissibility of the copy of the FOIA request attached to Henshaw's combined motion because it does not constitute the best evidence. This argument was addressed by the trial court when it ruled on Fort's motion to strike Angela's affidavit in the first proceeding. The court concluded that the affidavit was proper in form in that it was based on personal knowledge, had set forth facts, and was signed, dated, and notarized. The court further concluded that the affidavit complied with section 2-606 of the Code (735 ILCS 5/2-606 (West 2014)), which stated that when a defense or claim is founded upon a written instrument, a copy of the written instrument must be attached to the pleading as an exhibit. We agree with the trial court. Henshaw attached a copy of Angela's affidavit and the copy of the FOIA request as an exhibit to

his combined 2-619.1 motion to dismiss and motion for summary judgment. The affidavit complied with the requirements of section 2-606 as well as Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013), which sets forth the requirements for affidavits attached to motions for dismissal and summary judgment.

¶ 27 Notwithstanding the FOIA request, Fort argues that Henshaw committed a wrongful act outside the scope of his authority as a State employee because he maliciously disclosed intensely private conversations for publication with the express purpose to cause Fort embarrassment and humiliation. In support, Fort cites *Welch*, 322 Ill. App. 3d at 353, for the proposition that sovereign immunity does not apply where the complaint alleges that the State employee acted with malice. Fort also argues that the fact that Henshaw did not claim an applicable FOIA exemption provides further evidence of Henshaw's malicious act.

¶ 28 The facts are consistent that Henshaw's act was done with the intent to further the State's business in that he was attempting to fulfill his official responsibilities under FOIA. As previously noted, attached to the combined motion was an affidavit from Angela Howser as well as an affidavit from Assistant State's Attorney Walker. Angela's affidavit indicated that she submitted the FOIA request to the State's Attorney's office. Walker's affidavit indicated that she had contacted the Attorney General's Public Access Bureau on October 19, 2011, regarding compliance with the FOIA request and that she had relayed her conversation to Henshaw concerning the advice that she had received. Walker also made a notation on the request regarding this advice. Thereafter, the

recordings were released and no exemption was claimed. The conversations were published on Disclosure's website beginning in February 2012.

¶ 29 Although Fort argues that his affidavit contradicts the existence of the FOIA request, we note that his affidavit, which indicated that Howser told him that Henshaw voluntarily released the conversations without a FOIA request, contains inadmissible hearsay and therefore cannot be considered. See *Pruitt v. Pruitt*, 2013 IL App (1st) 130032, ¶ 20 (hearsay statements do not comport with Rule 191's requirement that the witness be competent to testify as to the facts averred). Fort has not provided any other affidavit to contradict these affidavits.

¶ 30 Moreover, we conclude that it was reasonable that Henshaw did not invoke the personal information exemption set forth in FOIA. Section 7(1)(c) of FOIA provides that personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal property, is exempt from disclosure (5 ILCS 140/7(c) (West 2014)). Initially, we note that the statutory exemptions to disclosure are construed narrowly with the public body having the burden of showing by clear and convincing evidence that they apply. 5 ILCS 140/1, 1.2 (West 2014); *Nelson*, 2014 IL 116303, ¶ 26. An "unwarranted invasion of personal privacy" is defined as the "disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." 5 ILCS 140/7(c) (West 2014). According to the record, Fort was convicted of aggravated criminal sexual abuse of a victim between 13 and 18 and his bail had been increased following his arrest because he had attempted to contact the

minor. Thus, there was a legitimate public interest in ensuring that Henshaw took adequate measures to protect the minor from further contact. Henshaw could have reasonably concluded that the public interest in disclosure outweighed Fort's right to privacy. Accordingly, we conclude that the first factor of the *Healy* test has been satisfied.

¶ 31 The second factor under *Healy*, *i.e.*, the source of duty, provides that sovereign immunity will not apply where an employee is charged with breaching a duty imposed on him independently of the State employment. *Carmody*, 2012 IL App (4th) 120202, ¶ 29. Sovereign immunity does exist where the charged act of negligence arose out of the State employee's breach of a duty that is imposed on him solely by virtue of his State employment. *Currie v. Lao*, 148 Ill. 2d 151, 159 (1992).

¶ 32 Here, Henshaw allegedly committed tortious conduct in disclosing the recordings, which were public records, in response to a FOIA request. This is a duty that is imposed on Henshaw solely by virtue of his State employment as only public bodies are required to respond to FOIA requests. See 5 ILCS 140/3(d) (West 2014). Thus, any duty that Henshaw allegedly breached did not arise independently of his State employment. Accordingly, the second factor of the *Healy* test has been met.

¶ 33 The relevant question for the third factor in the *Healy* test is whether the complained-of actions involve matters ordinarily within that employee's normal and official functions. *Carmody*, 2012 IL App (4th) 120202, ¶ 33. In this case, Henshaw's position as State's Attorney involved responding to FOIA requests, which is precisely the

complained-of conduct. Thus, Henshaw's act was part of his normal and official function. Accordingly, we conclude that the third factor has been satisfied.

¶ 34 Fort further argues that the officer suit exception to sovereign immunity is applicable and therefore sovereign immunity does not attach. The officer suit exception provides that an action against a State official for conduct in his official capacity may withstand a motion to dismiss on sovereign immunity grounds where plaintiff alleges that the officer is enforcing an unconstitutional law, violating Illinois law, or otherwise acting beyond his authority. *Wilson*, 2013 IL App (5th) 120337, ¶ 14. When the officer suit exception applies, the suit against the State employee is not considered one against the State for sovereign immunity purposes. *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 261 (2005).

¶ 35 The officer suit exception does not apply in the present case because Henshaw acted within the scope of his authority when, presented with a FOIA request, he determined that no FOIA exemption applied and disclosed the recordings in response to the request. Accordingly, the officer suit exception is inapplicable and the tort claims brought against Henshaw are barred by sovereign immunity.

¶ 36 We conclude that Fort's tort claims are in reality claims against the State; therefore, we find that those claims are barred from consideration by the trial court and should instead be heard in the Court of Claims. Thus, the trial court did not err in granting Henshaw's motion to dismiss for lack of subject matter jurisdiction on the basis of sovereign immunity. Because we resolve this case on sovereign immunity grounds, we need not address the additional issues raised on appeal.

¶ 37 For the reasons stated, we affirm the trial court's judgment.

¶ 38 Affirmed.