Cause No. 14-18-00001-CV

In the Fourteenth Court of Appeals
at Houston, Texas

Carl Tolbert, Nizzera Kimball and Vivian Robbins,
Appellants,

vs.

Terisa Taylor and Pathway Forensics, LLC,
Appellees.

On Appeal from Trial Court Cause No. 2015-23649
in the 309th District Court of Harris County, Texas

Brief of Appellee Terisa Taylor

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TO THE HON. COURT OF APPEALS:

Appellee Terisa Taylor ("Attorney Taylor"), respectfully files this Brief of Appellee, and in support thereof would respectfully show the Court the following:

ISSUE PRESENTED FOR APPEAL

Given that Appellant's own petition disclosed that Terisa Taylor was sued for actions connected to her representation of Marc Broome as a lawyer in a custody modification lawsuit, did the trial court properly grant summary judgment as to Appellant's claims under the attorney immunity doctrine?

STATEMENT OF FACTS

This lawsuit stems from evidence used in a custody modification suit (Cause No. 2001-37897), in which non-suited Defendant Marc Broome sought a modification action to limit Plaintiff/Appellant Vivian Robbins' access to their minor child. CR:192. Defendant/Appellee Terisa Taylor represented Broome as counsel in that underlying modification action. CR:192 ("Mr. Broome was at first represented just by Attorney Terisa Taylor"); *see also* CR:190-196 (recounting acts of Taylor as attorney).

In connection with the underlying modification suit, Attorney Taylor sought to use as evidence inappropriate texts and images involving Vivian Robbins. CR:192. Although this evidence is highly relevant to the underlying modification action, Appellants nevertheless complained that Broome (Taylor's client) was able

to obtain these texts and images improperly for use in the underlying litigation, through access given by Vivian Robbins to her minor daughter to Vivian's iPad and iCloud accounts. CR:192-194.

In a subsequent action, Appellants filed federal and state wiretap claims for texts and images acquired and used in an underlying modification action. CR:190.

Attorney Taylor is now being punished for the proper use of this highly relevant evidence. In particular, Appellants sued Attorney Taylor and others regarding this type of evidence, and the petition claimed liability as to Attorney Taylor for her litigation conduct as a lawyer in using the texts and images in the underlying litigation. CR:190-197.

As is clear from Appellants' First Amended Petition, all of the allegations concerning Attorney Taylor hinge on her involvement as a lawyer in the underlying modification action. For example, Appellants complain that the texts and images were shared with Attorney Taylor:

> again. Mark Broome then shared the text messages and e-mails with his lawyer, Terisa Taylor, and later her co-counsel.

CR:192-93, Petition, ¶17. The allegations against Attorney Taylor then stem from her actions as a lawyer in seeking to use these texts and images as evidence in the underlying modification proceeding:

18. Ms. Robbins did not know her text messages and e-mails were being intercepted until Defendant Terisa Taylor produced 617 pages of her text messages to Ms. Robbins' attorney on January 31, 2014 and told that attorney that she and her client were in possession of everything Ms. Robbins had communicated to others, including a nude photograph that Ms. Robbins had sent via text message to her boyfriend. Ms. Taylor told Ms. Robbins' attorney that she intended to use the photograph of Ms. Robbins' breasts as demonstrative evidence in the jury trial and she would show the jury a poster size photo of her breasts. Ms. Taylor told the attorney to advise his client to sign an agreed order resolving the custody case and agreeing to supervised visitation only or this evidence would be used against her. Ms. Robbins refused to sign Ms. Taylor's proposed order. So, then Ms. Taylor on February 5, 2014 filed an unusual pleading entitled "Notice of Intent to Use Demonstrative Evidence" which said that Mark Broome intended to use the following at the time of trial, "Power Point presentation and large photo board." Ms. Taylor for the previous six months had used information gleaned from the illegally intercepted communications in several family court hearings and to conduct discovery in the child custody modification case between Vivian Robbins and Mark Broome, prior to Ms. Robbins becoming aware of the interception.

CR:193, Petition, ¶ 18. As is made clear in the petition, Appellants allege that the texts and images were provided to Attorney Taylor, who then sought to use this information in the underlying litigation as evidence and in pleadings:

> 19. Mark Broome, Fiona McInally and Neal Broome (Fiona McInally's husband) have provided sworn affidavits filed by Mark Broome in the modification lawsuit which confirm that Fiona's iPad received Ms. Robbins' text messages between July 18, 2013 and January 11, 2014. Mr. Broome has also filed pleadings which state that he also has e-mails of Ms. Robbins.[2] The affidavits of Fiona McInally and Neal Broome confirm that they disclosed the contents of Ms. Robbins' electronic communications to Mark Broome. Mark Broome clearly disclosed the contents of those intercepted electronic communications to at least his wife, his attorney, Ms. Taylor, and Pathway Forensics. Ms. Taylor and her co-counsel have used and disclosed the contents of those intercepted electronic communications to the court and in their pleadings in the modification case repeatedly.

CR:193-194, Petition, ¶ 19.

Thus, it is clear that Appellants seek to hold Attorney Taylor liable only with respect to the actions she undertook as an attorney in the underlying litigation.

Attorney Taylor has absolute attorney immunity for these allegations, and she moved for summary judgment on this basis. CR:265. The motion was based on the allegations in the petition. Appellants filed a response that did not attach any controverting proof, only argument. The Court granted summary judgment as to Taylor on immunity grounds. CR:294. Appellants filed a motion to reconsider, urging that claims for injunctive relief had not been addressed. CR:297. That was denied too. CR:320. The interlocutory summary judgment against Taylor was merged into a final judgment against Appellants, from which this appeal has been taken. CR2:693.

SUMMARY OF THE ARGUMENT

The attorney immunity doctrine "stem[s] from the broad declaration ... that 'attorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). In other words, the doctrine is "intended to ensure 'loyal, faithful, and aggressive representation by attorneys employed as advocates.'" *Id*. Attorney immunity is necessary "to avoid the inevitable conflict that would arise if [an attorney] were

'forced constantly to balance his own potential exposure against his client's best interest.'" *Id*. at 483.

Here, from the face of Appellants' petition, Attorney Taylor was sued for using as evidence in litigation documents that were provided by her client. She could not defend herself—privilege prevented her from addressing the actual allegations or in disclosing conversations. She could only assert her immunity for conduct done in representation of the client. The attorney immunity doctrine exists for just these reasons—to avoid the tension of client privilege/representation as opposed to personal liability as to non-clients for representation of a client.

ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO ATTORNEY TAYLOR FOR ACTS SHE TOOK IN REPRESENTATION OF LITIGATION.

Attorneys such as Terisa Taylor owe duties to their *clients*, but they generally owe no duties to strangers to the attorney-client relationship, such as Appellants here. *See Barcelo v. Elliott*, 923 S.W.2d 575, 577-78 (Tex. 1996); *see also McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792-93 (Tex. 1999) (recognizing general lack of duty, with limited exception for direct misrepresentations to non-clients where reliance was explicitly intended). To ensure that an attorney's zeal for representation of her clients is not chilled by the prospect of being sued by non-clients, Texas provides attorneys immunity from

suits by non-clients based on "actions taken in connection with representing a client." *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 480 (Tex. 2015); *see also Rojas v. Wells Fargo Bank, N.A.*, 571 F. App'x 274, 278 (5th Cir. 2014) (attorneys are "immune from suits [by non-clients] … aris [ing] out of the duties involved in representing a client"); *Michels v. Zeifman*, No. 03-08-00287-CV, 2009 WL 349167, at *2 (Tex. App.—Austin Feb. 12, 2009, pet. denied) (mem. op.) (characterizing attorney immunity as "an absolute bar" to a non-client's claim against an attorney); *Bradt v. West*, 892 S.W.2d 56, 72 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (concluding that an attorney is immune for "conduct an attorney engages in as part of the discharge of his duties in representing a party in a lawsuit").[1]

This attorney immunity ensures that an attorney can engage in "loyal, faithful, and aggressive representation" without having to "balance [his or her] own potential exposure against [his or her] client's best interest." *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d at 480, 482; *Mitchell v. Chapman*, 10 S.W.3d 810, 812 (Tex. App.—Dallas 2000, pet. denied) (concluding that non-client did "not have a cause of action" against defendant-attorney because the non-client's interest in

[1] This broad attorney immunity is confirmed in numerous other Texas cases. *See, e.g., Sacks v. Zimmerman*, 401 S.W.3d 336, 340 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *Kruegel v. Murphy*, 126 S.W. 343, 345 (Tex. Civ. App.–Dallas 1910, writ ref'd); *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.–Houston [1st Dist.] 2005, pet. denied); *Renfroe v. Jones & Assocs*., 947 S.W.2d 285, 288 (Tex. App.–Fort Worth 1997, writ denied) ("Under Texas law, attorneys cannot be held liable for wrongful litigation conduct."); *Gaia Environmental, Inc. v. Galbraith*, 451 S.W.3d 398, 406 (Tex. App.–Houston [14 Dist.] 2014, pet. denied).

suing was "outweighed by the public's interest in loyal, faithful, and aggressive representation"). Allowing non-clients to subject attorneys to the burdens and risks of litigation for conduct undertaken in the course of representing a client would damage the adversarial system: Attorneys would be chilled by the prospect that they "may be sued [by a non-client] … for something [they do] in the course of representing [their] client," resulting in "tentative representation, not the zealous representation that … the public has a right to expect." *Bradt*, 892 S.W.2d at 72. "Such a result would act as a severe and crippling deterrent to the ends of justice." *Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, 2008 WL 746548, at *7 (Tex. App.–Houston [1st Dist.] Mar. 20, 2008, pet. denied).

A. Attorney Immunity Extends to ActS Taken By the Lawyer in Representation of the Client for Conduct in Litigation.

The Texas Supreme Court has made clear that non-parties may not circumvent the attorney immunity doctrine by alleging that the attorney's specific acts were wrongful. The immunity analysis must focus "on the kind - not the nature - of the attorney's conduct." *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d ay 480; *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 532-33 (N.D. Tex. 1996) ("[I]t is the kind - not the nature - of conduct that is controlling."). Under this functional test, attorneys are immune from suits by non-clients whenever their conduct on behalf of a client "requires the office, professional training, skill, and authority of an attorney." *Dixon*, 2008 WL 746548, at *7. Thus, "[e]ven conduct that is

wrongful in the context of the underlying suit is not actionable if it is part of the discharge of the lawyer's duties in representing his or her client." *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d ay 481 ("Merely labeling an attorney's conduct 'fraudulent' does not and should not remove it from the scope of client representation or render it foreign to the duties of an attorney.").

In *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015), the Texas Supreme Court considered the scope of attorneys' immunity from liability to non-clients. There, the husband in a divorce proceeding alleged that after the divorce decree was rendered, opposing counsel intentionally falsified a bill of sale for an aircraft to assist the wife in shifting tax liability from the wife to the husband. The supreme court held that the law firm was immune from liability to the husband. The supreme court held that, even if the law firm engaged in fraud, it was acting within the scope of its representation, and thus was immune from liability to the opposing party. The supreme court added that the attorney immunity doctrine does not apply to fraudulent actions outside the scope of the attorneys' discharge of their duties to clients. The court gave as examples an attorney who participated in a fraudulent business scheme with his client or assaulted opposing counsel during a trial.

In *Youngkin v. Hines*, 546 S.W.3d 675 (Tex. 2018), the Texas Supreme Court of Texas confirmed that *Cantey Hanger* "controls [its] analysis of attorney

immunity" and summarized the *Cantey Hanger* rule as follows: "[A]n attorney may be liable to nonclients only for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer," which "inquiry correctly focuses on the kind of conduct at issue rather than the alleged wrongfulness of said conduct." 546 S.W.3d at 683. The court noted that "[t]he 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." *Id.*

In *Youngkin*, the plaintiff alleged that the attorney knowingly participated in a fraudulent scheme to deprive the plaintiff of property by entering a settlement agreement on his clients' behalf "knowing they had no intention to comply," helping his clients avoid compliance by preparing a deed used to transfer the property to another person, and aiding that person in his efforts to wrongfully assert ownership of the property. The court noted that it was required, under *Cantey Hanger*, to "look beyond [the plaintiff's] characterizations of activity as fraudulent and conspiratorial and focus on the conduct at issue," which it described as "negotiating and entering a settlement agreement, preparing transfer documents, and filing a lawsuit." The court found that this "conduct was directly within the scope of [the lawyer's] representation of his clients, regardless of any disagreement over the substance of the settlement agreement" and was "not foreign to the duties of a lawyer." 546 S.W.3d at 681-83.

Here, Appellants seek to impose liability upon Attorney Taylor for her alleged use in litigation of information obtained by her client Broome. This falls squarely under the conduct test for attorney immunity.

Under this functional approach to acts taken by an attorney in the course of representation, a court has held that a law firm was immune from liability to an adverse party for allegedly assisting the law firm's client in misusing confidential information the client had misappropriated from the adverse party. *Highland Capital Management, LP v. Looper Reed & McGraw, P.C.*, 2016 WL 164528 (Tex. App.—Dallas Jan. 14, 2016, n.p.h.).

There, Highland Capital Management, LP sued its former employee Patrick Daugherty for misappropriating confidential information. The Looper Reed law firm represented Daugherty. While this suit was pending, Highland sued Looper Reed for allegedly using the confidential information in an attempt to extort, slander, and disparage Highland, failing to return materials Daugherty had stolen, facilitating Daugherty's wrongful disclosure of Highland's confidential information, and aiding and abetting Daugherty's breach of fiduciary duty by instructing him to disclose privileged information to third parties.

Looper Reed moved to dismiss, arguing that Highland's claims were barred by the doctrine of attorney immunity. A trial court granted the motion as to the claims for theft, breach of the duty of confidentiality, conversion, tortious

interference with contract, and civil conspiracy to commit theft, extortion, slander, and disparagement. Subsequently, the trial court granted Looper Reed's motion for summary judgment on the claim for aiding and abetting Daugherty's breach of fiduciary duty. The trial court ruled that this claim was also barred by the attorney immunity doctrine. The appellate court affirmed.

Applying the functional test for attorney immunity, the court held that Looper Reed was immune from liability to Highland. Highland's claims against Looper Reed were based on "acquiring documents from a client that are the subject of litigation against the client, reviewing the documents, copying the documents, retaining custody of the documents, analyzing the documents, making demands on the client's behalf, advising a client to reject counter-demands, speaking about an opposing party in a negative light, advising a client on a course of action, and even threatening particular consequences such as disclosure of confidential information if demands are not met." These kinds of actions, the court held, were part of an attorney's duties in representing a client—and thus absolute immunity applied.

As can be seen in Plaintiffs' First Amended Petition, the allegations against Attorney Taylor all stem from her legal representation and acts as an attorney in the underlying litigation. The doctrine of attorney immunity is broad in Texas, and would apply to claims such as these, which are simply based on the acts of a lawyer engaged in representation. *See, e.g., Sacks v. Hall*, 2014 WL 6602460

(Tex. App.—Houston [1st Dist] Nov. 20, 2014, pet. denied) (holding that statutory claims for use of allegedly wrongfully acquired information under HIPAA, a federal statute, were subject to attorney immunity, which was not pre-empted by federal statute addressing protection from disclosure of confidential medical records). Attorney immunity would apply to the types of claims asserted against Attorney Taylor in Appellants' First Amended Petition.

B. Summary Judgment Was Proper for Attorney Taylor Based on Appellants' Pleadings.

Attorney Taylor's motion for summary judgment was based on Appellants' pleadings, and Appellants responded with no contradictory proof. Procedurally, this was appropriate for consideration on summary judgment.

Whether an attorney's conduct was in the scope of his representation of a client is a legal question. *Youngkin*, 546 S.W.3d at 683. Attorney immunity applies to all "actions taken in connection with representing a client in litigation," even wrongful conduct that is "part of the discharge of the lawyer's duties in representing his or her client,"37 as long as it is not "entirely foreign to the duties of an attorney." Cantey Hanger, 467 S.W.3d at 481-82.

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. *Youngkin*, 546 S.W.3d at 683. A court would then decide the legal question of whether said conduct was within the scope of representation. *Id.* Based on these

concepts, the Texas Supreme Court in *Youngkin* held that a summary judgment could be properly based on pleadings. *Id.*

Other courts have resolved attorney immunity based on the pleadings, where the application of the attorney immunity doctrine was apparent on the face of the pleadings. *See, e.g.*, *Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *1, *7 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (granting immunity when the complaint specifically alleged that a law firm's wrongful actions occurred "during [the firm's] representation of" the employee in that suit and concluding that "[b]ecause the facts alleged by [the plaintiff] were sufficient to support the defense of immunity, [the firm] did not need to present further evidence in support of its motion"). The Fifth Circuit likewise dismissed a claim based on attorney immunity where the defense was apparent from the face of the complaint:

> **The factual allegations of the complaint in this case reflect that all of the alleged misrepresentations and omissions were related to Schiff Hardin's representation of Dorel in the Hinson litigation.** Looking beyond Ironshore's characterization of the firm's conduct as wrongful, as we must, the type of conduct at issue in this case includes: (1) reporting on the status of litigation and settlement discussions; (2) providing opinions as to the strength and valuation of plaintiffs' claims; (3) providing opinions as to the perceived litigation strategies employed by opposing counsel and the potential prejudice of pre-trial developments; (4) providing estimates of potential liability; (5) reporting on the progress of a jury trial; and (6) reporting on pre-trial rulings and pre-trial settlement offers.

> We are satisfied that the kinds of conduct at issue in this case fall within the routine conduct attorneys engage in when handling this type of litigation. Schiff Hardin's conduct falls squarely within the scope of the firm's representation of its client. **This court is "not bound to accept as true [plaintiff's] legal conclusion" that the misrepresentations were somehow "separate from [Schiff's] representation and defense of Dorel" and "not necessary to, nor a part of, Schiff's defense of Dorel in the Lawsuit." Immunity is established on the face of the complaint, which alleges only misrepresentations and omissions related to the Hinson litigation, in which Schiff Hardin undisputedly represented Ironshore's insured Dorel in the defense of a products liability case**.

Ironshore Europe DAC v. Schiff Hardin, L.L.P., 912 F.3d 759, 767 (5th Cir. 2019).

The First Amended Petition here was clear that Attorney Taylor was being sued as an attorney for her conduct in litigation in the scope of her representation. This was sufficient to trigger the attorney immunity doctrine.

C. Attorney Immunity Encompasses Statutory and Criminal Liability—The Focus Is Simply Whether the Party Was Acting as a Lawyer Within the Scope of Representation in Litigation.

Appellants complain that attorney immunity should not apply to statutory claims or criminal allegations, but that is not the way the Texas Supreme Court has looked at the issue recently.

The Texas Supreme Court has stressed that the attorney immunity doctrine focuses on whether the conduct alleged was done in representation of a client, rather than whether the conduct was wrongful or criminal. The *Cantey Hanger* opinion emphasized that "the focus in evaluating attorney liability to a non-client is 'on the kind — not the nature — of the attorney's conduct.' " 467 S.W.3d at 483.

In *Younger*, the court stressed that the analysis does not "focus[ ] on ... the alleged wrongfulness of" the purported conduct such that "a lawyer is no more susceptible to liability for a given action merely because it is alleged to be ... wrongful." *Youngkin*, 546 S.W.3d at 681.

As an example of the doctrine at work, the Supreme Court of Texas cited "assaulting opposing counsel during trial" — a presumably criminal action — as an example of unimmunized conduct. *Youngkin*, 546 S.W.3d at 683; *Cantey Hanger*, 467 S.W.3d at 483. The court held such behavior to fall outside the protections of immunity, not because it could be criminal, but "because it does not involve the provision of legal services and would thus fall outside the scope of client representation." *Cantey Hanger*, 467 S.W.3d at 482.

Other courts have held that criminal allegations do not defeat application of the attorney immunity doctrine. The Dallas Court of Appeals examined attorney conduct alleged to be "criminal," yet it too applied the doctrine of immunity because the conduct at issue was "'squarely within the scope' of ... representation." *Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *6 (Tex. App.—Dallas Apr. 13, 2016, pet. denied) (mem. op.) (citation omitted). The Fifth Circuit has held that "immunity can apply even to criminal acts so long as the attorney was acting within the scope of

representation." *Troice v. Greenberg Traurig*, L.L.P., 921 F.3d 501, 507 (5th Cir. 2019).

Likewise, attorney immunity applies to statutory claims too. In *Troice v. Greenberg Traurig*, L.L.P., the Fifth Circuit held that the doctrine applied to securities act and DTPA claims. 921 F.3d at 507. In *Sheller v. Corral Tran Singh*, LLP, 551 S.W.3d 357, 359, 362-66 (Tex. App.—Houston [14th Dist.] 2018, pet. denied), this Court held that the attorney immunity doctrine applied to DTPA and other statutory claims. *See also Wade v. Household Finance Corporation III*, 2019 WL 433741 (W.D. Texas 2019) (attorney immunity barred claims on efforts to foreclose on the property violate the Texas Constitution, the Texas Debt Collection Act, and the Texas Deceptive Trade Practices Act).

There is nothing about the statutory or criminal nature of Appellant's claims that would preclude application of the attorney immunity doctrine.

D. The Attorney Immunity Doctrine Has Been Applied to Federal Claims Too.

Appellants suggest that, even though they chose to file these claims in Texas state court, that the attorney immunity doctrine, also referred to as the litigation privilege[2], would never apply to federal claims brought in state court litigation.

[2] *See, e.g., Youngkin*, 546 S.W.3d 679 n.2; *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346–47 (5th Cir. 2016); *Sacks v. Hall*, No. 01-13-00531-CV, 2014 WL 6602460, at *11 (Tex. App.—Houston [1st Dist.] Nov. 20, 2014, no pet.).

This is not correct. The Texas attorney immunity doctrine has been applied as a defense as to numerous cases asserting a federal claim:

- *Sacks v. Hall*, 2014 WL 6602460 (Tex. App.—Houston [1st Dist] Nov. 20, 2014, pet. denied) (holding that statutory claims for use of allegedly wrongfully acquired information under HIPAA, a federal statute, were subject to attorney immunity, which was not pre-empted by federal statute addressing protection from disclosure of confidential medical records).
- *Hairston v. Deutsche Bank National Trust Company*, 2019 WL 462782 (N.D. Tex. Jan. 17, 2019) (applying immunity to case involving federal Truth in Lending Act claim and for intentional interference with a contractual relationship).
- *Simmons v. Jackson*, 2018 WL 7021485, *4 (N.D. Tex. 2018) (applying immunity doctrine in case with claims of federal "RICO" claims and conspiracy to deny his constitutional and equal protection rights, in violation of 42 U.S.C. §§ 1983 and 1985).
- *Spencer v. Hughes Watters Askanse, LLP*, 2015 WL 3507117 (W.D. Tex. June 3, 2015) ("Spencer alleges Defendants: (1) violated the FDCPA by filing a wrongful petition for forcible detainer and notice to vacate and demand for possession. . . Defendants took all of the

alleged actions in their official capacity as eviction counsel. Immunity applies to Spencer's allegations against Defendants as eviction counsel because their alleged action is "conduct an attorney engages in as part of the discharge of his duties in representing a party....").

- *Parker v. Buckley Madole, P.C.*, 2018 WL 1631062 (E.D. Tex. Jan. 5, 2018) (attorney immunity applying to federal fair debt collection act).
- *Terry v. Branch Banking & Tr. Co*., No. A-16-CV-859-LY-ML, 2017 WL 2999968, at *4–5 (W.D. Tex. Apr. 12, 2017), report and recommendation adopted sub nom. *Terry v. Baker Donelson Bearman Caldwell & Berkowitz,* No. A-16-CV-859-LY, 2017 WL 2999690 (W.D. Tex. June 7, 2017) (same).
- *Villanueva v. Wells Fargo Home Mortgage*, 4:16-CV-320, 2016 WL 3917641, at *2 (E.D. Tex. July 20, 2016) (dismissing defendant from suit where by mailing a notice of default and acceleration and a notice of Trustee's sale to plaintiff, it acted as attorney in foreclosure proceedings).
- *Wilder v. Ogden Ragland Mortg*., No. 3:15-CV-4013-N, 2017 WL 1053922, at *3 (N.D. Tex. Feb. 16, 2017) (defendant attorney entitled to immunity where conduct was limited to her role as foreclosure counsel).

- *Smith v. Bank of Am. Corp*., No. A-13-CV-0193-LY-ML, 2016 WL 29641, at *6 (W.D. Tex. Jan. 4, 2016) (finding attorney immunity applicable where plaintiff alleged attorney defendant had participated in filing fraudulent documents).
- *Iqbal v. Bank of Am., N.A.*, 559 Fed.Appx. 363, 365 (5th Cir. 2014) (affirming applicability of attorney immunity were actions complained of fell within scope of foreclosure representation).
- *Gipson v. Deutsche Bank Nat. Tr. Co*., No. 3:13-CV-4820-L, 2015 WL 2079514, at *6 (N.D. Tex. May 4, 2015) (applying Texas immunity law to the plaintiff's FDCPA claims against defendant as foreclosure counsel).

The above cases reflect that attorney immunity has indeed been applied as to federal claims.

E. The Summary Judgment Properly Encompassed Appellants' Tag-Along Claim for Injunctive Relief.

Appellants claims that the request for injunctive relief was not addressed by summary judgment. This is not correct.

After summary judgment was granted in favor of Attorney Taylor, Appellants have moved for reconsideration of this Court's May 5, 2016 summary judgment, claiming that Taylor's motion for summary judgment failed to address a claim for relief set forth by them. The sole briefing and argument presented to this

Court on the motion to reconsider is as follows:

> Plaintiffs move the Court to reconsider granting in its entirety the Amended Motion for Summary Judgment filed by Defendant Terisa Taylor for these reasons:
>
> 1. Ms. Taylor's motion did not mention or address the injunctive relief sought by Plaintiffs.
>
> 2. There is no case law that says an attorney cannot be enjoined from releasing or using confidential or illegal obtained documents or data and in fact attorneys are enjoined all of the time from doing just that. The common law rule that makes attorneys immune from suit arising out of their work as attorneys has never been applied to injunctive relief.

Of course, the summary judgment granted by the trial court was complete as to all claims raised against Terisa Taylor, specifically finding that Plaintiffs "take nothing by way of their claims against Defendant Terisa Taylor":

> **ORDER GRANTING DEFENDANTS TERISA TAYLOR'S AMENDED MOTION FOR SUMMARY JUDGMENT**
>
> The Court hereby grants Defendant Terisa Taylor's Amended Motion for Summary Judgment. Accordingly, Plaintiffs shall take nothing by way of their claims against Defendant Terisa Taylor, and costs are liable for court costs relating to the claims against Terisa Taylor.
>
> Signed on this _____ day of April, 2016
>
> Signed: 5/5/2016
>
> Judge Presiding

CR:294.

Appellants argue, however, that summary judgment could not be granted because the summary judgment motion did not attack the injunctive relief sought

additionally by them, instead only attacking the two causes of action that had been pled. This is incorrect. The rules of civil procedure make a significant distinction in petitions between a "cause of action" and "damages" and "other relief" that may be sought in connection with a "cause of action." *Compare* Tex. R. Civ. P. 47(a) (addressing requirements for a cause of action in a petition); *with* Tex. R. Civ. P. 47(c),(d) (addressing damages and other relief that may be sought in a petition).

Appellants' own petition reflects this very same distinction. They pled only two "causes of action"—which were so labeled in Plaintiffs' First Amended Petition.[3] The first "Cause of Action" was based on the Texas wiretap statute:

Cause of Action: Texas Statute

22. Texas Code of Criminal Procedure Sec. 18.20(16) states, "A person whose wire, oral or electronic communication is intercepted, disclosed or used in violation of this article or in violation of Chapter 16, Penal Code, has a civil cause of action against any person who intercepts, discloses or uses or solicits another person to intercept, disclose or use the communication and is entitled to recover" actual damages not less than liquidated damages of $100 per day for each day of violation or $1,000, whichever is higher, punitive damages and attorney's fees and litigation costs.

The second "Cause of Action" related to the Federal Wiretap statute:

[3] The live pleading in effect at the time the Court granted summary judgment on May 5, 2016 was Plaintiffs' First Amended Petition. Almost a month later (6/1/2016), Plaintiffs filed a Second Amended Petition which added several additional claims, without leave of Court. As will be discussed later, this pleading is a nullity as to Defendant Terisa Taylor.

Cause of Action: Federal Statute

24. The Federal Wiretap Act imposes liability on anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(a). The Act defines "intercept" to mean "the aural or other acquisition of the contents of any wire, electronic, or oral communications through the use of any electronic, mechanical, or other device." *Id.* at § 2510(4). 18 U.S. Code § 2520 states:

> *(a) In General.— Except as provided in section 2511 (2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.*
>
> *(b) Relief.— In an action under this section, appropriate relief includes—*
>
> *(1) such preliminary and other equitable or declaratory relief as may be appropriate;*
>
> *(2) damages under subsection (c) and punitive damages in appropriate cases; and*
>
> *(3) a reasonable attorney's fee and other litigation costs reasonably incurred.*

The petition then set forth "other relief" that was sought for the "Causes of Action," such as "Punitive Damages" and "Injunctive Relief." As can be seen below, the petition did not label this additional relief as a "Cause of Action":

Punitive Damages

26. Defendants acted intentionally and with malice and/or gross negligence and Plaintiffs are entitled to recover punitive/exemplary damages from Defendants. Plaintiff Vivian Robbins does not seek punitive/exemplary damages from Defendant Mark Broome.

Injunctive Relief

27. Plaintiffs request the Court to enter temporary and permanent injunctions against Defendants, which enjoin Defendants from:

1. Copying, sharing, using, disseminating, disclosing or using any electronic communications obtained from Vivian Robbins' iPad or Apple account (or copies thereof), including all such communications that are stored on Fiona McInally's iPad or copies thereof, including doing so with any attorneys representing Defendants in this lawsuit or in the pending child custody

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Indeed, the request for "Injunctive Relief" was specifically permitted by the federal statute, 18 U.S.C. § 2520(b)(1), which addressed equitable relief. The "Injunctive Relief" pleading in Plaintiffs' petition did not set forth any independent claim for which relief could be independently obtained. There would be no need to move for summary judgment on the "Injunctive Relief" portion, just as there was no need to move for summary judgment on the "Punitive Damages" relief—or the request for interest, costs of court or attorney's fees. The only two causes of action on which relief could be sought had properly challenged and dismissed.

The First Court of Appeals has discussed what constitutes distinct causes of action. In *Jones v. Ray*, 886 S.W.2d 817, (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (en banc), the court (en banc) noted that severance could only be appropriate if there were two distinct causes of action that could be severed. 886 S.W.3d at 821. The court observed that "a 'cause of action' consists of a plaintiff's primary right to relief and the defendant's act or omission that violates that right." *Id.*; *Krchnak v. Fulton*, 759 S.W.2d 524, 526 (Tex. App.—Amarillo 1988, writ denied); *Stone Fort Nat'l Bank v. Forbess*, 126 Tex. 568, 91 S.W.2d 674, 676 (1936)). The court then explained that there is a distinct cause of action where it could be severed from another cause of action and stand alone. *Jones*, 886 S.W.2d at 821.

The test for a "cause of action" certainly cannot be met here with respect to

the request by Appellants for "Injunctive Relief." Under the heading of "Injunctive Relief" there is no separate claim stating a right that has been violated and that independently gives rise to a right to relief. The "Injunctive Relief" pleading is not set out as a stand-alone claim that could exist separate and apart from the "causes of action" that were actually pled.

In fact, Appellants continued this same pleading distinction in the Second Amended Petition (filed 6/1/2016). When Appellants chose to add additional "causes of action," they deliberately added sections denoting that an additional "cause of action" was being asserted. The same treatment of relief continued, with a similar section for "Injunctive Relief" asserted at the end of the petition after the "causes of action" had already been alleged. Interestingly, note how the allegation of "Cause of Action: Federal Statute—Computer Fraud and Abuse Act" merely refers to an injunction as a form of relief based on that claim: "Plaintiff is entitled to injunctive relief as plead below." Second Amended Petition, p. 8.

For the Court's convenience, an excerpt of the Second Amended Petition appears below, distinctly showing that when Plaintiffs mean to assert a stand-alone cause of action, they plead it as a "cause of action":

Cause of Action: Intentional Infliction of Mental Distress

27. Plaintiffs Vivian Robbins and Carl Tolbert assert the tort of intentional infliction of mental distress against defendants, who acted intentionally or recklessly; the defendants' conduct was extreme and outrageous; the actions of the defendants caused the plaintiffs emotional distress; and the emotional distress suffered by the plaintiff was severe. Plaintiffs Vivian Robbins and Carl Tolbert seek actual and punitive damages against defendants.

Cause of Action: Federal Statute - Computer Fraud and Abuse Act

28. Defendants are liable under 18 U.S.C. § 1030(g) because they: (1) obtained information (2) by intentionally accessing (3) a protected computer (4) without authorization or by exceeding authorized access and caused Plaintiff Vivian Robbins damages. Plaintiff is entitled to injunctive relief as plead below.

Cause of Action: Publication of Private Facts

29. Defendants gave publicity about the private lives of Plaintiffs Vivian Robbins, Nizzera Kimball and Carl Tolbert in a way that would be highly offensive to a reasonable person of ordinary sensibilities and the matters publicized were not of legitimate public concern. Plaintiffs Vivian Robbins, Nizzera Kimball and Carl Tolbert should recovered from Defendants their actual damages.

Cause of Action: Texas - Harmful Access by Computer

30. Defendants caused Plaintiffs to suffer injury as a result of a violation of Texas Penal Code Chapter 33. Defendants acted knowingly or intentionally and should be liable under Tex. Civ. Pract. & Rem. Code Sec. 143.001 for Plaintiff's actual damages and reasonable attorney's fees and costs.

Cause of Action: Civil Conspiracy

31. Defendants were a member of a combination of two or more persons who had the object of accomplishing an unlawful purpose or accomplishing a purpose by unlawful means. Defendants had a meeting of the minds and one or more members committed an unlawful act and Plaintiffs suffered injury as a proximate result.

Punitive Damages

32. Defendants acted intentionally and with malice and/or gross negligence and Plaintiffs are entitled to recover punitive/exemplary damages from Defendants. Plaintiff Vivian

Quite clearly, there was no need to move for summary judgment on the request for "Injunctive Relief," and thus the trial court's summary judgment did not fail to address any cause of action that Appellants had asserted at the time the Court had rendered summary judgment.

PRAYER

Wherefore, premises considered, Appellee prays that judgment be affirmed in all respects. Appellee also prays for such other and further relief to which she may be otherwise entitled at law or in equity.

Respectfully submitted,

/s/ Alan Daughtry

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been served all counsel of record by electronic service through e-filing on this 13th day of May, 2019.

/s/ Alan Daughtry

ALAN B. DAUGHTRY

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief has been compiled using a computer program in Word with 14-point font conventional typeface for the body of the brief and 12-point font for footnotes. Excluding the portions of the brief not counted by Tex. R. App. P. 9, this brief contains 5,061 words.

/s/ Alan Daughtry
ALAN B. DAUGHTRY