COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00219-CV

STEVEN CHARLES RUSSO — APPELLANT

V.

DEREK A. ADAME AND KELLY GOODNESS, M.D. — APPELLEES

FROM THE 211TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 2010-30194-211

MEMORANDUM OPINION[1]

In six issues, Appellant Steven Charles Russo, pro se, appeals from the trial court's summary judgment in favor of Appellees Derek A. Adame and Kelly Goodness, M.D. on Russo's claims for libel, legal malpractice, and violations of

[1]*See* Tex. R. App. P. 47.4.

the Texas Disciplinary Rules of Professional Conduct.[2] We affirm in part and reverse and remand in part.

I.
Background

In January 2007, Adame was appointed as Russo's trial counsel in a criminal case in which Russo pled guilty. Russo filed a postconviction application for writ of habeas corpus alleging that Adame rendered ineffective assistance of counsel because, among other things, Adame refused to urge an insanity defense. The trial court ordered Adame to prepare an affidavit responding to designated issues that would allow the trial court to resolve Russo's claims.

In his affidavit, Adame stated that Russo believed that his high blood pressure and a problem with the dosage of his blood pressure medicine had rendered him insane or intoxicated at the time of his crime. Adame summarized his meetings with Russo and explained he had counseled Russo against such a defense, believing that it was not a legitimate "severe mental disease or defect," but Adame eventually requested Dr. Goodness, a forensic psychologist with whom he had worked on many occasions, be appointed to evaluate Russo. Adame went on to state that Dr. Goodness had determined that Russo was "competent and was at no time insane due to problems with his high blood pressure or medication." Based upon his experience and Dr. Goodness's

[2]Russo raises four points and two cross points. We will refer to his two cross points as his fifth and sixth issues, respectively.

opinion, Adame advised Russo that the insanity defense was not an effective or viable defense. Russo eventually accepted a plea bargain of five years, the statutory minimum for the charged offense.

Russo sued Adame for libel based on the following statements in Adame's affidavit:

- [Russo] confided that on at least ten different occasions he had touched the child's vagina when "tickling" her to put her to sleep.[3]
- [Russo] would also occasionally perform oral sex on the child during these times.
- Dr. Goodness characterized Russo as a "malingerer" or person who fakes medical symptoms in order to evade criminal prosecution.

In a separate suit, Russo also sued Dr. Goodness for libel based on the following statements:

- After an evaluation of his medical history and a personal interview with him, Dr. Goodness was of the opinion that Russo was competent and was at no time insane due to problems with his high blood pressure or medication.
- Dr. Goodness characterized Russo as a "malingerer" or person who fakes medical symptoms in order to evade criminal prosecution.

Both Adame and Dr. Goodness filed answers asserting the affirmative defenses of limitations and privilege. The trial court granted Adame and Dr. Goodness summary judgment on limitations grounds, Russo appealed, and this

[3]According to Adame's affidavit, the complainant in Russo's criminal case was his five year old stepdaughter.

court reversed the summary judgments and remanded the cases to the trial court. *Russo v. Adame*, No. 02-10-00446-CV, 2011 WL 2119684, at *1 (Tex. App.—Fort Worth May 26, 2011, no pet.) (mem. op.); *Russo v. Goodness*, No. 02-10-00330-CV, 2011 WL 2119627, at *1, *3 (Tex. App.—Fort Worth May 26, 2011, no pet.) (mem. op.). While Russo's appeals were pending, he filed another suit against Adame, asserting claims for legal malpractice and for violations of the Texas Disciplinary Rules of Professional Conduct.[4]

The trial court consolidated the three cases into a single cause. Adame and Dr. Goodness then filed a joint motion for summary judgment on their immunity defenses. Russo did not file a response or appear at the hearing. The trial court granted Adame and Dr. Goodness's motion, and Russo has appealed.

II.
Notice of Summary Judgment Hearing

In his first issue, Russo complains that the trial court erred by granting summary judgment for Adame and Dr. Goodness because he did not receive notice of the hearing. He contends his lack of notice prohibited him from presenting evidence at the hearing to contest Adame and Dr. Goodness's entitlement to summary judgment. He further complains in his fourth issue that

[4]Russo's "Claim of Civil and Disciplinary Violations" is approximately 215 pages long and alleges numerous tort claims and claims based upon violations of the Texas Disciplinary Rules of Professional Conduct. From what we can discern, all of Russo's tort claims are based on Adame's alleged legal malpractice.

had he received notice, he would have filed a motion for continuance because he was scheduled to have—and did have—brain surgery the day of the hearing.

A summary judgment movant must serve notice of the hearing on the nonmovant at least twenty-one days before the hearing. Tex. R. Civ. P. 166a(c); *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 11 (Tex. App.—Dallas 1994, no writ). A document filed electronically under rule 21 must be served through the electronic filing manager when, as here, the email address of the party to be served was on file with the electronic filing manager. Tex. R. Civ. P. 21a(a)(1). "Electronic service is complete on transmission of the document to the serving party's electronic filing service provider."[5] Tex. R. Civ. P. 21a(b)(3).

Both the motion and the notice of hearing were filed electronically. While there is a certificate of service on the motion stating that the motion was served on Russo through efiletexas.gov (the electronic filing manager), there is no certificate of service on the hearing notice that would constitute prima facie evidence of service of the hearing notice under rule 21a(e). *See* Tex. R. Civ. P.

[5]After Russo filed his appellate brief, Adame and Dr. Goodness filed in the trial court confirmation of service from efiletexas.gov reflecting that Russo was served with the notice of hearing by email. *See* Tex. R. Civ. P. 21a(b)(3) ("The electronic filing manager will send confirmation of service to the serving party."). This document was included in a supplemental clerk's record at Adame and Dr. Goodness's request, and they reference it in their brief. Even though the document is part of the appellate record, we cannot consider it because it was not before the trial court at the time it considered Adame and Dr. Goodness's summary judgment motion. *See Roventini v. Ocular Scis., Inc.*, 111 S.W.3d 719, 726 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

21a(e). However, in Russo's "Motion for Arrest of Judgment and Reversal of Courts Decision," which we treated as his notice of appeal, he stated:

> The Server of Notice tried to inform Mr. Russo of the Notice by sending Mr. Russo a link on an E-Mail Message, but Mr. Russo could not get to the Link and obtain Notice, which he informed the Server of Notice of. Mr. Russo believed that the Notice was a Counter Suit, without any additional knowledge.

Thus, by admitting that he received a link to the notice by email, Russo conceded that Adame and Dr. Goodness served the notice by transmitting it to their electronic service provider and that he was served through the electronic filing manager. *See* Tex. R. Civ. P. 21a(a)(1), (b)(3). Nonetheless, Russo denied actually receiving the notice. *See* Tex. R. Civ. P. 21a(e) ("Nothing [in rule 21a] shall preclude any party from offering proof that the document was not received . . . .").

Lack of notice of a summary judgment hearing is a procedural defect that may be corrected by the trial court in response to a timely motion for new trial or by an appellate court if the trial court overrules the motion. *Okonkwo v. Washington Mut. Bank, FA*, No. 14-05-00925-CV, 2007 WL 763821 at *2 (Tex. App.—Houston [14th Dist.] Mar. 15, 2007, no pet.) (mem. op.) (citing *French v. Brown*, 424 S.W.2d 893, 894 (Tex. 1967)). Therefore, a nonmovant must file a motion for new trial to preserve a complaint that he did not receive notice of a summary judgment hearing. *Smith v. Mike Carlson Motor Co.*, 918 S.W.2d 669, 672 (Tex. App.—Fort Worth 1996, no writ). Russo did not file a motion for new trial.

Even if we construe Russo's "Motion for Arrest of Judgment and Reversal of Courts Decision" as a motion for new trial, it was not verified or supported by an affidavit. Without an affidavit supporting his claim that he received no notice, the motion for new trial was defective. *See id.* Moreover, Russo failed to request a hearing on his motion in order to present evidence of lack of notice and obtain a ruling. *See Rios v. Tex. Bank*, 948 S.W.2d 30, 33 n.4 (Tex. App.—Houston [14th Dist.] 1997, no writ) ("Even if the complaint [of no notice of the summary judgment hearing] is raised in a post-trial motion, we believe this is a complaint on which evidence must be heard, and therefore, the party must request a hearing, present evidence, and obtain a ruling."). Accordingly, we conclude that Russo failed to preserve his complaint regarding lack of notice for our review. We therefore overrule his first and fourth issues.

III.
Summary Judgment

Adame and Dr. Goodness moved for summary judgment on all of Russo's claims "on their affirmative defense of immunity and absolute privileged communications uttered or published under the due course of a judicial proceeding." In his second, fifth, and sixth issues, Russo argues that the trial court erred by granting Adame and Dr. Goodness's motion for summary judgment.

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the

light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508–09 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011); *see* Tex. R. Civ. P. 166a(b), (c). To accomplish this, the defendant-movant must present summary judgment evidence that conclusively establishes each element of the affirmative defense. *See Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008).

Texas courts have long recognized that an absolute privilege extends to publications made in the course of judicial and quasi-judicial proceedings—"meaning that any statement made in the trial of any case, by anyone, cannot constitute the basis for a defamation action, or any other action." *Hernandez v. Hayes*, 931 S.W.2d 648, 650 (Tex. App.—San Antonio 1996, writ denied) (citing *James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982); *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942)); *Lane v. Port Terminal R.R. Ass'n*, 821 S.W.2d 623, 625 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (same); *see Bird v. W.C.W.*, 868 S.W.2d 767, 771–72 (Tex. 1994). The judicial

proceedings privilege is "tantamount to immunity," and where there is an absolute privilege, no civil action in damages for oral or written communications will lie, even if the language is false and uttered or published with express malice. *Hernandez*, 931 S.W.2d at 650 (citing *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987); *Reagan*, 166 S.W.2d at 912).

The scope of the absolute privilege extends to all statements made in the course of the proceeding, whether made by the judges, jurors, counsel, parties, or witnesses, and attaches to all aspects of the proceeding, including statements made in open court, hearings, depositions, affidavits, and any pleadings or other papers in the case. *Daystar Residential, Inc. v. Collmer*, 176 S.W.3d 24, 27 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *Lane*, 821 S.W.2d at 625. Whether an allegedly defamatory communication is related to a judicial proceeding is a question of law. *Fitzmaurice v. Jones*, 417 S.W.3d 627, 633 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *Daystar*, 176 S.W.3d at 28), *disapproved of on other grounds by In re Lipsky*, 460 S.W.3d 579, 587–91 (Tex. 2015) (orig. proceeding). We consider the entire communication in its context, and we must extend the privilege to any statement that bears some relation to the proceeding and must resolve all doubt in favor of the privilege. *Id.* (same).

In his second and fifth issues and in part of his sixth issue, Russo argues that Adame and Dr. Goodness were not entitled to summary judgment on the grounds of qualified privilege because they were not representing Russo or

employed by him during the habeas proceeding and because the statements in Adame's affidavit were made with malice, were false, and accused Russo of criminal acts. Adame's and Dr. Goodness's statements were contained in a court-ordered affidavit filed in Russo's postconviction habeas proceeding. We conclude and hold that these allegedly defamatory statements were made in the course of a judicial proceeding and were therefore privileged. And even if the statements Russo complains of were false or made with malice, the privilege is absolute, and these statements cannot form the basis for Russo's libel claims. Accordingly, the trial court did not err by granting summary judgment for Adame and Dr. Goodness on Russo's libel claims. We therefore overrule Russo's second and fifth issues and overrule his sixth issue in part.

In the remainder of his sixth issue—which asserts that Adame and Dr. Goodness's motion was "faulty for a number of reasons" and "illustrate[s] they do not have absolute or qualified immunity from [p]rosecution"—Russo argues that Adame's statements in his affidavit support Russo's claims against Adame for legal malpractice and for violations of the Texas Disciplinary Rules of Professional Conduct. We construe this argument as a contention that absolute privilege does not apply to those claims. *See* Tex. R. App. P. 38.1(f) ("The statement of an issue or point will be treated as covering every subsidiary question that is fairly included."); Tex. R. App. P. 38.9 (requiring courts to liberally construe briefs for substantial compliance with rules).

We recognize that communications made in the course of a judicial proceeding "also cannot form the basis of liability for other torts, including negligence, when the essence of the claim is that injury occurred as the result of allegedly false statements made during a judicial proceeding." *de Mino v. Sheridan*, No. 14-05-00210-CV, 2006 WL 1026933, at *2 (Tex. App.—Houston [14th Dist.] Apr. 20, 2006, pet. denied) (mem. op.); *Hernandez*, 931 S.W.2d at 654 ("The privilege would be lost if the appellant could merely drop the defamation causes of action and creatively replead a new cause of action. The United States Supreme Court and the Texas Supreme Court have firmly held that a privilege in a defamation cause of action also extends to all other torts plead by the plaintiff."). Here, however, Russo's claims for legal malpractice and for violations of the Texas Disciplinary Rules of Professional Conduct are not based on any injury incurred as a result of Adame's statements made during a judicial proceeding; these claims are based on the alleged injury incurred as a result of Adame's representation of Russo in the criminal matter. Thus, absolute privilege does not bar these claims. *But cf. Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 482 (Tex. 2015) (recognizing general rule that attorneys are immune from civil liability to nonclients for actions taken in connection with representing a client in litigation); *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497–98 (Tex. 1995) (holding that plaintiff who has been convicted of a criminal offense may negate the sole proximate cause bar to her legal malpractice claim in connection with that conviction only if she has been exonerated on direct appeal, through post-

conviction relief, or otherwise); *Blankinship v. Brown*, 399 S.W.3d 303, 311 (Tex. App.—Dallas 2013, pet. denied) ("The Texas Disciplinary Rules of Professional Conduct expressly state that a violation of the Code of Professional Responsibility does not give rise to a private cause of action." (citing Tex. Disciplinary R. Prof'l Conduct preamble ¶ 15, *reprinted in* Tex. Gov't Code Ann. tit. 2, subtit. G, app. A (West 2013 & Supp. 2016))). Accordingly, we hold the trial court erred by granting summary judgment for Adame on Russo's claims for legal malpractice and for violations of the Texas Disciplinary Rules of Professional Conduct based on absolute privilege.[6] We therefore sustain Russo's sixth issue in part.

IV.
Findings of Fact and Conclusions of Law

In his third issue, Russo argues that the trial court was required to file findings of fact and conclusions of law and that it erred by failing to do so.

Findings of fact and conclusions of law have no place in a summary judgment proceeding. *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994). Findings and conclusions "have no place" in a summary judgment proceeding because summary judgment cannot be rendered if there is a "genuine issue as to any material fact," and the legal grounds are limited to those stated in the motion and response. Tex. R. Civ. P. 166a(c); *IKB Indus. (Nigeria) Ltd. v. Pro-Line*

[6]Although not raised by Russo, Adame did not plead absolute privilege as a defense to Russo's claims for legal malpractice and for violations of the Texas Disciplinary Rules of Professional Conduct.

Corp., 938 S.W.2d 440, 441 (Tex. 1997); *Stiles v. Resolution Tr. Corp.*, 867 S.W.2d 24, 26 (Tex. 1993). In other words, if summary judgment is proper, there are no facts to find, and the legal conclusions have already been stated in the motion and response. *IKB Indus.*, 938 S.W.2d at 441. The trial court should not make, and an appellate court cannot consider, findings of fact in connection with a summary judgment. *Id.*

Thus, even assuming Russo timely and properly requested findings of fact and conclusions of law, *see* Tex. R. Civ. P. 296–98, we hold the trial court did not err by not making findings of fact and conclusions of law. *See Linwood*, 885 S.W.2d at 103. We overrule Russo's third issue.

V.
Conclusion

Having sustained Russo's sixth issue in part, we reverse the trial court's summary judgment for Adame on Russo's claims for legal malpractice and for violations of the Texas Disciplinary Rules of Professional Conduct, and we remand the case for further proceedings consistent with this opinion. Having overruled the remainder of Russo's six issues, we affirm the trial court's summary judgment for Adame and Goodness on Russo's libel claims.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: LIVINGSTON, C.J.; GARDNER and WALKER, JJ.

WALKER, J., concurs without opinion.

DELIVERED: October 13, 2016