IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8560

JAN TRAVLAND,

Plaintiff-Appellee,

versus

ECTOR COUNTY, TEXAS, ET Al.,

Defendants,

DAVID WEAVER, Individually, and in
His Official Capacity as Sergeant for
the Ector County Sheriff's Department,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(MO-93-CA-010)

(October 20, 1994)

Before WIENER, EMILIO M. GARZA and BENAVIDES, Circuit Judges.
PER CURIAM*:

In this interlocutory appeal, Defendant-Appellant David Weaver complains of the district court's denial of his motion for summary judgment based on absolute (hereafter, "sovereign") and official (hereafter, "qualified") immunity under Texas state law. Weaver

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

sought summary judgment on a defamation claim against him in his official and individual capacities brought by Plaintiff-Appellee Jan Travland. Weaver urges that the district court abused its discretion by basing its denial of his motion on inadmissible evidence, specifically an unauthenticated interoffice police memorandum, submitted by Travland. Weaver also asserts on appeal that the suit against him is barred by res judicata, Section 101.106 of the Texas Tort Claims Act, and privilege.

We conclude that the Texas Tort Claims Act protects Weaver from suit in his official capacity, and reverse the district court's denial of summary judgment based on sovereign immunity. We also conclude that the evidentiary document used by the district court was admitted erroneously. We nonetheless affirm the court's denial of Weaver's motion for summary judgment grounded in qualified immunity, as there is sufficient evidence, even absent the inadmissible document, to establish a genuine issue of fact. Finally, we dismiss as moot and nonjusticiable, Weaver's claims of res judicata, statutory bar, and privilege.

I

FACTS AND PROCEEDINGS

Travland, a former jailer in the Ector County Sheriff's Office (the "ESCO"), filed a defamation action against Weaver, a sergeant in the ESCO, in both his official and individual capacities. Travland alleged that Weaver deliberately conveyed false information about her to Stacey Nobles, a sergeant in the Odessa Police Department ("the OPD"). Weaver allegedly told Nobles

that Travland was suspected of criminal behavior, specifically, drug use. Weaver also allegedly told Nobles that Travland's husband, an OPD corporal under Nobles' supervision, was aware of and condoned his wife's illegal conduct.

Weaver contends that his contact with Nobles was an integral part of a preliminary investigation that he was conducting on the basis of reliable information that he had received about Travland's suspected drug use. Weaver maintains that he contacted Nobles, as Mr. Travland's supervisor, so that Nobles could determine if any narcotics in department custody to which Mr. Travland might have access were missing from the OPD.

Weaver filed a motion for summary judgment, claiming both sovereign and qualified immunity. The district court denied Weaver's motion, finding the following material facts in dispute: (1) whether Weaver was beginning a preliminary investigation into Travland's suspected drug use; and (2) whether Weaver acted in good faith when he contacted Nobles. In reaching its negative conclusions, the court relied on an unauthenticated OPD interoffice memorandum from J. W. Dodson, OPD Deputy Chief, to J. H. Jenkins, Chief of the OPD, ("the Dodson Memorandum"). The Dodson Memorandum was entered into evidence as an exhibit attached to an affidavit by Travland's attorney, and contained Dodson's opinion that Weaver's call to Nobles was "rumor mongering" and "highly irregular and improper." Weaver brought this interlocutory appeal from the district court's denial of his motion for summary judgment, claiming first that he is immune from suit in his official capacity

as a sergeant in the Ector County Sheriff's Office pursuant to the Texas Tort Claims Act § 101.057. Weaver also claims that he is immune from individual liability under Texas "official" (qualified) immunity law. Weaver asserts that the district court abused its discretion by basing its denial of his motion on the Dodson Memorandum, which he maintains is unauthenticated, inadmissible evidence. Weaver alternatively contends that even if the Dodson Memorandum is admissible, the opinions contained within that document are inadmissible hearsay and thus cannot serve as the basis for the court's decision. Finally, Weaver raises - for the first time on appeal - a claim that Travland's suit against him is barred pursuant to res judicata, Section 101.106 of the Texas Tort Claims Act, and privilege.

II

ANALYSIS

A. Jurisdiction and Standard of Review

The determination whether a summary judgment decision based on state law immunity is appealable depends on "whether the state's doctrine of . . . immunity, like the federal doctrine, provides a true immunity from suit and not a simple defense to liability."[1] Summary judgment decisions denying Texas state immunity are appealable to this court under the collateral order doctrine because Texas courts consider that state's immunity doctrines to

[1]Sorey v. Kellett, 849 F.2d 960, 962 (5th Cir. 1988).

provide immunity from suit.[2] As such, we have jurisdiction to review this case on appeal.[3]

We conduct a plenary review of a district court's ruling on a motion for summary judgment. We apply the same standards to our review as those that govern the district court's determination. "Summary judgment is appropriate only if there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[4] We must review the evidence bearing on material factual issues in the light most favorable to the nonmoving party. Before finding that there are no genuine issues of material fact, we must be satisfied that no reasonable factfinder could have found for the nonmoving party.[5]

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[2] See e.g., Travis v. City of Mesquite, 830 S.W.2d 94, 102 n.4 (Tex. 1992); (Cornyn, J., concurring) (noting that successful summary judgment based on immunity renders officer's immunity an immunity from suit, not just from liability); Closs v. Goose Creek Consol. Indep. Sch. Dist., 874 S.W.2d 859, 868 (Tex. App.)Texarkana 1994) (stating that government employee sued in official capacity is immune from suit and liability); accord Koerselman v. Rhynard, 875 S.W.2d 347, 350 (Tex. App.)Corpus Christi, 1994) ("immune from suit"); Boozier v. Hambrick, 846 S.W.2d 593, 596 (Tex. App.)Houston [1st Dist.] 1993) (stating that immunity is immunity from suit, not just immunity from liability); see also Brooks v. Scherler, 859 S.W.2d 586, 588 (Tex. App.)Houston [14th Dist.] 1993) (same).

[3] See e.g., Arrington v. County of Dallas, 970 F.2d 1441, 1447 (5th Cir. 1992) (reviewing interlocutory appeal of district court's denial of motions for qualified immunity from federal and state law claims).

[4] Lavespere v. Niagara Mach.& Tool Works, Inc., 910 F.2d 167, 177 (5th Cir. 1990) (citations omitted), cert. denied, 114 S. Ct. 171 (1993).

[5] Id. at 178.

B. IMMUNITY DEFENSES

A state employee may be sued in two capacities: official, which results in the State's liability for any judgment; and individual, which results in the employee's personal liability for any judgment.[6] If sued officially, the state employee may raise the defense of sovereign (or absolute) immunity; if sued individually, the affirmative defense of qualified (or official) immunity may be raised.

In the underlying case, Travland sued Weaver in both his official and individual capacities. Weaver raised both immunity defenses and sought summary judgment. As both types of immunity are affirmative defenses, the initial burden was on Weaver to provide competent evidence to show his entitlement to summary judgment.[7] If Weaver provided competent evidence, the burden shifted to Travland to introduce evidence that raised a genuine issue of material fact.

1. Sovereign Immunity

A suit against a government official in his official capacity is a suit against the State, and only the state legislature may waive the State's immunity.[8] Travland sued Weaver in his official

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[6]Gonzalez v. Avalos, 866 S.W.2d 346, 349 (Tex. App.)El Paso 1993, writ granted); Bagg v. University of Tex. Medical Branch at Galveston, 726 S.W.2d 582, 586 (Tex. App.)Houston [14th Dist.] 1987, writ ref'd n.r.e.)).

[7]City of Lancaster v. Chambers, No. D-3331, 1994 WL 264968, at *2 (Tex. June 15, 1994) (unpublished opinion); Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex. 1984).

[8]Thomas v. Collins, 853 S.W.2d 53, 55 (Tex. App.)Corpus Christi 1993 writ denied); Bagg, 726 S.W.2d at 584.

capacity, alleging defamation, but the Texas legislature has not waived its immunity to such intentional tort claims.[9] Consequently, Weaver has sovereign immunity from the defamation tort claim against him in his official capacity. Determining that Weaver is thus immune from suit in his official capacity, we reverse the district court's denial of Weaver's motion for summary judgment based on sovereign immunity.

2. Qualified (Qualified) Immunity

"Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority [or employment]."[10]

The district court denied Weaver's motion for summary judgment because it found genuine issues of material fact regarding his qualified immunity. The court questioned whether (1) Weaver's call to Nobles was an official act made within the scope of authority, and (2) Weaver acted in good faith. The district court relied on

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[9]See Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (West 1986) (stating that the Texas Tort Claims Act does not apply to claims "arising out of assault, battery, false imprisonment, . . . or any other intentional tort."). Defamation under Texas law is an intentional tort. See Smith v. Holley, 827 S.W.2d 433, 436 (Tex. App.))San Antonio 1992, writ denied) (referring to defamation as intentional tort).

[10]Lancaster, 1994 WL 264968, at *2; accord Koerselman v. Rhynard, 875 S.W.2d 347, 350 (Tex. App. - Corpus Christi 1994) (articulating three factors that constitute the doctrine of official immunity); Closs v. Goose Creek Consol. Indep. Sch. Dist., 874 S.W.2d 859, 868 (Tex. App.))Texarkana 1994) (same); Ervin v. James, 874 S.W.2d 713, 715-16 (Tex. App.))Houston [14th Dist.] 1994, writ denied) (same).

In this context, Texas courts use the terms "authority" and "employment" interchangeably.

the Dodson Memorandum as evidence rebutting Weaver's assertion that his call to Nobles was part of a good faith, preliminary investigation into Travland's suspected drug use. Weaver challenges the court's use of the Dodson Memorandum. If properly admitted, the Memorandum clearly puts both the good faith and scope of employment issues in dispute. But if the district court improperly admitted the Dodson Memorandum, a closer analysis is required to determine whether Weaver is entitled to summary judgment based on qualified immunity.

a. *Scope of Authority*

"Officers must be acting within the scope of their authority in order for a court to find them immune from suit."[11] "An official acts within the scope of her authority if she is discharging the duties generally assigned to her."[12] In the instant case, Weaver averred, and Travland did not contest, that Weaver was a law enforcement officer whose duties included both preliminary and comprehensive investigations. As Weaver was authorized to investigate illegal activity, the only issue in this case is factual: whether on the one hand Weaver made the allegedly defamatory remarks while conducting a preliminary investigation into suspected criminal activity (a duty generally assigned), or whether on the other hand he made the remarks while acting outside the scope of authority (e.g., while gossiping or "rumor

[11]Lancaster, 1994 WL 264968, at *7.

[12]Id.

mongering").[13]

Weaver presented evidence that he contacted Nobles to confirm information - obtained from a proven reliable informant - that Travland was engaged in criminal drug activity. Weaver offered his own affidavit, an affidavit by Nobles, and a memorandum accompanying Nobles' affidavit ("the Nobles Memorandum") to support his motion. Weaver contends that this evidence satisfied his burden of showing that his call was made pursuant to an investigation, and was thus an action taken within the scope of his authority.

In rebuttal, Travland offered the Dodson Memorandum and her own "live" pleadings; and she also pointed out inconsistencies in Weaver's evidence. As noted, if it is admissible, the Dodson Memorandum raises a genuine issue of material fact whether Weaver was acting within the scope of his authority when he called Nobles. In particular, the Dodson Memorandum contains Dodson's comments that Weaver's call to Nobles was "highly irregular and improper," "a matter not to be discussed between two first line supervisors," and "like rumor mongering." Certainly this evidence suggests the possibility that Weaver was doing something other than conducting a preliminary investigation within the scope of his authority. As the Dodson Memorandum is clearly relevant to whether Weaver was

[13]The issue is not whether Weaver was authorized to perform the act upon which liability is alleged, in this case, defamation. Id. at *3 (articulating that appropriate focus for court is "whether officer is performing a discretionary function, not on whether officer has discretion to do an allegedly wrongful act while discharging that function.").

acting within the scope of his authority, we must next consider its admissibility.

(i) Admissibility of the Dodson Memorandum

Weaver asserts that the Dodson Memorandum, which was introduced into evidence by Travland and relied upon by the district court, was not properly authenticated and is thereby inadmissible evidence. We agree.

"Documents presented in support of a motion for summary judgment may be considered even though they do not comply with the requirements of Rule 56 if there is no objection to their use."[14] Moreover, exhibits properly made part of an affidavit may be considered,[15] but such documents must be authenticated by and attached to an affidavit, and the affiant must be a person through whom the exhibits could be admitted into evidence.[16] In this case, Weaver timely objected to the introduction of the Dodson Memorandum, which accompanied Travland's attorney's affidavit. In addition, the affiant, Travland's attorney, was not a person through whom the Dodson Memorandum could be admitted. Despite

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[14]Eguia v. Tompkins, 756 F.2d 1130, 1136 (5th Cir. 1985) (referring to Rule 56, which governs summary judgment motions and accompanying affidavits) (citing McCloud River R.R. Co. v. Sabine River Forest Products, Inc., 735 F.2d 879, 882 (5th Cir. 1984)).

[15]10A Wright et al., Federal Practice & Procedure § 2722, at 56-57 (2d ed. 1983).

[16]Id. at 59-60. "A letter submitted for consideration under Rule 56(e) must be attached to an affidavit and authenticated by its author in the affidavit or a deposition." Cf. Marshall v. Norwood, 741 F.2d 761, 764 (5th Cir. 1984) (consideration of prison conduct record appropriate, where record was certified and referred to by affiant, prison official).

these hurdles, the district court admitted the Dodson Memorandum as a business record and recognized its contents as the expert opinion of Dodson, the Chief of the OPD. We discuss these evidentiary issues in turn.

(a) Authentication of Business Records

The Federal Rules of Evidence define a business record as "[a] memorandum . . . made at or near the time by . . . a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum . . ., all as shown by the testimony of the custodian or other qualified witness."[17]

A business record can be authenticated by testimony of either the "custodian" of the record or an "other qualified witness."[18] We define "other qualified witness" as" one who can explain the record keeping of the organization and vouch that the requirements of Rule 803(6) are met."[19] We have also stated that a business record can be admitted into evidence "where circumstances indicate that the records are trustworthy."[20] We have affirmed the introduction of

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[17]FED R. EVID. 803(6).

[18]United States v. Ullrich, 580 F.2d 765, 771-772 (5th Cir. 1978); United States v. Fendley, 522 F.2d 181, 185 (5th Cir. 1975).

[19]United States v. Iredia, 866 F.2d 114, 119-20 (5th Cir. 1989), cert. denied, 492 U.S. 921 (1989).

[20]United States v. Veytia-Bravo, 603 F.2d 1187, 1191-92 (5th Cir. 1979), cert. denied, 444 U.S. 1024 (1980). The "circumstances" to which we were referring in Veytia-Bravo were business records whose trustworthiness could be established by the custodian of the record or by another qualified witness. See also United States v. Flom, 558 F.2d 1179, 1182-83 (5th Cir. 1979) (articulating that circumstances which demonstrate trustworthiness

evidence even when the affiant neither prepared nor had first-hand knowledge of the preparation of the document, so long as the witness's testimony was sufficient to support the document's reliability.[21]

The Dodson Memorandum was attached to an affidavit of Travland's attorney.[22] Travland's counsel cannot authenticate the Memorandum as a custodian of OPD interoffice memos; thus she could do so only if she qualifies as an "other qualified witness." Travland's counsel did not - and likely could not - present evidence that she had sufficient knowledge to authenticate the Dodson Memorandum; neither did she - nor likely could she - attest to the reliability and trustworthiness of the Memorandum. Counsel's statement that she obtained the document during discovery is not assuring. Weaver asserts that he did not provide the document to Travland; thus, for all we know, Travland's counsel could have obtained the document from Travland herself. Counsel's affirmation neither guarantees nor establishes that the Dodson

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of business records can be used to authenticate records in the absence of creator or custodian, i.e., invoices received and held by company in regular course of business).

[21]United States v. Duncan, 919 F.2d 981, 986 (5th Cir. 1990) (finding district court did not abuse discretion when it permitted custodian of records to authenticate records), cert. denied, 500 U.S. 926 (1991).

[22]In her affidavit, Travland's counsel swore that "[a]ttached hereto is a true and correct copy of a letter from [OPD] Deputy Chief Dodson to [OPD] Chief of Police James Jenkins. This letter comprises a part of discovery material in the above referenced cause." Counsel does not claim, and Weaver denies, that the document was obtained from Weaver via the discovery process.

Memorandum is authentic or reliable.

Similarly, the facts that the Memorandum is typed on department memo letterhead, is addressed from Dodson to Jenkins, appears to have Dodson's signature, and discusses the established event at about the same time as the event in question, do not conclusively establish that the document is a reliable and trustworthy business record. We conclude therefore, that Travland's attorney, as the affiant of the affidavit to which the Dodson Memorandum was attached and the proponent of the document, failed to establish a reliable link between the Memorandum as a business record and Dodson. As such, the unauthenticated Dodson Memorandum was not properly admitted into evidence.

(b) Admissibility of Unauthenticated Documents as Summary Judgment Evidence

Travland asserts that "the competency of evidence tendered in support of a motion for summary judgment is not to be judged on the same basis as evidence . . . offered in trial in proper form."[23] Weaver counters by arguing that the admissibility of evidence in a motion for summary judgment is governed by the same rules that apply to the admissibility of evidence at trial.[24] We address these

[23]S.E.C. v. American Commodity Exch., Inc., 546 F.2d 1361, 1369 (10th Cir. 1976). See also Sabine Corp. v. ONG Western, Inc., 725 F. Supp. 1157, 1169 (W.D. Okla. 1989) (considering unauthenticated business records because "they would be admissible at trial through a witness who could properly lay the foundation for their admissibility and authenticated them").

[24]See Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 175-76 (5th Cir. 1990), cert. denied, 114 S. Ct. 171 (1993)(stating that court must find that meets requirements of Federal Rules before considering it in summary judgment motion).

assertions to determine whether the district court abused its discretion by considering an unauthenticated document as summary judgment evidence.

As a general rule, inadmissible evidence cannot be relied upon to create an issue of material fact for the purpose of defeating a summary judgment motion.[25] In Duplantis we stated that an unauthenticated letter, submitted by the plaintiffs' expert to rebut the defendant's summary judgment evidence, "is not the kind of evidence described in Rules 56(c) and 56(e)."[26] We noted that it was "not the district court's duty to examine whether and how [the unauthenticated letter] might be reduced to acceptable form by the time of trial."[27] In so holding, we disagreed with other courts who have interpreted case law to mean that a "nonmoving party could oppose a summary judgment motion using unauthenticated documents."[28] Courts that have confronted the issue recently appear to have followed our reasoning in Duplantis.[29]

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[25]See Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 192 (5th Cir. 1991) (reaffirming that inadmissible material will not be considered on a motion for summary judgment); see also Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 192 (5th Cir. 1990) (stating that allegations offered to defeat summary judgment must be supported with admissible evidence); Oglesby v. Terminal Transp. Co., Inc., 543 F.2d 1111, 1112 (5th Cir. 1976) (finding nonmovant's unsworn affidavit insufficient to raise genuine issue of material fact).

[26]Duplantis, 948 F.2d at 192.

[27]Id.

[28] Duplantis, 948 F.2d at 192 (discussing other court's interpretations of Celotex Corp. v. Catrett, 477 U.S. 317 (1986)).

[29]See, e.g., Richardson v. Oldham, 811 F. Supp. 1186, 1198 (E.D. Tex. 1992) (excluding from summary judgment evidence

Based on Duplantis, we conclude that the district court abused its discretion by admitting and considering the unauthenticated, inadmissible Dodson Memorandum. We therefore need not discuss appellant's assertion that the contents of the Memorandum constituted inadmissible hearsay. Nevertheless, we affirm the court's denial of Weaver's motion for summary judgment based on qualified immunity because Weaver's own evidence raises a genuine issue of material fact: whether Weaver was acting within the scope of his authority.

(ii) Weaver's Evidence

Weaver offered into evidence the Nobles Memorandum that recounted the telephone conversation in which Weaver made his allegedly defamatory remarks. In this memorandum, Nobles stated that Weaver told him that: (1) Weaver and Travland had been jailers on the same shift, but that Travland had been moved to a different shift because of improper sexual activity with another jailer; and (2) Nobles should not mention the content of their conversation to others in the OPD unless absolutely necessary. The Nobles Memorandum also noted that Travland previously had made allegations of misconduct against Weaver to the Sheriff's Office

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"unauthenticated medical reports containing hearsay material, unauthenticated police records and unauthenticated photographs of [plaintiff's] injuries (citing Duplantis, 948 F.2d at 191-92), aff'd, 12 F.3d 1373 (5th Cir. 1994)); see also United States v. Rhodes, 788 F. Supp. 339, 342 (E.D. Mich. 1992) (noting that, absent an "affidavit authenticating the [document], the [document does] not come under the business record exception to the hearsay rule" (citing, inter alia, Duplantis, 948 F.2d at 192)); Maier-Schule GMC, Inc. v. General Motors Corp., 154 F.R.D. 47, 57 (W.D.N.Y. 1994) (citing Duplantis).

Inspector.

Clearly, none of these topics comport with Weaver's position that he was conducting a preliminary investigation into Travland's purported drug use. Thus, Weaver's own evidence leads us to conclude that a reasonable factfinder could determine that Weaver's call to Nobles was not within the scope of his authority. Our conclusion is bolstered by Weaver's own affidavit, which reveals that Weaver called Nobles, the supervisor of Travland's husband, rather than the ECSO or OPD Internal Affairs Offices, because Weaver decided that it was easier and quicker to call Nobles rather than to launch a formal investigation. Again, we conclude that a reasonable factfinder could determine that based on Weaver's own testimony and evidence, Weaver was not acting within the scope of his authority. Based on this conclusion, we affirm the district court's denial of Weaver's motion for summary judgment based on qualified immunity.

b. *Discretionary Act and Good Faith*

Because we find a genuine issue of material fact sufficient to affirm the district court's denial of Weaver's motion for summary judgment, we need not discuss here the discretionary and good faith aspects of Texas immunity law.

C. RES JUDICATA, STATUTORY BAR, AND PRIVILEGE

Weaver presents three additional arguments in an effort to support his entitlement to summary judgment. Two are raised for the first time on appeal, and the third presents a nonjusticiable issue.

Weaver claims that, inasmuch as a judgment was rendered against Travland on her defamation claim against Ector County, the suit against Weaver in his official capacity is now res judicata. We need not address this claim because we hold today that Weaver is entitled to summary judgment based on sovereign immunity from Travland's defamation claim against him in his official capacity. Furthermore, this argument is raised for the first time on appeal, and presents no trial court order from which to appeal.

Weaver also contends that in light of the prior judgment against Travland he is absolutely immune from suit pursuant to Section 101.106 of the Texas Tort Claims Act.[30] Again, we need not reach this claim for the same reasons discussed above.[31]

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[30]See TTCA § 101.106 ("A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or mission gave rise to the claim").

[31]Even if Weaver's statutory claim is valid, case law has construed Section 101.106 of the Texas Tort Claims Act to protect government employees from individual liability for acts done within the course of their employment and scope of authority. See White v. Annis, 864 S.W.2d, 127, 132 (Tex. App. - Houston [14th Dist.} 1993) (stating that purpose of 101.106 is to protect employees from individual liability for acts and omissions done within scope of employment); see also Davis v. Mathis, 846 S.W.2d 84, 88 (Tex. App. - Dallas 1992) (linking application of statute to individuals performing governmental function).

In this appeal, Weaver seeks this statutory bar on the claim against him in his official capacity and not his individual capacity. If Weaver had asserted this same claim as it relates to his individual liability, there is a possibility that the statute would not bar suit against Weaver.

We find that a genuine issue of fact exists as to whether Weaver was acting within the scope of his authority. It seems unlikely that the statute was intended to protect conduct by employees that falls outside the scope of employment. As such, the statute would probably not bar a lawsuit that addresses whether an individual was acting within the scope of his authority.

Finally, Weaver claims that he is entitled to summary judgment because his call to Nobles was privileged communication between law enforcement officers. But, as privilege is a defense to liability and not a bar to suit,[32] we do not have jurisdiction under the collateral order doctrine to consider this argument on interlocutory appeal.

III

CONCLUSION

Weaver's claims regarding res judicata and Section 101.106 of the Texas Tort Claims Act are moot in light of our holding on sovereign immunity, and his claim of privilege presents a non-justiciable issue for this court. We therefore reject these three issues on appeal. Weaver is, however, immune from Travland's defamation claim against him in his official capacity. We therefore reverse the district court's denial of Weaver's motion for summary judgment based on sovereign immunity.

The district court abused its discretion by admitting into evidence and considering the contents of the unauthenticated Dodson Memorandum. As Weaver's own evidence establishes a genuine issue of material fact, however, we affirm the district court's denial of Weaver's motion for summary judgment based on qualified immunity, and remand this case to the district court for further proceedings consistent with this opinion.

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[32] Town of South Padre Island v. Jacobs, 736 S.W.2d 134, 143 (Tex. App.))Corpus Christi 1986, writ denied) (referring to doctrine of absolute privilege as a rule of non-liability) (citing Reagan v. Guardian Life Ins. Co., 166 S.W.2d 909, 912 (Tex. 1942)).

REVERSED in part, AFFIRMED in part, and REMANDED.