

IN THE SUPREME COURT OF TEXAS

=====
No. 97-1135
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SCOTT BRADLEY, PETITIONER

v.

THE STATE OF TEXAS ON THE RELATION OF DALE WHITE, RESPONDENT

=====
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS
=====

Argued on September 28, 1998

JUSTICE BAKER delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE ENOCH, JUSTICE OWEN, JUSTICE HANKINSON, JUSTICE O'NEILL and JUSTICE GONZALES join.

JUSTICE ABBOTT filed a concurring opinion.

This is a quo warranto case. Scott Bradley asserts that the Board of Aldermen of the Town of Westlake, Texas did not lawfully remove him as Mayor under section 21.002(f) of the Texas Local Government Code because the removal proceedings violated Texas Rule of Civil Evidence 605.¹ We agree. Therefore, we reverse the court of appeals' judgment for the State and render judgment for Bradley.

I. BACKGROUND

¹ Because the removal trial was held April 28, 1997, the former Texas Rules of Civil Evidence apply. Former Texas Rule of Civil Evidence 605 is identical to current Texas Rule of Evidence 605. *See* TEX. R. EVID. 605.

In May 1994, Scott Bradley was elected Mayor of Westlake, a general-law municipality. He was reelected in May 1996. On April 14, 1997, Howard Dudley, a Westlake alderman, filed a complaint against Bradley alleging official misconduct and incompetency. Specifically, Dudley alleged that Bradley (1) canceled a special town meeting called by alderman Carroll Huntress and removed the public notice of the meeting; (2) directed the Town Secretary to exclude from the meeting agenda an item Huntress requested and to remove a part of the proposed minutes from another town meeting; and (3) caused the Town Engineer to prepare a false boundary map of Westlake, and then presented the falsified map to the Board of Aldermen as part of an ordinance.

On April 28, 1997, the Westlake Board of Aldermen sat as a court to hear the charges against Bradley and to decide whether there was sufficient cause for his removal from the Mayor's office. During the trial, Dudley and another alderman, Al Oien, testified against Bradley. Dudley testified that he had provided Bradley with a request for and notice of the meeting Bradley allegedly canceled. Oien testified that when the Board passed the ordinance at issue, no map was attached to it. At the end of the trial, four of the five aldermen, including Dudley and Oien, found Bradley guilty of the charges. On motion made by Oien and seconded by Dudley, the Board voted to remove Bradley as Mayor of Westlake. Days later, the aldermen appointed Dale White as Mayor. Bradley refused to recognize the aldermen's judgment on the grounds that the removal procedure violated applicable procedural rules, substantive state law, and his federal and state constitutional rights.

On May 20, 1997, the State of Texas, on relation of Dale White, filed a quo warranto action seeking a declaration that White, not Bradley, was the lawful Mayor. The State alleged that: (1) the aldermen had lawfully removed Bradley from the Mayor's office under Texas Local Government Code section 21.002(f); (2) the aldermen had lawfully appointed Dale White as Mayor; (3) White

had taken the oath of office on May 2, 1997, and therefore, lawfully held office as Mayor; and (4) Bradley had unlawfully usurped and intruded into the Mayor's office since his lawful removal. The State filed a motion for summary judgment asserting as grounds the allegations in its quo warranto petition.

Bradley filed a cross-motion for summary judgment. In his summary judgment motion Bradley alleged the following affirmative defenses: (1) Texas Local Government Code section 21.002 violates the Texas Constitution's separation of powers doctrine; (2) section 21.002 is unconstitutionally vague; (3) Bradley's removal trial violated his federal and state procedural due process rights; (4) a section 21.002 removal trial is penal in nature, and Bradley was denied his state constitutional right to a jury trial; (5) the aldermen were disqualified under the Texas Constitution to sit as judges in the removal trial because they had a pecuniary interest in the outcome; (6) the removal trial violated Texas Rules of Civil Evidence 605, 607, and 611b, and Texas Rules of Civil Procedure 18b, 527, 528, 544, and 571; (7) the removal trial violated the Texas Open Meetings Act; (8) the evidence at trial did not support Bradley's removal; (9) the removal judgment became a nullity when a new board of aldermen granted Bradley's motion for new trial; and (10) the removal judgment became a nullity when Bradley filed an appeal bond with the new board of aldermen.

The trial court denied the State's motion for summary judgment and granted Bradley's motion for summary judgment without specifying upon which of Bradley's summary judgment grounds it based its judgment. The court of appeals held that the State had conclusively proved the elements of its quo warranto action. 956 S.W.2d at 745. The court of appeals also held that Bradley had not conclusively proved all essential elements of his defense in quo warranto as a matter of law nor had he defeated at least one element of the State's quo warranto claim. Accordingly, the court

of appeals reversed the trial court's judgment and rendered summary judgment for the State.

II. APPLICABLE LAW

A. STANDARD OF REVIEW - CROSS MOTIONS FOR SUMMARY JUDGMENT

When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both sides' summary judgment evidence and determine all questions presented. *See Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997); *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988). The reviewing court should render the judgment that the trial court should have rendered. *See Agan*, 940 S.W.2d at 81; *Members Mut. Ins. Co. v. Hermann Hosp.*, 664 S.W.2d 325, 328 (Tex. 1984). If a party brings the case to this Court and we reverse the court of appeals, we should render the judgment that the court of appeals should have rendered. *See Agan*, 940 S.W.2d at 81; *Tobin v. Garcia*, 316 S.W.2d 396, 400-01 (Tex. 1958). When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995). We do not consider constitutional challenges when we can dispose of a case on nonconstitutional grounds. *See Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 13 (Tex. 1994).

B. REMOVAL PROCEDURES

The Texas Local Government Code governs a mayor's removal from office in a general-law municipality. *See* TEX. LOC. GOV'T CODE § 21.002. A mayor may be removed from office for official misconduct, intentional violation of a municipal ordinance, habitual drunkenness,

incompetency, or a cause prescribed by a municipal ordinance. *See* TEX. LOC. GOV'T CODE § 21.002(c). When a complaint is made against the mayor, the complaint must be presented to an alderman of the municipality. *See* TEX. LOC. GOV'T CODE § 21.002(f). The alderman shall then file the complaint, serve the mayor with a copy, set a date for trial of the case, and notify the mayor and the other aldermen to appear on that day. *See* TEX. LOC. GOV'T CODE § 21.002(f). A majority of the municipality's aldermen constitutes a court in the mayor's removal trial with one of the aldermen presiding over the trial. *See* TEX. LOC. GOV'T CODE § 21.002(f). If two-thirds of the members of the court who are present at the trial find the mayor guilty of the complaint's charges and find that the charges are sufficient cause for removal from office, the court's presiding officer shall enter a judgment removing the charged officer and declaring the office vacant. *See* TEX. LOC. GOV'T CODE §21.002(h).

Section 21.002 removal proceedings are subject to the procedural rules governing the justice courts and to procedural rules governing district and county courts, to the extent these govern justice courts. *See* TEX. LOC. GOV'T CODE § 21.002(h); TEX. R. CIV. P. 523 (“All rules governing the district and county courts shall also govern the justice courts, insofar as they can.”) In addition, the Texas Rules of Civil Evidence apply to section 21.002 trials. *See* TEX. R. CIV. EVID. 101(b) (“[E]xcept as otherwise provided by statute, these rules govern civil proceedings in all Texas courts other than small-claims courts.”).

C. TEXAS RULE OF CIVIL EVIDENCE 605

“The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve this point.” TEX. R. CIV. EVID. 605. Texas Rule of Civil Evidence 605

is identical to its federal counterpart. *See* FED. R. EVID. 605. Not surprisingly, there are few reported federal or state cases involving Rule 605 violations. Most cases that do involve judges testifying at the trial over which they are presiding are decided on due process grounds. *See, e.g., Brown v. Lynaugh*, 843 F.2d 849, 851 (5th Cir. 1988); *Tyler v. Swenson*, 427 F.2d 412, 415 (8th Cir. 1970); *Terrell v. United States*, 6 F.2d 498, 499 (4th Cir. 1925); *Haynes v. State of Missouri*, 937 S.W.2d 199, 202 (Mo. 1996); *Wilson v. Oklahoma Horse Racing Comm'n*, 910 P.2d 1020, 1024 (Okla. 1996). These cases hold that a judge testifying as a witness violates due process rights by creating a constitutionally intolerable appearance of partiality. *See Brown*, 843 F.2d at 851 (“[I]t is difficult to see how the neutral role of the court could be more compromised, or more blurred with the prosecutor’s role, than when the judge serves as a witness for the state.”); *Tyler*, 427 F.2d at 416 (“The danger. . .of subjecting [the judge’s] impartiality to doubt and of placing the [party against whom the judge testifies] at an unfair disadvantage. . .is very obvious.”); *see also In Re Murchison*, 349 U.S. 133, 136 (1955)(disapproving of the “spectacle” of a trial judge presenting testimony which he must consider in adjudicating guilt or innocence).

Rule 605 is similarly concerned with the appearance of partiality. *See Hensarling v. State*, 829 S.W.2d 168, 170 (Tex. Crim. App. 1992)(referring to Texas Rule of Criminal Evidence 605, which is identical to Texas Rule of Civil Evidence 605 and noting that the Rule’s purpose is to preserve the judge’s posture of impartiality before the parties and the jury); WRIGHT & GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6062 (1990)(referring to Federal Rule of Evidence 605).

Comments of the Federal Advisory Committee on Proposed Rules indicate that Federal Rule of Evidence 605 purports to protect the appearance of impartiality. The Committee describes

Federal Rule of Evidence 605 as:

a broad rule of incompetency, rather than [a rule of] incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality?

FED. R. EVID. 605 advisory committee's note.

Indeed, one of the few federal cases to apply Rule 605 held that it was reversible error for a trial judge's law clerk to testify about facts favorable to the plaintiff because the danger that the jury would identify the law clerk with the trial judge was obvious. *See Kennedy v. Great Atl. & Pac. Tea Co.*, 551 F.2d 593, 598 (5th Cir. 1977). The court held that the "potential for prejudice" was so great that it rendered inquiry into actual prejudice to the parties "fruitless." *See Kennedy*, 551 F.2d at 598.

Rule 605 does not only apply to members of the judiciary, but also to those performing judicial functions that conflict with a witness's role. *See Gary W. v. Louisiana Dept. of Health and Human Resources*, 861 F.2d 1366, 1368 (5th Cir.) (applying Rule 605 to prohibit deposition of special master appointed to ensure compliance with protective order in family law case); *Central Platte Natural Resources Dist. v. State of Wyoming*, 513 N.W.2d 847, 864 (Neb. 1994) (applying Rule 605 and holding that court properly excluded testimony of doctor who assisted in decision making process in administrative adjudication); *but see Williams v. State*, 665 S.W.2d 299 (Ark. App. 1984) (permitting testimony from trial court's bailiff, called as a rebuttal witness to impeach a defense witness's credibility).

III. ANALYSIS

Because the trial court did not specify upon which ground it rendered summary judgment for Bradley, we can render judgment for Bradley if one of Bradley's summary judgment grounds is meritorious. *See Star-Telegram*, 915 S.W.2d at 473. We first consider Bradley's nonconstitutional summary judgment grounds. *See Moriel*, 879 S.W.2d at 13. One of Bradley's summary judgment grounds is that he was not lawfully removed from office as the State's quo warranto action alleges because Oien and Dudley testified against him while they sat in judgment over his removal trial, violating Texas Rule of Civil Evidence 605. The court of appeals responded to Bradley's Rule 605 argument by citing case law that holds that aldermen who assert a complaint against a mayor are not disqualified from judging the mayor's removal hearing. *See Riggins v. Richards*, 77 S.W. 946, 949 (Tex. 1904). The court of appeals then noted that section 21.002 allows all citizens of general-law municipalities, including aldermen, to file a complaint against a mayor. *See* TEX. LOC. GOV'T CODE § 21.002(f). However, the court of appeals did not discuss the aldermen's dual roles as judges and *witnesses* against Bradley in the removal trial.

Although Oien and Dudley are not members of the judiciary, they assumed judicial roles in the removal trial, roles which conflicted with their roles as witnesses. Section 21.002 required the aldermen to sit as a "court" over the removal "trial." *See* TEX. LOC. GOV'T CODE § 21.002 (f), (g), and (h). Oien and Dudley, along with their fellow aldermen, decided whether Bradley had committed the acts the complaint described and if so, whether these acts warranted removal.

Oien and Dudley testified against Bradley about the facts that served as the basis for the complaint and then adjudicated whether Bradley was guilty of the complaint's charges. Their testimony created the appearance of bias that Rule 605 seeks to prevent and such a potential for

prejudice to Bradley that inquiry into actual prejudice is fruitless. *Accord Kennedy*, 551 F.2d at 598. Therefore, we need not and do not conduct a harm analysis.

The concurring opinion asserts that section 21.002 is void for vagueness because the statute does not specify which justice court and district court rules apply to removal trials. The concurrence concedes, however, that the language of section 21.002 and Texas Rule of Civil Procedure 523 indicate that Texas Rule of Civil Evidence 605 applies to removal trials. The concurrence suggests that, nevertheless, Rule 605 should not apply because aldermen may be the only people familiar with the facts that form the basis for the complaint against a mayor.

Here, however, there is no indication that Oien and Dudley's testimony was necessary to the removal proceedings. On the contrary, the record reveals that it was not. Bradley himself admitted the substance of the first complaint. He testified at the removal trial that he canceled the meeting Huntress had called and removed the posted public notice of the meeting.² Bradley's concession rendered Dudley's testimony -- that he had provided Bradley with notice of and a request for the meeting -- unnecessary. The aldermen voted that Bradley was guilty of canceling the meeting and removing notice of the meeting and that those actions alone were sufficient cause for removal. Accordingly, Oien's testimony, which dealt solely with the falsified-map charge, was not necessary to the removal proceedings either.

IV. CONCLUSION

We conclude that Oien and Dudley, by testifying, violated Texas Rule of Civil Evidence 605,

² Bradley testified that he canceled the meeting and removed the notice because it was an illegally called meeting.

. Therefore, the Board of Aldermen did not lawfully remove Bradley as Mayor. Because Bradley conclusively negated an element of the State's quo warranto action -- that the aldermen had lawfully removed Bradley under section 21.002 -- the court of appeals improperly reversed the trial court's judgment for Bradley. We do not need to consider any of Bradley's other summary judgment grounds. Accordingly, we reverse the court of appeals' judgment and render judgment for Bradley on the State's quo warranto action. We declare that Bradley was the lawful Mayor of the Town of Westlake when the State filed its quo warranto action.

James A. Baker, Justice

OPINION DELIVERED: April 8, 1999