IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

LEONARD JOHNSON	§	
	§	
v.	§	**CASE NO. 4:23-cv-650**
	§	
THE TOWN OF PROSPER, TEXAS, et. al.	§	

DEFENDANTS LT. BOOTHE AND CHIEF KOWALSKI'S
REPLY TO PLAINTIFF'S RESPONSE TO THEIR MOTION TO DISMISS

COME NOW **PAUL BOOTHE** and **DOUG KOWALSKI**, two of the three Defendants, and file their REPLY TO PLAINTIFF'S RESPONSE TO THEIR MOTION TO DISMISS, as follows:

I.
Plaintiff's Failure to Aver Plausible Claims or Negate Qualified Immunity

The PLAINTIFF'S CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS (hereinafter "PLAINTIFF'S RESPONSE")[Dkt. 16] underscores how his lawsuit fails to aver plausible claims or overcome Lt. Boothe and Chief Kowalski's entitlement to Qualified Immunity. Mired in the same minutiae as his COMPLAINT, Plaintiff's RESPONSE ignores the reality of how phishing crimes are committed and the practicalities of how probable cause is developed in real life law enforcement. Under the Plaintiff's skewed world view, impersonating an elected official is somehow acceptable if done in the context of making a Public Information Act request. But a State District Court Judge and a Collin County Grand jury - both finding that probable cause existed to arrest Plaintiff for impersonating a public servant - did not agree. Nor should this Court.

Plaintiff seeks to "contextualize" his criminal conduct and portray his pretense as parody.[1] The not so subtle insinuation is that Plaintiff is much more clever than anyone else and, according

[1] See, Plaintiff's RESPONSE [Dkt. 16], p. 14

to him, someone with "basic knowledge of Prosper's government"[2] would have recognized that his ruse "signaled that the requestor was someone who perhaps had a keen interest in local politics, but, without more, was not actually trying to pass himself off as a sitting Councilmember."[3] Plaintiff apparently has no grasp of the blatant stupidity which frequently accompanies criminal conduct; "obvious misspellings" do little, if anything, to alert law enforcement that the potential suspect is a self-professed lampooner of local politics. The real world context of what transpired is that on the cusp of the 2020 elections, Plaintiff, masquerading as a Town Councilmember who was actively seeking re-election, engaged in calculated catfishing to try to obtain protected police records and then continued his charade in a group email [on the very eve of the election] to every sTown of Prosper Councilmember, the Mayor, and the Town Manager.[4] Plaintiff chides that the Town must "tolerate" "menacing" emails as protected First Amendment speech,[5] but the tenor and timing of Plaintiff's email certainly gave the recipients pause and resulted in the political candidate [Councilmember Hodges] requesting that an investigation be initiated to ensure that there was not some type of criminal activity afoot which could have jeopardized not only his reputation but the legitimacy of the electoral process.[6]

Despite Plaintiff's best efforts, his pleadings and public records - when viewed through the lens of clearly established law - readily reveal that he does not allege any plausible claims against Lt. Boothe or Chief Kowalski nor negate their Qualified Immunity. Dismissal should follow.

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[2]See, Plaintiff's RESPONSE [Dkt. 16], p. 14

[3]See, Plaintiff's RESPONSE [Dkt. 16], p. 14

[4]See, Defendants Lt. Boothe and Chief Kowalski's MOTION TO DISMISS [Dkt. 8], Ex. 15

[5]See, Plaintiff's RESPONSE [Dkt. 16], p. 17, fn. 11

[6]See, Defendants Lt. Boothe and Chief Kowalski's MOTION TO DISMISS [Dkt. 8], Ex. 5, p. 3 (describing Councilmember Hodges concerns)

II.
Plaintiff does not plausibly allege that Chief Kowalski had any legally significant personal involvement in the investigation, arrest, and indictment of Plaintiff

Plaintiff's RESPONSE seeks to obfuscate the peripheral role of Chief Kowalski in this matter. In his lawsuit Plaintiff incorrectly asserts that the "Prosper Town Council, acting as the final policymaker for the Town of Prosper, officially directed PPD Chief Kowalski to begin an investigation into Plaintiff's identity".[7] Indisputably, Lt. Boothe ran the investigation, not the Chief.[8] Painting with a broad brush, Plaintiff now argues "Chief Kowalski is liable because he directly ratified the unlawful investigation from start to finish."[9] Again, this is nothing more than conjecture, but even if true, it does not rise to a level of deliberate indifference required for supervisory liability. It remains clear that there are no allegations of sufficient personal involvement of Chief Kowalski which support his continued inclusion in this lawsuit.

III.
The Independent Intermediary doctrine bars Plaintiff's claims

Plaintiff does not, because he cannot, dispute that probable cause was determined - twice - by a State District Court Judge then a Collin County Grand Jury. But to thwart the preclusive effect of those two independent determinations of probable cause which separately broke the causal chain, Plaintiff continues to castigate Lt. Booth - and effectively labels him a liar. And in doing so, Plaintiff similarly suggests that a seasoned Judge was bamboozled and a Grand Jury was intentionally mislead. They were not. More than ample evidence supported Plaintiff's arrest.

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[7]Compare, Plaintiff's COMPLAINT [Dkt. 1], paragraph IV(B)(38), p. 8 to Ex. 5 confirming investigation was commenced at request of Councilmember Hodges individually.

[8]By making this argument Defendants certainly do not contend nor concede that there was anything improper about Lt. Boothe's investigation.

[9]See, Plaintiff's RESPONSE [Dkt. 16], p. 42

Plaintiff's RESPONSE also consistently conflates the concept of probable cause [measured by the "more likely then not" standard] with a criminal conviction at a trial [governed by a "beyond a reasonable doubt" standard]. Citing a litany of cases where convictions were affirmed[10] does nothing to demonstrate that probable cause did not exist to arrest the Plaintiff based on the issuance of a warrant by a State District Court Judge and then an indictment by a Collin County Grand Jury. While Plaintiff shouts at length about the Judge's determination of probable cause, he merely whispers about the Grand Jury's INDICTMENT. Each determination separately broke the causal chain. Recall that the Grand Jury independently issued its own subpoenas[11] and made its own determination, an important fact disregarded if not wholly ignored in Plaintiff's RESPONSE.

Curiously, when critiquing the Collin County Grand Jury and its INDICTMENT of the Plaintiff, Plaintiff writes:

> "At this stage, Plaintiff has plausibly alleged the Grand Jury's indictment was facially invalid, because Plaintiff's indictment was quashed by the presiding judge in his criminal case on November 7, 2021, after Plaintiff filed an unopposed motion seeking that relief."[12]

This is an interesting yet incorrect spin on the actual procedural underpinning of the case. There is a docket entry on November 7, 2022, that the "Motion to Quash is granted"[13], but the actual dismissal of the case was due to the State's MOTION TO DISMISS which merely relayed: "The State is requesting that this case be dismissed for interest of Justice."[14] The trial Court's ORDER OF MOTION TO DISMISS PROSECUTION of December 15, 2022, which is the order governing the

[10]See, Plaintiff's RESPONSE [Dkt. 16], p. 12-13

[11]See, Defendants Lt. Boothe and Chief Kowalski's MOTION TO DISMISS [Dkt. 8], Ex.'s 9, 10, and 11

[12]See, Plaintiff's RESPONSE [Dkt. 16], p. 25

[13]See, Defendants Lt. Boothe and Chief Kowalski's MOTION TO DISMISS [Dkt. 8], Ex. 14

[14]See, MOTION TO DISMISS PROSECUTION attached hereto as EXHIBIT 16

dismissal of the case, generically granted the State's MOTION TO DISMISS PROSECUTION [15] without any findings at all. There are myriad reasons why cases may dismissed 'in the interest of Justice." The mere fact that a year after the INDICTMENT was filed the case was dismissed "in the interest of Justice" certainly does not mean that there was no probable cause at the time of the Plaintiff's arrest. Plaintiff seeks to engraft a judicial finding about probable cause which is not borne out by the plain reading of the criminal case documents.

IV.
Malley and *Franks* do not preclude dismissal of this case

The Plaintiff's pointing to *Malley v. Briggs*[16] and *Franks v. Delaware*[17] to salvage his claims does nothing.[18] He goes to great lengths to hyper-scrutinize each submitted affidavit and posit about purported shortcomings in the facts.[19] Yet even a cursory review of the comprehensive affidavits submitted by Lt. Boothe readily reveal that they are not so "lacking in indicia of probable cause as to render official belief in its [probable cause] existence unreasonable." *Malley* at 475 U.S. 335, 344-45. Nor was there an obvious failure of accurately presented evidence to support the probable cause required for issuance of a warrant. Similarly, Lt. Booth did not intentionally, or with reckless disregard for the truth, include any false statements in his various detailed warrant applications.[20]

Plaintiff would hold Lt. Boothe to the standard of a First Amendment professor when it comes to the level of detail to be included in probable cause affidavit. But that is not the law, nor

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[15] See, ORDER OF MOTION TO DISMISS PROSECUTION attached hereto as EXHIBIT 17

[16] *Malley v. Briggs*, 475 U.S. 335 (1986)

[17] *Franks v. Delaware,* 438 U.S. 154 (1978)

[18] See, Plaintiff's RESPONSE [Dkt. 16], paragraph VI(C)(ii), p. 20-35

[19] See, Plaintiff's RESPONSE [Dkt. 16], p. 21-25

[20] See, Defendants Lt. Boothe and Chief Kowalski's MOTION TO DISMISS [Dkt. 8], Ex.'s 3, 4, 5, and 7

should it be. This Court, like the State Court District Judge Smith and the Collin County Grand Jury, can review the submitted information and readily conclude that more than ample probable cause existed for the arrest of Plaintiff. That the Plaintiff was not ultimately tried and/or convicted for his criminal conduct remains irrelevant to this case.

V.
Plaintiff has failed to allege any claims which would overcome Chief Kowalski and Lt. Boothe's entitlement to Qualified Immunity

Lt. Boothe and Chief Kowalski are certainly not plainly incompetent nor did they knowingly violate the law. A reasonable peace officer could have believed that their [Boothe and Kowalski's] actions were lawful in light of clearly established law and the information possessed by them at the time and a reasonable officer identically situated could have believed that the investigation and arrest of the Plaintiff for impersonating a public servant was objectively reasonable. Plaintiff's chiding to the contrary does not constitute non-conclusory factual allegations sufficient to deny immunity.

Tasked with overcoming Qualified Immunity, Plaintiff's RESPONSE fails on many levels. First, as detailed in Defendants' MOTION TO DISMISS, Plaintiff cannot plead any cognizable Fourth or First Amendment claims against Lt. Boothe or Chief Kowalski.[21] Second, and perhaps particularly compelling at this juncture, Plaintiff has failed to demonstrate that the law was clearly established/beyond debate that Plaintiff could not be investigated and prosecuted under these facts. "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Jackson,* 959 F.3d at 200-01 (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed. 2d 985 (2012)). "In other words, existing precedent must have placed the statutory or constitutional question beyond debate." *Jackson,* 959

[21] See, i.e., Defendants Lt. Boothe and Chief Kowalski's MOTION TO DISMISS [Dkt. 8], p. 23-27

F.3d at 201 (quoting *Reichle,* 566 U.S. at 664). And, unless all reasonable officers in the defendant's circumstance would have known that the conduct in question violated the constitution, the defendant is entitled to qualified immunity. *Thompson v. Upshur City, Tex.,* 245 F.3d 447, 457 (5th Cir.2001).

Plaintiff's RESPONSE falls into the trap of making sweeping statements of the generic law which do not set out the requisite high level of particularity required to defeat qualified immunity. Plaintiff's RESPONSE fails to point to any authoritative cases law that would have provided fair warning that Lt. Boothe's and/or Chief Kowalski's conduct violated the Constitution under these particular circumstances, i.e., that a law enforcement agency cannot investigate possible criminal activity [impersonating a public servant] surrounding the submission of a Texas Public Information Act request. Plaintiff implicitly admits same, writing for example that "Their [Defendants Boothe and Kowalski's] **completely novel interpretation of the impersonation statute and the TPIA**, and their decision to retaliate against Plaintiff for exercising his rights, was unconstitutional under the Fourth Amendment and First Amendments."[22] Similarly, Plaintiff comments "Defendants arrested Plaintiff under a **completely novel** and untenable application of the impersonation statute [citing Texas Penal Code], to Plaintiff's lawful request for public records."[23]

The still evolving and certainly unclear law in this area is underscored by a very recent case cited by Defendants in their MOTION TO DISMISS but notably omitted from the Plaintiff's RESPONSE: *Grisham v. Valenciano*, SA-21-CV-00983, 2023 WL 367216, 2023 U.S. Dist. LEXIS 10775 (W.D. Tex. Jan. 20, 2023). In *Grisham* the Western District of Texas concluded that Olmos Park Police Chief Rene Valenciano was entitled to qualified immunity in a First Amendment retaliation case wherein the Plaintiffs [gun rights activists] alleged that the Chief retaliated against them by

[22]See, Plaintiff's RESPONSE [Dkt. 16], p. 6-7 (emphasis added)

[23]See, Plaintiff's RESPONSE [Dkt. 16], p. 10 (emphasis added)

investigating them and sharing information with other law enforcement agencies. The Court reviewed and analyzed several cases on First Amendment Retaliation [including *Kennan*], 2023 U.S. Dist. LEXIS 10775, at 13-17, then succinctly concluded:

> The Court, therefore, finds [Plaintiffs] have failed to meet their burden to show, beyond debate, "all reasonable officials" in the Chief Valenciano's circumstances would have known his investigation was unconstitutional. *Linicomn v. Hill*, 902 F.3d at 538-39; *Ashcroft v. al-Kidd*, 563 U.S. at 741. Thus, the Court finds Chief Valenciano is entitled to qualified immunity.

This Court, too, should likewise find [if even necessary] that the law was not clearly established that Lt. Boothe and/or Chief Kowalski could not investigate then commence prosecution of Plaintiff for the criminal offense of Impersonating a Public Servant when his actions were done in the context of a Texas Public Information Act request. Even Plaintiff believes the investigation and arrest of the Plaintiff is a "completely novel" circumstance.[24] This second prong of immunity is far more than sufficient to now find that Qualified Immunity prevails and dismiss Defendants Boothe and Kowalski.

VI.
Plaintiff has failed to plead any plausible claims for declaratory relief

Plaintiff agrees that dismissal of the underlying substantive claims against Defendants effectively resolves any dispute as to Plaintiff's request for Declaratory Judgment against them.[25] Obviously, the Plaintiff contends that his various claims can survive Rule 12(b)(6) scrutiny; these Defendants vigorously disagree. Depending on the Court's ruling(s) on the constitutional claims and qualified immunity, Plaintiff's request for declaratory relief may be rendered moot.

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[24]See, Plaintiff's RESPONSE [Dkt. 16], p. 6-7, 10

[25]See, Plaintiff's RESPONSE [Dkt. 16], p. 45

VII.
Plaintiff has failed to plead any plausible claims for "punitive damages"

It is well established that a governmental employee cannot be liable for punitive damages unless a plaintiff establishes that the employee acted willfully, intentionally, or with a reckless and callous indifference to plaintiff's civil rights. *Young v. City of New Orleans*, 751 Fed.2d 794, 799-800 (5th Cir., 1985). There are no credible allegation that Lt. Boothe and/or Chief Kowalski acted willfully, intentionally, or with a reckless and callous indifference to Plaintiff's civil rights, precluding the recovery of punitive damages against them.

Plaintiff's RESPONSE offers no substantive discussion of any factual allegations meeting this standard, but instead, just refers this Court back to his pleading.[26] His lackluster approach illustrates the paucity of credible non-conlusory factual allegations which would support a claim for punitive damages against Lt. Booth and/or Chief Kowalski.

VIII.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants **PAUL BOOTHE** and **DOUG KOWALSKI** respectfully request this Court to dismiss them from Plaintiff's complaint for failure to state a claim upon which relief can be granted, and for such other and further relief to which such Defendants may show themselves justly entitled.

[26]See, Plaintiff's RESPONSE [Dkt. 16], p. 45

Respectfully submitted,

By: /s/ *Robert J. Davis*

ROBERT J. DAVIS
State Bar No. 05543500
J. BAILEY MCSHANE
State Bar No. 24104388
MATTHEWS, SHIELS, KNOTT,
EDEN, DAVIS & BEANLAND, L.L.P.
8131 LBJ Freeway, Suite 700
Dallas, Texas 75251
972/234-3400 (office)
972/234-1750 (telecopier)
bdavis@mssattorneys.com
bmcshane@mssattorneys.com

ATTORNEYS FOR DEFENDANTS
THE TOWN OF PROSPER, TEXAS,
PAUL BOOTHE, and DOUG KOWALSKI

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2023, I electronically filed the foregoing document with the clerk of the Court for the Eastern District, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means: Thomas S. Leatherbury and Peter B. Steffensen.

/s/ *Robert J. Davis*
ROBERT J. DAVIS