Defamation and Privacy

The following cases cover the period of September 1, 2009 – April 1, 2010.

Michael Morrison

DEFAMATION

Limited Public Figure

In , **Klentzman v. Brady**,[1] No. 01-07-00520-CV, 2009 WL 5174369 (Tex.App.-Hous. (1 Dist.) Dec. 31, 2009, No Pet.), the plaintiff, the son of a chief deputy sheriff, filed this libel action against a newspaper and reporter over an article alleging that his father acted to suppress evidence of the plaintiff's having been ticketed for being a minor in possession of alcohol.

Appellants, LeaAnne Klentzman ("Klentzman") and Carter Publications, Inc. d/b/a The West Fort Bend Star, Inc. ("the Star"), by interlocutory appeal, sought to reverse the trial court's denial of their summary judgment motion to dismiss.

The plaintiff alleged that appellants published a writing that injured his reputation by "omitt[ing] material facts and therefore creat[ing] a misleading presentation of the factual circumstances regarding [his] trial and the unrelated stop by the DPS trooper."

The gist of the opinion dealt with the Texas case law on the defense of substantial truth. A publication is substantially true even though the defendant errs in details if, "the defendant correctly conveys a story's 'gist' or 'sting'." Conversely, a defendant who "gets the details right but fails to put them in the proper context and thereby gets the story's 'gist' wrong," may be held liable for defamation. The test for whether a publication is false is based on a reasonable person's perception of the entirety of a publication.

Here, there was, "more than a scintilla of evidence to raise a genuine issue of material fact as to whether the 'gist' of the Article was false, and therefore appellants were not entitled to a no-evidence summary judgment on the essential element of falsity."

Appellants furthered argued that plaintiff is a limited purpose public figure and must prove actual malice to recover. The court of appeals found otherwise, rejecting the proposition that this status arises either from the plaintiff being the child of a public official or someone whose conduct is related in an, "integral and meaningful way to the conduct of a public official."

"[T]he mere fact that [the plaintiff's] father is a public official and, thus, that [the child']s behavior might be more 'newsworthy' than a teenager whose father was not a public official, does not mean that any alleged misbehavior in which he might have engaged made [him] a limited-purpose public figure with respect to the particular controversy at issue in this litigation . . . . It is not enough that the 'son of the Chief Deputy' generally engaged in acts that 'would generate attention and discussion'; rather, the voluntary acts would have had to be 'with respect to this controversy', in an attempt to influence the resolution of the public questions at issue in the controversy."

Following its review of the record, taking the evidence in its most favorable light to the plaintiff, the court of appeals held that there was insufficient evidence of either the required public controversy or any attempt by the plaintiff to alter the outcome of what controversy existed to make him a limited purpose public-figure and affirmed the ruling of the trial court.

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[1] Opinion not released for publication in the permanent law reports, until released, it is subject to revision or withdrawal.

Unhappy Clients Beware

In **Franco v. Cronfel**,[2] No. 03-09-00494-CV, 2010 WL 850153 (Tex.App.-Austin March 12, 2010,), Franco posted the following review of legal services provided by Ochoa-Cronfel on the website www.RipoffReport.com ("Ripoff Report"), under his first name, "Gilbert":

> "This attorney was assigned to be a receiver for some assets that I needed to recover. He totally screwed up the whole deal. He allowed the defendants in the case to steal money and property. He lied on court documents as far as time he spent on the case. He falsified and mislead [sic] the court with financial statements and other information to the court. He made deflamatory [sic] remarks before the court about me-which were blatent [sic] lies.
>
> He threatened me with extortion to get almost $20,000 from me when the court orders state that the receivers [sic] fees are a taxation against the defendants, not the plaintiff. He would not liquidate my property to me, unless I paid him money-a direct contriction [sic] to the court order.
>
> He is now trying to extort more money from me or he will use his legal power to cause me more fiancial [sic] harm. This is a bad attorney in its worst form. He personally has cause [sic] me almost $500,000 in damages.

Franco signed the review, "Victim of Extortion and Fraud, Austin, Texas, U.S.A."

For some reason, Ochoa-Cronfel took offense and sued Franco for defamation. The trial court held that Ochoa-Cronfel was a public official as a matter of law and consequently must prove actual malice. Franco appealed the trial court's denial of his no-evidence and traditional motions arguing that Ochoa-Cronfel had not raised a fact issue regarding actual malice.

Here malice, if it existed, would be based on the defendant having entertained serious doubts as to the truth of his publication. In concluding that Franco published the material with actual malice, the court of appeals relied on Franco's selective omission of facts, his attempt to remove the review after its discovery; his addition of disclaimers that the review reflected only his opinions; his admission during his deposition that his statements did not constitute proven facts and the fact that Franco later lied about having made the posting. Franco was ordered to pay all costs and reasonable attorney fees of the appeal.

Context

In **Overstreet v. Underwood**, 300 S.W.3d 905 (Tex.App.-Amarillo 2009, Rev den, Mar. 5, 2010), a female county court employee filed suit against her employer for sexual harassment, retaliatory discharge, and defamation, the latter which was based on the innuendo of a statement by Underwood to a third person with Overstreet present that, "his wife had indicated that she had observed instances of Overstreet's 'improper touching' of Underwood."

In considering whether the words "improper touching" implied a defamatory meaning the court looks not to how the plaintiff might construe the publication but to how it would be construed by the average, reasonable person or the general public.

Here, the court of appeals held that the trial court did not err in granting summary judgment and decreeing that Overstreet take nothing against Underwood. Both courts seemed persuaded by Mrs. Underwood deposition statement that her reference to "improper touching" was based conduct at a public reception and other such events, that, "it is not reasonable to imply by innuendo or otherwise, that Overstreet's conduct . . . would be considered to be sexually suggestive or provocative."

Discharge in Bankruptcy?

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[2] Opinion not released for publication in the permanent law reports, until released, it is subject to revision or withdrawal.

In, **In re Perry**, 423 B.R. 215, (Bkrtcy. S.D. Texas, Houston Division 2010), the bankruptcy court held that sending an email is considered a publication for defamation purposed and that both actual and punitive defamation damages are non-dischargeable in bankruptcy.

Must Identify the Plaintiff

In, **Robinson v. Radio One, Inc**, Case No. 03:09-CV-1203-O. --- F.Supp.2d ----, 2010 WL 606683 (N.D.Tex.) Feb. 19, 2010, the plaintiff, an airport security guard, brought a libel action against the radio station and Smiley, the host of a featured radio program called, *The Rickey Smiley Show*, after Smiley referred to him both at the airport and on air as, "Henry the gay security guard." After the broadcast, people began calling Plaintiff "gay." The plaintiff denies that he is homosexual.

An audio tape of the broadcast, "includes . . . a reference to 'Henry' working at Love Field, a poem about 'Henry, Henry' who 'sure act[s] gay,' off color humor about 'Henry's' duties in conducting personal searches, an admonition to 'Henry' to stop taking pictures, and a laughing 'Sorry, Henry!''

Radio One admitted that the broadcast asserted there was a "gay security guard" at Love Field but denies that it referred to or identified the plaintiff. From this, a reasonable listener could conclude that the broadcast referred to a real person named Henry who was a security guard working at Love Field. For purposes of this review, "the Court is bound to note that Robinson has alleged that 'Henry the gay security guard' was identified in sufficient detail that '[a]fter the airing of the show, people began accosting Robinson calling him gay . . . .'" Even if Robinson's last name was not aired, the test is, "whether persons who know the defamed and heard the statement could have reasonably thought it to be an assertion of fact about him."

The court rejected the defendants' attempted characterization of the clip as parody or satire noting that an assertion is not necessarily parody or satire simply because it was made to provoke laughter and it granted Radio One's motion to dismiss as to any liability for statements made at the airport but denied defendants' motion to dismiss for claims arising from the broadcast.

Opinion

Sansing v. Garcia[3], **No. 13-08-00211-CV,** 2009 WL 3385247 (Tex.App.-Corpus Christi Oct. 22, 2009,), involved reviewed a faculty/administration conflict involving Sansing, a tenured biology professor at Del Mar College, and Garcia, the college president. Sansing brought suit for intentional infliction of emotional distress, slander and fraud. The trial court granted Garcia's motion for summary judgment.

The court of appeals, taking a sticks and stones approach, remarked that, "Sansing was sufficiently offended by Garcia's remarks to bring the underlying suit. Yet, [a publication] 'may be false, abusive, unpleasant, or objectionable to the plaintiff and still not be defamatory in light of the surrounding circumstances.' . . . A reasonable reading of Garcia's entire remarks shows that he was conveying his belief that Sansing's comments and conduct were inappropriate", which was not a false statement of fact.

In, **Vice v. Kaspzak**, No. 01-08-00168-CV, 2009 WL 3152122 ((Tex.App.-Hous. (1 Dist.) Oct. 1, 2009 Pet. filed), the plaintiff, Kasprzak, brought a defamation action based on a newspaper article, a published letter to the editor, and an anonymous flyer that impugned his reputation for serving both as the president of the board of a homeowners' association and as the attorney for the subdivision developer in actions against members of the homeowners' association for delinquent maintenance fees. The flyer, for example, read in part:

> "As President of NPOAN and attorney of record for the developer and his many companies he is playing both side [sic] of the fence. This is unethical business and should be reported to the Texas Bar Association by everyone in the subdivision."

[3] In a TX R RAP RULE 47.2, memorandum opinion.

The court of appeals concluded from the record that the trial court erred in denying appellants' motion for summary judgment on the claims of plaintiff's wife and daughter as neither were identified nor could it be reasonably inferred that the complained of statements were intended to refer to either of them. However, the statements were found to have referred to plaintiff.

The court of appeals found that: (1) the controversy at issue was public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff occupied more than a trivial or tangential role in the controversy; and (3) the alleged defamation was germane to the plaintiff's participation in the controversy. On the basis of fairly thin evidence, the court of appeals found that the plaintiff was a limited purpose public figure. As it turns out, however, this discussion as well as that on malice which followed was obiter dicta as the case was decided on an independent basis.

The court of appeals found that the challenged defamatory publications were either substantially true or mere opinion and held that the trial court erred in denying Vice and Slotter's motion for summary judgment on the Kasprzaks' defamation claims.

Invasion of Privacy and Conspiracy
The court of appeals, having held that the statements were not defamatory and "because the Kasprzaks rely on the existence of defamatory statements as the basis for claiming they were harmed by Vice's and Slotter's invasion of their privacy and conspiracy," concluded that those derivative claims also fail as a matter of law.

In the reporter's opinion, caution should be used in relying on this opinion, as whether or not a statement is defamatory is notvordinarily dispositive of the privacy issue.

Privacy

Intrusion:
In **Webb v. Glenbrook Owners Association, Inc**., 298 S.W.3d 374, (Tex.App.-Dallas 2009), the court of appeals reversed and remanded that portion of a permanent injunction which ordered the Webbs to, "refrain from installation or operation of any surveillance cameras anywhere on the exterior of the[ir] Property that are capable of recording any activity located outside of the Property boundaries."

This restriction was one of eleven paragraphs of a permanent injunction entered by the trial court against the Webb's on behalf of the Homeowners' Association which among other things alleged invasion of privacy.

The Webbs had motion activated security cameras on their property and which, when activated, also recorded some activity beyond the limits of their property. The trial jury found this to be a nuisance as to those landowners whose property was also recorded.

The court of appeals, citing, *Vaughn v. Drennon*, 202 S.W.3d 308, 320 (Tex.App.-Tyler 2006, pet. denied), held that since, "watching a neighbor from one's own property does not support a finding of invasion of privacy", that the portion of the injunction which prohibited security cameras on the Webb's property which recorded activity on neighbor's property constitutes a clear abuse of discretion. On this basis, it reversed and remanded that portion of the injunction to the trial court for further proceedings.

This conclusion is in accord with the generally accepted principle that it is not an invasion of privacy to record that which one would be free to see, at least if from a place where the viewer/recorder is entitled to be. While the court of appeals relied on other reasoning, it is generally held that there is simply no reasonable expectation of privacy in such circumstances.

Computer Hacking

Allegations of hacking into the private computer email files of another state a plausible state privacy claim for which relief can be granted. *Coalition for an Airline Passengers' Bill of Rights, v. Delta Air Lines, Inc.,* --- F.Supp.2d ----, 2010 WL 420023 (S.D.Tex.), Houston Division, Civil Action No. H-09-3305, Jan. 28, 2010.