DEFAMATION AND PRIVACY

The following cases cover the period of March 1, 2008 until August 31, 2008.

MICHAEL MORRISON

DEFAMATION

Summary Judgment

In *Crouch v. Trinque*, No. 11-06-00195-CV, 2008 WL 2764594, (Tex.App.—Eastland July 17, 2008, no pet.),[1] Crouch, a former state university employee, brought suit against her former supervisor and a university vice president for intentional infliction of emotional distress, defamation, tortious interference, and conspiracy. She appealed from the trial court's judgment in defendants' favor.

The court of appeals upheld a summary judgment in favor of the vice president on all claims on the basis of official immunity but reversed as to the supervisor on the claims of defamation and tortious interference finding that a fact question existed as to these.

Holding that reasonable minds could differ, based upon the summary judgment evidence, with respect to the supervisor's good faith, the court of appeals could not conclude as a matter of law that a reasonable person in the supervisor's position could have believed her conduct was justified. Thus, an issue of fact existed as to whether she was entitled to official immunity.

The court of appeals then held that, as to the defamation claim, the supervisor "failed to conclusively establish an absence of malice" and therefore failed to establish as a matter of law the existence of a qualified privilege to defamation.

Don't Mess with Texas High School Football

In, *Palestine Herald-Press Co., v Zimmer,* 257 S.W.3d 504 (Tex.App.-Tyler, 2008, pet. denied), an assistant high school football coach brought a defamation action against a newspaper and its sports editor for a column describing the coach's conduct following a game. The defendants appealed from the trial court's denial of their motions for summary judgment.

Following a close game in which a blocked last second field goal attempt was decisive, Zimmer went onto the playing field and celebrated the victory. It was Zimmer's post-game, on-field conduct during a 7 second exhibition which raised the ire of Tyler, a sports writer for the paper from the losing school's hometown.

Tyler wrote an article that appeared in the September 24, 2006, edition of the Palestine Herald in "From the Cheap Seats," Tyler's weekly editorial column. Tyler's article entitled "Sportsmanship comes first" read as follows:

> "In high school football, winning and losing is not always the most important factor.
>
> OK, before I get run out of town for that statement, there is some truth, so just hold on and listen.
>
> At the high school level, while winning football games is nice, when it comes down to the bottom line, the most important thing that needs to come out of a high school football game is not winning but sportsmanship.
>
> * * *
>
> However, what I saw Friday night was the worse [sic] yet.
>
> In a great game between Palestine and Jacksonville at Wildcat Stadium, that went to the end, the Indians prevailed with a 19-17 comeback win.
>
> When Palestine missed a long field goal attempt at the end of the game, there was celebration on the Jacksonville sideline, which is understandable.
>
> Palestine had beaten Jacksonville the year before and the Indians had to come back in the fourth quarter to win Friday night. So go ahead, jump up and down, enjoy the win.
>
> However[,] while the Jacksonville players and coaches celebrated the win, the Jacksonville defensive coordinator, Mark Zimmer, stood at mid-field, facing the Palestine sideline and started making an obscene gesture with his arms.
>
> This is ABSOLUTELY uncalled for! After a hard-fought contest by both teams for 48 minutes, there is no place for this in the game, and for a coach to do this is beyond any words I can think of.
>
> After what I witnessed, I have no respect for Jacksonville and it is because of one coach. He not only put a black mark on the Jacksonville football team [,] but also Jacksonville High School and the city of Jacksonville.
>
> This coach should feel embarrassed and ashamed of what he did and how he acted. This is not acceptable behavior by anyone on the football field and for it to be a coach makes it even worse.
>
> Zimmer owes the Palestine team, the Wildcat fans[,] and the city of Palestine an apology for his actions.
>
> There is no place for this in sports."

After reviewing the article, the court of appeals concluded that none of Tyler's statements, with one possible exception, were capable of being objectively verified and were therefore not statements of fact upon which a defamation claim could be based.

The one possible exception was the claim that Zimmer made an "obscene gesture with his arms." The court of appeals concluded, however, that "Tyler's statement that the gesture Zimmer made with his arms was 'obscene,' without further description, [was] subjective and indefinite" rather than an objectively verifiable statement of fact," and held that the trial court erred in denying Appellants' no evidence motion for summary judgment because there was no evidence in the summary judgment record that the statements in Tyler's article of which Zimmer complained were objectively verifiable statements of fact.

Slander Per Se

In *Tranum v. Broadway,* No. 10-06-00308-CV, 2008 WL 2640126 (Tex.App.—Waco July 2, 2008, pet. filed),[2] the

[1] Not Yet Released for Publication

[2] Not Yet Released for Publication

defendant, Tranum, published statements accusing Broadway of criminal conduct related to his employment, including theft and embezzlement.

At trial, Tranum was found liable for malicious prosecution and slander against Broadway who was awarded mental anguish, reputational, and exemplary damages. In modifying, and affirming the judgment as modified, the court of appeals held that statements which impugn an employee's honesty in his dealings with his employer fall within the general classification of "words that affect a person injuriously in his profession or occupation" and are slanderous per se. Consequently, the evidence supported a judgment based on slander per se.

In *Morrison v. Dallas County Community College*, 273 Fed.Appx. 407 (C.A.5 2008),[3] Morrison argued that Defendant's alleged statement that Morrison was "terminated for fighting" constituted slander *per se* by causing injury to his office, business or profession.

The circuit court, while recognizing that Texas law recognizes slander *per se,* held that the district court properly rejected the argument.

For this statement to constitute slander *per se*, it must have been "so obviously harmful" to the defendant's professional reputation that damages may be presumed *See e.g., Shearson Lehman Hutton, Inc. v. Tucker,* 806 S.W.2d 914, 921 (Tex.App.1991) (statement suggesting that stock broker would lose his license was slanderous *per se*" because it is aimed at his conduct as a licensed stockbroker and it asserts a matter incompatible with his practicing that profession"); *Bradbury v. Scott,* 788 S.W.2d 31, 38 (Tex.App.1989) ("To charge an employee with dishonesty in his dealings with his employer is slanderous *per se*...."). The alleged statement does not rise to the level of "so obviously harmful" to Morrison's occupation or profession that would justify a presumption of reputational injury sufficient to support an award of damages.

As Morrison, who had the burden of proving that his reputation was actually damaged as a result of Defendant's statement, offered no evidence of actual damages the summary judgment was properly entered.

Qualified Privilege

In *McIntosh v. Partridge,* No. 07-20440, 2008 WL 3198250 (5th Cir. 2008) the plaintiff, McIntosh, argued that it was error for the district court to dismiss his state law defamation claim on the basis of qualified privilege because Partridge failed to prove the absence of malice or to plead the affirmative defense of qualified privilege in his first responsive pleading.

In Texas, qualified privilege is an affirmative defense and Partridge failed to raise it in his answer as required by Rule 8(c). Additionally, the complaint also alleged actual malice, which if proved would defeat the privilege. Consequently, the district court erred in dismissing the claim for failure to state a claim under Rule 12(b)(6) based on qualified privilege.

However, Partridge also asserted official immunity as a privilege to the extent that McIntosh's defamation claim was brought against him in his individual capacity.

The circuit court may affirm a district court's granting of a motion to dismiss on a basis not relied upon by the district court, and Partridge properly raised the defense of official immunity in his answer. In Texas, "[a] governmental employee is entitled to official immunity: (1) for the performance of discretionary duties; (2) within the scope of the employee's authority; (3) provided the employee acts in good faith." McIntosh does not dispute that Partridge was performing discretionary duties within the scope of his employment when he allegedly defamed McIntosh by reporting him to the state dental board, but he claims that these statements were false and that Partridge made them intentionally, willfully, and maliciously.

Under Texas law, "[a] plaintiff attempting to controvert the employee's summary-judgment evidence on good faith must show that no reasonable person in the employee's position could have thought that the facts justified the employee's actions." McIntosh presented no evidence to show that a reasonable employee in Partridge's position would not have reported to the state dental board Dr. Sadowski's and Dr. Scalzitti's allegations that McIntosh committed professional misconduct. Furthermore, while the district court did not specifically address the defense of official immunity, such defense was properly pled, the court properly held that Partridge was entitled to qualified immunity as to McIntosh's federal claims, and "Texas law of official immunity is substantially the same as federal qualified immunity law."

The evidence on official immunity, as well as that on qualified immunity (and on qualified privilege) appears to be fully developed. McIntosh has at no time suggested other evidence that he had and would have tendered below (or sought discovery respecting) had official immunity, and not simply qualified immunity, been raised as a ground for summary judgment (or had qualified privilege been properly raised). The circuit court affirmed the dismissal of the claim on its finding that the record evidence shows as a matter of law that Partridge was entitled to official immunity (and that those statements were made without malice) and that there is no evidence to support a contrary finding.

[3] Not Selected for publication in the Federal Reporter