DEFAMATION AND PRIVACY

The following cases cover the period of April 1, 2007 until September 1, 2007.

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Defamation:

Privileges

In ***Florance v. Buchmeyer***, 500 F. Supp. 2d 618 (N.D. Tex. 2007), the court confirmed that references in pleadings filed in prior court proceedings containing descriptions of plaintiff such as "litigation terrorist" and "litigation Jihad" were absolutely privileged under the judicial privilege to defamation.

In ***Stoddard v. W. Telemarketing***, L.P., No. EP-06-CV-259-PRM, 2007 WL 2191300 (N.D. Tex. July 31, 2007), plaintiff brought suit against his former employer claiming both defamation and that his discharge violated Title VII, 1981 of Texas Commission on Human Rights Act.

The court of appeals found that there was sufficient evidence in to raise questions of fact under Title VII as to whether the reason given for his firing was a pretext for discriminatory treatment or that race was a motivating factor in his termination and denied defendant's motion for summary judgment on the discrimination claims.

The slander and libel claim turned on the availability and effect of a qualified privilege to statements contained within an investigative report compiled by the defendant. The court found, that as communications made in connection with an "investigation following a report of employee wrongdoing," they were entitled to a qualified privilege but, of course, a qualified privilege is defeated by proof of actual malice which was alleged by plaintiff.

In a summary judgment review, where the defendant offers 'clear, positive and direct' evidence establishing the lack of actual malice the plaintiff must offer controverting proof to raise a fact issue as to malice. Here, however, the defendant's affidavit fell short of the "clear, positive and direct" threshold and failed to seriously contest the plaintiff's characterization of the publication as defamatory. Therefore summary judgment was inappropriate on the libel issue but, since the plaintiff failed to present any evidence of slander, summary judgment as to that issue was upheld.

Proof of Malice:

In ***DR Partners v. Floyd***, 228 S.W.3d 493 (Tex. App.—Texarkana 2007, pet. denied), the defendant newspaper published a story incorrectly stating that the plaintiff had been "charged" with stealing opposition campaign signs on election day when, in fact, plaintiff had only been "accused" by political rivals of stealing the signs.

The main dispute concerned whether the word "charged" is synonymous with "accused." The defendant argued that the words are equivalent and that any ambiguity in the article must be construed in its favor while plaintiff argued that the word has a specific meaning utilized by the newspaper industry which refers to formal criminal charges.

Defendants' summary judgment affidavits, claimed that the word "charges" was intended as a synonym for accusations and one defendant entertained "no doubts, let alone serious doubts, about the truth of any statement" while that of the other stated that he "believed the headline to be true" at the time it was published.

The court of appeals held that the record contained less than a scintilla of evidence of actual malice. "Actual malice cannot be inferred from the fact a publication is not substantially true as determined from the meaning a reasonable person would attribute to the article. Actual malice cannot be inferred from the falsity of the statement alone. Actual malice requires proof that the defendant subjectively knew or subjectively had serious doubts that the article was communicating a falsehood. Further, the possibility that a jury might disbelieve the defendant is not evidence of actual malice."

The misuse of the word "charged" in the story was "the sort of inaccuracy that is commonplace in the forum of robust debate," and is not actionably libelous in nature. The court of appeals held that the plaintiff failed to present more than a scintilla of evidence to controvert the lack of actual malice.

In ***Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.***, 219 S.W.3d 563 (Tex. App.—Austin 2003, pet. filed), a waste disposal company sued a competitor for, among other claims, defamation following the defendant's publication of information impugning the environmental integrity of a landfill operated by plaintiff as well as the propriety of a bid process.

Appellant challenged a take-nothing judgment based on charge errors related to defamation per se and presumed damages and the jury's zero-damages award. Appellee argued that even if the charge challenge was sustained on appeal, the take-nothing judgment should be affirmed based on the lack of evidence of actual malice.

Without delving into the specific facts, suffice it

to note that the jury found actual malice based upon its conclusion that the relevant "statements were false and that, by clear and convincing evidence, the defendant knew of the falsity or had serious doubts about their truth."

However, the jury also found that the plaintiff had suffered "zero" actual damages and that since the defendant had not acted with "common law malice" it awarded no exemplary damages. Based on this verdict, the court entered a take nothing judgment. On appeal, the court addressed the existence of actual malice, defamation per se and presumed damages.

Actual Malice

Defendant argued that there was insufficient "legally sufficient evidence to uphold the jury's finding of actual malice." The court of appeals, disagreed. The court reasoned that, "If the jury's decisions regarding credibility are reasonable, then the appellate court must defer to the jury." On that basis, it concluded that since the jury's determinations on the lack of credibility of the defendant's evidence on the issues of falsity and actual malice were reasonable, it too should ignore that evidence. Consequently, and "[i]n light of the undisputed evidence and the remainder of [the] testimony" it affirmed the jury's finding of actual malice.

Charge Error

While the existence of defamation per se is generally a question of law, here such a finding was dependent upon fact issues that needed to go to the jury. Therefore, the court of appeals held that it was error for the trial court to refuse to submit certain questions and instructions related to defamation per se and presumed damages because the pleadings and evidence raised issues of whether the plaintiff was libeled in a manner injurious to its business."

Damages Award

The court rejected the contention that a jury may opt to award zero damages when instructed that a plaintiff is entitled to presumed damages under a finding of defamation per se. Consequently, it remanded the damages issue holding that the plaintiff would be entitled to some amount of presumed general damages if, on remand, the jury answered the defamation per se question affirmatively.

In summary, the court of appeals held that "the jury's finding of actual malice [wa]s supported by clear and convincing evidence and that the trial court erred in refusing to question and instruct the jury on the issues of defamation per se and presumed damages" and reversed and remanded the take-nothing.

Privacy

In ***Lowe v. Hearst Commc'ns, Inc.***, 487 F.3d 246 (5th Cir. 2007), a diversity case in which the invasion of privacy claim was based on defendant newspaper's publication of information which Texas Courts had "sealed" to prevent release of the information in the "202 documents" to the public, to the parties and their agents. The plaintiff, bankruptcy trustee for the estate of Ted and Mary Roberts, sued the newspaper publisher for invasion of privacy based on public disclosure of private facts.

The suit was based on an article published by the defendant, "describing a blackmail scheme carried out by two married attorneys, Ted and Mary Roberts. The article alleged that Mary had engaged in a series of extramarital affairs and that Ted had then extorted thousands of dollars from Mary's lovers by sending them draft Rule 202 petitions (the "202 documents") naming them as defendants. The 202 documents proposed to seek information on whether Ted had legal grounds for a variety of claims, including divorce and obscenity. These documents also mentioned Ted's intent to contact the men's wives and employers as witnesses. Under threat of litigation, as many as five men entered into settlement agreements with Ted, who received between $75,000 and $155,000 in total as a result. The article also contained the perspectives of five legal scholars as to the merits of the causes of action raised by Ted against Mary and her lovers and the ethics of Ted's behavior. Additionally, the story revealed details of the Roberts' domestic life, including their purchase of a $655,000 house in a San Antonio suburb, the fact that they had an eight-year-old son, and the fact that Mary was the daughter of a Lutheran minister. Ted Roberts has since been tried and convicted on charges of theft related to the allegations in the article."

A state trial court issued a protective order sealing the 202 documents when they were introduced in a separate court dispute between Robert West and his former law partner. Applying Texas law, the court determined that public disclosure of private facts requires proof, "that (1) publicity was given to matters concerning his private life; (2) the publication of which would be highly offensive to a reasonable person of ordinary sensibilities; and (3) the matter publicized was not of legitimate public concern."

The district court recognized the existence of "a legally cognizable expectation of privacy in the published facts but found that the information in the article was of legitimate public concern."

The complaint separated the information in the article into two parts, one which dealt with the criminal conduct and another which disclosed

personal details such as the purchase of a home and the existence of a child.

The court of appeals dispatched the first with its recognition that, "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions ... are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report." "Given the broad interpretation of newsworthiness, particularly with regards to alleged criminal activity, an article describing the use of the legal system by prominent local lawyers in a way that could be described as blackmail is a matter of public concern. In this case, the newsworthiness of the story was enhanced by a discussion regarding the legal ethics of Ted's actions, as well as by commentary from the prosecutor's office about its proposed response."

The court conceded that while a "general subject matter of a publication may be a matter of legitimate public concern, it does not necessarily follow that all information given in the account is newsworthy." But, it never-the-less declined to hold that the personal portions of the article were an invasion of privacy remarking that, "This Circuit has declined to get involved in deciding the newsworthiness of specific details in a newsworthy story where the details were "substantially related" to the story."

Finally, even if the article violated the state protective order the appropriate remedy lies in contempt of state court and not in liability for invasion of privacy where the information is a matter of public concern.