

DEFAMATION AND PRIVACY

The following cases cover the period of September 1, 2006 until April 1, 2007.

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Defamation:

Proof Requirement for a Public Official

In *Cox Tex. Newspapers, L.P. v. Penick*, No. 03-05-00504-CV., 2007 WL 486634 (Tex. App.—Austin Feb. 13, 2007, no pet. h.), “Penick, a public figure, filed suit claiming that he had been defamed in thirteen publications (including articles, an editorial series, and letters to the editor regarding a murder trial prosecuted in part by Penick) appearing in the *Smithville Times* between August 2, 2001, and January 3, 2002.”

The court of appeals ruled that Penick’s evidence was insufficient to rebut the defendants’ affidavit evidence in support of their motion for summary judgment because it failed to establish that he was specifically identified by some of the publications and, as to the others, it failed to establish malice.

Although Penick was involved in the prosecution under criticism, he was not mentioned by name or by office in ten of the publications and there was no evidence that readers would associate the article’s criticism with him individually in those publications.

The court of appeals rejected Penick’s argument that a publication can be considered “of and concerning” him as required for recovery based “solely on the fact that he supervised those specifically named or because he assumed that his status as a public figure would cause people to associate him with the article.”

The court of appeals quoted with approval from *Dean v. Dearing*, 263 Va. 485, 561 S.E.2d 686, 689 (2002), where the Supreme Court of Virginia wrote,

A member of a governmental group against which an allegedly defamatory statement is made can sustain a common law action for defamation only if that member can show the statement specifically implicated that member or each member of the group. Such implication can be shown by extrinsic evidence, but evidence that others “understood” the implication based solely upon a plaintiff’s membership in the

referenced group will not satisfy the “of and concerning” requirement.

Malice

A media defendant may negate the actual malice element of a public plaintiff’s *prima facie* case through summary judgment, as a matter of law, by proving that the publication was not made with knowledge of falsity or in reckless disregard of the truth.

Defense affidavits that are “clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted” shift the burden to the plaintiff to produce evidence of the contrary

Here, the court of appeals ruled that the defendants’ affidavits were sufficient, as a matter of law, to shift the burden to Penick to present evidence establishing a genuine issue of material fact which he failed to do. Consequently, it reversed and rendered in favor of appellant that portion of the district court’s order that denied summary judgment.

Privileges

In *Cloud v. McKinney*, No. 03-04-00656-CV., 2006 WL 2504383 (Tex. App.—Austin Aug. 30, 2006, no pet. h.) (not released for publication), the former executive director of the Texas Lottery Commission, brought suit alleging that she was defamed by McKinney, the governor’s chief-of-staff, and Walt, the governor’s re-election campaign spokeswoman, when each made statements to the media which Cloud claims accused her of lying.

McKinney’s and Walt’s motions for summary judgment were granted. Walt’s was granted because Cloud failed to prove malice, a necessary element for a public official to recover on a defamation claim. The trial court granted McKinney’s motion on the basis of an absolute privilege. Cloud appealed.

Absolute privileges allow certain governmental officials the freedom to carry out their job requirements without fear of being sued for defamation even if the statement was false or “published with express malice.” This privilege has been extended from the judiciary to heads of executive agencies, cabinet members and to lower ranking executive officials in certain circumstances.

The court of appeals held that the governor’s chief-of-staff is a sufficiently high-ranking policy-making official to be accorded an absolute privilege for statements made in the performance of official duties. Here, McKinney made the statements in question during a press conference and to members of his staff. The court reasoned that part of McKinney’s job was to answer questions regarding

matters of public concern including statements such as these concerning the resignation of a public official.

Since he was not individually liable the district court did not err in granting summary judgment in favor of McKinney on the grounds of official immunity.

In her defamation action against Walt, Cloud claimed that her own status as a public official did not bar her claim against Walt, because Walt acted with actual malice and thus lost any qualified or constitutional privilege she might have to Cloud's defamation claim.

The court of appeals upheld the trial court after finding that Cloud failed to provide evidence regarding Walt's mental state, a necessary predicate to a claim of actual malice and that there was no evidence in the record that Walt's statements were made with actual malice.

Damages and Liability

In, *Beaumont v. Basham*, 205 S.W.3d 608 (Tex. App.—Waco 2006, pet. filed), a former employee brought suit for defamation and invasion of privacy, among other claims, after being accused of embezzlement and a sexual relationship with a minor and for the defendants' break-in of her home. The trial court entered judgment on the jury verdict in favor of the plaintiff on the defamation and privacy claims.

Appellants contend that they are not liable for invasion of privacy because the invasion of privacy and the theft claims were based on the same injury and under the "one satisfaction rule," Texas law prohibits a "double recovery" when defendants commit technically different acts that result in a single injury.

Here, however, the court of appeals found that there was no double recovery because there was evidence of separate and distinct injuries resulting from the invasion of privacy and from the theft.

Appellants' contention that there was no evidence to support the jury's award of damages for loss of reputation was overruled because Appellants failed to contest the assertion that the statements were defamatory *per se*. Defamation *per se* presumes injury to the victim's reputation and supports recovery of general damages, including damages for loss of reputation which, in this case, the evidence supported.

Appellants' second issue, that the court abused its discretion by submitting a single question in the charge for multiple slander allegations, was overruled as harmless error since Appellants did not identify any of the statements as an invalid basis for recovery.

Finally, the court of appeals rejected Appellants'

argument that it was error to admit evidence of "bad acts supposedly committed by Beaumont" holding that evidence of extraneous conduct is admissible under Rule 404(b) to show malice in a defamation suit.

Privacy:

In an unpublished, per curiam opinion in, *Hatch v. Wal-Mart Stores Inc.*, 200 F. Appx. 310, (5th Cir. [Tex.] 2006), the court of appeals affirmed the district court's summary judgment in favor of Wal-Mart on all claims, including one for invasion of privacy.

The privacy claim failed because Hatch failed to present any evidence that the facts made known were communicated to the public at large as required by Texas. A cause of action for invasion of privacy under public disclosure requires proof that private facts were communicated to the public at large, not just a small group of persons.