DEFAMATION AND PRIVACY

The following cases cover the period of September 1, 2007 until February 29, 2008.

MICHAEL MORRISON

DEFAMATION

Qualified Privileges

In *Thomas-Smith v. Mackin*, 238 S.W.3d 503 (Tex. App.—Houston [14th Dist.] 2007, no pet.), Thomas-Smith, the university provost questioned, during a phone conversation with Rambally, the Dean of Arts and Science, whether her recommendation of Mackin for an appointment was based on a "love" or "lover" relationship between Rambally and Mackin. Mackin, who was married, learned of the comment, filed suit and was awarded $40,000 for reputational injury.

The court of appeals held that evidence that the comment was related to a subject about which Thomas-Smith, as provost, had a duty to communicate with Dean Rambally was sufficient to raise a fact issue on the existence of the qualified privilege of common interest. This entitled Thomas-Smith to a jury question on whether she was entitled to the privilege. Consequently, the trial court's refusal to submit the requested question was reversible error and the case was remanded for further proceedings.

The next two cases, *Abdel-Hafiz v. ABC, Inc*., 240 S.W.3d 492 (Tex. App.—Fort Worth 2007, pet. filed) and *Fox Entm't Group, Inc. v. Abdel-Hafiz*, 240 S.W.3d 524 (Tex. App.—Fort Worth 2007, pet. filed), both deal with the evidentiary requirements necessary to support or defeat a motion for summary judgment where the case turns on actual malice within a defamation context.

Both defamation actions were brought by Abdel-Hafiz, an Egyptian born Muslim who became a naturalized U.S. citizen and a special agent in the FBI, and involve claims against news organizations and their agents (*ABC* also included claims against FBI personnel) following network broadcast allegations that Abdel-Hafiz had damaged the FBI investigation by refusing to record a conversation with another Muslim.

It is undisputed that around April 1999, (1) Abdel-Hafiz was asked to secretly record a Muslim suspect in an FBI investigation code-named "Vulgar Betrayal" which was focused on "identify[ing] and neutraliz[ing] . . . the HAMAS terrorist support organization located within the United States," and (2) that he did not do so.

The trial court in *Fox* denied defendants' motions for summary judgment while in *ABC* the trial court granted the network and reporters' motion for summary judgment and dismissed the claims against the FBI personnel for want of jurisdiction. In both, on appeal, defendants were found to have been entitled under the evidence in the record to summary judgment or dismissal.

ABC

In *ABC*, the court of appeals, finding that nothing in the record raised a fact question in support of the existence of actual malice, affirmed the trial court.

Since neither party disputed that ABC had published the statements, the court of appeals confined its review of the summary judgment record to the "actual malice" standard which it held required evidence creating more than a surmise or suspicion of actual malice.

Appellant claimed: (1) that ABC published statements that it knew were substantially false and (2) that ABC chose its material with actual malice and omitted material facts and juxtaposed facts in a material way such that the gist of the Broadcast and the Article was false.

After examining the evidence in the record pertaining to the state of mind of ABC's reporters, researchers, and related staff at the time that the Broadcast and Article were published, the court found it failed to raise a fact question on malice.

Further, after reviewing the evidence and "bearing in mind that a publisher's presentation of facts may be misleading but still not constitute a 'calculated falsehood' unless the publisher knows or strongly suspects that it is misleading, and considering the totality of the story presented by ABC in its Broadcast," the court found no evidence that ABC deliberately omitted or juxtaposed the information in order to present a substantially false impression of Appellant.

Fox

Again, as in *ABC*, neither party disputed that Appellant published the statements. Appellee contended that: (1) Appellant purposefully avoided the truth; (2) Appellant knew the statements were false or acted with reckless disregard to their truth or falsity; and (3) Appellant selected its material with actual malice and made deliberate omissions.

After withdrawing its August 31, 2007 opinion and judgment, the court of appeals held that, based upon its review of the record, there was no evidence that Appellant purposefully avoided the truth, published the statements or made omissions with actual malice and reversed and rendered that Abdel-Hafiz take nothing.

In *Belo Corp. v. Publicaciones Paso Del Norte, S.A. De C.V.,* 243 S.W.3d 152 (Tex. App.—El Paso 2007,

pet. denied),[1] a Mexican newspaper brought suit against Belo and two journalists for defamation and business disparagement, based upon a published article suggesting that *El Diario* "soft-peddled" its coverage of investigations related to the murders of over 400 women in Juarez over a period of a decade in order to attract advertising revenue from the local government. Defendants' filed this interlocutory appeal following the trial court's denial of their motion for summary judgment.

The article in issue portrays how *El Diario,* published by Osvaldo Rodríguez Borunda, and *Norte de Ciudad Juárez,* published by Oscar Cantú Murguia, viewed the killings and their effect on the image of the city. *Norte* theorized that the rich, the powerful, the government, organ traffickers, or Satanists have perpetrated the murders, while *El Diario* took the position that the over 400 murders are all cases of domestic killings.

The article also highlighted the growth of *El Diario* to a daily circulation of 60,000, making it the largest newspaper in Juarez while *Norte's* circulation dwindled from 30,000 to fewer than 18,000. Cantú blames the decline on government officials whom he says have withheld government advertising and threatened local vendors who sell his newspaper. Rodríguez disputes the charges that he has soft-peddled his reporting in return for government advertising. The article reports that the Juarez city government accounted for $400,000 of *El Diario's* advertising revenue in 2003 while the Chihuahua state government spent $350,000. The piece concludes: "Mr. Rodriguez said he's in no one's pocket.... He said government advertising accounts for only a small fraction of his ad revenue.... But *El Diario* is full of advertising, while *Norte* is not."

El Diario argues that Belo grossly distorted the truth regarding its coverage and, that relying on only two of the paper's articles was "glaringly deceptive."

The court of appeals held that, as a public figure, El Diario may recover for the omission of facts only upon proof that the publisher selected the material with actual malice. Here, the court of appeals held that the evidence failed to support the conclusion that Belo knew it was creating the false impression or that the alleged omissions and distortions, by themselves, constituted evidence of actual malice.

Further, the fact that Belo may have been motivated by a desire to increase its own circulation, was not dispositive, the court wrote, because even though a defendant may have published defamatory material to increase its own profits, this does not, by itself, establish a knowing falsehood or a reckless disregard for the truth or falsity of the impression created thereby.

The court of appeals accordingly concluded that there was "less than a scintilla of evidence to create a genuine issue of material fact concerning actual malice and reversed and rendered in Belo's favor.

Limitations

In *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.,* 512 F.3d 137 (5th Cir. 2007), the Circuit Court held that the single publication rule applies to an alleged defamatory publication which was published by the defendant both as an article in its daily newspaper and also as a story on the newspaper's web site and that limitations under the "single publication rule" begin to run when publication is complete. In Texas a publication is complete on "the last day of the mass distribution of copies of the printed matter" and retail sales of individual copies after that date or subsequent sales of back issues do not trigger a new limitations period, though new printings of the original content would.

The Dallas Morning News published the allegedly defamatory article in its July 29, 2003 print edition, and Nationwide filed its complaint on July 28, 2004, just within limitations. It then failed to serve Belo for more than 10 months. The district court held that this lengthy and unexplained delay failed to satisfy the due diligence requisite to could allow service outside of limitations to relate back to a timely filing.

Nationwide argued that the continued availability of the article on the defendant's website was, for limitations purposes, a republication each time a viewer accessed it under the so called "continuous publication" and that service was therefore timely.

Texas courts have yet to decide whether the single publication rule should apply to Internet publications so the 5th Circuit made an "Erie guess" and concluded that Texas would not follow the continuous publication rule urged by the plaintiff for internet publications.

Based upon its determination that only a single court has applied "continuous publication" while all other courts have rejected it in situations such as this, the court held that, "[P]olicy considerations favor application of the single publication rule here and we note that application of the rule in this context appears consistent with the policies cited by Texas courts in adopting and applying the single publication rule to print media: to support the statute of limitations and to prevent the filing of stale claims."

The court was influenced by reasoning that a statement called up when a web page is accessed is no different from a statement on a paper page which is accessed by readers from time to time. While recognizing important differences between print media and the Internet, the court found that the similarities between the two support application of a consistent rule.

Applying the single publication rule here, the statute of limitations began to run on July 29, 2003, the date the initial print publication was complete.

The court of appeals saw no reason to address

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[1] OPINION NOT YET RELEASED FOR PUBLICATION

whether the web site story constituted a "republication" under the single publication rule since Nationwide's suit would be time-barred based on either date because of its undue delay in serving the defendant.

The rule is that, "If a plaintiff files suit within the limitations period, but serves the defendant after the limitations period has expired, the date of service relates back to the date of filing if the plaintiff exercises due diligence in obtaining service." *See Auten v. DJ Clark, Inc.*, 209 S.W.3d 695, 698 (Tex.App.-Houston [14th Dist] 2006, no writ). However, Nationwide's more than 10-month unexplained delay in serving Belo was unreasonable as a matter of law, and thus Nationwide's claims are barred by the statute of limitations.

PRIVACY

Public Information Requests

In, *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 03-07-00102-CV, 2008 WL 160173 (Tex. App.—Austin Jan. 17, 2008, pet. filed),[2] the comptroller argued that common law and constitutional privacy precluded the release under a public information request of a state employee's date of birth.

On November 18, 2005, an editor from *The Dallas Morning News* submitted a request to the Comptroller for an electronic copy of the Texas state employee payroll database. When the Attorney General concluded that employee date-of-birth information is public and must be disclosed the Comptroller filed suit seeking declaratory relief from compliance with the Attorney General's letter ruling.

The court reviewed and rejected each basis argued by the comptroller in justification of a privacy interest. It rejected each common law claim based upon the lack of proof that releasing date-of-birth information would be highly offensive or embarrassing to a reasonable person. It rejected the constitutional privacy claim because there was no showing that such information falls within any recognized zone of privacy.

Summary judgment was therefore properly granted in favor of the News on the ground that date-of-birth information is not protected under the constitutional right to privacy.

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[2] OPINION NOT YET RELEASED FOR PUBLICATION