

DEFAMATION AND PRIVACY

The following covers the period of September 1, 2008 through March 31, 2009.

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DEFAMATION

In Varkonyi v. The State of Texas, 276 S.W.3d 27 (Tex.App.-El Paso 2008, Pet. Ref'd), the criminal defendant appealed his conviction on charges of promotion of or possession with intent to promote obscene materials for which he was sentenced to confinement in the El Paso County Jail for twenty days.

The following excerpt from an email sent by the defendant to a police undercover officer conveys a sense of the evidence: "I attached one [video] clip of the Pony enjoying himself, on good faith. [illegible] can have more when I get to enjoy one of the ladies you offered to introduce to me. You can call me anytime for more info or to set-up another meeting."

Appellant raised a challenge to the facial constitutionality of the Texas obscenity statute claiming that it criminalizes, through its definition of "promote," the transfer of material which can lawfully be used or viewed in private.

The El Paso Court of Appeals, noting that obscene material itself is not protected by the First Amendment held that Appellant's conviction does not criminalize constitutionally protected conduct, affirmed the conviction. The court reasoned that while "Appellant's viewing of the material in the privacy of his own home is protected conduct, his exhibition of the material to the undercover police officers in the context of a business transaction involving the employment of Appellant to set up a pornographic website is not." "Nor does Appellant have a right to give obscene material to others. Consequently, his transmission of the video as an e-mail attachment is not constitutionally-protected conduct. Section 43.23 (c)(1) was constitutionally applied to Appellant and his conduct under the facts of this case."

In Hadlock v. Texas Christian University, 2009 WL 485669 (Tex.App.-Fort Worth) No. 2-07-290-CV., Feb. 26, 2009(No Pet.)¹, the Fort Worth Court of Appeals, by memorandum opinion, upheld a summary judgment against the defamation claims of Plaintiff.

Hadlock was denied tenure as an instructor of French at TCU and claimed that he was defamed through several, independent oral or written publications during the process. The defendants moved for a no-evidence summary judgment and the trial court and the court of appeals both held that the evi-

¹ SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

dence failed to specifically identify where within the record a defamatory statement resided or incorrectly identified, as defamatory, specific statements which the courts found were not reputationally injurious.

PRIVACY

In re Manion, No. 07-08-0318-CV, 2008 WL 4180294, (Tex.App.-Amarillo Sept. 11, 2008, Orig. Proceeding)² Realtors, Tommy Manion and Tommy Manion of Texas, Inc., filed a petition for a writ of mandamus alleging an abuse of discretion by the trial court in the signing of an order granting the discovery of certain financial documents as overly broad as to scope and time, unduly burdensome, and which would require the production of private and confidential information.

There is no presumption of privilege. The party attempting to prevent or restrict discovery has the burden of pleading and proving the basis for the desired limitation and Manion cited no authority in support of a constitutional right to privacy in such records to counter existing case law to the contrary and his counsel's conclusory assertions are not evidence. Finally, he failed to meet his burden of proving that Freeman's requests were overbroad, *i.e.* unrelated in time to the litigation. Therefore, the record does not support a conclusion that the trial court abused its discretion by ordering the discovery of Manion's financial documents from 2000 to the present.

LEGISLATIVE DEVELOPMENTS

House Bill 4237, introduced by Representative Peña, if passed, would extend the statutory privileges currently available to traditional publishers to "citizen journalists" utilizing the internet, through amendments to Title 4, Civil Practices & Remedies Code, Sections 73.002 and 73.004 as set out below:

Sec. 73.002. PRIVILEGED MATTERS.

(a) The publication by a newspaper, internet website, weblog, or other periodical of a matter covered by this section is privileged and is not a ground for a libel action. This privilege does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.

(b) This section applies to:

(1) a fair, true, and impartial account of:

(A) a judicial proceeding, unless the court has prohibited publication of a matter because in its judgment the interests of justice demand that the matter not be published;

(B) an official proceeding, other than a judicial proceeding, to administer the law;

(C) an executive or legislative proceeding (including a proceeding of a legislative committee), a proceeding in or

²SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

before a managing board of an educational or eleemosynary institution supported from the public revenue, of the governing body of a city or town, of a county commissioners court, and of a public school board or a report of or debate and statements made in any of those proceedings; or

(D) the proceedings of a public meeting dealing with a public purpose, including statements and discussion at the meeting or other matters of public concern occurring at the meeting; and

(2) reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information.

Sec. 73.004. LIABILITY OF BROADCASTER. (a) A broadcaster is not liable in damages for a defamatory statement published or uttered in or as a part of a radio, ~~[or]~~ television, or internet broadcast by one other than the broadcaster unless the complaining party proves that the broadcaster failed to exercise due care to prevent the publication or utterance of the statement in the broadcast.

(b) In this section, “broadcaster” means an owner, licensee, [or] operator of a radio or television station or network of stations and the agents and employees of the owner, licensee, or operator, or a person or business who streams images or images and sound using the internet and a website or blog, and their agents and employees.

SECTION 2. The change in law made by this Act applies only to libel actions brought on or after the effect date of this Act, regardless of the date the libel occurred.

SECTION 3. This Act takes effect September 1, 2009.