Defamation and Privacy

The following cases cover the period of April 1, 2011 – September 30, 2011.

Michael Morrison

DEFAMATION

Per se* and *Per quod

Hancock v. Variyam,[1] No. 07–09–0277–CV, 2011 WL 2463085 (Tex.App.-Amarillo June 16, 2011)

Finding that statements in letters written by Hancock were libelous *per se,* the jury awarded Variyam actual damages of $90,000 and exemplary damages of $85,000. Hancock argues on appeal that the trial court erred by finding, as a matter of law, that his statements were libel *per se* and that Variyam failed to prove that Hancock's statements caused him any damage.

Defamation claims are divided into two categories, defamation *per se* and defamation *per quod,* according to the level of proof required in order to make them actionable. Statements that are defamatory *per quod* require proof of both the defamatory nature of the statement and the amount of damages caused by the defamation. In defamation *per se,* general damages are presumed.

"A communication is considered libel *per se* when it is so obviously hurtful to the person aggrieved that no proof of its injurious character is required to make it actionable. A false statement will typically be classified as defamatory *per se* if it: injures a person in his office, profession, or occupation; charges a person with the commission of a crime; or imputes to him a loathsome disease."

"Whether a given statement is reasonably capable of a defamatory meaning is a question to be decided by the trial court as matter of law. . . . This is an objective test, not a subjective one. Thus, the parties' opinion of the statements, or the defendant's intent in making the statements have no bearing on whether they are defamatory. 'Common sense requires courts to understand the statement as ordinary men and women would' and the question whether a statement is defamatory *per se* is only submitted to the jury if the contested language is ambiguous or of doubtful import. Otherwise, it is an issue of law for the trial court to decide. Therefore, according to this body of law, a written communication, made by a nonmedia defendant, concerning a private-figure individual and pertaining to a nonpublic issue, which is obviously hurtful to the aggrieved party in his profession or occupation, is libel *per se." [Citations omitted]*

The court of appeals found that Hancock's written statements that Variyam had a "reputation for lack of veracity" and "deal[t] in half truths, which legally is the same as a lie" were libelous *per se;* that the evidence was legally and factually sufficient to support the jury's award of $60,000 in damages; and that exemplary damages, in a ratio of less than 1 to 1 to general damages, were not excessive.

Downing v. Burns,[2] No. 14-09-00718-CV, 2011 WL 3196944 (Tex. App.—Houston [14th Dist.] July 28, 2011, no pet. h.).

Downing sued the Burnses for defamation based on a statement to a third party that Dowing had stolen from them that apparently spawned a rumor that spread to others in their industry.

The court of appeals reversed the trial court's judgment n.o.v. in favor of the defendants, holding that statements that Downing stole checks or money were defamatory *per se* and legally sufficient evidence to support the jury's liability finding of defamation.

The court of appeals rejected the Burnses argument that Downing cannot recover for defamation *per se* because her pleadings alleged only "defamation" and the jury was charged only with defamation *per quod*.

The court wrote, "In support of this argument, they

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cite *Hines*, in which we held that the trial court charged the jury only on defamation *per quod*, and we did not apply the damage presumption applicable to defamation per se. Here, as in *Hines*, the defamation-damage question in the charge did not include an instruction that damages were presumed. *Id.* at 501. Unlike the case before us, however, the plaintiff in *Hines* never argued that the presumption of general damages from defamation per se applied. *See id.* Further, the plaintiff in *Hines* also requested and received economic damages for the defamation claim, and economic damages are not general damages which can be presumed to flow from defamation per se. In contrast, the trial court did not instruct the jury in this case to consider or award economic damages for defamation. Because the trial court did not charge the jury to determine Downing's economic damages from defamation, the jury's answers do not show that Downing—unlike Hines—was awarded damages that could not have been presumed. We therefore conclude that the trial court erred in granting the Burnses' motion for judgment notwithstanding the verdict with regard to the defamation claim."

Just Joking

Garcia v. MAC Equip., Inc., Civil Action No. H-09-902, 2011 WL 4345205 (S.D. Tex. Sept. 15, 2011).

Alleging that he was fired in retaliation for reporting that he was the victim of sexual harassment, Ricardo Garcia sued his former employer, MAC Equipment, Inc., and two employees on multiple theories, one of which was defamation based upon serial publications by a co-worker that Garcia was homosexual. The summary judgment defense was that the publications were jokes and could not reasonably be taken as factual.

Among the "jokes" were comments such as:

Garcia was "[another employee's] bitch."

Garcia had a "weird sexual orientation,"

Gossip, jokes and mocking Garcia about being homosexual.

The defendants only argument in support of their summary judgment is that Espinoza was just joking.

The court of appeals noted that " '[a] defendant cannot escape liability for defamatory factual assertions simply by claiming that the statements were a form of ridicule, humor or sarcasm.' '[A]s stated by an Irish court, 'The principle is clear that a person shall not be allowed to murder another's reputation in jest' and that 'if a man in jest conveys a serious imputation, he jests at his peril.' "

"The proper focus of judicial inquiry ... is not whether the allegedly defamatory statement succeeds as comedy, nor whether its audience thought it to be humorous or believed it to be true; the threshold inquiry is simply whether the communication in question could reasonably be understood in a defamatory sense by those who received it."

The court concluded that, under the circumstances described in the summary judgment record, the question of "[w]hether the remarks were actually understood as harmless jokes or as defamatory statements is for the trier of fact to determine."

[in dicta]

In Texas, the imputation of homosexuality was historically defamatory *per se* because it was tantamount to sodomy, which was then criminal. But the Texas cases have not addressed whether an imputation of homosexuality continued to be defamatory as a matter of law after the United States Supreme Court overturned the Texas sodomy statute in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

Several courts from other jurisdictions have held that a false statement that an individual is homosexual is not defamatory *per se* after Lawrence and at least one has held that a such a statement can never be defamatory. However, since neither party raised the issue, the court of appeals refrained from address it.

Consent

Brooks v. AAA Cooper Transp [ACT], Civil Action No. H-10-0818, 2011 WL 999567 (S.D. Tex. Mar. 18, 2011).

Plaintiff was terminated by ACT for his refusal to cooperate with a random drug test required by DOT drug testing regulations. The defamation claim is based on ACT's response to an information request from Casual Driver Leasing Services, LLC ("CDL"), for information regarding Plaintiff's former employment with ACT.

ACT's Safety Department representative checked

"Yes" to the question on the form that asked, "Has this person refused (includes verified adulterated and substituted results) to take a required test for drugs and/or alcohol in the last three years?" ACT was required by Federal regulation to provide this information.

The information request form contained a signed release from Plaintiff "releasing ACT from all liability in connection with its response to the information request."

While the court of appeals recognized that such consent is limited and does not "immunize defamations that the plaintiff had no reason to anticipate," it found that ACT's response on the CDL form was within the scope of the release and that his consent barred his action for defamation.

The court of appeals further held that Defendant was entitled to summary judgment on Plaintiff's claim for violation of the Privacy Act of 1974 since the Act is applicable to federal agencies only and does not regulate the conduct of private companies.

Business Exclusion

Safeco Ins. Co. of Ind. v. Hiles, Civil Action No. 3:10-CV-1289-D, 2011 WL 3500998 (N.D. Tex. Aug. 9, 2011).

The court of appeals granted insurer's motion for summary judgment against insured's claim of coverage under a homeowner's policy.

Safeco established that the defamation claim against Hiles in *Anderton* [the lawsuit for which coverage was claimed] is subject to a policy exclusion of business activities. Read fairly, the relevant pleadings allege no facts that suggest that any non-business activities of Hiles were involved in the *Anderton* plaintiff's claims. "For the business pursuits exception to apply, it is not necessary that a pleading contain a specific reference to business pursuits or to profit. *See, e.g.,* Hallman, 159 S.W.3d at 644–45 (inferring from nature of activity alleged in petition that defendant acted with profit motive, and applying business pursuits exclusion). As in *Hodges*, the primary thrust of the *Anderton* petition is the business relationships among Hiles, Anderton, and Cawley"

Email

Nart v. Open Text Corp., No. A-10-CA-870 LY, 2011 WL 3844216 (W.D. Tex. Aug. 29, 2011).

Following the termination of his employment, Selim Nart brought suit alleging numerous tort claims including defamation. Nart alleged that an email providing the reasons for his termination sent by Defendant's Human Resources Manager, David Lasater, defamed him.

The court of appeals held that the email communication in question is entitled to a qualified privilege. The email did not exceed the scope of the privilege as no facts suggest that the reasons for his termination were communicated to anyone outside the company or to anyone without an interest in the subject matter.

The qualified privilege immunized Defendants as Nart failed to produce any evidence of actual malice to defeat it.

Limitations and Actual Malice

Pitts & Collard, L.L.P. v. Schechter, No. 01-08-00969-CV, 2011 WL 1834813 (Tex. App.—Houston [1st Dist.] May 12, 2011, no pet. h.).

Plaintiff alleged that as retribution for a dispute over referral fees between his and defendant's law firms, Pitts made slanderous statements to the Houston City Council before approval of Schechter's nomination to serve as the Chairman of the Metropolitan Transit Authority of Harris County and that Pitts slandered him to professional colleagues

The trial court entered judgment for Schechter for compensatory and punitive damages on the defamation claim that alleged Pitts slandered him to his colleagues; and judgment n. o. v. in favor of Pitts on Schechter's defamation claim relating to statements made before the Houston City Council because these claims were barred by limitations.

The court of appeals found that Pitts waived the affirmative defense of limitations by failing to submit an issue on limitations or to object to its omission.

The court of appeals reversed and rendered a take-nothing judgment on Schechter's professional colleague defamation cause of action.

Pitts challenged the trial court's judgment in Schech-

ter's favor on the defamation claim based on statements to Schechter's professional colleagues as barred by limitations. He also argues that Schechter should have obtained a jury finding of actual malice.

Schechter's nomination to chair the METRO board was a matter of public concern that impacted the entire Houston area making him a public figure for purposes of the challenged publication and requiring him to prove actual malice.

"Schechter contends that Pitts waived his complaint about the absence of an instruction on actual malice. Pitts did not object to the malice instruction that was submitted to the jury, which constitutes a waiver under application of the ordinary procedural rules.

He did not request that the jury be instructed on actual malice, offer a substantially correct question, or in any other way indicate that he thought the charge was improper because Schechter was a public figure. *See* TEX.R. CIV. P. 278 ("Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment....").

In an ordinary case, the lack of an objection by Pitts would require us to evaluate the sufficiency of the evidence with respect to the court's charge, and not some other law that was not identified to the trial court. Even when fundamental constitutional rights are at stake, the rules of appellate procedure bar review of unpreserved error except in very narrow circumstances.

"However, the free-speech implications of this case require that we find waiver only in circumstances that are "clear and compelling. Our research has not uncovered a single example after the landmark case of *New York Times v. Sullivan* in which a procedural waiver at trial of a First Amendment right was found to be so clear and compelling as to preclude appellate review. . . . Accordingly, we proceed to review de novo the sufficiency of the evidence to show actual malice."

Following its independent review of the record, the court sustained Pitts's issue, though "raised for the first time on appeal, that the evidence is legally insufficient to establish that he acted with the actual malice required for him to be liable on a claim of defamation against a public figure."

Bankruptcy

In re Pilgrim's Pride Corp., No. 08-45664 (DML), 2011 WL 3799835 (Bankr. N.D. Tex. Aug. 26, 2011).

Citing several other opinions, the court concluded that a party's claim for defamation must be tried before a District Court.