

Defamation and Privacy

The following cases cover the period of October 1, 2011 – March 31, 2012.

Michael Morrison

DEFAMATION

In, *Hotze v. Miller*, No. 12–10–00413–CV, 2012 WL 76151 (Tex.App.-Tyler Jan. 11, 2012) rehearing overruled (Mar 19, 2012), Hotze, an M.D., appealed the denial of his summary judgment motions in a defamation suit brought against him by Keith E. Miller, M.D. Miller chaired the Disciplinary Process Review Committee of the Texas Medical Board (TMB). Miller’s defamation action was based on communications Hotze made to board and staff members of the TMB about Miller. The court of appeals rejected Miller’s assertion that he was not a public official and therefore need not establish actual malice.

The court reasoned that the TMB is an executive body of state government whose members are executive officers of the state. The TMB's powers and duties are given by the legislature in order for the state to regulate the practice of medicine within its borders. The TMB has discretion to issue a license to practice medicine in Texas which it may suspend or revoke.

Thus, TMB members are executive officers of the state who have substantial control over governmental regulation of medical practitioners, an issue of public concern. A fortiori, Miller, as a TMB board member, is a public official who must prove actual malice to recover for defamatory statements that relate to his official conduct.

In, *Cullum v. White*, No. 04-09-00695-CV, 2011 WL 6202800 (Tex. App.—San Antonio Dec. 14, 2011, no pet. h.), a ranch owner sued a former employee for libel after the defendant included in emails sent to past customers of the plaintiff and posted on a webpage allegations or insinuations such as:

Plaintiff:

- Had a “severe drinking issue,”
- Was a “pathological liar,”
- Would be “federally charged”
- Had admitted “to shooting and killing a Mexican transient on the Ranch”
- Was “ ‘flagged’ by the FBI for possible ‘terrorist activity’ ”

The court of appeals concurred that “the emails and the webpage clearly include actionable defamation. From the summary set out above, a reasonable person could understand the publications as a whole as defamatory. The publications contained facts that accused White of illegal activity and impeached her honesty, integrity and ethics personally and in her business as a ranch operator. There is more than a scintilla of evidence to support the finding of libel.”

While affirming the award of compensatory damages, the court of appeals reversed the award of

exemplary damages.

In, *Burbage v. Burbage*, No. 03-09-00704-CV, 2011 WL 6756979 (Tex. App.—Austin Dec. 21, 2011, no pet. h.), Kirk Burbage sued his brother Chad for defamation based on, among other allegations, that Chad in letters and in a website published allegedly defamatory comments including allegations such as the following:

“Anna Burbage (‘Miss Anna’) was a victim of Elder Abuse. The Abuser was her grandson, Kirk Burbage and others.”

“Virginia Burbage Markham . . . is being abused by her son, Kirk Burbage, of the Burbage Funeral Home. She is currently a victim of ELDER as well as FAMILY ABUSE.”

“The methods [of abuse of Virginia Markham by Kirk Burbage] include: lies, trespassing, grand larceny, will tampering/undue influence, gifts with the intent to control his mother, discrediting fellow sib-lings, deceptively misrepresenting the contents of legal documents requiring the signature of the ABUSED for personal gain and to cover up land fraud and involving the ABUSED ELDER in Cemetery Land Fraud implicating several families including Shirley and Brice Phillips of the Phillips Crab House.”

“Kirk Burbage has also been known to abuse the dead, specifically his cousin, Anne Prettyman Jones.”

The court of appeals upheld a jury verdict which awarded \$3,802,000 in non-economic, compensatory damages, as follows: \$300,000 for past injury to reputation; \$3,500,000 for future injury to reputation; \$1,000 for past mental anguish; \$1,000 for future mental anguish and \$5,800,000 in exemplary damages. The court reduced the exemplary damages to \$750,000 as required by Tex.Civ.Prac.&Rem. 41.008(b), as no economic damages were awarded.

PRIVACY

In, *Jones v. Houston Community College System*, 816 F.Supp.2d 418 S.D. Texas 2011, the court concluded that community college security officers had a reasonable expectation of privacy in “room 136” of the security office of HCC's Coleman College for Health Sciences. Among its other uses, room 136 was where officers “in the normal course of business” changed between their street clothes and uniforms after closing and locking the office door. The court found that, under the circumstances, evidence that the defendants had installed a covert surveillance camera to video the interior of room 136 was sufficient to defeat defendants’ motion to dismiss.

In, *FAA v. Cooper*, --- S.Ct. ----, 2012 WL 1019969 (U.S.), Cooper, a licensed pilot, intentionally failed to disclose his (HIV) diagnosis to the Federal Aviation Administration (FAA), as required. At some point, he applied for and received long-term disability benefits on the basis of his HIV status from the Social Security Administration (SSA). On multiple occasions thereafter, he continued to withhold information about his condition from the FAA, in order to renew his certificate.

Cooper's deception was revealed when the Department of Transportation (DOT), the FAA's parent agency, and the SSA exchanged data as part of a joint criminal investigation to identify medically unfit individuals who had obtained FAA certifications. Consequently, his pilot certificate was revoked and he was indicted for making false statements to a Government agency.

After pleading guilty and being fined and sentenced to probation, Cooper filed suit, alleging that the FAA, DOT, and SSA violated the Privacy Act of 1974, which allows an aggrieved individual to sue for "actual damages," if the Government intentionally or willfully violates the Act's requirements in such a way as to adversely affect the individual. Specifically, he claimed that the unlawful disclosure to the DOT of his confidential medical information had caused him mental and emotional distress. The District Court concluded that the Government had violated the Act. But, finding the term "actual damages" ambiguous, the court relied on the sovereign immunity canon, which provides that sovereign immunity waivers must be strictly construed in the Government's favor, to hold that the Act does not authorize the recovery of non-pecuniary damages. Reversing the District Court, the Ninth Circuit concluded that "actual damages" in the Act is not ambiguous and includes damages for mental and emotional distress. The Supreme Court, in reversing the Ninth Circuit [once again], held that the Privacy Act does not unequivocally authorize damages for mental or emotional distress and therefore does not waive the Government's sovereign immunity from liability for such harms. Cooper loses.