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***Defamation*: Defamatory Effect Is Determined by a Publication's "Gist" as Understood by an Objectively Reasonable Person; "Gist" May Not Be Decided Solely From Crowd-Sourced Resources.**

D Magazine Partners, L. P. v. Rosenthal involved a publisher's motion to dismiss a defamation suit pursuant to the Texas Citizen's Participation Act (TCPA). Rosenthal sued D Magazine for an article referring to her as a "welfare queen." The article pointed out that Rosenthal received benefits under the state Supplemental Nutrition Assistance Program while living in one of Dallas's most affluent areas. Rosenthal maintained that the gravamen of the article was that she had engaged in welfare fraud. An earlier investigation by the Texas Health & Human Resources Commission found no wrongdoing, however.

Under the TCPA, defendants may move to dismiss as unmeritorious suits "based on, relate[d] to, or … in response to a party's exercise of the right of free speech." Tex. Civ. Prac. & Rem. Code. § 27.003(a). According to Justice Lehrmann's opinion, the TCPA's dismissal provisions are designed to balance protecting a defendant's free speech rights from vexatious litigation against preventing defamation of the plaintiff's by constitutionally unprotected speech.[2]

To avoid dismissal, the plaintiff must present clear and convincing evidence of a prima facie case for each element of the claim subject to the TCPA. Even if the plaintiff meets this burden, the defendant may nevertheless obtain dismissal proving each element of a valid defense by a preponderance of the evidence. When the plaintiff is a private individual, the elements that must be proved include: (1) defendant's publication of a false statement (2) made with negligence regarding its truth; (3) that defamed the plaintiff; (3) and (4), unless the statement was defamatory *per se*, damages. In *D Magazine*, the central issue was whether the statement was defamatory.

> *The Gist of the Article Was Defamatory Because, As a Whole, It Created the Perception the Subject Fraudulently Obtained SNAP Benefits.*

Under the court's precedent, a statement is defamatory if the "gist" of the publication as a whole would be perceived by the objective "reasonable person" to be more harmful to the plaintiff's reputation than a substantially truthful

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[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

[2] The major, and perhaps only, difference between a TCPA dismissal motion and a summary judgment motion appears to be that the former burdens the non-movant with a clear and convincing evidence standard, as opposed to a legally sufficient evidence standard. The opinion does not address whether the Legislature may validly assume, as it apparently does, that the burden of litigation is an especial threat to free speech, as opposed to other interests also adversely affected by litigation costs. Another way to view it is that the cost of litigation is an incidental but equal and necessary burden on all the privileges of membership in a civilized society that prefers the courtroom to the cudgel.

publication would have been. The dispute here was about what the "gist" of the article was – i.e., would a reasonable person perceive that "welfare queen" suggested that the plaintiff obtained benefits fraudulently. The court of appeals resorted to Wikipedia as evidence that fraud was implied in one of the phrase's two popularly understood meanings. The supreme court first catalogued the benefits and, with greater gusto, the potential failings of a crowd-sourced reference. It suggested that such resources might be an appropriate supplement, but it rejected the opinion of the court of appeals because it relied on Wikipedia as a primary authority for the commonly understood meaning of "welfare queen" to conclude that the gist of the article was defamatory. In a separate concurring opinion, Justice Guzman examined in great detail the perils of citing to and relying on sources like Wikipedia and the observations of commentators about when the use of such resources was inappropriate in judicial decisions.

The supreme court came to the same conclusion as the court of appeals: the article was defamatory. But it did so only after considering the overall effect of the whole article, not just the impression created by the provocative use of "welfare queen" in the title. To support its determination that the "gist" of the article was that Rosenthal had committed fraud, the court referred to a statement that Rosenthal "must" have been less than forthcoming, suggesting that she had withheld information. It also considered statements that were juxtaposed in a way to "strongly imply" that she had undisclosed financial resources. The opinion notes that there were individual statements in the article that were exculpatory, but the supreme court reiterated that "gist" is determined from the context of the article as whole, not isolated statements. The "gist," it concluded, was that Rosenthal had engaged in dishonesty to obtain SNAP benefits, that this central assertion was untrue and defamatory. This conclusion foreclosed the magazine's contention that Rosenthal had failed to prove that the article was untrue. This conclusion also eliminated the publisher's defense based on the "fair comment" privilege because the privilege only applies to statements that are "fair, true, and impartial."

> *The Magazine Was Negligent In Publishing the Article Because It Failed to Adequately Check Sources or Confirm the Accuracy of the Information With the Article's Subject.*

The opinion then turned to whether D Magazine had been negligent in publishing the article, which had been written by an anonymous author. There was evidence that the magazine confirmed information in the article that was based on public information. But the evidence also showed that the magazine never contacted the state agency about confidential information that the article claimed was obtained from the agency's records. Rosenthal informed the magazine before publication that she believed someone that was harassing her submitted the article. While the magazine asserted that the author was not the harasser, it never confirmed any details about the author's identity and credentials. The magazine asked Rosenthal for comment on the general thrust of the article before publication, but it did not review the specifics of the article with her. The opinion concluded that these failings were more than enough to surpass the TCPA's prima facie case threshold for the negligence necessary to establish liability for defaming a private individual.

Although the magazine was unsuccessful in securing a TCPA dismissal of Rosenthal's defamation claim, it was successful in having her other claims dismissed. However, the trial court denied, the magazine's request for attorney's fees incurred in obtaining those other dismissals. The court of appeals refused to consider the magazine's challenge to this denial. The court of appeals reasoned that the case was before it on interlocutory appeal that was only authorized for orders *denying*, not granting, a dismissal. Accordingly, it concluded it had no jurisdiction to consider the attorney's fee issue. The supreme court disagreed. It ruled that the court of appeals had jurisdiction on the attorney's fee question because the fees were denied in the same *order* that denied the TCPA dismissal motion and that the magazine was entitled to recover attorney's fees incurred in obtaining the dismissals in a reasonable amount as determined by the trial court as part of further proceedings in the case.

***Sovereign Immunity & Subject-Matter Jurisdiction*: Sovereign Immunity from Suit May Not Be Used to Collaterally Attack a Judgment That Is Otherwise Final.**

When a governmental entity has not waived immunity from suit, courts are said to lack subject-matter jurisdiction over actions against such entities. In *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), the court ruled that statutory permission for political subdivisions to "sue and be sued" did not also waive sovereign immunity. *Tooke* overturned a prior decision which had been applied to the initial dispute between the litigants in *Engelman Irrigation District v. Shields Bros., Inc.* In that earlier case, Shields Brothers, Inc. recovered for breach of contract. Under the governing law at the time, "sue and be sued" was deemed sufficient to waive the district's immunity. Many years later, that rule was overruled in *Tooke*. After *Tooke* was handed down, the irrigation district collaterally attacked the earlier judgment seeking declaratory relief that it was void for want of jurisdiction.

Texas Supreme Court Decisions Are Generally Retroactive, But Retroactivity Does Not Affect Judgments Are Already Final.

The initial issue in *Engelman* was whether the ruling in *Tooke* was retroactive and, if so, whether that retroactivity meant that otherwise final judgments were now void for want of jurisdiction. In a unanimous opinion by Justice Willett, the court reiterated that its decisions were generally retroactive. However, that the retroactivity is limited to cases that were still in the "judicial pipeline." The court rejected the irrigation district's contention that the decision in *Tooke* could affect judgments that became final long before *Tooke*. As the court has noted on earlier occasions, to hold otherwise would cause chaos because the matters decided by judgments would never be truly resolved.

Sovereign Immunity Implicates Subject-Matter Jurisdiction But May Not Be Used to Collaterally Attack an Otherwise Final Judgment.

As the court has done on several occasions this term, it took the opportunity to reign in out-of-context reliance on overly simple platitudes that disregard underlying legal principles. In this case, the platitude under scrutiny was that courts have no subject-matter jurisdiction if sovereign immunity has not been waived. The court explained that its prior decisions held that existence of sovereign immunity "implicated" and "concerns" personal and subject-matter jurisdiction in the sense that a court could not entertain a suit against the sovereign. It rejected, however, equating subject-matter jurisdiction with waiver of sovereign immunity. After all, sovereign immunity can be waived but subject-matter jurisdiction can never be created by either waiver or agreement. Courts are obliged to determine jurisdiction *sua sponte*, but they are not empowered to assert sovereign immunity when the governmental entity fails to do so.

The opinion treats sovereign immunity as any other litigation issue for purposes of *res judicata* and collateral estoppel:

> It is one thing to characterize sovereign immunity as jurisdictional so as to provide a defendant with certain procedural advantages in an *ongoing case*, such as avoiding a waiver of the defense or allowing a challenge of the immunity ruling by interlocutory appeal. In today's case, however, we are asked to jettison the foundational principle of res judicata, by allowing Engelman to reopen a final judgment that would otherwise operate as claim preclusion. We decline to allow this result.

(Emphasis added). The court was also unpersuaded by the argument that the judiciary was ignoring legislative power by not treating sovereign immunity as a jurisdictional impediment exposing otherwise final judgments to collateral attack. The court reasoned the effect of a final judgment is a matter for the judiciary. A legislative effort to rescind the finality of judgments due to sovereign immunity would transgress powers constitutionally dedicated to the judiciary.

***Lawyer Professional Liability*: An Action for Breach of Fiduciary Duty is Still Viable Against An Attorney Even Without Causation of Damages.**

***Appellate Procedure*: Argument Not Waived When It Was Implicitly Raised in the Court of Appeals.**

***Pleading*: When Allegation Is Relevant to Several Alleged Theories of Liability, It Is Not Fair Notice of a Liability Theory Not Specifically Alleged.**

***Joint Liability*: Civil Conspiracy, Aiding & Abetting and Joint Venture Require Awareness of and Knowing Participation in Wrongful Conduct.**

First United Pentecostal Church of Beaumont v. Parker was a suit against an attorney, Parker, who worked with another lawyer who absconded with more than a million dollars of church money. Later summary judgment proceedings revealed no evidence that Parker participated in the embezzlement. Instead, the evidence showed that Parker for more than a year failed to tell the church about the money's loss. The church sought to recover from Parker for breach of fiduciary duty, civil conspiracy, aiding and abetting, and as a joint venturer with the wrongdoer.

An Action for Breach of Fiduciary Duty is Still Viable Against An Attorney Even Without Causation of Damages.

In reviewing the trial court's take-nothing summary judgment in Parker's favor on all claims, Justice Johnson's opinion for a unanimous court first addressed the alleged breach of fiduciary duty. The court agreed that the church could not recover damages from Parker under that theory because nothing Parker did caused the loss. It concluded, however, that liability for equitable relief remained possible. When an attorney breaches a fiduciary duty to the client, equity may require the attorney to forfeit all or part of the fees paid by the client. When the client seeks equitable forfeiture, there are two reasons why the client need not prove damage causation. First, an attorney is obliged to discharge fiduciary responsibilities in representing a client. When the attorney breaches a fiduciary duty, equity may require fee forfeiture even if the transgression does not damage the client. Second, fee forfeiture is necessary to deter misconduct, regardless of whether the misconduct causes damages. The court ruled that there was some evidence that Parker breached a fiduciary duty by failing to promptly disclose the other lawyer's theft. For that reason, it overturned the take-nothing summary judgment on the claim for breach of fiduciary duty.

The Argument That Causation Evidence Is Unnecessary for Fee Forfeiture Was Not Waived For Failure to Brief in the Court of Appeals.

The court disagreed that the summary judgment could not be reversed because the church had not urged in the court of appeals that the forfeiture theory was a basis for reversal. Pointing out the church mentioned the forfeiture theory in the trial court, the supreme court ruled that the argument was fairly raised by briefing. In particular, the opinion pointed to the church's authorities from which it argued that the necessity of proving damages for a breach of fiduciary duty was "beside the point." Not only did it deem the causation issue adequately raised under Texas Rule of Appellate Procedure 38.1 as "subsidiary" to the issue briefed, but it also reiterated its disfavor for "turn[ing] away claims based on waiver or failure to preserve…."

There Can Be No Recovery For Other Vicarious Responsibility Theories Without Evidence of the Actor's Awareness of the Anticipated Wrongful Conduct and of a Causal Connection Between the Wrongful Act or Omission and Damages.

The church's failure to adduce any evidence that Parker's conduct caused any of its alleged damages was, however, fatal for all the church's other theories of recovery. The claim that Parker conspired with his fellow attorney to steal the church's money failed because that theory required proof that the actor was aware from the outset of the anticipated wrongful conduct. The church could adduce no evidence that Parker had such awareness. Indeed, the evidence only showed that the other lawyer had taken the funds before Parker learned of the loss. The court was also unpersuaded that a cover-up conspiracy was a viable basis for recovery. Parker's failure to disclose in hopes that the funds could be replaced by proceeds from other work in no way caused or contributed to the loss of the church's funds.

No Fair Notice of Claim of Aiding & Abetting and No Evidence Parker With Wrongful Intent Assisted in Embezzling the Funds.

On two grounds, the court rejected the church's challenge to the take-nothing summary judgment on its purported claim that Parker could be liable for aiding and abetting the other lawyer in absconding with the church's money.

Before addressing this theory, however, the court emphasized it was not ruling on the unresolved question whether aiding and abetting was a valid liability theory. Instead, it merely *assumed* for purposes of its decision that it was.

First, it ruled that the allegation that Parker knowingly participated in the other lawyer's breach of fiduciary duty was not enough to give fair notice that it was asserting an aiding and abetting claim, especially since the church pleaded theories such as joint venture and civil conspiracy which also required knowing participation. Second, it would have been impossible for the church to escape summary judgment on the hypothetical aiding and abetting theory because of the lack of any evidence of causation.

Liability As a Joint Venturer Requires Evidence of Agreement to Share Profits or Losses or Otherwise Demonstrate a Right of Joint Control.

The court also affirmed the summary judgment that the church take nothing against Parker as a joint venturer with the other attorney. Nothing showed that Parker knew of or participated in the transfer of the church's funds to the other lawyer's account. Mere references to "our" firm or "us" and "we" in reference to the law practice was not enough to establish a joint venture as the funds transfer. Likewise, that Parker was paid from an account that might have included some of the church funds was not enough to suggest that Parker had a right of control over the account or agreed to share the profits or losses resulting from the theft.