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ANTI-SLAPP CASE STUDY: DEALING WITH DEFAMATION, BUSINESS DISPARAGEMENT, AND SOCIAL MEDIA

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I. INTRODUCTION

Let's start by facing reality: When creating and publishing content, you **cannot** guarantee that you won't end up in a courtroom. But it's important to think about this worst-case scenario before publishing, because doing so can make it less likely that you will be sued in the first place. This paper addresses causes of action that are commonly aimed at content creators, as well as swords and shields that can be helpful if you find yourself (or your client) in the courtroom. Specifically, this paper will focus on the right of publicity and the torts of defamation and business disparagement.[1] Additionally, this paper will provide an overview of statutory schemes you can use to your advantage when a lawsuit is on the horizon. The respective causes of action will be discussed in a streamlined fashion, with more in-depth analysis found in the footnotes.

II. DEFAMATION

When someone doesn't like what's published about him or her, defamation is generally the go-to cause of action. Knowing the elements before getting sued can be helpful in responsibly guiding the creative process. In Texas, a plaintiff must prove the following elements to meet his or her burden for defamation:

1) the defendant published a statement of fact;[2]
2) the statement referred to the Plaintiff;[3]
3) the statement was defamatory;[4]
4) the statement was false;[5]
5) the statement was made with the requisite degree of fault with regard to the truth of the statement;[6] and

[1] While this paper will primarily focus on Texas law, the live presentation may address how courts in other jurisdictions address these causes of action, as well.

[2] A plaintiff can sue not only the person who originally made a defamatory statement, but also a person or entity that published or republished a defamatory statement. Essentially, the re-publisher is said to have adopted the statement as his or her own. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 570 (Tex. 1998) (plaintiff was a media member who followed agents at the Branch Davidians compound in Mount Carmel during a raid. A *Nightline* television report was critical of the plaintiff's involvement in the raid, suggesting that the media member's involvement tipped off the fact that a raid was imminent. Plaintiff sued WFAA because one of its correspondents reported statements from the original *Nightline* episode and further stated that plaintiff was one of the media members on site during the raid). The statement at issue must "expressly or impliedly assert facts that are objectively verifiable." *Bentley v. Burton*, 94 S.W.3d 561, 579 (Tex. 2002). Using the word "opinion" in the statement will not absolve anyone from liability. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) (the statement, "[i]n my opinion, Jones is a liar" implied knowledge of facts that lead to the conclusion that Jones lied). Moreover, expressly agreeing with another's statement can also lead to liability. *See Bentley v. Bunton*, 94 S.W.3d 561, 585-86 (Tex. 2002) (finding that a talk show co-host's conduct could lead to liability when he reiterated examples of a judge's alleged corruption that the other co-host previously cited on another episode).

[3] The statement must directly or indirectly refer to the plaintiff without the additional assistance of context or supporting statements. *See Cox Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 433 (Tex. App.—Austin 2007, pet. denied) (previous articles referred to plaintiff, individually, but the article with the statements in question merely referred to a group that included plaintiff).

[4] Statements are considered libel *per se* when the statement, on its face, does one of the following: injures the plaintiff in his/her position or occupation, falsely charges the plaintiff with a crime, imputes that the person has a loathsome disease, or imputes sexual misconduct. *KTRK TV, Inc. v. Robinson*, 409 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (discussing statements charging one with a crime or injuring one's business or profession); *Memon v. Shaikh*, 401 S.W.3d 407, 421 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (listing all four types of statements). To determine whether a statement is defamatory, the court first looks to whether the statement is defamatory as a matter of law—i.e., its meaning is unambiguous in the minds of ordinary readers, without reference to any meaning attributed by either party. *A.H. Belo & Co. v. Looney*, 246 S.W. 762, 768-79 (Tex. App.—Texarkana 1916), *aff'd*, 246 S.W. 777 (Tex. 1922). If the statement is not defamatory as a matter of law, then the court must determine whether the alleged meaning of the statement is ascribed by innuendo or implication (assuming the plaintiff made such allegations in his or her pleadings). *See ABC, Inc. v. Shanks*, 1 S.W.2d 230, 237 (Tex. App.— Corpus Christi 1999, pet. denied) (analyzing whether a statement on a *PrimeTime Live* program was defamatory by innuendo).

[5] If the statement involves a matter of public concern, then the plaintiff is required to prove that the statement was false. *See Bentley v. Bunton*, 94 S.W.3d 561, 586 & n.62 (Tex. 2002). In situations where courts treat defamation as a strict liability tort—such as when a private plaintiff sues a non-media defendant for speech involving a private concern—the defendant has the burden to prove truth an affirmative defense. *See Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995).

[6] The requisite degrees of fault are as follows: a) acting with actual malice when the plaintiff is a public official or public figure; b)

6) the Plaintiff suffered pecuniary injury.[7]

If the defamatory statement is oral, then the cause of action is for slander. On the other hand, if the defamatory statement is in writing or other graphical form, then the cause of action is for libel.[8] As this paper is geared toward content creators, it focus will focus on the latter.

A court's analysis begins with determining the type of statement at issue. This is important because if a statement is a matter of public concern,[9] then the statement is afforded greater protection by the First Amendment. Of even more importance is the type of plaintiff in the dispute. The type of plaintiff determines the corresponding burden that the plaintiff must meet when proving the requisite degree of fault. While the lines between the types of plaintiffs can be blurry at times, a plaintiff will fall in one of the following categories: private figure, public official,[10] or public figure.[11]

Once the court has determined whether the statement was a matter of public concern and the type of plaintiff, it looks to whether the content creator made the statement at issue with the requisite degree of fault.

The plaintiff must prove actual malice[12] in the following situations:

- When a public figure plaintiff (including all- purpose and limited-purpose public figures[13]) sues suing for statements relating to matters of public concern;

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negligent when a private plaintiff sues a media defendant for speech involving a matter of public concern (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex. 1976)); or c) liable without regard to fault (i.e., strict liability) when a private plaintiff sues a non-media defendant for speech including private concerns.

[7] But the plaintiff does not have to prove pecuniary injury when injury is presumed, as may be the case in some situations involving defamation *per se*. *See Klentzman v. Brady*, 456 S.W.3d 239, 270 n.5 (Tex. App.—Houston [1st Dist.] 2014), *aff'd*, 515 S.W.3d 878 (Tex. 2017) (stating that juries may presume the existence of general damages in *per se* cases when (1) the speech is not public, or (2) the plaintiff proves actual malice).

[8] TEX. CIV. PRAC. & REM. CODE § 73.001.

[9] Public concern is "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004). The U.S. Supreme Court has also defined public concern as a "matter of political, social, or other concern in the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). On the other hand, a statement involves a private concern if it is in only an individual's interest. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (the statement at issue related to an individual's financial credit). "It is well-settled that even after the 2019 amendments [to the TCPA], criminal acts are matters of public concern." *Garcia v. Semler*, 663 S.W.3d 270, 281 (Tex. App.—Dallas 2022, no pet.) (quoting source omitted); *see also Cortez v. Johnston*, No. 06–13–00120–CV, 2014 WL 1513306, at *6 (Tex. App.—Texarkana 2014, no pet.) (mem. op.) ("Criminal allegations involve legitimate public concern"); *see also AOL, Inc. v. Malouf*, Nos. 05-13-01637-CV & 05-14-00568-CV, 2015 WL 1535669, at *2 (Tex. App.—Dallas Apr. 2, 2015, no pet.) (mem. op.) (a news articles allegations of a dentist being charged with Medicaid fraud constituted a "communication [] connected with matters of health or safety, government, and community well-being."). Further, the "provision of medical services by a health care professional constitutes a matter of public concern." *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509-10 (Tex. 2015); *Batra v. Covenant Health Sys.*, 562 S.W.3d 696, 709 (Tex. App.—Amarillo 2018, pet. denied) (holding that private communications relating to a physician's "handling of specific cases, his medical competence, and disciplinary action" were "matters of public concern"); *see also Pisharodi v. Columbia Valley Healthcare Sys., L.P.*, 622 S.W.3d 74, 82-83 (Tex. App—Corpus Christi-Edinburg 2020, no pet.) (finding statements made as part of a peer review process are protected free speech because the provision of medical services by a health care professional constitutes a matter of public concern); *id.* at 82 ("The TCPA does not require that alleged communications explicitly 'mention' health or safety concerns; a 'tangential relationship' is sufficient.").

[10] Whether a person is a public official is a question of law. *HBO v. Harrison*, 983 S.W.2d 31, 36-37 (Tex. App.— Houston [14th Dist.] 1998, no pet.). Generally, public officials include elected officials and candidates. In determining whether a person is a public official, courts look to the amount of authority the individual has. *See Houston Chronicle Publ'g v. Stewart*, 668 S.W.2d 727, 729 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd) (finding that a court reporter was not a public official because she did not have control over governmental affairs). Also, the statement at issue must refer to the plaintiff's official conduct or his or her fitness for the respective office. *See Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 814-15 (Tex. 1976) (finding the individual was not a public official for purposes of the case because the article focused on plaintiff's role as a consultant, not on the plaintiff's fitness for office).

[11] A public figure may be someone who has achieved pervasive fame or notoriety (*i.e.*, an "all-purpose" public figure) or may be considered a public figure for only a limited range of issues relating to a particular public controversy (a "limited-purpose" public figure). *See San Antonio Express News v. Dracos*, 922 S.W.2d 242, 251 (Tex. App.—San Antonio 1996, no writ) (finding that a popular television personality was an all-purpose public figure); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (finding that media member who voluntarily injected himself into raid on Branch Davidian compound became a limited-purpose public figure). In very rare cases, a person may involuntarily become a public figure.

[12] "Actual malice" means that the defendant published the statement with knowledge of or reckless disregard for its falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279- 80 (1964).

[13] *See supra* footnote 11.

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