Affirmed in Part, Reversed and Remanded in Part, and Opinion filed August 10, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00197 -CV

J. H. HUBBARD, Appellant

V.

LEON DAVIS, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 98-02089

O P I N I O N

In this defamation case, J. H. Hubbard appeals a summary judgment entered in favor of Leon Davis. We affirm in part and reverse and remand in part.

Background

Hubbard, an attorney and member of the Houston Racquet Club (the "Club"), became concerned regarding a proposal to lease a portion of the Club's property to a cellular telephone company for the purpose of erecting a communications tower. Davis, a member of the Club and its board of directors, was representing the Club in the lease negotiations. Hubbard filed suit to enjoin the Club from pursuing the lease without first obtaining approval

of the Club's members. Before the suit was settled by agreement, Davis sent a letter to the Club's president and the members of its board advising them of the lawsuit and informing them that he was resigning from his responsibilities on the project because Hubbard had "turned it into a personal attack"and had accused Davis of taking kickbacks from the cellular telephone company. Davis's letter also stated: "I would like to attribute this person's position and attitude to his youth and inexperience. Unfortunately, he is neither young nor inexperienced."

After learning of this remark, Hubbard filed the present defamation suit against Davis. Davis filed a motion for summary judgment asserting that: (1) the allegedly defamatory statement was subject to a qualified privilege; (2) the alleged publication was not, as a matter of law, a defamatory statement; and (3) there is no evidence to support Hubbard's allegation that he was defamed. Hubbard filed an objection and response to the motion. The trial court granted Davis's motion and entered a take-nothing summary judgment in his favor.

Notice

As an initial matter, Hubbard argues that the trial court erred in granting the summary judgment because Davis failed to give the required notice of hearing on the motion. Hubbard contends that the lack of proper notice is fatal to the summary judgment[1] and that it resulted in a "hurried and incomplete response" to the summary judgment motion.

Except on leave of court, a summary judgment motion must be filed and served at least 21 days before the time specified for its hearing. *See* TEX. R. CIV. P. 166a(c). This period is increased by three days if the motion is served by mail, requiring that the motion be mailed at least 24 days before the hearing. *See* TEX. R. CIV. P. 21a; *Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex. 1994). In computing the number of days for notice of hearing, the

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[1] *See Williams v. Carpentier*, 767 S.W.2d 953, 954 (Tex. App.–Beaumont 1989, no writ) (holding that the failure of a trial court to hold a hearing on a specific date on a motion for summary judgment was error). Hubbard filed a response to Davis's motion on December 27, objecting to the lack of proper notice and thereby preserving this complaint. *See Rios v. Texas Bank*, 948 S.W.2d 30, 33 (Tex. App.–Houston [14th Dist.] 1997, no writ).

day of service is excluded but the day of hearing is included. *See* TEX. R. CIV. P. 4; *Lewis*, 876 S.W.2d at 316.

In this case, Davis filed his motion for summary judgment on December 14, 1998. The attached notice of submission states that the motion would be submitted to the court for consideration without oral hearing unless one was requested by Hubbard by January 4, 1999. Neither the certificate of service attached to the notice of submission nor that attached to the motion specifies a date or method of service.[2] Davis asserts that service was complete on December 14, 1998, the day the motion was mailed, while Hubbard contends that service was effected on December 15, his date of receipt. However, even assuming the motion was served on December 14, the earliest date that hearing or submission could have properly been set for it was January 7, 1999, twenty-four days from December 15. *See* TEX. R. CIV. P. 166a(c); TEX. R. CIV. P. 21a.

The purpose of the summary judgment notice provision is to give the opposing party a fair opportunity to respond on the merits. *See Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 759 (Tex. App.–Amarillo 1995, writ denied). Although notice of a hearing or submission of a summary judgment is required, receipt of notice in less than the required time is not "jurisdictional" and can be waived or be harmless error. *See Martin v. Martin, Martin, & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998).

In this case, despite the shortened notice period, Hubbard did not file a motion for a continuance. Moreover, even though the court did not rule on Davis's motion until February 8, 1999, Hubbard did not seek leave to file a late or supplemental response. On appeal, Hubbard has failed to specify what other authority, argument, or evidence he could have offered had longer notice been given. Therefore, although the lack of proper notice was error, Hubbard has failed to demonstrate that it was harmful and thus reversible. Accordingly, this contention is overruled.

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[2] There is nothing in the record to indicate that any action was taken in the case between the filing of Hubbard's response on December 27, 1998 and the granting of Davis's motion on February 8, 1999.

Scope of Motion for Summary Judgment

Hubbard further asserts that granting Davis's motion was reversible error because the motion failed to address all of the defamatory statements that Hubbard had alleged. Hubbard's original petition alleged that Davis had defamed him by stating to others: "I would like to tell you that the lawyer who sued me is young and inexperienced, but unfortunately he is neither" (the "first defamation"). Hubbard's second amended petition, filed four days before Davis's summary judgment motion, complained of this statement and added that Davis had also defamed him on other occasions by: (1) making the same statement as in the first defamation but substituting the word "person" for "lawyer" (the "second defamation"); (2) accusing Hubbard of unspecified "falsehoods" (the "third defamation"); and (3) stating "I would like to attributed [sic] this person's position and attitude to his youth and inexperience. Unfortunately, he is neither young nor inexperienced" (the "fifth defamation").[3]

Summary judgment may be granted and affirmed only on the grounds set forth in the motion. *See Perry v. S.N.*, 973 S.W.2d 301, 303 (Tex. 1998); *Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983). In this regard, separate libels published at different times are generally considered separate and distinct torts for which separate causes of action lie. *See Renfro Drug Co. v. Lawson*, 138 Tex. 434, 443, 160 S.W.2d 246, 251 (1942); *Houston Press Co. v. Smith*, 3 S.W.2d 900, 909 (Tex. Civ. App.–Galveston 1928, writ dism'd w.o.j.). However, if a summary judgment conclusively disproves an ultimate fact central to all the causes of action alleged, or if unaddressed causes of action are derivative of an addressed cause of action, the motion may be construed as covering those additional causes of action or variations of actions.[4]

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[3] Although Hubbard argues in his brief that Davis also made a fourth defamatory statement, that Davis accused him of making "tasteless and baseless accusations," there was nothing in his second amended petition regarding any such alleged defamation. Therefore, Davis had no burden to negate it in his summary judgment motion.

[4] *See Smith v. Heard*, 980 S.W.2d 693, 697-98 (Tex. App.–San Antonio 1998, pet. denied); *see also Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 435-36 (Tex. App.–Houston [14th Dist.] 1999,

In this case, Davis's summary judgment motion specifically refers only to the statement contained in the first defamation. Because the second and fifth defamations alleged in Hubbard's second amended petition are only slight variations of the first defamation, the motion was also applicable to those alleged defamations. Beyond that, however, Davis's no evidence ground asserts only that Hubbard failed to "produce any material evidence which would support any element of the cause of action, defamation."[5] Because neither the no evidence ground nor any other portion of the motion specifically addresses the third defamation or any fact or element common to it, the summary judgment cannot be affirmed as to the third defamation, but if at all, only as to the first, second, and fifth defamations, discussed below.

Review of Summary Judgment

A summary judgment may be granted if the summary judgment evidence shows that, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or response. *See* TEX. R. CIV. P. 166a(c). To be entitled to summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or establish each element of an affirmative defense to each claim. *See American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). When, as here, a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary grounds are meritorious. *See Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex. 1999).

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no pet.) (holding that variations of a negligence claim in a second amended petition were addressed by a previously filed summary judgment motion); *Farah v. Mafrige & Kormanik, P.C.*, 927 S.W.2d 663, 672 (Tex. App.–Houston [1st Dist.] 1996, no writ) (holding that negligent misrepresentation claim was covered when summary judgment motion proved that all tort claims sounded in contract and were barred by statute of limitations).

[5] The no evidence ground thus failed to specify as to which elements of the defamation action there was no evidence, as required by Texas Rule of Civil Procedure 166a(i).

To maintain a defamation claim, a plaintiff, such as Hubbard, who is not a public figure or official, must prove that the defendant: (1) published a statement;[6] (2) that was defamatory concerning the plaintiff; and (3) did so with negligence regarding the truth of the statement. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Whether a statement is reasonably capable of a defamatory meaning is a threshold question of law to be determined by the courts.[7] *See Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 654-55 (Tex. 1987). Only if a court determines that the language used is ambiguous or of doubtful import should a jury determine the statement's meaning and the effect of its publication on the ordinary reader. *See Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 446 (Tex. App.–Houston [1st Dist.] 1993, no writ).

A statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him, or if it tends to expose him to public hatred, contempt, or ridicule. *See Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 92 (Tex. App.–Dallas 1996, writ denied). Importantly, however, a defamatory statement must be one of fact or implied fact, rather than opinion.[8] *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-21 (1990); *Carr v. Brasher*,

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[6] "Publication" of defamatory words means to communicate them orally, in writing, or in print to a third person capable of understanding their defamatory meaning and in such a way that the third person did so understand. *See Abbott v. Pollock*, 946 S.W.2d 513, 519 (Tex. App.–Austin 1997, writ denied).

[7] To determine if a publication is defamatory, a court must look at the entire communication and not examine separate sentences or portions. *See Schauer v. Memorial Care Sys.*, 856 S.W.2d 437, 446 (Tex. App.–Houston [1st Dist.] 1993, no writ). Non-defamatory statements may not be made defamatory by taking them out of context. *See id.* The test is how, in light of the surrounding circumstances, a person of ordinary intelligence would perceive the entire statement. *See Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987).

[8] Although the distinction between opinion and statements of fact is not always clear, factors examined by courts in making the determination include whether: (1) common usage of the specific language has a precise, well understood core of meaning that conveys facts, or whether the statement is indefinite and ambiguous; (2) the statement is capable of being proven objectively true or false; and (3) considering the full context of the statement, unchallenged language surrounding the allegedly defamatory statement will influence one to infer that a particular statement has factual content. *See Ollman v. Evans*, 750 F.2d 970, 979 ((D.C. Cir. 1984); *Yiamouyiannis v. Thompson*,

776 S.W.2d 567, 570 (Tex. 1989); *Falk & Mayfield L.L.P. v. Molzan*, 974 S.W.2d 821, 824 (Tex. App.–Houston [14th Dist.] 1998, pet. denied). Loose and figurative terms employed as hyperbole or metaphor, even if false and abusive, are expressions of opinion and are protected by the First Amendment of the United States and section 8, article I, of the Texas Constitutions.[9]

In this case, Davis's motion for summary judgment asserted that his remark, "I would like to tell you that the lawyer who sued me is young and inexperienced, but unfortunately he is neither,"was opinion protected by the First Amendment. The thrust of this statement is that Hubbard's actions were the type that would be made by a person who is young and inexperienced, *i.e.*, lacking in judgment. Such an assertion is a matter of individual judgment and "rests solely in the eyes of the beholder." *Falk & Mayfield*, 974 S.W.2d at 824. Hubbard further argues that because the statement implies he is an unfit lawyer,[10] it is actionable even if it is opinion. However, the characterization does not purport to state or imply a fact that can be verified objectively but only a viewpoint that is inherently subjective

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764 S.W.2d 338, 341 (Tex. App.– San Antonio 1988, writ denied). Relying on *Milkovich*, Hubbard argues that there is no special constitutional privilege for opinion. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). However, *Milkovich* only refused to carve out a separate constitutional protection for "opinions," as opposed to facts. *See id.* at 19, 21. It determined that existing precedent afforded ample protection for statements of opinion and those statements that "cannot 'reasonably be interpreted as stating actual facts' about an individual." *See id.* at 20 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

9 *See Banfield v. Laidlaw Waste Sys.*, 977 S.W.2d 434, 439 (Tex. App.–Dallas 1998, pet. denied) (finding that a reference to the appellant as "son of a bitching troublemakers" was a constitutionally protected opinion); *Falk & Mayfield*, 974 S.W.2d at 824 (concluding that an allegation of participating in "lawsuit abuse" was a matter of individual judgment and although the accusation was derogatory and disparaging, it did not convey a verifiable fact but was indefinite and ambiguous); *Schauer*, 856 S.W.2d at 446 (concluding that a "fair" rating on an employee evaluation was opinion); *Rawlins v. McKee*, 327 S.W.2d 633, 635-36 (Tex. Civ. App.–Texarkana 1959, writ ref'd n.r.e.) (concluding that references to a political candidate as "radical" and connected to "labor bosses" was not libelous).

10 Hubbard argues that the statement is a defamation *per se* because it injures him in his profession. The character of a statement as a defamation *per se*, as contrasted from an ordinary defamation, relates only to whether damages are to be presumed or must be proven. *See Shearson*, 806 S.W.2d at 922. Hubbard has cited and we have found no authority holding that an opinion that is not actionable as a defamation can nevertheless be actionable as a defamation *per se*.

in nature. Whether an individual exercises sound judgment in pursuing a matter, even a legal matter, is necessarily a question of opinion.[11] Therefore, we conclude that the statement was an opinion that is not actionable as a defamatory statement. Accordingly, we reverse the portion of the summary judgment pertaining to the third defamation, remand that portion of the judgment to the trial court for further proceedings, and affirm the remainder of the summary judgment pertaining as to the first, second, and fifth defamations.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed August 10, 2000.

Panel consists of Justices Yates, Fowler, and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).

[11] Hubbard argues that because he was successful in the suit, Davis's statement is objectively verifiable as false, therefore the statement is actionable. We note that the outcome of the suit was not known at the time of Davis's letter and for several months thereafter. Regardless, conclusions as to the soundness of one's judgment is necessarily a subjective matter and does not always depend on the ultimate outcome of one's choices.