Affirmed and Opinion filed May 17, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-01255-CV

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JAMES L. HONEYCUTT, Appellant

V.

FOREST COVE PROPERTY OWNERS' ASSOCIATION, INC.; WILLIAM R. LILLEY A/K/A WILLIAM R. LILLEY, JR., A/K/A BOB LILLEY, INDIVIDUALLY AND AS DIRECTOR AND/OR AGENT OF FOREST COVE PROPERTY OWNERS' ASSOCIATION, INC.; AND SHEILA LILLEY, INDIVIDUALLY, Appellees

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On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 96-30648A

O P I N I O N

James L. Honeycutt appeals from summary judgments in favor of appellees in his libel and slander suits against them. In one issue, appellant contends the trial court erred in granting the summary judgments. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant sponsored parties for high school students at his residence. Many of the residents of the neighborhood were concerned over the noise, profanity, reckless driving, and intoxicated driving that occurred when Honeycutt held these parties. The Lilleys wrote a letter to the property owners' association (Forest Cove) asking them if they could do anything "to insure safe streets and restful nights on Golden Bear Lane and adjacent streets." Forest Cove wrote Honeycutt a letter advising him that he was in violation of the deed restriction concerning "no noxious or offensive trade or activity shall be carried on . . . which may be or become an annoyance to the neighborhood." If Honeycutt planned to continue hosting parties, the association asked him to "make arrangements and/or take precautions which avoid/prevent the above stated nuisances, annoyances, and safety concerns. . . ." The letter from the Lilleys, which was also signed by twenty-one other residents, is the subject of this lawsuit. The entire paragraph of the letter that is the subject of this lawsuit is:

> Sadly, I admit, for years I have turned my head, and chosen not to become involved (like too many of us in today's society). This past Thursday's events clearly spelled out to me the potential danger to the children in our neighborhood from reckless and intoxicated teen drivers. The number of nights my family has been disturbed between the hours of 11 PM and 2 AM due to activated car alarms, loud radios, yelling, fighting, loud profanity, honking, **public lewdness**, and speeding are countless! This has evolved into an intolerable public nuisance, sanctioned by Mr. Honeycutt, who has no concern for his neighbors, as he recently indicated that he will continue to have parties for the football players (emphasis added).

In his first amended original petition, appellant alleges "public lewdness" is libel per se in that it is crime. TEX. PEN. CODE ANN. § 21.07 (Vernon 1994 & Supp. 2000). The Lilleys' motion for summary judgment alleged as grounds that: (1) the statements were conditionally privileged because the Lilleys had a common interest with their neighbors, the school officials, and law enforcement officials in the health and safety of the residents of the subdivision; (2) the statement was not defamatory or defamatory per se as a matter of law because it did not accuse Honeycutt of a crime; and (3) the statement was true.

The property owners' association alleged as grounds for its motion for summary judgment: (1) it was entitled to judgment as a matter of law under rule 166a(b) & (c), Texas Rules of Civil Procedure, and (2) there is no evidence of one or more essential elements of Honeycutt's claims under rule 166a(i), Texas Rules of Civil Procedure.

In his response to the Lilleys' motion for summary judgment, appellant asserted that the Lilleys did not act in good faith and failed to prove an absence of malice. Therefore, appellant asserts that they cannot claim conditional or qualified privilege.

In his response to the no-evidence motion for summary judgment filed by the property owners' association, appellant contended there was some evidence that Mr. Lilley, as director/agent of the association, participated and/or conspired in the publication of the Lilleys' slanderous letter. He also asserted there was evidence to support his allegations of defamation against Forest Cove. Appellant also objected to the summary judgment evidence attached to the association's motion for summary judgment.

The trial court granted summary judgments to the Lilleys and the property owners' association without stating the specific grounds.

SUMMARY JUDGMENT FOR THE LILLEYS

In four sub-issues, under his general issue contending the trial court erred in granting summary judgments on Honeycutt's claims of libel and slander, he contends: (1) Lilleys' statement concerning "public lewdness" is defamatory per se; (2) whether the statements implicate Honeycutt is a fact issue; (3) the defamatory statements are not privileged; and (4) there is no evidence that the statements were true or, at a minimum, a fact issue regarding their truth exists.

Standard of Review

To be entitled to a summary judgment, a defendant must disprove at least one of the essential elements of each of the plaintiff's causes of action. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470,471 (Tex. 1991). To meet this burden, the defendant must show that no

genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). In determining whether a material fact exists precluding summary judgment, the evidence favoring the nonmovant must be taken as true and all reasonable inferences are indulged in favor of the nonmovant. *Id.; see also Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472,477 (Tex. 1995).

Lilleys' Statement as being Defamatory

Appellant contends that "public lewdness" is a crime under section 21.07, Texas Penal Code. That section provides that a person commits an offense if he knowingly engages in sexual intercourse, deviate sexual intercourse, sexual contact, or sodomy with animals or fowl in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his conduct. Appellant contends that the statement in the Lilleys' letter asserts that Honeycutt had engaged in or sanctioned public lewdness, which is a criminal act, and because the statements impute sexual misconduct, the statements are defamatory per se. *See Gray v. HEB Food Store No. 4*, 941 S.W.2d 327, 329 (Tex. App.—Corpus Christi 1997, writ denied).

If a statement unambiguously and falsely imputes criminal conduct to plaintiff, it is defamatory per se. *Mitre v. Brooks Fashion Stores, Inc.*, 840 S.W.2d 612, 619 (Tex. App.—Corpus Christi 1992, writ denied). However, the charge of violating a criminal statute need not be made in a technical manner. It is sufficient to constitute slander per se if, in hearing the statement, an ordinary person would draw a reasonable conclusion that the complaining party was charged with a violation of some criminal law. *Id*. at 620.

Generally, whether the words complained of are reasonably capable of a defamatory meaning is the threshold question to be determined by the court. *See Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 655 (Tex.1987). In answering this question, the court must construe the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. *Id*. However, where the

language used is ambiguous, the factfinder should be entitled to determine the statement's meaning and the effect it would have on the ordinary listener. *Musser*, 723 S.W.2d at 655; *Free v. American Home Assurance Co.*, 902 S.W.2d 51, 55 (Tex. App.—Houston [1st Dist.] 1995, no writ).

The statement did not "directly" accuse Honeycutt of participating in "public lewdness." The Lilleys complained that they had been disturbed on "countless" occasions by "activated car alarms, loud radios, yelling, fighting, loud profanity, honking, **public lewdness**, and speeding." The statement does not in anyway accuse Honeycutt of causing any of these enumerated nuisances. In her very next sentence, Ms. Lilley states that this conduct by unnamed persons "has evolved into an intolerable public nuisance, sanctioned by Mr. Honeycutt . . . ." This statement clearly states that the teenage parties are a nuisance causing disturbances in the neighborhood, and these parties are sponsored by Honeycutt.

Appellant contends that these statements infer or implicate that Honeycutt committed the crime of "public lewdness." Essentially, appellant contends that, by innuendo, the effect and meaning of the language is libelous. An innuendo may be used to explain, but not to extend, the effect and meaning of the language charged as libelous. *Schauer v. Memorial Care Systems*, 856 S.W.2d 437, 448 (Tex. App.—Houston[1st Dist.] 1993, no writ); *Arant v. Jaffe*, 436 S.W.2d 169, 176 (Tex. Civ. App.—Dallas 1968, no writ). The test is what construction would be placed upon such language by the average reasonable person or the general public, not by the plaintiff. *Id*. It is the duty of the court to determine if the challenged statements are capable of the meaning ascribed to them by the innuendo; if, in the natural meaning of the statements, they are not capable of a defamatory interpretation, the case must be withheld from the jury. *Id*.

In this case, the trial court could properly reject Honeycutt's attempt to use innuendo to transform permissible speech into actionable defamatory statements. No reasonable person, reviewing the statement in question, would conclude Honeycutt was being accused of public lewdness. *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987);

Duncantell v. Universal Life Ins. Co., 446 S.W.2d 934, 937 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.). We overrule appellant's contentions that Lilleys' statements were libelous per se as a matter of law. We overrule appellant's contentions that the statements create a fact issue for the jury.

The Defamatory Statement as being Privileged

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 Hardwick v. Houston Lighting & Power Co.*, 881 S.W.2d 195, 197 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.). Publication of defamatory words means to communicate orally, in writing, or in print to some third person capable of understanding their defamatory import and in such a way that he did so understand. *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 335 (Tex. App.—Dallas 1986, no writ). A cause of action for libel accrues if the defendant publishes a false, defamatory statement of fact of and concerning the plaintiff and if the defendant was at fault. *Holly v. Cannady*, 669 S.W.2d 381, 383 (Tex. App.—Dallas 1984, no writ). Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). To be entitled to summary judgment, the defendant has the negative burden to prove the absence of at least one of these elements, for example, that the statement complained of was not defamatory, that the statement was not published, or that a legal excuse exists. *Ramos*, 711 S.W.2d at 333-34.

Legal excuse includes the defense of qualified privilege. A privilege will be granted to statements that occur under circumstances wherein any one of several persons having a common interest in a particular subject matter may reasonably believe that facts exist that another, sharing that common interest, is entitled to know. *Gillum v. Republic Health Corp.*, 778 S.W.2d 558, 572 (Tex. App.—Dallas 1989, no writ). A qualified privilege attaches to bona fide communications, oral or written, upon any subject in which the author or the public

has an interest or with respect to which the author has a duty to perform to another owing a corresponding duty. *Dixon v. Southwestern Bell Tel. Co.*, 607 S.W.2d 240, 242 (Tex. 1980). This privilege is termed conditional or qualified because a person availing himself of it must use it in a lawful manner and for a lawful purpose. *Id*. The effect of the privilege is to justify the communication when it is made without actual malice. *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 899 (Tex. 1970).

Thus, when a statement is privileged, Texas law requires a showing of actual malice to overcome that privilege. *Dixon*, 607 S.W.2d at 242. Actual malice means with knowledge that the statement was false or with reckless disregard of whether it was false. *Dun & Bradstreet*, 456 S.W.2d at 900. Reckless disregard requires proof that a false defamatory statement was made with a high degree of awareness of its probable falsity. *Gillum*, 778 S.W.2d at 572. Generally, when publication is made under circumstances creating a qualified privilege, the plaintiff has the burden to prove malice. *Ramos*, 711 S.W.2d at 335. However, when a defendant moves for summary judgment, as movant, he has the burden to prove the absence of malice. *Jackson v. Cheatwood*, 445 S.W.2d 513, 514 (Tex. 1969); *Ramos*, 711 S.W.2d at 335. Malice exists when the evidence shows that the speaker entertained serious doubts as to the truth of his statements. *Gillum*, 778 S.W.2d at 572. Therefore, the defendant can prove the absence of malice by showing that the speaker never entertained serious doubts as to the truth of his statements. Significantly, malice cannot be inferred from the character of the allegedly defamatory statement without other evidence to prove it. *Id*. at 572-73. The burden is on appellees, as the movants/defendants, to show that they acted without actual malice in the exercise of a qualified privilege.

Appellant contends that the Lilleys have waived their claim of conditional privilege by sending the letter to four school officials who did not have an interest in or duty to investigate the teenagers' parties at Honeycutt's residence. Reviewing the summary judgment evidence in this light, we conclude that the summary judgment evidence establishes the following:

The parties at Honeycutt's residence were mostly for students and student athletes in

the school district employing these school officials. In their affidavits, the Lilleys stated they had observed teenage drivers speeding on their way to Honeycutt's house, several incidents of beer drinking, smoking, profanity, fights, and urinating in the street. In her affidavit, Ms. Lilley gave several instances of what she felt was lewd and offensive conduct: (1) her three year old daughter picked up a used condom from the grassy median near Honeycutt's house; (2) she overheard a group of kids yelling at others to look into one of the cars parked in front of Honeycutt's house where a couple of the guests were "doing it"; (3) she observed a teenage boy leaning against a tree, displaying his genitals and urinating; and, (4) she was awakened by a group of boys fighting in her front yard while two others stood to the side, one vomiting near her air conditioner and cursing. Steve and Sally Spindler stated they frequently heard loud music, observed reckless driving, mail box destruction, and intoxicated teenage drivers. Jerry and Kelly Higgins stated in their affidavits that they had observed similar activities.

School officials have a common interest in protecting the health and safety of their students on and off school grounds. Ms. Lilley was a school counselor for the Humble Independent School District. Mr. Lilley was director of the property owners' association. Ms. Lilley stated in her affidavit: "As can be seen from the letter itself, I wrote in an effort to apprise my local community association, and local school and law enforcement officials of what I believe to be a dangerous and offensive situation on my street." Mr. Lilley stated in his that he felt the activities at Honeycutt's residence were a matter of public concern for the health and safety of his family and his neighbors.

Other than deny that his teenage guests drank beer and smoked at his house, Honeycutt responded that his guests were not "out-of-hand" and were orderly. He did not respond to the Lilleys' comment on the reports of his guests urinating in the street, "doing it" in cars in front of his house, and leaving beer cans and bottles around the premises and in the street. He also stated: "I have never committed the crime of 'public lewdness' as charged in the November 18, 1995, letter, nor have I ever engaged in sexual deviate conduct such as been suggested by Shelia Lilley." He concluded: "I believe that the letter was sent in an effort to embarrass me with my neighbors and the school and to have me investigated by law enforcement."

The Lilleys neither entertained serious doubts as to the truth of the statements nor made these statements with a high degree of awareness of their probable falsity. The communications appeared accurate; they reasonably believed they had a duty to report these teenage parties to the property owners' association and the school officials. The members of the school board who received this information had an interest in the information as it related to the safety and health of their students. *See also Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 92-93 (Tex. App.—Dallas 1996, writ denied).

We conclude that the summary judgment evidence conclusively showed that the Lilleys acted without malice and in good faith, and, thus, the Lilleys conclusively established their affirmative defense of qualified privilege. Consequently, the trial court properly granted the Lilleys' summary judgment on Honeycutt's claim of defamation. We overrule appellant's contention that the Lilleys' statement was not privileged.

The Truth of the Statements

In his last subissue, appellant asserts that his evidence establishes a fact issue as to the truth of the "public lewdness" statement. Other than furnish affidavits from various guests and neighbors indicating they never observed any incidents of "public lewdness," appellant contends that he swore in his affidavit that he never committed the crime of "public lewdness."

As we stated under the first subissue, there was nothing in Lilleys' statement that claimed appellant ever committed "public lewdness." The statement refers to part of several instances of conduct at the parties at Honeycutt's house that the Lilleys stated were a nuisance. The instances of "public lewdness" were the Lilleys' observance of boys urinating in the street, displaying their genitals, hearing some teenagers inviting others to watch a couple "doing it" in a car, and Ms. Lilley's daughter finding a used condom near Honeycutt's house. Ms. Lilley stated these are the acts she found "lewd and offensive." None of these acts were attributed directly to Honeycutt.

The Lilleys were only required to show substantial truth to defeat the defamation claim. *McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex. 1990); *Ortiz v. San Antonio City Employees Federal Credit Union*, 974 S.W.2d 833, 837 (Tex. App.—San Antonio 1998, no pet.) We find the statement did not defame Honeycutt and it was substantially true. We overrule appellant's contentions in this final subissue. We affirm the summary judgment for the Lilleys.

SUMMARY JUDGMENT FOR FOREST COVE PROPERTY OWNERS' ASSOCIATION, INC.

Forest Cove Property Owners' Association moved for summary judgment under rule 166a(i), Texas Rules of Civil Procedure, contending there was no evidence that the Lilleys' letter to the association was published by the association, that the Lilleys' letter was defamatory, untrue, and done with malice. Forest Cove also contended there was no evidence that their letter to Honeycutt was published, that it was defamatory, untrue, and done with malice. Appellant responded to the motion contending there was some evidence that Lilleys' letter was defamatory, untrue, and was published with malice, and there was some evidence that the association letter was defamatory, untrue and published with malice. Attached as summary judgment proof were the same affidavits attached to the Lilleys' motion for summary judgment which are no evidence of any defamation by the property owners' association.

On appeal, appellant does not separately brief his contentions to show reversible error for the summary judgment for the property owners' association. Accordingly, appellant has not preserved this complaint for review. We cannot raise points of error *sua sponte*. As the Texas Supreme Court recently reiterated, our task is to consider only those issues presented by the parties. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). We overrule appellant's contentions that summary judgment was improper for the property owners' association.

We affirm the judgments of the trial court.

/s/ Eric Andell
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Sears, Draughn, and Andell.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears and Joe L. Draughn, and Former Justice Eric Andell sitting by assignment.