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Be Nice - Or I'll Sue: Is This a New Perigee for FAA/Customer Relations - *Cox & Novickis v. 5-State Helicopters, Inc.* - A Clash of Personal and Public Rights

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**BE NICE — OR I’LL SUE: IS THIS A NEW PERIGEE FOR
FAA/CUSTOMER RELATIONS? *COX & NOVICKIS V.*
5-STATE HELICOPTERS, INC. A CLASH OF
PERSONAL AND PUBLIC RIGHTS**

CHRIS KILGORE*
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DE MONTESQUIEU’S RULE:

The wording of laws should mean the same thing to all men.

I. SUMMARY

AFTER A FEDERAL Aviation Administration (FAA) ramp inspection, an air taxi operator wrote letters complaining to its Flight Standards District Office (FSDO) and to the Regional Headquarters about the conduct of the Aviation Safety Inspectors (ASIs), in particular about what was perceived as unfair and unsafe practices by the inspectors while conducting the ramp check. A single, minor infraction was found by the FAA, resulting in the issuance of an administrative warning letter to the operator. Regarding the certificate holder’s operations, the matter was closed. Following a further investigation of the inspectors’ conduct, the Regional Office substantiated and acted to internally correct some of the operator’s complaints.

Shockingly, the inspectors individually later sued the operator and its officials in a state court for defamation, charging that the

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letters to their superiors had damaged their reputations in the workplace and subjected them to “embarrassment, humiliation and mental anguish.”

While the FAA is not a party, this litigation does not encourage support for the concept of “FAA/Customer” relations, at the very time the agency has been advancing its so-called “partnership” with industry. As federal employees, the inspectors enjoy immunity from other-than-certain constitutional torts, but under federal law, the operator has no equivalent protection. We go to great lengths to protect individuals from retaliation by their aviation employers and others when they “blow the whistle” on safety violations or fraud, waste and abuse. But it appears that somewhere along the way, we have neglected to protect them from—guess whom?—FAA inspectors “here to help us.”

Regardless of how one sees the merits of the cases reviewed here, it seems to us that it is patently unfair for an inspector, offended by a certificate holder’s complaints to the agency concerning the inspector’s performance of official conduct, to be allowed to then personally retaliate against the certificate holder. The “chilling” effect this has on the sometimes tenuous, sometimes litigious and always fragile relationship between the FAA and an intensely regulated industry is obvious. At best, in defending itself the operator will expend tens of thousands of dollars that are unrecoverable. At worst, the operator could lose its business. In either event, in the eyes of the operator, it has been betrayed by the FAA, even though the government is not party. Surely, this is contrary to Stephen Covey’s best advice—a “lose-lose” situation for both the operator and the government. Similar state suits have been filed in Texas and Arizona. Therefore, this may be only the beginning of a very unwelcome trend.

**THE TWO LEAST CREDIBLE
SENTENCES IN THE ENGLISH LANGUAGE:**

1. The check is in the mail.
2. I’m from the government and I’m here to help you.

Imagine this:

You are on the ramp when you are approached by an FAA Aviation Safety Inspector (“ASI”). He wants to “take a look” at your certificates/aircraft/operation. He appears to be rude, obnoxious, and he seems intent on finding a violation. Anything that appears to be resistance on your part draws an in-

stant admonition and a reminder of the seemingly omnipotent power he wields. This is underscored by the fact that the inspection suddenly seems to move into slow motion, further delaying your travel. Nevertheless, the inspection is eventually concluded and you are unaware that any violation was found. You are unhappy with the experience, but relieved.

Later, the more you think about what happened, the more angry you become. So, at the first opportunity, you fire off a letter to your “friendly” FSDO complaining about the inspector, noting in particular his unprofessional and confrontational attitude. In response, you get a brief letter from the FSDO stating that they are looking into it. Months later, you get a follow-up letter stating that the investigation of your complaint is complete, apologizing for any perceived lack of courtesy, reminding you that the FAA inspector indeed does have the power to delay you and inspect you, telling you that appropriate follow-up actions will be taken, and concluding with the obligatory “thank you for your interest in aviation safety.” You know a bureaucratic response when you see one; but you did get a chance to vent and hopefully, having called the FSDO’s attention to the problem, the inspector will be a bit more careful in the future. All things considered, you are satisfied.

A year later, you are in shock when you are served with a lawsuit. The FAA inspector has sued you for defamation, alleging that your complaint letter has injured him, that he has suffered mental anguish and humiliation, and that his job has been adversely affected. You can’t believe it! Surely, this can’t be right! You soon learn that the inspector can indeed do this. Your lawyer thinks it is a weak case for the inspector, but it is going to cost you plenty to prove you are right. Even worse, there is always a chance that you could still lose, even if you are right.

You open the proverbial can of “alphabet soup” and contact your concerned industry association, and the FAA’s Washington headquarters. Everyone tells you that this has to be the most ridiculous thing that they’ve heard and they share your indignation, but you quickly learn that, for the most part, you are on your own. You get a lot of sympathy, but little else. However, from the FAA, you won’t even get that.

You will also soon learn that you are about to embark on what—trite, but true to say— will be a Sisyphean task, at-

tempted up a “rigged” course (remember, Sisyphus was doomed to roll the heavy stone uphill in Hades, where you too will feel you are). The FAA will not be a party to the suit but will stand by while one of its inspectors sues a “customer.” To make matters worse, you will find that getting information from the FAA which might help you will be an exercise in futility. Others may have complained to the FSDO before, and the manager there may have even apologized for this guy on occasion. But chances are that those past incidents are not reported in his official personnel file and, no matter what was said before, no one at the FSDO is going to testify against him on the record. The cost to you is going to be high and the risk great, but you’ve got no choice. You have been drawn into the turbulent, murky and unpredictable world of litigation.

To add insult to injury, you are soon faced with the classic conundrum of this seemingly dark netherworld. You are informed that the inspector will take a relatively modest five-figure sum to settle the case—“modest” in comparison to the damages you are being sued for, anyway. You don’t believe you have done anything wrong, and you don’t believe for a nanosecond that the inspector has been injured in any way. But the cost of proving you are right is going to be much more than the cost of settling, and even then your lawyer will not give you any assurance that you will not end up paying those costs plus the amount of damages claimed by the inspector.

One thing is certain: no matter what our unfortunate airman/operator decides to do, he or she will forever be disillusioned and angry—not only at the inspector who caused all of this, but also at the entire justice system. And all for good reason. Win, lose, or draw, the relationship between the regulator and the regulated is forever altered. It makes no difference that the inspector might be a renegade or that he is not representative of the vast majority of government servants.

Then, there are the practical considerations. Once a personal suit is filed against a certificate holder by an inspector, can that inspector ever again credibly resume a position of regulating the defendant? How about that inspector’s co-workers and friends? How about others at the FSDO named by the inspector as his witnesses? How does the FSDO manager schedule his workforce when one or more of them is in personal litigation against certificate holders in his district?

What if the only inspectors in the FSDO that have experience in the specialty of the certificate holder's operations are or have been involved in a personal lawsuit against the certificate holder?

Is this scenario a fantasy? A fairy tale? Hyperbole? Hardly! It is a phenomenon that could get worse before it gets better. Inspectors have sued and won, even when the damages claimed were speculative at best. Word has spread among them that they "don't have to take it any more," and that they might even make a little money. These suits, even when motivated by little more than retaliation or greed, can be sustained. Protected by the shield of governmental immunity, the risk to the inspector, if any, is negligible. Unless and until this situation is restrained by new case law or federal law or policy, it can be abused. And if it can be abused, it will be.

Before we begin a discussion of an actual case, a short primer on defamation is appropriate, as this is not an area of the law routinely presented to aviation practitioners. No attempt is made to wade into the finer nuances of the law of defamation, but be forewarned there are many.

II. DEFAMATION

Defamation is defined as the act of "harming the reputation of another by making a false statement to a third person. If the alleged defamation involves a matter of public concern, the plaintiff is constitutionally required to prove both the statement's falsity and the defendant's fault."¹

"A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."² The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.³

Libel is defamation expressed in a fixed medium, especially a writing, but also a picture, sign, or electronic broadcast, while

¹ BLACK'S LAW DICTIONARY 448 (8th ed. 2004). "Defamation . . . is involved in two related harms, libel and slander. A familiar statement is that libel is written whereas slander is oral. This covers the idea in a general way but tends to mislead because defamation may be published without the use of words and hence be neither written nor oral." *Id.*

² RESTATEMENT (SECOND) OF TORTS § 559 (1997).

³ *Id.* § 563.

slander is defamation expressed in a transitory form, especially speech.⁴

These terms may also be defined by state statute. For example, libel is defined in Texas as "a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule or financial injury."⁵

Context and perspective are important. "We have long held that an allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it."⁶ A threshold question of law is whether the communication is reasonably capable of defamatory meaning.⁷ Importantly, the opinion of the parties has no bearing on whether the complained of words are actually defamatory.⁸

Only statements of fact can be defamatory. To be actionable, the statement of fact must be objectively verifiable.⁹ Opinion, even rhetorical hyperbole, is not actionable.¹⁰ Further, "[w]hether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court."¹¹

⁴ BLACK'S LAW DICTIONARY 935, 1421 (8th ed. 2004).

⁵ TEX. CIV. PRAC. & REM. CODE ANN. §73.001 (Vernon 2005).

⁶ *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000).

⁷ *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

⁸ *Musser v. Smith*, 690 S.W.2d 56, 58 (Tex. App.—Houston [14th Dist.] 1985), *aff'd*, 723 S.W.2d 653 (Tex. 1987); *see also* *Farias C. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 878 (5th Cir. 1991) ("[plaintiff's] opinion of the statements has no bearing on whether they were defamatory"); *Patton v. United Parcel Serv., Inc.*, 910 F. Supp. 1250, 1272 (S.D. Tex. 1995) ("A plaintiff's opinion of the statements has no bearing on whether they were defamatory."); *Dolcefino v. Randolph*, 19 S.W.3d 906, 918 (Tex.App.—Houston [14th Dist.] 2000), *aff'd*, *Turner*, 38 S.W.3d 103 (Tex. 2000) (holding that a plaintiff's conclusory statement that "[t]his was false, defamatory, and has injured me in my profession" is insufficient to prove falsity).

⁹ *See Turner*, 38 S.W.3d at 114.

¹⁰ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-20, (1990); *Gaylord Broad. Co. v. Francis*, 7 S.W.3d 279, 284 (Tex. App.—Dallas 1999, pet. denied); *see also* *Eric Scott Fulcher, Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 GA. L. REV. 717, 731 (2004).

¹¹ *Dolcefino*, 19 S.W.3d at 917 (citing *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653 (Tex. 1987)).

"In making this determination, [the court] must construe the statement as a whole in light of the surrounding circumstances. . ."¹²

A. DEFAMATION PER SE

Sometimes, words are defamatory in and of themselves and are not capable of an innocent meaning.¹³ They are actionable on their face and, if proven, damages are presumed.¹⁴ Words actionable *per se* include: imputation of a crime, a loathsome disease, unchastity, or words affecting plaintiff's business, trade, profession, office or calling.¹⁵

"The publication of defamatory matter, actionable *per se*, entitles the person defamed to compensation for the actual injury done him without regard to the motive with which the publication was made and want of actual intent to injure or defame furnishes no legal excuse."¹⁶

B. STANDARD OF CONDUCT / LIABILITY

In defining the standard of conduct and determining whether a statement is defamatory, the standards vary, depending on who is allegedly being defamed, by whom, and within what process. Obviously, the law affords private individuals the most protection. Public figures, such as celebrities, or public officials, such as candidates for office or those in offices of interest to the public, are afforded less protection. In the instance of public persons, the speaker has a qualified immunity; that is, for a statement to be actionable, it must be made with knowledge that it is not true.¹⁷

"To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement."¹⁸

¹² *Id.*

¹³ BLACK'S LAW DICTIONARY 499 (8th ed. 2004).

¹⁴ 53 C.J.S. *Libel & Slander* § 43 (1987).

¹⁵ See BLACK'S LAW DICTIONARY 449 (8th ed. 2004).

¹⁶ 53 C.J.S. *Libel & Slander* § 43 (1987).

¹⁷ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

¹⁸ *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

In some instances, such as judicial proceedings, all speech is protected, and an absolute privilege applies.¹⁹ Absolute privilege is also referred to as an immunity.²⁰ An absolutely privileged communication is one for which, due to the occasion upon which it is made, no civil remedy exists, even though the communication is false and was made or published with express malice.²¹ This doctrine has been firmly established in Texas for well over one hundred years.²²

The absolute privilege applies to communications related to both proposed and existing judicial proceedings, but *also* extends to quasi-judicial proceedings, those governmental functions where free speech, without threat of retribution, is desired.²³

[T]he rationale for extending an absolute privilege to quasi-judicial proceedings rests in the public policy consideration that every citizen should have the unqualified right to appeal to the

¹⁹ *James v. Brown*, 637 S.W.2d 914, 916-17 (Tex. 1982) ("Communications in the due course of a judicial proceeding will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made. *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909 (1942). This privilege extends to any statement made by the judge, jurors, counsel, parties or witnesses, and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits and any of the pleadings or other papers in the case.") *see also* *Thomas v. Brace*, 940 S.W.2d 340, 343 (Tex. App.-San Antonio 1997, no writ) ("This absolute privilege has been extended to communications made in contemplation of and preliminary to judicial proceedings.")

²⁰ *See Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987) (stating that "absolute privilege is more properly thought of as an immunity because it is based on the personal position or status of the actor"); *Attaya v. Shoukfeh*, 962 S.W.2d 237, 239 (Tex. App.—Amarillo 1998, pet. denied) (referring to absolute privilege as an immunity).

²¹ *See Bird v. W.C.W.*, 868 S.W.2d 767, 771-72 (Tex. 1994); *James*, 637 S.W.2d at 916; *Reagan*, 166 S.W.2d at 912.

²² *See Runge v. Franklin*, 10 S.W. 721, 723 (Tex. 1889).

²³ *James*, 637 S.W.2d at 917; *Reagan*, 166 S.W.2d at 912-13; *Randolph v. Jackson Walker, L.L.P.*, 29 S.W.3d 271, 278 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also* *Bailey v. Superior Ct.*, 636 P.2d 144, 146 (Ariz. Ct. App. 1981) (holding that a complaint made to quasi-judicial body absolutely privileged); *Drummond v. Stahl*, 618 P.2d 616, 620 (Ariz. Ct. App. 1981), (complaint made to quasi-judicial body is absolutely privileged); Piper M. Willhite, *Defamation Law: Privileges from Liability: Distinguishing Quasi-Judicial Proceedings from Proceedings which are Preliminary to Judicial Hearings*, 47 OKLA. L. REV. 541, 562 (1994) (concluding that an absolute privilege applies in Oklahoma to quasi-judicial proceedings). A concise summary of the current law in Texas regarding the privilege in quasi-judicial proceedings is given by the United States District Court for the Southern District of Texas in *Khan v. United Recovery Systems, Inc.*, No. Civ.H-03-2292, 2005 WL 469603 (S.D.Tex.).

agencies of government for redress “without the fear of being called to answer in damages,” and that the administration of justice will be better served if “witnesses are not deterred by fear of lawsuits.”²⁴ In fact, the United States Supreme Court has recognized the right to petition as “among the most precious of the liberties safeguarded by the Bill of Rights.”²⁵

However, what constitutes a quasi-judicial proceeding is a subject of debate and varies from jurisdiction to jurisdiction. Texas courts have recognized six factors that are relevant to whether proceedings are quasi-judicial for purposes of absolute immunity.²⁶ Professor Keeton has stated that the central factors to consider in determining whether an administrative body or agency possesses quasi-judicial power are: (1) whether the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts; (2) whether the body is entitled to hold hearings and decide the issue by the application of rules of law to the facts; and (3) whether the body’s power affects the personal or property rights of private persons.²⁷ Some states extend absolute privilege to administrative proceedings.²⁸ Additionally, media defendants are typically afforded some privilege in reporting.²⁹ In Texas, there is a specific statute regarding libel actions against newspapers and broadcasters.³⁰

C. PRIVATE INDIVIDUALS — NO PRIVILEGE

No culpable mental state is required for proving defamation of a private individual. In both libel and slander, the issues are

²⁴ *Gallegos v. Escalon*, 993 S.W.2d 422, 425 (Tex. App.—Corpus Christi 1999, no pet.) (quoting *Hernandez v. Hayes*, 931 S.W.2d 648, 651 (Tex. App.—San Antonio 1996, writ denied)).

²⁵ *United Mine Workers of Am. v. Ill. Bar Ass’n.*, 389 U.S. 217, 222 (1967).

²⁶ *Shanks v. Alliedsignal, Inc.*, 169 F.3d 988, 993-94 (5th Cir. 1999); *Village of Bayou Vista v. Glaskox*, 899 S.W.2d 826, 829 (Tex. App.—Houston [14th Dist.] 1995, no writ).

²⁷ W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 114 (5th ed. 1984).

²⁸ *See Smith v. McDonald*, 895 F.2d 147, 149 (4th Cir. 1990) (stating that “communications made in the course of an administrative proceeding are absolutely privileged if the administrative officer or agency is exercising a judicial or quasi-judicial function”) (citing *Mazzucco v. N.C. Bd. Of Medical Exam’rs*, 228 S.E.2d 529 (N.C. App. 1976); *Angel v. Ward*, 258 S.E.2d 788, 792 (N.C. App. 1979) (stating that North Carolina law grants an absolute privilege in administrative proceedings)).

²⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 327-28, (1974).

³⁰ TEX. CIV. PRAC. & REM. CODE ANN. §§ 73.001-006 (Vernon 2005).

whether the utterance was made, whether it was false, whether it damaged the complainant, and whether the speaker had a privilege.³¹ Whether the defendant intended to say or publish the defamatory words is not an element of the cause of action, unless privilege is involved.³² Even innocent, mistaken publication may subject the defamer to liability.³³

D. PUBLIC FIGURES AND PUBLIC OFFICIALS — QUALIFIED PRIVILEGE

Public officials and public figures must establish a higher degree of fault. They must prove that the defendant published a defamatory falsehood with 'actual malice,'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.³⁴ Actual malice requires a showing of either deliberate falsification or reckless publication, "despite the publisher's awareness of probable falsity."³⁵

Reckless disregard has further been determined to mean that the defendant entertained a serious doubt as to the truth of the publication.³⁶ "Reckless disregard is a subjective standard, focusing on the defendant's state of mind."³⁷

Actual malice is a "term of art" in the defamation context,³⁸ and "is unfortunately confusing in that it has nothing to do with bad motive or ill will,' but rather it is a 'shorthand to describe the First Amendment protections for speech injurious to

³¹ RESTATEMENT (SECOND) OF TORTS § 558 (1977).

³² See *Hornby v. Hunter*, 385 S.W.2d 473, 476 (Tex. Civ. App.—Corpus Christi 1964, no writ); see also *Express Publ's. Co. v. Lancaster*, 2 S.W.2d 833, 834 (Tex. 1928); 50 TEX. JUR. 3D *Libel & Slander* § 12 (1986) (noting that intent is not an element of defamation).

³³ *Hornby*, 385 S.W.2d at 476.

³⁴ *N.Y. Times*, 376 U.S. at 279-80. The United States Supreme Court has acknowledged that its choice of the term "actual malice" in defamation cases as meaning knowing falsity and reckless disregard for the truth was unfortunate, since the term is easily confused with common-law malice. *Id.*; see *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991). Actual malice in defamation cases is not used in the common law sense of hatred, ill-will, enmity, or wanton desire to injure. *Id.*

³⁵ *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 153 (1967).

³⁶ *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 171 (Tex. 2003) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731, (1968)).

³⁷ *New Times, Inc. v. Bruce Isaacks*, 146 S.W.3d 144, 162 (Tex. 2004).

³⁸ *Forbes, Inc.*, 124 S.W.3d at 171.

reputation.’”³⁹ “Constitutional malice generally consists of “[c]alculated falsehood.”⁴⁰

The law is clear that actual malice is not a difference of opinion as to the truth of the matter.⁴¹ Actual malice is not ill will, spite, hatred, or desire to injure.⁴² And, actual malice cannot be based on a witness’ lack of credibility.⁴³ Further, failure to investigate the truth or falsity of the statement before it is published, standing alone, is insufficient to show actual malice.⁴⁴

Moreover, the defendant’s testimony that he believed what he said is not conclusive, irrespective of all other evidence. The evidence must be viewed in its entirety, and the defendant’s state of mind is often proved by circumstantial evidence. The Texas Supreme Court has stated:

A lack of care or an injurious motive in making a statement is not alone proof of actual malice, but care and motive are factors to be considered. An understandable misinterpretation of ambiguous facts does not show actual malice, but inherently improbable assertions and statements made on information that is obviously dubious may show actual malice. A failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is. Imagining that something may be true is not the same as belief.⁴⁵ Actual malice must be proven by clear and convincing evidence.⁴⁶

³⁹ *Bruce Isaacks*, 146 S.W.3d at 161.

⁴⁰ *Forbes, Inc.*, 124 S.W.3d at 171 (citing *Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002)).

⁴¹ *Harte-Hanks Communications, Inc. v. Connaughten*, 491 U.S. 657, 681 (1989).

⁴² *Masson*, 501 U.S. at 510.

⁴³ *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984).

⁴⁴ *Harte-Hanks*, 491 U.S. at 688; *Doubleday v. Rogers*, 674 S.W.2d 751, 756 (Tex. 1984).

⁴⁵ *Bentley*, 94 S.W.3d at 596.

⁴⁶ *Gertz*, 418 U.S. at 342; *N.Y. Times*, 376 U.S. at 285-286, (applying clear and convincing standard to media defendant); *Casso v. Brand*, 776 S.W.2d 551, 554 (Tex. 1989) (applying clear and convincing standard also to suits against private individuals); see also *Forbes, Inc.*, 124 S.W.3d at 172. These standards apply equally to media and non-media defendants. See *Alaniz v. Hoyt*, 105 S.W.3d 330 (Tex. App.—Corpus Christi 2003, no pet.) (citing *Casso*, 776 S.W.2d at 551) (“We are reluctant to afford greater constitutional protections to members of the print and broadcast media than to ordinary citizens. . . . Therefore, we join those states which have extended the *New York Times* standard to defamation suits by public officials and public figures against non-media defendants.”).

1. *Public Officials Expanded*

It has been recognized that when the conduct of public officials is involved, there is an even greater level of protection afforded the citizen-critic, because it is as much the citizen's duty to criticize as it is the official's duty to administer.⁴⁷ In concluding that such a privilege is required by the First and Fourteenth Amendments, Justice Brennan observed:

As Madison said, 'the censorial power is in the people over the Government, and not the Government over the people.' It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.⁴⁸

This begs the question of exactly who may be considered a public official and how far into the ranks of government the public official designation should extend.⁴⁹ The Supreme Court did suggest the reach may be broad. Justice Brennan noted an "oft-cited statement of a like rule" by a Kansas court in which the court held that "[t]his privilege extends to a great variety of subjects and includes matters of public concern, public men, and candidates for office."⁵⁰

In *Rosenblatt v. Baer*, the Supreme Court provided more guidance:

Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

. . .

Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all gov-

⁴⁷ *N.Y. Times*, 376 U.S. at 282.

⁴⁸ *Id.*

⁴⁹ Whether a plaintiff is a public official for defamation purposes is a question of law to be determined by the court. *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966); *HBO v. Harrison*, 983 S.W.2d 31, 36-37 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

⁵⁰ *N.Y. Times*, 376 U.S. at 280-82.

ernment employees, both elements identified in *New York Times* are present and the *New York Times* malice standards apply.⁵¹

It has been recognized that the Supreme Court has not reserved the public official designation for high level officers.⁵² In *St. Amant v. Thompson*, the Court found that a deputy sheriff was a public official, "at least where law enforcement and police functions are concerned."⁵³

In *HBO v. Harrison*, the court concluded that public official status was determined on the basis of authority and exercise of that authority, finding that a non-government employee, a court-appointed psychologist, was a public official because of public interest reasons based on perceived responsibility.⁵⁴ Another Texas case held a child protective services (CPS) specialist to be a "public official" under the *New York Times* rule.⁵⁵ The court held that the CPS specialist was a public official for defamation purposes because, by the nature of her duties, she exercised authority on the state's behalf, served as an investigator, had the authority to recommend enforcement action, and had substantial public contact relating to her official duties.⁵⁶

In fact, the exact question of whether FAA investigators are "public officials" for the purposes of defamation was addressed by an Arizona court of appeals in *Lewis v. Oliver*. After analyzing the nature of the inspector's duties, the effect of an FAA inspector upon air transportation, and the resultant public interest; the court simply and clearly held, "In short, . . . Lewis is a public official and consequently must establish actual malice in order to recover."⁵⁷

⁵¹ *Rosenblatt*, 383 U.S. at 85-86.

⁵² *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 814 (Tex. 1976).

⁵³ *St. Amant*, 390 U.S. at 730, n.2.

⁵⁴ *Harrison*, 983 S.W.2d at 37.

⁵⁵ *Villareal v. Harte-Hanks Communications, Inc.*, 787 S.W.2d 131, 134-35 (Tex. App.—Corpus Christi 1990, writ denied).

⁵⁶ *Id.* at 135. The court additionally relied upon a non-exhaustive list of other cases holding government employees who are in a position of employment with powers which affect the lives, liberty, money, or property of citizens as "public officials." See, e.g., *Press, Inc. v. Verran*, 569 S.W.2d 435, 441 (Tenn. 1978) (holding that a junior social worker is a public official); *Hodges v. Okla. Journal Publ. Co.*, 617 P.2d 191, 193 (Okla. 1980) (holding that a license tag agent is a public official); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1103 (Okla. 1978) (holding that a grade school wrestling coach is a public official); *Ryan v. Dionne*, 248 A.2d 583, 585 (1968) (holding that a collector of delinquent taxes is a public official).

⁵⁷ *Lewis v. Oliver*, 873 P.2d 668, 675 (Ariz. Ct. App. 1993).

Accordingly, aviation safety inspectors for the FAA are "public officials" for the purposes of defamation and are thereby required, at a minimum (if absolute privilege weren't applicable), to prove "actual malice" under the rule of *New York Times*.

2. *Another Basis Requiring Actual Malice*

The malice standard also applies when the communications complained of concern an individual who has an interest in the matter and qualified immunity. More specifically, actual malice applies to communications to public officials acting in their supervisory capacity when the communication is not related to an ongoing judicial or a quasi-judicial proceeding.

The RESTATEMENT (SECOND) OF TORTS § 598, *Communications to One Who May Act in the Public Interest* (1977), provides that a publication is conditionally privileged if: 1) there is information that affects a sufficiently important public interest, and 2) the public interest requires the communication of defamatory matter to a public officer who is authorized or privileged to take action if the defamatory matter is true. Comment "e" explains this rule and states:

The rule stated in this section is applicable to defamatory communications to public officials concerning matters that affect the discharge of their duties. The duties of a public officer include supervision of inferior officers, and this supervision in many cases carries with it the power to remove or discipline the inferiors for neglect of duty or malfeasance in office, or to report the misconduct to heads of departments or other persons having the power of removal or discipline. In performing this duty of supervision, it is desirable that public officers have extensive information concerning the conduct of their subordinates in order that they may intelligently exercise their discretion. Therefore, a defamatory publication made by a citizen to a public officer concerning the work of a subordinate under his control or supervision is conditionally privileged.⁵⁸

Thus, if a communication does not relate to an ongoing judicial or quasi-judicial proceeding, by the virtue of an FAA inspector being a public official, as well as the privilege discussed in the Restatement, the inspector would, at a minimum, always be required to prove actual malice for defamation purposes.

⁵⁸ RESTATEMENT (SECOND) OF TORTS § 598, cmt. e. (1977).

E. DEFAMATION DISGUISED AS TORTIOUS
INTERFERENCE WITH CONTRACT

Plaintiffs, in the case study discussed here, attempted to characterize defamation claims as claims for tortious interference with a contract or as business disparagement. This would appear to remove the claim from the defamation arena and to avoid the requirement that the plaintiff establish actual malice by a public official or public figure. Disguising a defamation claim as a tortious interference or business disparagement claim has also been used, at least in Texas, to attempt to avoid defamation's shorter one-year limitations period.

However, Texas courts, by applying a "looks like a duck, quacks like a duck" corollary, have held that, no matter how artfully packaged, interference claims arising from an alleged defamatory communication are still claims for defamation.⁵⁹ The *Hurlbut* court noted that claims of business disparagement and tortious interference with contract arising from a defamation claim were, in essence, a claim for slander.⁶⁰ "To hold otherwise would permit litigants to circumvent constitutional defenses against the tort of libel by pleading torts that do not require falsity or actual malice."⁶¹

When a non libel claim is grounded on the same speech giving rise to a libel claim that requires a showing of malice, the plaintiff must prove actual malice.⁶² Accordingly, where actual malice would be required regarding a defamation claim, a plaintiff would also be required to prove by clear and convincing evidence both the falsity and the actual malice (by clear and convincing evidence) for both the defamation claim and for the asserted tort claim. The Texas Supreme Court has reiterated the requirement of actual malice in a business disparagement claim in *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 172 (Tex. 2003).

⁵⁹ *Hurlbut*, 749 S.W. at 766-67.

⁶⁰ *Id.* Recent decisions have held that where a privilege applies, it is to be applied to preclude *all* claims based on the communication, regardless of the label of the claim. *Khan*, 2005 WL 469603, at *13 (citing *Laub v. Pesikoff*, 979 S.W.2d 686, 690-92 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)).

⁶¹ *KTRK Television, Inc. v. Fowkes*, 981 S.W.2d 779, 789-90 (Tex. App.—Corpus Christi 1991, writ denied). Likewise, courts have held that extension of absolute privilege beyond defamation actions is necessary to avoid circumventing the policy behind the privilege. *Laub*, 979 S.W.2d at 690-92.

⁶² *Fowkes*, 981 S.W.2d at 789 (citing *KTRK v. Felder*, 950 S.W.2d 100, 108 (Tex. App.—Houston [14th Dist.] 1997, no writ) and *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988)).

F. DEFAMATION DAMAGES

No attempt will be made here to discuss in depth the issue of damages available in a defamation suit. For the purposes of this article, it suffices to say that compensatory damages allowable for defamation are divided into two categories: general and special.

General damages include mental anguish, injury to reputation, and the like. These are damages that naturally flow from the libel and are not easily susceptible to monetary valuation.⁶³ The amount of general damages of injury to reputation and mental anguish is often very difficult to determine, and a jury is given wide discretion in its estimation of them.⁶⁴ However, general damages, beyond nominal damages, have been denied on the basis of insufficient evidence when they are based only on self-serving statements without other independent indicia of injury.⁶⁵

Included as a form of special damages is lost earning capacity.⁶⁶ Lost earning capacity, as a form of damages, must be specifically stated and proved.⁶⁷

G. PRACTICAL ROAD BLOCKS—DISCOVERY ISSUES

In the case reviewed, the official personnel records acquired under the federal Freedom Of Information Act (FOIA) were either incomplete or so general as to be almost useless. However, since they proved virtually nothing, this furthered the burden on the plaintiff-inspectors to produce additional records in discovery. Interestingly, there was a noticeable difference between personnel documents provided by the FAA and those provided by the inspectors.

The defense will likely have great difficulty in discovering the testimony of other FAA employees, with respect to the employment history of the plaintiff-inspectors, any past disciplinary ac-

⁶³ See *W.T. Util. Co. v. Wills*, 164 S.W.2d 405, 412 (Tex. Civ. App.—Austin 1942, no writ).

⁶⁴ *Evans v. McKay*, 212 S.W. 680, 685 (Tex. Civ. App.—Dallas 1919, writ diss'm'd).

⁶⁵ *Reveley v. Bird Publ'n, Inc.*, 601 F. Supp. 444, 446 (W.D. Tex. 1984).

⁶⁶ *M. Pac. Ry. Co. v. Richmond*, 11 S.W. 555, 558 (Tex. 1889); *Houston Belt & Terminal Ry. Co. v. Wherry*, 548 S.W.2d 743, 753 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

⁶⁷ *Kelly v. Diocese of Corpus Christi*, 832 S.W.2d 88, 91 (Tex. App.—Corpus Christi 1992, writ diss'm'd w.o.j.); *Vista Chevrolet, Inc. v. Barron*, 698 S.W.2d 435, 441 (Tex. App.—Corpus Christi 1985, no writ).

tions, the authentication of employment records, and other relevant documents because of the infamous *Touhy* Rule (so-called after *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 464-65 (1951)). *Touhy* regulations prohibit federal employees from testifying in legal proceedings between private litigants without the permission of the government. They also require compliance with conditions and limitations set by the governing agency or department. The Department Of Transportation's *Touhy* regulation, which governs the FAA, is found at 49 C.F.R. Part 9. This regulation essentially limits testimony to one pre-trial deposition per employee, and then only with respect to facts and not expert or opinion testimony.⁶⁸ In other words, some of the key issues in a defamation claim, such as reputation, promotion potential, or damage, will be completely off limits and excluded. Even if warranted, one within the FAA will not be able to "speak evil" of another employee, at least not on the record.

**POP QUIZ FOR LAW STUDENTS AND OTHER
CONSTITUTIONAL SCHOLARS: QUARRELS THAT HAVE
SHAPED THE CONSTITUTION¹**

1. The Case of the Missing Commissions?
2. The Case of the Copperhead Conspirator?
3. The Case of the Unscrupulous Warehouseman?
4. The Case of the Prejudiced Doorkeeper?
5. The Case of the Louisiana Traveler? (NOT the Pelican Brief!)
6. The Case of the Overworked Laundress?
7. The Sick Chicken Case?
8. The Case of the Wenatchee Chambermaid?
9. The Case of the Florida Drifter?

¹ From *Quarrels that have Shaped the Constitution* (Revised Edition), Edited by John A. Garraty, Columbia University, Harper & Row (1987). (We have provided the answers to items 1 through 9 in the Addendum.)

⁶⁸ For an overview of the *Touhy* privilege, see Don Lively, *Government Housekeeping Authority: Bureaucratic Privileges Without A Bureaucratic Privilege*, 16 HARV. C.R.—C.L.L. REV. 495 (1981); Robert R. Kiesel, *Every Man's Evidence and the Ivory Tower Agencies: How May a Civil Litigant Obtain Testimony From An Employee Of A Nonparty Federal Agency?*, 59 GEO. WASH. L. REV. 1647 (1991); Gregory S. Coleman, *Touhy and the Housekeeping Privilege: Dead But Not Buried?*, 70 TEX. L. REV. 685 (1992); Jason Grech, *Exxon Shipping, The Power To Subpoena Federal Agency Employees, and the Housekeeping Statute: Cleaning Up the Housekeeping Privilege for the Chimney-Sweeper's Benefit*, 37 WM. & MARY L. REV. 1137 (1996).

III. A CASE STUDY: 5-STATE HELICOPTERS, INC.

5-State Helicopters, Inc. v. Cox, 146 S.W.3d 254 (Tex. App. — Fort Worth 2004, pet. denied)

A. BACKGROUND

On November 20, 1998, two FAA Airworthiness Inspectors, Brian Novickis and John Cox,⁶⁹ on their way to inspect an A&P training program at Texas State Technical College in Waco, Texas, noticed two helicopters engaged in aerial lift operations on the campus.⁷⁰ For reasons that were not entirely clear, they decided to perform a ramp inspection of the helicopters.⁷¹ Escorted by the contractor, they entered the restricted helicopter operating area and approached a ground guide that was controlling one of the helicopters as it was removing and dropping off old rooftop air conditioning units.⁷² They stated their intention was to inspect the helicopters and asked that they be called when the helicopters were next on the ground.⁷³

The lift operation involved the removal and replacement of approximately 300 air conditioning units at the school over a holiday weekend.⁷⁴ Time was of the essence. Unaccustomed to having to stop an operation midstream to accommodate FAA inspectors, and disturbed by the inspectors' entry into the restricted operating area (an apparent safety violation), the operator, 5-State Helicopters, was not pleased.⁷⁵

⁶⁹ Brian Novickis was the lead inspector. John Cox was in training at the time. For the most part, it appeared that Cox had little active involvement in the matters at issue.

⁷⁰ See 5-State Helicopters, Inc. v. Cox, 146 S.W.3d 254, 256 (Tex.App.—Fort Worth 2004, pet. Denied).

⁷¹ *Id.*

⁷² Brief of John E. Cox and Bryan Novickis at app. 2, *5-State Helicopters, Inc.* (No. 02-03-00205-CV) [hereinafter Cox and Novickis Brief]; First Supplemental Clerk's Record at 37, *5-State Helicopters, Inc.* (No. 02-03-00205-CV) [hereinafter First Supplement Clerk's Record].

⁷³ First Supplemental Clerk's Record, *supra* note 72.

⁷⁴ *Id.* at 40.

⁷⁵ During rotorcraft external-load operations conducted under FAR Part 133, the area underneath and adjacent to the operation must be kept clear of personnel and moveable property in the event the load should either fall because of mechanical problems or need to be jettisoned because of control problems. As in the case of this job, the area is usually barricaded and patrolled by law enforcement personnel (in this case, campus police) to keep non-essential persons out. Here, the campus personnel and the HVAC contractor assumed that the FAA personnel were allowed into the operating area. Since this incident, the Fort Worth FSDO has made it clear that unless there is an immediate hazard that

When the FAA inspectors arrived at the ramp after the helicopters had landed, the operator challenged them.⁷⁶ The ensuing “discussion” was reported to be somewhat heated.⁷⁷ Nevertheless, the inspection proceeded with the permission of the operator.⁷⁸ One minor discrepancy was found—the flight manual was not found in one of the helicopters.⁷⁹ Testimony established that the flight manual had been placed in a briefcase in order to prevent it from getting wet during storms the previous night.⁸⁰

The inspectors noted several other anomalies, but it was unclear at the time whether they were in fact violations.⁸¹ Principal among these was the installation of an auxiliary battery in the cargo compartment of one of the helicopters.⁸² The operator explained that the installation was approved and that the aircraft records contained an FAA Form 337 to that effect.⁸³

After the inspection was complete, the operation resumed.⁸⁴ Several days later, 5-State sent a letter of complaint to the Manager of the Fort Worth FSDO.⁸⁵ It complained that the inspectors, by entering the restricted operating area and engaging the ground guide, had created an unsafe condition.⁸⁶ It also complained that one of the inspectors refused to provide official identification and that the inspection was unnecessarily long (almost two hours).⁸⁷ The letter commented on the specific complaints the inspectors had made during the inspection and characterized the conduct of the inspectors as “nit-picking” in an attempt to find some type of violation.⁸⁸ They asked that the FSDO Manager investigate.⁸⁹

must be corrected, FAA inspectors are not to enter an operating area. *See id.* at 116.

⁷⁶ Cox and Novickis Brief, *supra* note 72 at app. 2.

⁷⁷ *Id.* at app 3.

⁷⁸ *Id.* at app. 2.

⁷⁹ Conditional Cross-Brief of 5-State Helicopters, Inc. at 2, *5-State Helicopters, Inc.* (No. 02-03-00205-CV) [hereinafter Conditional Cross-Brief].

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *5-State Helicopters, Inc.*, 146 S.W.3d at 256, 258.

⁸³ Conditional Cross-Brief, *supra* note 79, at 2.

⁸⁴ Cox and Novickis Brief, *supra* note 72, at app. 2.

⁸⁵ *5-State Helicopters, Inc.*, 146 S.W.3d at 256, 258.

⁸⁶ *Id.* at 256; Cox and Novickis Brief, *supra* note 72, at app. 2.

⁸⁷ Cox and Novickis Brief, *supra* note 72, at app. 2.

⁸⁸ *Id.*

⁸⁹ *5-State Helicopters, Inc.*, 146 S.W. 3d at 256.

Upon an alleged informal response that nothing would happen with their complaints, the operator contacted the Helicopter Association International (HAI), a professional trade association, which arranged a conversation with two FAA officials in Washington, D.C.⁹⁰ Those officials advised 5-State that it should send a copy of its complaint to the FAA regional office at Fort Worth, which 5-State did.⁹¹ Along with its letter to the Southwest Region, 5-State added an additional assertion that a contractor had related to 5-State that the inspectors told a nearby Wal-Mart cashier that they had “shut down” the helicopter operation and had “kept a disaster from happening.”⁹² Allegedly, the contractor heard about this the day after the inspection.⁹³

When 5-State learned of the latest allegation, it was understandably upset.⁹⁴ In the past, because of the dangerous and highly visible nature of 5-State’s work, mostly in urban areas, and because of the fact that most of its lift work was performed pursuant to a Congested Area Plan approved by the FAA, it had been visited routinely by FAA representatives.⁹⁵ 5-State’s operations were considered by many in several different FSDO’s to be exemplary.⁹⁶ In fact, 5-State’s operations and facilities were often used by safety inspectors as a training ground for new inspectors.⁹⁷ During the course of its many inspections, not one violation had ever been found; the company’s accident and incident record was spotless—a fact of which the company was extremely proud.⁹⁸

Between December 1998 and January 1999, 5-State was subjected to no less than *four* “follow-up” inspections related to this Waco incident.⁹⁹ The result of each was the same—no viola-

⁹⁰ Brief of 5-State Helicopters, Inc. at 4-5, *5-State Helicopters, Inc.* (No. 02-03-00205-CV) [hereinafter 5-State Helicopter Brief].

⁹¹ *Id.*

⁹² *Id.*; Cox and Novickis Brief, *supra* note 72, at app. 3.

⁹³ 5-State Helicopters Brief, *supra* note 90, at 4-5.

⁹⁴ Cox and Novickis Brief, *supra* note 72, at app. 3.

⁹⁵ *Id.*

⁹⁶ Reporter’s Record Vol. V at 245-46, *5-State Helicopters, Inc.* (No. 02-03-00205-CV) [hereinafter Reporter’s Record Vol. V].

⁹⁷ *Id.*

⁹⁸ *Id.* at 203.

⁹⁹ The fourth, and final, inspection was conducted by FAA Regional Office staff and was a part of the only official investigation into the conduct of the inspectors. The other three were initiated by undetermined persons at the Fort Worth FSDO. All of the inspections were related to the specific observations/

tions were found.¹⁰⁰ One Dallas FSDO inspector reported that his inspection was at the request of “someone” in Fort Worth and he characterized this follow-up inspection as a “fishing” expedition, predicated on regulations.¹⁰¹ The Dallas inspector also reported that the complaining inspector told him that they had “shut down” the Waco job (notably, the same phrase attributed to having been used by the Wal-Mart cashier).¹⁰² Further, the Manager of the Fort Worth FSDO admitted that the performance of multiple follow-up inspections, particularly after finding no prior violations, was “unusual.”¹⁰³

The second letter sent by 5-State resulted in an investigation of the conduct of the Waco inspectors by the Southwest Region.¹⁰⁴ In March 1998, 5-State received notice from the Southwest Region that the investigation had been concluded.¹⁰⁵ The letter noted, among other things, that the entry of the inspectors into the operating area was indeed a safety issue and was being addressed.¹⁰⁶ The letter confirmed a conversation by the inspectors about the inspection, but as the Southwest Region did not speak to anyone other than the inspectors about that issue, the Region was unable to establish any events other than those described by the inspectors.¹⁰⁷ The letter stated that the issues substantiated by the investigation had been addressed with the personnel involved.¹⁰⁸

concerns of the inspectors at the Waco inspection. *5-State Helicopters, Inc.*, 146 S.W.3d at 258; Conditional Cross-Brief, *supra* note 79, at 2.

¹⁰⁰ Reporter's Record Vol. V, *supra* note 96, at 194-98.

¹⁰¹ Reporter's Record Vol. IX at Exhibit 18, *5-State Helicopters, Inc.* (No. 02-03-00205-CV).

¹⁰² *Id.*

¹⁰³ Reporter's Record Vol. V, *supra* note 96, at 117-18. In fact, FAA Order 2150.3A, Paragraph 203 states that “[i]f the evidence fails to support a violation or demonstrate a lack of qualifications or competency of a certificate holder, then neither administrative nor legal enforcement action is appropriate.” When the first follow-up inspection failed to find any evidence of a violation or non-compliance, that should have been the end of it.

¹⁰⁴ *5-State Helicopters, Inc.*, 146 S.W.3d at 256.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* By a Memorandum dated July 21, 1999, FSDO Managers were notified by the FAA of the requirement that inspectors needed to be knowledgeable of the Congested Area Plan and that they should consider themselves non-participants, limit entry into the operating area unless operations are ceased or a safety hazard exists that requires immediate action, and not interfere with the operation or cause unreasonable delays.

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

Five days later, on March 30, 1999, Inspector Novickis sent a letter advising 5-State that a single violation had been noted (the absence of the flight manual), but that legal enforcement action would not be pursued and that the case was considered closed.¹⁰⁹

B. THE LAWSUIT

On November 19, 1999, the inspectors filed personal suits in state district court, in Tarrant County, Texas, alleging that 5-State Helicopters' letters were false and misleading and that the resulting investigation into the incident by the Southwest Region "brought shame, embarrassment, humiliation and mental anguish" to the inspectors, damaging their reputation within the work place and within their profession.¹¹⁰ They further claimed that the letters exposed the inspectors to financial injury and caused them shame, embarrassment, humiliation, mental pain and anguish, lost earning capacity, loss of enjoyment of life, and loss of reputation.¹¹¹ In addition to defamation, the inspectors also alleged tortious interference with their contractual relations with the FAA.¹¹²

C. QUASI-JUDICIAL PRIVILEGE

Early in this litigation, research by 5-State's counsel suggested that any investigation by the FAA constituted a quasi-judicial process for which an absolute privilege applied.¹¹³

¹⁰⁹ Administrative letters issued by the FAA are not appealable, but remain on record for two years.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* 5-State was not served with the complaint until almost ten months later, on September 10, 2000. Limitations was an issue in the case as well, but is not relevant to this discussion. It is also only noted that the defense filed a counterclaim against the inspectors which could have been removed to a United States District Court under the Westfall Act (the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L.No. 100-694, 28 U.S.C.A. § 1), which potentially grants absolute tort immunity to government employees for acts committed within the course and scope of their employment. In enacting the Westfall Act, the Congress desired to have these tort suits decided in a federal forum, a "presumably level playing field," at least for the government. *See Nevarez v. United States*, 903 F. Supp. 1094, 1096 (W.D. Tex.), *rev'd on other grounds*, 95 F.3d 1149, *on remand* 957 F. Supp. 884 (1995). In our case, the FAA inspectors "presumably" did not want a "level playing field" because they elected not to remove the counterclaim, which would have resulted in the complete case being removed to a federal district court. In fairness to the agency, it was apparently unaware of this action until after it was commenced.

¹¹³ *See Shanks*, 169 F.3d at 993-94; *Reagan*, 166 S.W.2d at 912-13.

Texas state courts have recognized that absolute immunity attaches to certain situations involving the administration of the functions of the branches of government.¹¹⁴ Absolute privilege applies to quasi-judicial proceedings as well,¹¹⁵ including certain proceedings before governmental agencies.¹¹⁶

Texas courts have recognized six factors that are relevant to a determination of whether proceedings are quasi-judicial for purposes of absolute immunity:

- (1) The power to exercise judgment and discretion;
- (2) The power to hear and determine or ascertain facts and decide;
- (3) The power to make binding orders and judgments;
- (4) The power to affect the personal or property rights of private persons;
- (5) The power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and
- (6) The power to enforce decisions or impose penalties.¹¹⁷

A proceeding need not meet all of the criteria to be considered quasi-judicial.¹¹⁸

In addressing whether the National Transportation Safety Board ("NTSB") is a quasi-judicial agency, the court in *Shanks v. Alliedsignal, Inc.* observed: "[T]he leading Texas Supreme Court case on quasi-judicial proceedings noted that an agency proceeding may be deemed quasi-judicial simply where a statute confers upon the agency 'the power to conduct investigations and hearings.'¹¹⁹ Expressed another way, '[a] quasi-judicial power has been described as the power to investigate and to draw conclusions from such investigations [citation omitted] or the authority to redress grievances.'¹²⁰

¹¹⁴ *Hurlbut*, 749 S.W.2d at 768.

¹¹⁵ *Reagan*, 166 S.W.2d at 912.

¹¹⁶ *Matta v. May*, 118 F.3d 410, 415 (5th Cir. 1997) (applying Texas law).

¹¹⁷ *Shanks*, 169 F.3d at 994 (applying Texas law).

¹¹⁸ *Id.*; *Parker v. Holbrook*, 647 S.W.2d 692, 695 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

¹¹⁹ *Shanks*, 169 F.3d at 994 (citing *Reagan*, 166 S.W.2d at 913).

¹²⁰ *Gallegos v. Escalon*, 993 S.W.2d 422, 425 (Tex. App.—Corpus Christi 1999, no pet.) (citing *Parker*, 647 S.W.2d at 695 and *McAfee v. Feller*, 425 S.W.2d 56, 57-58 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ)). Further, quasi-judicial immunity has been extended in Texas to: (1) the Texas State Board of Medical Examiners, *Ramirez v. Texas State Board of Medical Examiners*, 927 S.W.2d 770, 773 (Tex. App.—Austin 1996, no writ); (2) a school board grievance process hearing, *Hernandez v. Hayes*, 931 S.W.2d 648, 654 (Tex. App.—San Antonio 1996, writ de-

Determining that NTSB proceedings were entitled to absolute immunity, the court in *Shanks* found that the Board's proceedings satisfied at least the first, second and, fifth of the requisite criteria for absolute immunity in Texas.¹²¹ Further, the *Shanks* court found only two circumstances in which Texas courts have found that communications to government agencies are not entitled to absolute immunity.¹²² The first involved unsolicited communications to law enforcement officials, when such statements are made in advance of any formal proceeding or investigation.¹²³ Texas courts have also denied absolute immunity where the challenged communications are made to agencies that issue mere recommendations or preliminary findings.¹²⁴ However, "Texas courts have clarified that when communications relate to an ongoing proceeding, absolute immunity still applies."¹²⁵

When an FAA inspector encounters a violation, there are, with certain exceptions and excluding medical denial cases, generally three choices. The FAA can (1) handle the matter administratively (by issuing a warning or a letter of correction that requires additional training); (2) seek a civil penalty (fine) or propose to suspend or revoke the airman or operating certificate of the individual or business entity that committed the violation (legal enforcement action); or (3) terminate the investigation without further action.¹²⁶

nied); (3) the National Railroad Labor Board, Special Board of Adjustment proceedings, *Lane v. Port Terminal R.R. Ass'n*, 821 S.W.2d 623, 625 (Tex. App.—Houston [14th Dist.] 1991, writ denied); (4) Texas Railroad Commission proceedings, *Aransas Harbor Terminal Ry. Co. v. Taber*, 235 S.W. 841, 843 (Tex. Comm. App. 1921); and (5) proceedings before a municipal board of aldermen, *Town of S. Padre Island v. Jacobs*, 736 S.W.2d 134, 144 (Tex. App.—Corpus Christi 1986, writ denied).

¹²¹ *Shanks*, 169 F.3d at 994.

¹²² *Id.*

¹²³ *Id.* (citing *Hurlbut*, 749 S.W.2d at 768 and *Zarate v. Cortinas*, 553 S.W.2d 652, 655 (Tex.Civ.App.—Corpus Christi 1977, no writ)). *Zarate* was a case that did not involve communications to a quasi-judicial body, and in fact, the court in *Zarate* recognized the absolute privilege afforded to communications to a quasi-judicial body. In discussing and distinguishing *Reagan v. Guardian Life Insurance Co.*, the *Zarate* court recognized "[t]he communication in the Reagan case was from an insurance company to the insurance commission which is a quasi-judicial body." *Zarate*, 553 S.W.2d at 655 (citing *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909 (Tex. 1942)).

¹²⁴ *Shanks*, 169 F.3d at 994.

¹²⁵ *Id.* (citing *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex. App.—San Antonio 1997, no writ)).

¹²⁶ See 14 C.F.R. §§ 13.5(h), 13.11 (2005).

The process generally takes the following steps:¹²⁷

- a. The aviation safety inspector believes a violation of the Federal Aviation Regulations (FAR) has been committed.
- b. A letter of investigation is sent to the alleged violator by the inspector.
- c. The inspector completes his or her investigation and prepares an Enforcement Investigative Report (EIR). If the inspector determines that the matter does not require legal enforcement action, he or she may take administrative action in disposing of the case by issuing a "Warning Notice" or "Letter of Correction."
- d. If the inspector believes that legal enforcement action is warranted, the EIR is sent to the Regional Counsel with a recommendation for either a civil penalty or certificate action.
- e. Legal enforcement actions are described in Subpart C of Part 13 of the FAR, 14 C.F.R. §13.13 *et. seq.*¹²⁸ While there are other extraordinary actions that the FAA take, such as the seizure of aircraft¹²⁹ or the temporary grounding of unsafe air carrier aircraft¹³⁰ the typical choices are either the imposition of a civil penalty or the suspension or revocation of an FAA-issued certificate.
- f. Legal enforcement actions are the formal adjudication of the guilt or innocence of the respondents because final orders are issued. There is an opportunity for trial-type hearings, required to be determined on the record under the U.S. Administrative Procedure Act.¹³¹ Those decisions may be ultimately reviewed only by federal appellate courts, not by any trial court.¹³²
- g. If the decision is made to impose a civil penalty of \$50,000 or less upon an individual or small business to improve, or \$400,000 or less upon anyone else, the FAA sends a Notice of Proposed Civil Penalty to the person charged with the violation.¹³³ Ultimately, a decision is

¹²⁷ This description of the process includes the changes made by the Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, 117 Stat. 2490 (2003) (effective Dec. 12, 2003).

¹²⁸ 14 C.F.R. §§ 13.13-29 (2005).

¹²⁹ 14 C.F.R. § 13.17 (2005).

¹³⁰ 49 U.S.C. § 44713(c) (2005).

¹³¹ Administrative Procedure Act, § 5 U.S.C. 554 (2005).

¹³² 49 U.S.C. § 46110(a) (2005).

¹³³ 14 C.F.R. § 13.16(b) (2005).

made by the Administrator of the FAA, who may affirm an Order Assessing Civil Penalty, after an opportunity for a trial-type hearing before a DOT Administrative Law Judge. If the assessment is against an individual acting as a pilot, flight engineer, mechanic, or repairman, the matter is heard by the NTSB. Absent an appeal to a United States court of appeals, an Order becomes final and subject to collection action by the Attorney General. Civil penalties in excess of these amounts are enforced through proceedings filed directly in the United States district courts; however, in cases under the hazardous materials regulations, the FAA will prosecute hazardous materials (HAZMAT)¹³⁴ violations regardless of the amount of the civil penalty.¹³⁵ Often, those cases, which are assessed at \$240 to \$27,500 per violation, may result in an Order of Assessment by the FAA Administrator of penalties that sometime reach several million dollars.

- h. If the FAA decides to revoke or suspend an FAA issued certificate, a proposal is issued.¹³⁶ Unless there is an emergency safety issue, in which case a certificate can be suspended or revoked immediately,¹³⁷ certificate actions normally begin with a Notice of Proposed Certificate Action which, after the opportunity for informal procedures, leads to an FAA Order revoking or suspending the subject certificate. That Order can be appealed to the National Transportation Safety Board (NTSB). If so, the certificate action will be tried before an NTSB Administrative Law Judge ("ALJ").¹³⁸ The ALJ's decision may be appealed to the full NTSB and final action there is reviewable by a U.S. Court of Appeals.¹³⁹ During this process, the NTSB is *required* by statute to give deference to the FAA's policies and interpretation of its own regulations.¹⁴⁰

Since this process is more extensive than that described and considered in *Shanks*,¹⁴¹ an inspection initiated by an FAA in-

¹³⁴ Also known as "Dangerous Goods" in international agreements.

¹³⁵ 49 C.F.R. § 171.1-.21 (2005); 14 C.F.R. § 13.16, .201-.235 (2005).

¹³⁶ 14 C.F.R. § 13.19 (2005).

¹³⁷ 49 U.S.C. § 44709(e)(2) (2005).

¹³⁸ 49 U.S.C. § 821 (2005).

¹³⁹ 49 U.S.C. § 46110 (2005).

¹⁴⁰ 49 U.S.C. §§ 44709(d)(3), 46301(d)(5)(C) (2005).

¹⁴¹ *Shanks*, 169 F.3d at 994-95.

spector should appear, even to a casual observer, as initiating the type of quasi-judicial process contemplated by Texas law and from which no action in defamation can arise.

It was the opinion of 5-State's counsel that the quasi-judicial power of most, if not all, of the agencies found to be quasi-judicial in nature, including the NTSB, pale in comparison to the powers of the FAA.¹⁴² Further bolstered by an affidavit by a former FAA counsel, which laid out in detail the functions of the FAA in regard to the tests outlined in *Shanks*, 5-State asserted that FAA proceedings actually satisfy all six of the criteria:

- (1) The FAA has the power to exercise judgment and discretion.¹⁴³
- (2) The FAA, through the statutory enforcement process, has the power to hear and determine or ascertain facts and decide.¹⁴⁴
- (3) The FAA has the power to make binding orders and judgments.¹⁴⁵
- (4) The FAA has power, through certificate actions or civil penalty assessments, to affect the personal or property rights of private persons.¹⁴⁶
- (5) The FAA has the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing.¹⁴⁷
- (6) The FAA has the power to enforce decisions or impose penalties.¹⁴⁸

In a fairly "all fours" case, the Dallas Court of Appeals addressed nearly the exact circumstance. In *Putter v. Anderson*, the parents of a teenager who had been arrested orally complained about the treatment of their son to the Dallas Police Department's Internal Affairs Division ("IAD").¹⁴⁹ When the police department informed the parents that no consideration could be given to their complaints unless they were reduced to writing, the parents sent a letter.¹⁵⁰ The officer who was the subject of

¹⁴² Compare 14 C.F.R. §13 (2005), with *Shanks*, 169 F.3d at 994-95.

¹⁴³ See 49 U.S.C. §§ 5123, 44709, 46101, 46106 & 46304 (2005); 14 C.F.R. § 13.1-.401 (2005).

¹⁴⁴ See 5 U.S.C. § 554 (2005); 49 U.S.C. §§ 46102, 46110 (2005); 14 C.F.R. § 13.

¹⁴⁵ See 5 U.S.C. § 554, 49 U.S.C. §§ 46102 & 46110; 14 C.F.R. § 13.

¹⁴⁶ See 49 U.S.C. §§ 5123, 44709, 46101, 46106, 46110 & 46304; 14 C.F.R. § 13.

¹⁴⁷ See 49 U.S.C. § 46104 (2005); 14 C.F.R. § 13.

¹⁴⁸ See 49 U.S.C. §§ 5123, 44709, 46101, 46106 & 46304; 14 C.F.R. § 13.

¹⁴⁹ *Putter v. Anderson*, 601 S.W.2d 73, 75 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

¹⁵⁰ *Id.*

the complaint asserted that the first letter and a second letter sent by the parents to the IAD following a second arrest of the son by the same officer were defamatory.¹⁵¹ Evidence showed that the letters invoked a police department regulation imposing a duty to make an investigation and to draw conclusions as to whether the complaints about the officer were sustained.¹⁵² Relying upon *Guardian Life Insurance Co.*, the Dallas Court held that the IAD was a quasi-judicial body for the purposes of determining "absolute privilege" because it had the power to investigate and to draw conclusions from such investigation.¹⁵³ As a consequence, the two letters were held to be "absolutely privileged" and "no cause of action . . . [could be] predicated" upon them.¹⁵⁴ Simply put, the parents made a complaint to the instructed entity that had the duty to investigate the complaint and make a determination of its sustainability. Such communication was "absolutely privileged" and immune from suit, regardless of the falsity of the communication or the malicious intent of the author.¹⁵⁵

On the strength of such analysis and legal support, 5-State filed a motion for summary judgment on the basis of absolute privilege.¹⁵⁶ The trial judge denied the motion without comment.¹⁵⁷

D. THE TRIAL

The case was tried to a jury.¹⁵⁸ At the end of trial, Plaintiffs elected to have the case submitted to the jury solely on a theory of tortious interference with contract, dropping the defamation claim and asserting that actual malice need not be submitted to the jury for the claim.¹⁵⁹ In response to the Special Issues, the jury found, among other things, that Defendants did interfere

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 76-77.

¹⁵⁴ *Id.* at 77.

¹⁵⁵ See *Reagan*, 155 S.W.2d at 912.

¹⁵⁶ *5-State Helicopters, Inc.*, 146 S.W. 3d at 256 n.2.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 256.

¹⁵⁹ An actual malice question was submitted to the jury; however, over defense objections and contrary to law, it included an instruction that actual malice existed if mere intent to cause injury was present. 5-State Helicopters Brief, *supra* note 90 at app. C.

with Plaintiffs' contract of employment and that they acted with malice.¹⁶⁰ The jury awarded Plaintiffs \$110,000.¹⁶¹

In a post-trial interview, jurors provided several interesting revelations. When asked if they believed that 5-State Helicopters knew any of the allegations, particularly the Wal-Mart allegation, to be false, the jury members said no, they did not see any evidence that 5-State had any reason to believe the allegations were false.¹⁶² But, they did feel that 5-State should have investigated the allegations before they wrote the letter.¹⁶³

When queried about damages, the jurors acknowledged that there was no evidence of specific damages; they simply picked a number that they thought would "send a message" to the defendants.¹⁶⁴ The jurors also indicated that, after determining that one of defendant's witnesses was not credible, they pretty much made up their mind.¹⁶⁵ The jurors characterized their "message" in terms unrelated to the Special Issues within the Judge's instructions.¹⁶⁶ Very simply, they felt it was "wrong" for defendants to complain about the inspectors to their employer without fully investigating the matter first.¹⁶⁷

E. APPEAL TO THE COURT OF APPEALS

The judgment was appealed to the Fort Worth Court of Appeals on numerous grounds, including that Plaintiffs' claims were barred by limitations, barred by quasi-judicial immunity, and that the evidence was legally and factually insufficient to support the verdict.¹⁶⁸ Specific evidentiary issues involved the

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Author Chris Kilgore was trial counsel and conducted post-trial interviews with jury members.

¹⁶³ When the standard is malice, there is no legal duty to investigate. *Curtis Publ'g Co.*, 388 U.S. at 153. Defendant asked for an issue or instruction so stating, but Defendant's submissions were denied.

¹⁶⁴ Post-trial interviews with jurors by Chris Kilgore.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ We stress again the legal standard that failure to investigate, even when a reasonably prudent person would have done so, is not sufficient to establish actual malice. *Harte-Hankes*, 491 U.S. at 688; *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 756 (Tex. 1984).

¹⁶⁸ *5-State Helicopters*, 146 S.W. 3d at 255-56. Although not expanded here, there were significant evidentiary issues regarding damages and actual malice. The inspectors stated they "felt" their reputations had been damaged, but had no evidence of that. They were not reprimanded and not disciplined. Their supervisor testified that from his perspective, their reputations had not been harmed.

submission of the tortious interference claim, damages, and the insufficiency of the actual malice instruction.¹⁶⁹

On July 29, 2004, the Fort Worth Court of Appeals issued its opinion, reversing the trial court and rendering judgment for defendants on the basis of quasi-judicial immunity.¹⁷⁰

First, the Court of Appeals recognized the long history of jurisprudence and public policy in Texas affording absolute immunity to communications related to both proposed and existing judicial and quasi-judicial proceedings.¹⁷¹ Further, the Court reiterated that it is a question of law [w]hether an alleged defamatory statement is related to a proposed or existing judicial or quasi-judicial proceeding," and that "all doubts should be resolved in favor of the communication's relation to the proceeding."¹⁷²

While stating that the plaintiff did not dispute the FAA's quasi-judicial status, the court nonetheless examined the powers and process of the FAA and held that the FAA is a quasi-judicial body.¹⁷³ The Court noted that "a proceeding is quasi-judicial in nature if it is conducted by a governmental executive officer, board or commission that has the authority to hear and decide the matters coming before it or to redress the grievances of which it takes cognizance."¹⁷⁴ "Even communications made in contemplation of or preliminary to a quasi-judicial proceeding are privileged if they concern a matter that the quasi-judicial body is authorized to investigate and decide."¹⁷⁵

The Court reiterated the public policy behind protecting communications in such proceedings. "[E]very citizen should have the unqualified right to appeal to governmental agencies

One inspector later resigned from the FAA to pursue another job opportunity, and when that did not work out, he was rehired by the FAA. The other received regular promotions and advancements.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 259. Finding that plaintiffs' claims were barred as a matter of law, it was not necessary for the Court of Appeals to address the other issues.

¹⁷¹ *Id.* at 256-57.

¹⁷² *Id.* at 257.

¹⁷³ *Id.* at 257-58.

¹⁷⁴ *Id.* at 257 (citing *Attaya v. Shoukfeh*, 962 S.W.2d 237, 239 (Tex. App.—Amarillo 1998, pet. denied)).

¹⁷⁵ *5-State Helicopters*, 146 S.W.3d at 257 (citing *Reagan*, 166 S.W.2d at 913, *Attaya*, 962 S.W.2d at 238-39, *Rose v. First Am. Title Ins. Co.*, 907 S.W.2d 639, 641-42 (Tex. App.—Corpus Christi 1995, no writ), and *Putter*, 601 S.W.2d at 75-77 (all holding that a private citizen's complaint may be the first step in a quasi-judicial proceeding if the governmental entity has the duty or authority of investigate and resolve same)).

for redress ‘without the fear of being called to answer in damages’. . .”¹⁷⁶ “The absolute privilege is intended to protect the integrity of the process and ensure that the quasi-judicial decision-making body gets the information it needs.”¹⁷⁷

Considering the functions of the FAA as previously established by defendants, the court of appeals easily determined that (1) the FAA’s quasi-judicial status, (2) the FAA’s actions stemming from the November 1998 inspection constituted a quasi-judicial proceeding; and (3) defendants’ statements were related to that proceeding.¹⁷⁸ The Court specifically held:

[B]ecause appellants’ two letters were related to a matter that the FAA was authorized to investigate and determine—whether appellants’ aircraft were in compliance with federal aviation laws—appellants’ statements in their letters were related to a quasi-judicial proceeding and were absolutely privileged, regardless of the truth, falsity, or malicious nature of the statements. Moreover, both appellees’ claim for libel and their claim for tortious interference with contract are for defamation-type damages based on the allegedly libelous communications; therefore, the absolute privilege doctrine bars both claims.¹⁷⁹

As such, strong precedent now exists that establishes the FAA as a quasi-judicial body. Therefore, inspections conducted by FAA inspectors constitute quasi-judicial proceedings and communications related to these proceeding will be afforded an absolute privilege or immunity.

Another appealed issue warrants mention. Plaintiffs withdrew their defamation claim and submitted the case on the theory of tortious interference with contract,¹⁸⁰ notwithstanding the fact that no evidence of an employment contract or of a contractual relationship, other than the inspectors’ own characterizations, was ever introduced at trial.¹⁸¹ 5-State pointed out on appeal that plaintiffs’ characterizations of their employment with the FAA as a “contract” was erroneous; particularly with the attempted implication of civil service protections as forming some sort of “contract.”¹⁸² Established law demonstrates that federal

¹⁷⁶ *5-State Helicopters*, 146 S.W.3d at 257 (citing *Attaya*, 962 S.W.2d at 239).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 257-58.

¹⁷⁹ *Id.* at 259.

¹⁸⁰ *5-State Helicopters* Brief, *supra* note 90, at app. C.

¹⁸¹ Reply Brief of 5-State Helicopters, Inc. at 7-10, *5-State Helicopters, Inc.* (No. 02-03-00205-CV).

¹⁸² *Id.*

employment is a matter of legal status pursuant to statutes and regulations rather than a matter of contract and thus the inspectors' employment status is "statutory rather than contractual."¹⁸³

F. THE PLAYING FIELD IS LEVELED

Federal statutes authorize a citizen to file a complaint in writing and require the FAA to investigate the complaint.¹⁸⁴ The FARs specifically require complaints to be made to an FAA regional or district office. Further, complaints must be reviewed, investigated, and determined whether they are sustainable for further investigation or enforcement.¹⁸⁵ As the FARs stress and encourage citizens to provide the FAA with information regarding what is believed to be violations of the regulations, the same principle holds that citizens and entities that are the subjects of FAA regulation should not be discouraged from disclosing information to the FAA for fear of being subjected to claims for defamation. The court in *Putter v. Anderson* recognized this principle, which now has been recognized by a court directly involving the FAA.¹⁸⁶

The inspectors, on the other hand, certainly have ample protection. They have governmental immunity for suit.¹⁸⁷ Further, should a citizen's complaint result in investigation, disciplinary action or enforcement, federal statutes and regulations afford the inspectors meticulous "due process."¹⁸⁸

In summary, the court of appeals in *5-State Helicopters* can be seen to have "leveled the playing field"— at least in Texas.¹⁸⁹

¹⁸³ *Hedman v. United States*, 15 Cl. Ct. 304, 308 (1988), *aff'd* 915 F.2d 1552 (Fed. Cir. 1990).

¹⁸⁴ 49 U.S.C. § 46101.

¹⁸⁵ 14 C.F.R. § 13.1.

¹⁸⁶ *See Pitler*, 601 S.W.2d at 73; *See also Moore & Assoc. v. Metro. Life Ins. Co.*, 604 S.W.2d 487, 489 (Tex. Civ. App.—Dallas 1980, no writ) ("The corollary principle is that the agencies of government, in order to properly perform their functions, should be authorized to call upon any citizen for full disclosure of information without subjecting the citizen to a claim for libel.").

¹⁸⁷ *See Westfall Act*, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended in scattered sections of 26 U.S.C.).

¹⁸⁸ *See* 49 U.S.C. § 46101(a)(4).

¹⁸⁹ One other case in Texas has involved a defamation suit brought by FAA inspectors (and may have been a progenitor of the suit brought against *5-State*). In *Peshak v. Greer*, 13 S.W.3d 421 (Tex. App.—Corpus Christi 2000, no pet.), the court upheld an actual damages verdict regarding a defamation and malicious prosecution claim stemming from a complaint an aircraft owner made to the FAA and police officials accusing an FAA inspector of having broken into his aircraft. *Id.* at 424, 427-28. While the court examined the issue of damages avail-

The plaintiff-inspectors filed a petition for review to the Texas Supreme Court.¹⁹⁰ Mistakenly claiming that an intermediate appellate court in Arizona had addressed the same issue and decided differently, the plaintiffs in *5-State Helicopters* asked the court to overrule over fifty years of jurisprudence in Texas.¹⁹¹ The petition for review was denied without a published opinion on April 8, 2005.¹⁹²

G. ARIZONA LAW IS SIMILAR TO TEXAS

In *Lewis v. Oliver*, an intermediate court of appeals in Arizona held that a defendant's allegations that an FAA investigator committed perjury during an administrative hearing before the NTSB would be afforded only a qualified privilege.¹⁹³ Interestingly, the court recognized that other Arizona intermediate appellate courts applied absolute privilege to complaints made to quasi-judicial bodies, but chose not to follow them in the belief that only "administrative proceedings" were at issue.¹⁹⁴

Further, the *Lewis* court recognized the Fourth Circuit Court of Appeals opinion in *Smith v. McDonald*¹⁹⁵ and in a North Carolina case, *Angel v. Ward*,¹⁹⁶ afforded an absolute privilege in administrative proceedings, but construed its own prior case of *Melton v. Slonsky*¹⁹⁷ as not granting absolute privilege in administrative proceedings.¹⁹⁸

able in a defamation suit, it is most noteworthy that the issues of quasi-judicial immunity or absolute privilege were never raised. At a minimum, from the information derived in the opinion it appears that the communications in that case were not made in relation to a proposed or on-going proceeding initiated by the FAA, but were instead, similar to the *Zarate* case, unsolicited statements to law enforcement officials accusing the inspector of a crime. More importantly, the issue of the plaintiff's status as a public official, thus requiring proof of actual malice in any circumstance should absolute privilege not apply, was raised for the first time on appeal and therefore waived. *Id.* at 424.

¹⁹⁰ Petition for review denied by *Cox v. 5-State Helicopters, Inc.*, No. 04-0950, 2005 Tex. Lexis 309, at *1 (Tex. Apr. 8, 2005).

¹⁹¹ Cox and Novickis Petition for Review at 4-7, Cox (No. 04-0950).

¹⁹² Cox, 2005 Tex. LEXIS 309, at *1.

¹⁹³ *Lewis v. Oliver*, 873 P.2d 668, 673 (Ariz. Ct. App. 1993), *cert. denied*, 513 U.S. 929 (1994).

¹⁹⁴ *Lewis*, 873 P.2d at 673. The practitioner is cautioned that while much defamation law among the states is similar, the issue of the characterization of proceedings and what might be deemed as quasi-judicial varies from jurisdiction to jurisdiction.

¹⁹⁵ 895 F.2d 147 (4th Cir. 1990).

¹⁹⁶ 258 S.E.2d 788 (N.C. Ct. App. 1979).

¹⁹⁷ 504 P.2d 1288 (Ariz. Ct. App. 1973).

¹⁹⁸ *Lewis*, 873 P.2d at 673.

Although the *Lewis* court construed the circumstances before it as an administrative proceeding rather than quasi-judicial proceeding, it recognized that the law of Arizona applies an absolute privilege to circumstances involving a quasi-judicial body. If only read in a cursory fashion, the rationale in *Lewis* may be seen as contrary to the well-reasoned holding in *Shanks* that analyzed and applied Texas law, holding that the NTSB is a quasi-judicial body.¹⁹⁹ However, insofar as the Texas Court of Appeals in *5-State* established the quasi-judicial nature of the FAA, even the *Lewis* court recognized that Arizona law would afford absolute privilege.²⁰⁰ In that respect, Arizona law does not substantially differ from established Texas jurisprudence.

FAA VISION:

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IV. CONCLUSION

FAA inspectors, like other government personnel, are entitled to exercise their personal rights to recourse when they believe they have been unfairly verbally attacked, but not when the statements made against them are legally privileged or otherwise protected speech, as in the case reviewed here—in the context of a quasi-judicial proceeding. As regulatory enforcement officers, they are subject to criticism, whether warranted or not, as a natural part of their public duties. In that respect, they are protected by the shield of governmental tort immunity. Those

¹⁹⁹ The defamatory statements in *Lewis* did not take place during the NTSB proceeding, nor were they truly related to the proceeding itself. A correct reading of the facts in *Lewis* demonstrates that the complained-of accusations did not occur during the NTSB investigation. Following the NTSB proceedings, the defendant complained over a "hotline" about the propriety of the initial inspection and enforcement action. The DOT Inspector General investigated the complaint and determined no wrongdoing had occurred. After these proceedings, in an informal meeting, the defendant then made the accusations that the plaintiff had committed perjury during the NTSB proceedings. *Lewis*, 873 P.2d at 670. Such circumstance is clearly distinguishable from the *5-State* case where the communications were made directly to the FAA—a quasi-judicial body—and related to the proceeding. As such, citing *Bailey* and *Drummond*, even the *Lewis* court recognized that Arizona law would similarly afford an absolute privilege.

²⁰⁰ *Id.* at 672.

who are the subjects of the regulatory activity should be shielded as well when making protected statements.

When the cost of proving that you are right may easily reach six figures, the nuisance value alone of this type of litigation is not trivial. But the cost of litigation is nothing compared to the apparent destruction of trust between the FAA and the aviation community, the chilling effect litigation may have on the free flow of customer communications to the FAA, and the damage it could do to important proactive programs such as the Aviation Safety Report Program (ASRP), the Aviation Safety Action Program (ASAP), the Flight Operations Quality Assurance (FOQA) program, and the data recording program.

Skillful pilots gained their reputation from storms and tempests.

Epicurus

ADDENDUM:

Answers to Pop Quiz :

1. *Marbury v. Madison*, 5 U.S. 137 (1803).
2. *Ex parte Milligan*, 71 U.S. 2 (1866).
3. *Munn v. Illinois*, 94 U.S. 113 (1876).
4. *United States v. Singleton*, 109 U.S. 3 (1883).
5. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
6. *Muller v. Oregon*, 208 U.S. 412 (1908).
7. *Schechter v. United States*, 295 U.S. 495 (1935).
8. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
9. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Casenote

