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WHAT'S IN A NAME?: PROVING ACTUAL DAMAGES FOR REPUTATIONAL HARM IN TEXAS DEFAMATION CASES WILL ONLY GET HARDER

*Austin Brakebill**

WHAT is a reputation worth? King Solomon wrote in Proverbs that "a good name is to be chosen rather than great riches."[1] For businesses, a positive reputation attracts better workers to companies, increases loyalty among customers, and adds intangible value to a company on the market.[2] According to Richard Branson, founder of the Virgin Group of companies, "[i]f you do anything to damage either your own reputation or your company's, you could destroy your business."[3] The problem with reputation is that while it clearly has value, it is nearly impossible to put a dollar amount on it. This has recently become painfully clear for plaintiffs in Texas defamation suits because the Texas Supreme Court has made it much more difficult to prove damages for reputational harm. As more people gain access to the internet and internet defamations become more prevalent, more plaintiffs will be faced with the question of how to prove that their invaluable reputation has been harmed and to what extent. *Brady v. Klentzman* and its four-justice dissent do not make it any easier and will only cause uncertainty.[4] This article proposes a legislative solution based on statutory damages awards from copyright law to ensure that plaintiffs with actual injuries can receive actual compensation even when it is difficult to prove their injury. Where a plaintiff has met his burden for proving defamation, then a court could presume damages according to the legislature's guidance.

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1. *Proverbs* 22:1 (ESV).

2. Robert G. Eccles, Scott C. Newquist & Roland Schatz, *Reputation and Its Risks*, HARV. BUS. REV. (Feb. 2007), https://hbr.org/2007/02/reputation-and-its-risks [https://perma.cc/LG5M-C6QS].

3. Richard Branson, *A Bad Reputation Is Bad Business*, CANADIAN BUSINESS (May 1, 2013), http://www.canadianbusiness.com/blogs-and-comment/a-bad-reputation-is-bad-business/ [https://perma.cc/7VAP-HLR2].

4. *See* Brady v. Klentzman, 515 S.W.3d 878 (Tex. 2017).

LeaAnne Klentzman had a scoop on the antics of Wade Brady, the son of the local Chief Deputy for the Fort Bend County Sheriff's office, and the questionable behavior in which the Chief Deputy engaged to cover up these antics.[5] Writing for the West Fort Bend Star, Klentzman described how Wade Brady was stopped by a State Trooper and ticketed as a minor in possession of alcohol (MIP).[6] Then, on his way home from this incident, Wade was tailed by a DPS Trooper, who had to handcuff Wade in his own driveway because he was so "unruly and intoxicated."[7] According to Klentzman's article, Chief Brady repeatedly contacted the officers involved in the driveway incident and intimidated them to give over any tapes or notes related to the incident.[8]

Wade sued Klentzman and the West Fort Bend Star for libel and libel per se, arguing that they maliciously published the story and that they left out that he was acquitted of the MIP charge.[9] Wade alleged that he was asked to quit his job because of the article and that his friends told him that people were saying it made him look like an entitled criminal.[10] The jury agreed with Wade and awarded him $30,000 for damage to his reputation and a host of exemplary and punitive damages.[11] On appeal, the media defendants argued that no evidence supported the awards for harm to Wade's reputation.[12] The Houston Court of Appeals held that there was sufficient evidence of actual damages for injury to Wade's reputation.[13] Both parties filed petitions for review, and, contrary to its recent decisions, the court upheld the damages awards.[14]

Defamation comes in two forms: *per se* and *per quod*.[15] Defamation per se involves statements that are so obviously harmful to someone's reputation that general damages are presumed.[16] However, only nominal damages may be recovered unless the plaintiff offers evidence of the existence and the amount of damages.[17] The amount of damages must "fairly and reasonably compensate the plaintiff" rather than having "juries . . . simply pick a number and put it in the blank."[18] This requirement is necessary to protect the "vigorous exercise of First Amendment freedoms."[19] In contrast, defamation per quod does not presume damages, making

5. *Id.* at 881.
6. *Id.*
7. *Id.* at 882.
8. *Id.*
9. *Id.*
10. Klentzman v. Brady, 456 S.W.3d 239, 269 (Tex. App.—Houston [1st Dist.] 2014), *aff'd*, Brady v. Klentzman, 515 S.W.3d 878, 888 (Tex. 2017).
11. *Id.* at 250.
12. *Id.* at 267.
13. *Id.* at 269.
14. Brady v. Klentzman, 515 S.W.3d 878, 887 (Tex. 2017).
15. Hancock v. Variyam, 400 S.W.3d 59, 63 (Tex. 2013).
16. *Id.*
17. Burbage v. Burbage, 447 S.W.3d 249, 259 (Tex. 2014).
18. Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc., 434 S.W.3d 142, 160 (Tex. 2014) (internal citation omitted).
19. *Id.* at 159.

them an essential element of a claim.[20] So, if a plaintiff wishes to recover anything beyond nominal damages, then, regardless of whether the defamation was per se or per quod, the plaintiff must prove the existence and the amount of damages.

Unfortunately for plaintiffs, what counts as proof of actual damages for the Texas Supreme Court is unclear.[21] In *Hancock v. Variyam*, Dr. Hancock sent a letter attacking the character of his supervising physician, Dr. Variyam, to the Dean of the medical school and to several members of the accrediting body at the hospital.[22] As a result, Variyam's division did not receive accreditation for its fellowship program.[23] The Supreme Court held that the denial of accreditation was insufficient to prove injury to reputation without further proof that the letter caused the denial.[24] Because there was no injury to Variyam's reputation, there was no evidence of damages either.

One year later, the Supreme Court made proving injury to reputation more difficult in *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc*.[25] Waste Management published an "Action Alert" alleging that Texas Disposal (TDS) ran a landfill in Travis County that was environmentally irresponsible, while TDS was negotiating a contract in San Antonio.[26] In an opinion by Justice Willett, the court held that 271 pages of invoices summarized by TDS's CEO showing lost profits and additional expenses following the publication of the Action Alert were insufficient because they did not quantify TDS's injury.[27] And exhibits showing decreases in TDS's base business after the statements were published did not "reveal any quantity of damages" to the plaintiff's reputation.[28] The lost profits and decrease in business are "not the sort of general damages that necessarily flow" from defamatory statements.[29] So, TDS failed to prove both the amount of damages and the causal link between the Action Alerts and the numbers that TDS did provide.

Three months after *Waste Management*, the Texas Supreme Court doubled down on this position. In *Burbage v. Burbage*, Chad Burbage published statements in a small community accusing his brother Kirk of abusing the elderly and the dead, committing fraud, and running his funeral home without a license.[30] In an opinion by Justice Green, the court held that Kirk's estimation of the value of the funeral home was insufficient based on *Waste Management* because it did not exactly quantify the

20. *See Hancock*, 400 S.W.3d at 71.
21. *See Burbage*, 447 S.W.3d at 259; *Waste Mgmt.*, 434 S.W.3d at 160; *Hancock*, 400 S.W.3d at 64.
22. *Hancock*, 400 S.W.3d at 62–63.
23. *Id.* at 63.
24. *Id.* at 71.
25. *See Waste Mgmt.*, 434 S.W.3d at 145.
26. *Id.* at 147.
27. *Id.* at 160.
28. *Id.* at 160–61.
29. *Id.* at 160.
30. Burbage v. Burbage, 447 S.W.3d 249, 252–53 (Tex. 2014).

reputational harm.[31] That Kirk lost pre-paid contracts after the statements were made was insufficient based on *Hancock* because Kirk testified optimistically that he would "like to believe that" people did not believe the statements, which undercut his argument that the statements and the contracts were causally connected.[32]

Against the backdrop of these three cases, Wade Brady's lawsuit against LeaAnne Klentzman seemed hopeless. Brady only presented vague statements from witnesses that "people in the community . . . had a negative impression of Wade after this article" and that his boss asked him to quit, only to rehire him soon thereafter.[33] Neither piece of evidence demonstrates any causal relationship between the statements and the alleged harm.[34] Wade offered "no evidence quantifying [his] injury to [his] reputation."[35] But in spite of these shortcomings, the court held that Wade's evidence was sufficient.[36] This sudden shift on what evidence of reputational injury is and is not acceptable invited a dissent from Justice Hecht, joined by Justice Brown, and unsurprisingly, Justices Green and Willett, who wrote the opinions in *Burbage* and *Waste Management*.[37]

To begin, the dissent pointed out that Wade not only failed to prove the amount of damages but did not even attempt to do so.[38] "[A]bsolutely all the evidence" that Wade offered was an old man from the next town over's negative impression of Wade, the Sheriff's testimony that Wade's boss was concerned with the article some time before asking Wade to resign, and that Wade's friends said that other people had told them that the article made Wade look bad.[39] Not a single word was offered to prove why his injured reputation was worth $30,000. Additionally, the dissent pointed out that just because the old man from the next town over had a negative impression of Wade after reading the article did not mean that he had a negative impression *because* of the article.[40] "*Post hoc* is not *propter hoc*."[41] Wade also never claimed that he was asked to resign *because* of the article.[42] In fact, Wade was rehired by the same people, so his reputation was obviously not injured that badly, if at all.[43]

At first blush, *Brady v. Klentzman* seems like a boon for plaintiffs bringing defamation claims because the bar has apparently been lowered for proving reputational harm damages. But rather than lowering the bar, *Brady* and its dissent hide the bar altogether and will lead to confusion

31. *Id.* at 261.
32. *Id.* at 262.
33. Brady v. Klentzman, 515 S.W.3d 878, 887 (Tex. 2017).
34. *Id.* at 890 (Hecht, J., dissenting).
35. *See* Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc., 434 S.W.3d 142, 160 (Tex. 2014)
36. *Brady*, 515 S.W.3d at 888 (majority opinion).
37. *Id.* at 888 (Hecht, J., dissenting).
38. *Id.* at 890.
39. *Id.* at 888–90.
40. *Id.* at 890.
41. *Id.*
42. *Id.*
43. *Id.*

and uncertainty for litigators state-wide. The majority did not overrule *Hancock*, *Waste Management*, or *Burbage*; in fact, the majority cites to all three in upholding the damages award.[44] This seemingly contradictory decision would be enough to give lawyers pause on its own, but the four-justice dissent compounds the uncertainty. When a similar case to *Brady* makes its way to the Supreme Court, the four dissenters only need to convince one justice to join them to rule against the plaintiff. These four justices could find a friend in Justice Guzman, who wrote the majority opinion in *Hancock*.[45] So an attorney must answer the question of whether to go with the majority's lesser standard and risk getting overturned by the dissenters plus one or, rather, to go with the higher standard and potentially waste time proving more than necessary.

This uncertainty is particularly troubling given the advancements being made in internet and communications technology. As more people take to the internet to air their grievances, more people and businesses will feel compelled to file defamation lawsuits to remedy their perceived reputational injuries.

A recent case coming out of the 134th District Court in Dallas County serves as an example of the difficulties a hypothetical appellate attorney would face.[46] In *Moldovan v. Polito*, a newlywed couple posted defamatory statements about their wedding photographer on Facebook and Instagram because they believed that the photographer had breached their contract.[47] The newlyweds also took their grievances to a local news station, which produced a video story that was viewed by over 350,000 people.[48] Due to an interlocutory appeal on a different issue, the Dallas Court of Appeals was able to take an early look at the sufficiency of the evidence.[49] The court found that the news story views, negative comments on the photographer's Facebook page, and negative reviews on wedding websites were "the cause of damages" to the photographer's reputation.[50]

After sending the case back down to the trial court, a jury found in favor of the photographer and awarded $1.08 million.[51] Part of that award is made up of $70,000 for past reputational injury and $40,000 for

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44. *Id.* at 887 (majority opinion).

45. *See* Hancock v. Variyam, 400 S.W.3d 59, 62 (Tex. 2013). President Donald Trump nominated Justice Willett to the United States Court of Appeals for the Fifth Circuit, and Justice Willett was confirmed on December 13, 2017. James Blacklock, Justice Willett's replacement, is a conservative like his predecessor and will likely rule in a similar fashion.

46. *See Moldovan v. Polito*, No. 05-15-01052-CV, 2016 WL 4131890, at *1 (Tex. App.—Dallas Aug. 2, 2016, no pet.); *Jury Finds Newlyweds Defamed Dallas Wedding Photographer Andrea Polito Over Album Cover Fee*, NBCDFW (Aug. 2, 2017), http://www.nbcdfw.com/news/local/Jury-Finds-Newlyweds-Defamed-Dallas-Wedding-Photographer-Andrea-Polito-Over-Album-Cover-Fee-437916313.html [https://perma.cc/U63K-G4ME].

47. *See Jury Finds Newlyweds Defamed*, *supra* note 46.

48. *Moldovan*, 2016 WL 4131890, at *10.

49. *Id.* at *1.

50. *Id.* at *10.

51. *See Jury Finds Newlyweds Defamed*, *supra* note 46.

future reputational injury.[52] Mental anguish and lost profits were split out into separate damages awards, so neither are included in the award for injury to reputation.[53] If this case were appealed, the question for the court would be whether it applies *Brady* and does not require proof of an amount of damages, or whether it applies *Burbage* and requires some proof of the amount of damages. If the court chooses the former, then the award of $110,000 could just be the whim of a capricious jury as the court cautioned against in *Waste Management*, and people around the world would potentially be subject to liability for unpredictable amounts of money if they comment on a Texas resident or business's page.[54] If the court chooses the latter, then future plaintiffs would have to argue how much money a "like" or a negative comment on Facebook is worth to make their trip to the courthouse worth their time. These two options are not options at all, and a third way is necessary to fix this catch-22.

Statutory damages based on copyright law could provide a workable solution to this conundrum. Traditionally, statutory damages in copyright law were meant to provide some remedy to copyright owners "when it was difficult to prove how much damages they had suffered" from an infringement since all that was required to recover was proof of an infringement.[55] Statutory damages serve the same compensatory and deterrent goals as the tort system.[56] As a legislative solution, the preferences of both potential plaintiffs and defendants would be taken into consideration when determining the amount of damages allowed to be rendered upon proof of defamation. However, it is not so easy to implement because, like copyright, defamation implicates First Amendment freedoms of speech.[57] Fortunately, the U.S. Supreme Court in *Gertz v. Robert Welch, Inc.* already provided a way to protect First Amendment freedoms in defamation cases.[58]

The Court in *Gertz* held that actual malice was necessary to award presumed, i.e., statutory, damages for defamation, which is in line with the holding from the famous *New York Times Co. v. Sullivan* case when media defendants are sued.[59] This willfulness requirement is appropriate given the purposes of statutory damages: "to punish and deter" defamatory statements and "to spare the plaintiff the difficulty of proving actual damages."[60] By requiring willfulness, the legislature can be assured that a defendant's freedom of speech is not violated while ensuring that plain-

52. *Id.* Jury charge embedded at bottom of page.

53. *Id.*

54. *See* Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc., 434 S.W.3d 142, 159 (Tex. 2014).

55. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM & MARY L. REV. 439, 446 (2009).

56. *Id.* at 499.

57. Bradley E. Abruzzi, *Copyright and the Vagueness Doctrine*, 45 U. MICH. J.L. REFORM 351, 400 (2012).

58. *Id.*

59. *Id.* at 400–01.

60. *Id.* at 400.

tiffs who must ordinarily prove the nebulous value of a social media "like" may recover fair compensation for their proven injury. If the legislature is still concerned with undeserved awards even with the willfulness requirement, the legislation could include a provision for courts to ask parties to demonstrate why the damages are sufficiently difficult to prove.[61] By implementing statutory damages, the legislature would ensure that plaintiffs could recover for actual injuries that have been too difficult to prove, while also protecting the First Amendment freedoms of speech by following the Supreme Court's prescriptions in *Gertz*.

If statutory damages were available during the *Brady* litigation, then the present uncertainty would not exist. The only questions for the jury would be whether the defendant published a defamatory statement about the plaintiff, whether that statement was false, and whether the statement was made with actual malice.[62] Here, the jury found that the articles were defamatory and false but were not instructed on actual malice—an oversight that would not have happened under the proposed statutory damages legislation. If Wade did prove actual malice, then the judge or jury would award the statutorily prescribed amount and be done with the matter. With statutory damages, the subject case of this article would have been done at trial.

The Texas Supreme Court's ruling in *Brady v. Klentzman* highlights the difficulty that plaintiffs have in recovering actual damages for injuries to their reputations. While defamation per se presumes recovery of nominal damages, if plaintiffs want to make their time in court worth their money, then they must prove the existence and the amount of actual damages. *Brady v. Klentzman* muddies the already opaque waters by seeming to allow lesser proof of damages, but the four-justice dissent and existing precedent will leave plaintiffs with no certain path forward. As internet defamation makes actual damage to reputation even more difficult to prove, the uncertainty generated by *Brady* will leave plaintiffs with no real compensation for their real injuries. The value of a reputation is almost impossible to quantify; determining the value of an injury to a reputation is even more difficult. Instead of requiring plaintiffs to put a number on their good name, a legislative solution guaranteeing recovery for clear cases of defamation would provide compensation for people who would otherwise be left on their own by the courts.

61. Samuelson & Wheatland, *supra* note 55, at 502.

62. Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 336 (1994).