

Winning Under the Negligence Standard: CBS Affiliate Reasonably Relied on Law Enforcement When Airing Wrong Mug Shot

By Michael J. Lambert

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Media law practitioners do not expect to see this sentence in an opinion at the motion to dismiss stage, especially when viable privileges are still available, but that’s how the Texas Court of Appeals resolved a defamation case against CBS-owned television station KTVT in late September. The Court held that KTVT was not negligent for airing the wrong mug shot of a bank robbery suspect that it had received from law enforcement: “[T]here is no evidence supporting a conclusion that a photograph obtained from a law enforcement agency after a public-information-act request using the correct name and birth date of the individual would warn a reasonably prudent broadcaster of its defamatory potential.” [CBS Stations Group of Texas, LLC v. Burns](#), No. 05-21-00042-CV, 2021 WL 4398031 (Tex. App.—Dallas Sept. 27, 2021, no pet. h.).

Background

In early 2019, Dallas-based KTVT prepared a report on four individuals, including a man named Cedric Burns, who had robbed a bank at gunpoint and were arrested in a high-speed chase in Hurst, Texas. After learning the names and birth dates of the suspects from authorities, KTVT submitted Texas Public Information Act requests to law enforcement agencies, including the Tarrant County Sheriff’s Office (TCSO), seeking mug shots of the suspects. Instead of sending the mug shot of the Cedric Burns suspected of bank robbery, TCSO gave KTVT a mug shot of another Cedric Burns in its database from a previous arrest. KTVT, having no reason to know of the mix-up, included the mug shot in its 5:00 p.m. broadcast. Soon after, the Cedric Burns featured in the broadcast (but not arrested for bank robbery) informed KTVT about the error. The station immediately removed the image from its website and future newscasts.

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Dallas County District Court Denies TCPA Motion

A year later, Burns sued KTVT for defamation and intentional infliction of emotional distress in Dallas County District Court. In response, KTVT filed a Motion to Dismiss under the Texas Citizens Participation Act (TCPA), the state’s anti-SLAPP law, asserting various grounds for dismissal. Tex. Civ. Prac. & Rem. Code Ann. §27.001, *et seq.* Two days after the expiration of

the statutorily required 30-day time period to rule on the TCPA Motion, the court issued an Order denying the TCPA Motion without explanation. KTVT appealed.

Texas Court of Appeals Reverses and Dismisses Case

KTVT argued to the Court of Appeals that constitutional, common law, and statutory privileges protected its use of the mug shot and that it had the right to rely on law enforcement's representations in newsgathering, even if the information received is ultimately false. It explained that the report was protected under the fair report and fair comment privileges and as a substantially true recounting of a third-party allegation about a matter of public concern. Tex. Civ. Prac. & Rem. Code §§ 73.002(b)(1), 73.002(b)(2), 73.005(b). It also argued that the report was substantially true and that Burns failed to establish clear evidence of actual malice.

Presented with all of KTVT's defenses, the Court of Appeals relied on a less common off-ramp at the motion to dismiss stage—negligence. In its opinion, the Court first found that Burns was a private figure because, “while the controversy—the identity of the persons arrested for the robbery and involved in the high-speed chase—was likely a topic of public discussion, there is no evidence that the plaintiff here, Burns, had more than a tangential role in the controversy at the time his photograph was published.” Burns also did not seek publicity about the robbery, have access to the media, or voluntarily engage in activities involving an increased risk of exposure and injury to his reputation, the Court wrote.

The Court next turned to whether KTVT aired the report negligently—that is, whether it knew or should have known the mug shot was false. As purported evidence of fault, Burns attached to his response to the TCPA Motion a screenshot of Google search results for “cedric burns cbs,” a letter from his psychologist, a letter stating that he had eight speaking engagements cancelled because of the report, and an affidavit. In the affidavit, Burns testified that he received many calls and texts from individuals about his picture being linked to “these horrible crimes,” that he called KTVT and spoke to a manager about the problem, and that the report harmed his career and health. Even taking all his submissions as true, the Court held that Burns did not show CBS was negligent in publishing the photograph: “We conclude Burns failed to present clear and specific evidence that CBS knew or should have known that publication of the photograph in connection with the report on the robbery was false.” The Court then dismissed Burn's IIED claim because it was based on the same facts as the defamation claim. It also awarded costs and attorney's fees to KTVT under the TCPA.

Conclusion

Although media lawyers shouldn't expect to see a trend of negligence-based decisions, it's comforting to know the possibility exists. The Court's unusual decision to dismiss the case on negligence grounds in the face of many other defenses serves as a reminder that, at times, libel defendants can still succeed on fault if a plaintiff is not a public figure.

Laura Lee Prather and Catherine Robb of Haynes and Boone, LLP represented KTVT. Michael J. Lambert is an associate at the firm.