

WRITING SAMPLE

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Background: This is a brief portion of a memo written on a public disclosure of private facts claim in Texas. The claim consists of four parts, but in order to size it appropriately, I have only included one.

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To: Application Review Board

From: Joshua Nosal
Re: The privacy element of Krista Warner's claim of public-disclosure against Martie Jenkins
Date: Dec 1, 2012

QUESTION PRESENTED

Martie Jenkins posted information about Krista Warner's gambling habits and debt on her Facebook wall. In Texas, a remedy for public disclosure of private information requires that publicity be given to private facts, that the publicity would be offensive, and that there is no legitimate public concern for the facts. Can Warner provide material facts that support public disclosure of private information in order to survive summary judgment?

BRIEF ANSWER

Probably yes, although publicity will be the most difficult to prove. Warner will be able to show that Jenkins disclosed her private information to the public on her Facebook wall. She will also be able to show that the disclosure would be offensive to a reasonable person and that the public does not have a legitimate interest in the information.

STATEMENT OF FACTS

This memo will discuss the ability to survive summary judgment of Warner's public-disclosure claim against Jenkins. On the 7th of September 2012 Jenkins began posting details about Warner's gambling activity and extensive debt on Jenkins's Facebook page. Warner is devastated that people have learned about her gambling situation.

Over the years, Warner has become involved with a group of friends that make private bets on sporting events together. She has supplemented this gambling with weekend trips to a casino in Louisiana. Until now her activity has been kept a secret, even to her fiancé, who does not believe in gambling. According to Warner, no one knew about her private gambling group.

However, Jenkins, the president of Warner's neighborhood association in the Pecan Heights neighborhood, has recently been posting comments about Warner's gambling trips to Louisiana, her private betting group, and her large gambling debt. One of Jenkins's friends commented on her

Facebook page, joking about Warner's gambling, while another suggested that she might have an addiction. Two other comments suggest that Jenkins's friends live in the same neighborhood as Warner.

Judging by the frequency of comments on Jenkins's Facebook page, it is relatively active. Seven people responded to her posts in the same week of her comments. However, her safety settings are set to private so that only her friends can see her wall posts. Because of this, Warner had to learn about the comments through a friend at church.

After learning about the Facebook page, Warner was devastated. She felt compelled to tell her fiancé about her gambling so he would not learn about it from someone else, but now she is worried that he will break off their engagement. Warner admitted that she has a gambling problem, but she doesn't think that Jenkins can share this private information with her friends and community.

DISCUSSION

Warner's public-disclosure claim should be able to survive summary judgment. In order to survive, Warner must provide material facts supporting each element of her claim. The elements of public disclosure of private information, which must be shown for an injured party to obtain remedy, are:

(1) that publicity was given to matters concerning [her] private life, (2) the publication of which would be highly offensive to a reasonable person of ordinary sensibilities, and (3) that the matter publicized is not of legitimate public concern.

Indus. Found. of the S. v. Tex. Indus. Accident Bd., 540 S.W.2d. 668, 682 (Tex. 1976). These elements can be approached in four parts by dividing the first part into two, the nature of publicity and the nature of private facts.

A court should conclude that an issue of material fact exists with regard to each element of Warner's claim. Warner should be able to (1) create a material fact issue about the privacy of her information. She should also be able to (2) create a material fact issue about the publicity of Jenkins's

disclosure that made her information common knowledge, although it will be the hardest element to support. In addition, Warner should be able to show that (3) there is a material fact issue created about offensiveness of Jenkins's disclosure to the reasonable person. Finally, Warner should be able to prove that (4) there is a material fact issue raised about the public's lack of legitimate concern for the information. By supporting the four elements of her public-disclosure claim with material facts, Warner's claim will likely survive summary judgment.

1) The content of Warner's information raises a material fact issue about its privacy.

Warner should be able to create an issue of material fact over the privacy of information, posted by Jenkins on her Facebook. Private information consists of facts about the private affairs of an individual. Indus. Found., 540 S.W.2d at 684. Unless the information is private, protection under the freedom of speech and press by the First Amendment prohibits recovery for injuries caused by public disclosure. *Id.* Private matters can be further classified in three subcategories, which are: matters already known, matters of public record, and matters in public view.

The San Antonio Court of Appeals held that information put in public records is no longer private, and its public disclosure is protected under the First Amendment. Hogan v. Hearst Corp., 945 S.W.2d 246, 250 (Tex. App.—San Antonio 1997, no pet). In Hogan, a man was convicted for indecent exposure in a public park. *Id.* After the conviction, the police disclosed to the public his name, date of birth, and offense. *Id.* A lawsuit over his later suicide included invasion of privacy. *Id.* Because the information was released in the arrest record, which is also a public record, the court held that the information was public. *Id.*

Similarly, the Corpus Christi Court of Appeals held that information obtained at a public event is already available to the public and protected by the First Amendment. McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 904 (Tex. App.—Corpus Christi 1991, writ denied). In McNamara, a newspaper photographed a high school soccer game and published the photos in an

article reporting on the game. Id. These photographs unintentionally exposed a student's genitals. Id. The student later brought a lawsuit for invasion of privacy that was examined by the court as a public disclosure of private facts claim. Id. Because the photographs were taken at a public place for a newsworthy article, the court held that the photographs were protected by First Amendment rights and thus were public information. Id.

Warner's gambling information was private. According to Warner, she had not shared her gambling habits with anyone. Evidence of her secrecy, even to her fiancé, can support this lack of public knowledge. Unlike McNamara, where a newspaper documented a public soccer game, it is unlikely that anyone documented or paid special notice to Warner's public casino gambling. Because she has not told anyone about her sports gambling ring, and because it is unlikely that anyone paid notice to her public gambling, a court is likely to believe that no one had knowledge of her gambling habits. As a result, the first category, which involves matters already known, should support the privacy of Warner's information unless Jenkins can show that she documented Warner's gambling activity at a public casino.

Also, under the second category, which involves matters of public record, Warner's information does not qualify as public. Because all of her gambling has been legal, there are no criminal records documenting it. Unlike Hogan, where the victim's identity and crime were documented in criminal records, there are no public records of Warner's gambling because all of her gambling has been legal. As a result, Jenkins shouldn't be able to use public records to deny an issue of material fact about the private nature of Warner's information.

However, the third category, including matters in public view, may prevent Jenkins's liability for some of her Facebook posts, but Warner should be able to show that not all her information was in public view. McNamara allows the publishing of information gathered at a public soccer game. Similar to the public nature of the soccer game, the casino that Warner frequents is also public

because anyone can come to view the activity of individuals at that casino. The same First Amendment rights, that protected information collected at the soccer game in McNamara, protect information obtained by watching Warner gamble at a public casino.

Jenkins may have attended the Louisiana casino and witnessed Warner during one of her gambling weekends. She may argue that this evidence protects her Facebook posts because she obtained the knowledge at a public location and in public view. However, even though some of Jenkins's posts consist of information on public gambling in public view, her posts on Warner's sports gambling and financial debt do not. Thus, Warner should be able to provide material fact that proves Jenkins disclosed her private information on Facebook. Further information about how Jenkins learned of her gambling and debt would be helpful.

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CONCLUSION

Warner's public-disclosure claim should be able to survive summary judgment, although support of the offensiveness element will be the most difficult to prove. Warner should be able to create a material fact issue about the private nature of the information disclosed by Jenkins because it was not a matter of public record or in public view. She should also be able to show that Jenkins's Facebook posts and further dissemination create a material fact issue regarding public disclosure of her information. Because the Facebook posts contain her name, and because she can potentially claim a medical illness, she should be able to create a material fact issue regarding the offensiveness of Jenkins's disclosure. Additionally she should be able to create a material fact issue regarding the public's lack of concern for all of Jenkins's Facebook posts. By creating an issue of material fact for all the elements of her public-disclosure claim, Warner should be able to survive summary judgment.