

Case No.: 02-16-00244-CV

IN THE SECOND
COURT OF APPEALS
FORT WORTH, TEXAS

JAMES MCGIBNEY and VIAVIEW, INC.,
Appellants,

Vs.

NEAL RAUHAUSER,
Appellee.

Appealed from 67th District Court
of Tarrant County, Texas
Trial Cause No. 067-270669-14
Hon. Donald J. Cosby, Judge

**SUPPLEMENTAL BRIEF OF AMICUS CURIAE THOMAS RETZLAFF
IN SUPPORT OF APPELLEE NEAL RAUHAUSER**

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Amicus Curiae, Pro se

**SUPPLEMENTAL BRIEF OF AMICUS CURIAE
THOMAS RETZLAFF**

Retzlaff, the lead defendant in this case in the trial court, submitted an amicus brief on June 9, 2017, supporting appellee Neal Rauhauser. Retzlaff supplements that brief to address questions posed by Justice Meier during the June 13, 2017, oral arguments. Retzlaff also points out a recent decision by a sister court that speaks to appellants' Issue 4 (that the award of nonmonetary sanctions was unconstitutional).

SUPPLEMENTAL ARGUMENT

Amicus Issue 5: The trial court’s order transferring ownership of some of appellants’ websites to appellee was not an abuse of discretion as the ownership of these websites is a felony in violation of Texas Penal Code §33.07 (Online Impersonation).

Argument & Authorities

During oral arguments, Justice Meier asked counsel for appellants how many people in the United States were named “Neal Rauhauser.” Counsel replied that he had never researched that question.¹

During oral arguments, and in their briefing, Appellants offered no justification for owning websites in the name of Rauhauser and his attorney, Mr. Dorrell. But ignored in the briefing by both the appellants and the appellee is that **IT IS A CRIMINAL OFFENSE IN TEXAS TO OWN WEBSITES IN THE NAMES OF ANOTHER FOR THE PURPOSES OF HARMING HIM.**

A person commits an offense if the person, without obtaining the other person’s consent and with the intent to harm, defraud, intimidate, or threaten any person, uses the name or persona of another person to:(1) create a web page on a commercial social networking site or other Internet website.

¹ If the Court needs to, it can play back the recording that was made of the oral arguments if it needs to refresh its memory.

Tex. Penal Code § 33.07(a)(1).

“Harm” means “anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.” Tex. Penal Code § 1.07(a)(25). In the particular context of chapter 33, “Computer Crimes,” “harm” means “partial or total alteration, damage, or erasure of stored data, interruption of computer services, introduction of a computer virus, or any other loss, disadvantage, or injury that might reasonably be suffered as a result of the actor's conduct.” *Id.* § 33.01(14) (emphasis added). *State v. Stubbs*, 502 S.W.3d 218, 236 (Tex. App. – Houston [14th Dist.] 2016, pet. ref’d).

Relevant to this Court’s analysis of appellants’ arguments is that, in the context of the Online Impersonation statute, appellate courts have defined “harm” to also include defamation and have held that the statute furthers the State’s “significant interest” in proscribing malicious conduct associated with the nonconsensual, online use of someone else’s name or persona to create a web page. *See Ex parte Maddison*, 2017 Tex. App. LEXIS 3708 (Tex. App. – Waco Apr. 26, 2017) (D created Facebook page in someone else’s name); *State v. Stubbs*, 502 S.W.3d 218 (Tex. App. – Houston [14th Dist.] 2016, pet. ref’d) (D created a Craig’s List webpage in someone else’s name); *Ex parte Bradshaw*, 501 S.W.3d 665 (Tex. App. – Dallas 2016, pet. ref’d) (D used someone else’s name to send messages on

social media website). Section 33.07(a) lists four types of intent: intent to harm, intent to defraud, intent to intimidate, and intent to threaten.

Intent to intimidate and intent to threaten.

To “intimidate” means to “frighten,” or make someone “afraid” or feel fear, particularly to make someone do what one wants. *New Oxford American Dictionary* 28, 695, 911. “Fear” is an unpleasant emotion caused by the threat of danger, pain, or harm. *Id.* 632. To “threaten” means to state one's intention to take hostile action, or inflict pain, harm, or loss against another. *Black's Law Dictionary* 1618; *New Oxford American Dictionary* 1806. In the absence of a Penal Code definition, the Court of Criminal Appeals has stated that the plain meaning of “threaten” includes “to declare an intention of hurting or punishing; to make threats against; [] to be a menacing indication of (something dangerous, evil, etc.)...; [] to express intention to inflict (injury, retaliation, etc.); [and] to be a source of danger, harm, etc., to.” *Olivas v. State*, 203 S.W.3d 341, 345 (Tex. Crim. App. 2006) (citing *Webster's New Twentieth Century Dictionary of the English Language Unabridged* 1901 (2d ed. 1983)).

Intent to harm.

The noun “harm” is defined both in the introductory provisions and in chapter 33, “Computer Crimes,” of the Penal Code. Essentially, “harm” includes anything reasonably regarded as (or that might reasonably be suffered in the way of) loss, disadvantage, or injury. *See id.* §§ 1.07(a)(25), 33.01(14); *see also Black's Law Dictionary* 784 (“injury, loss, damage; material or tangible detriment”); *New Oxford American Dictionary* 793 (“physical injury,” “material damage,” and “actual or potential ill effects or danger”). Section 33.07(a) includes harm as a verb – the actor must commit the offense “with the intent to harm ... any person.” *Id.* At its simplest, the plain meaning of the verb to “harm” is “to cause harm to.” *Merriam Webster's Collegiate Dictionary* 569 (11th ed. 2003).

Evidence in the trial court showed that McGibney brags about owning thousands of websites in the names of his victims, which he then fills with defamatory material and false allegations regarding bogus claims of criminal and/or sexual misconduct, all in an effort to uphold his company’s motto of “Sometimes You’ve Got To Be A Bully To Beat A Bully!” *See* 2 SCR 346-390 for a list of all the websites appellants currently own.

AS ALWAYS, WE ARE MORE THAN WILLING TO TAKE THIS PAGE DOWN. JEN THE CHOICE IS, AND ALWAYS HAS BEEN YOURS TO MAKE. SIMPLY STOP SUPPORTING A COURT DOCUMENTED PEDOPHILE AND RAPIST (WWW.THOMASRETZLAFF.COM) AND HIS PARTNER IN CRIME WHO HAS FOUR OUTSTANDING WARRANTS FOR HIS ARREST (WWW.NEALRAUHAUSER.COM). INSTEAD DO THE RIGHT THING AND HELP US GET JUSTICE FOR ALL OF THEIR VICTIMS. YOU OFFERED TO SELL US ACCESS TO YOUR EMAIL BECAUSE IT CONTAINS CORRESPONDANCE WITH ONE, IF NOT BOTH OF THESE FUGITIVES.

McGibney owns:

- NealRauhauser.com
- NealRauhauser.exposed
- RauhauserUnmasked.com
- NealRauhauser.org
- NealRauhauser.net
- NealRauhauser.info

McGibney also owns websites in the name of Rauhauser's attorney:

- JeffDorrell.com
- JeffreyDorrell.com

Impersonation is a nature-of-conduct offense. *Cornwell v. State*, 471 S.W.3d 458, 464 (Tex. Crim. App. 2015) (interpreting the statute governing

impersonation of a public servant). Moreover, a regulation of conduct only implicates the First Amendment if it qualifies as “expressive conduct” akin to speech. *Arnold v. State*, 853 S.W.2d 543, 545-46 (Tex. Crim. App. 1993); *Ex parte Thompson*, 442 S.W.3d 325, 334 (Tex. Crim. App. 2014).

The *Bradshaw* court found, “Almost all conceivable applications of section 33.07(a) to speech associated with the proscribed conduct fall within the categories of criminal, fraudulent, and tortious activity that are unprotected by the First Amendment.” *Ex parte Bradshaw*, 501 S.W.3d at 674 (citing *United States v. Stevens*, 559 U.S. 460, 468-69 (2010)). The *Bradshaw* court also found, “It also serves a significant First Amendment interest in regulating false and compelled speech on the part of the individual whose identity has been appropriated.” *Id.* at 677 (citation omitted).

Rauhauser made these arguments to the trial court in his *Notice of New Aggravating Criminal Misconduct* filed on November 9, 2015, where McGibney admits that his purposes in owning these websites is to “punish,” defame, harass, and torment Rauhauser and his attorney, whom he labels as “rapists,” “stalkers,” “felons,” and “pedophiles” in an effort to cause them emotional, reputational, and financial harm. (4 CR 1121.)



The fact that this revenge pornographer is asking to be able to keep the proceeds and tools of his criminal enterprise’s activities so he can continue to harm, threaten, and extort his victims is the height of hubris!

Under these three Texas appellate court cases, this “property” is criminal contraband that is a third-degree felony for appellants to possess and use.

Appellants can have no cognizable property right to property the State has decided is illegal to possess.

Notice of additional Aggravating Misconduct:

After the conclusion of oral arguments on June 13, Retzlaff was assaulted on the courthouse steps by James McGibney. McGibney was taken into custody by Tarrant County Sheriff's deputies and a report was taken. Below are some screen shots from the courthouse security video showing McGibney stalking both Retzlaff and counsel for Rauhauser, Jeff Dorrell, as Retzlaff and Mr. Dorrell made their way down the elevator, through the lobby, and out the North exit of the courthouse. McGibney is in the white long-sleeve shirt. Mr. Dorrell is pulling a bag. Retzlaff is next to him in a grey suit.





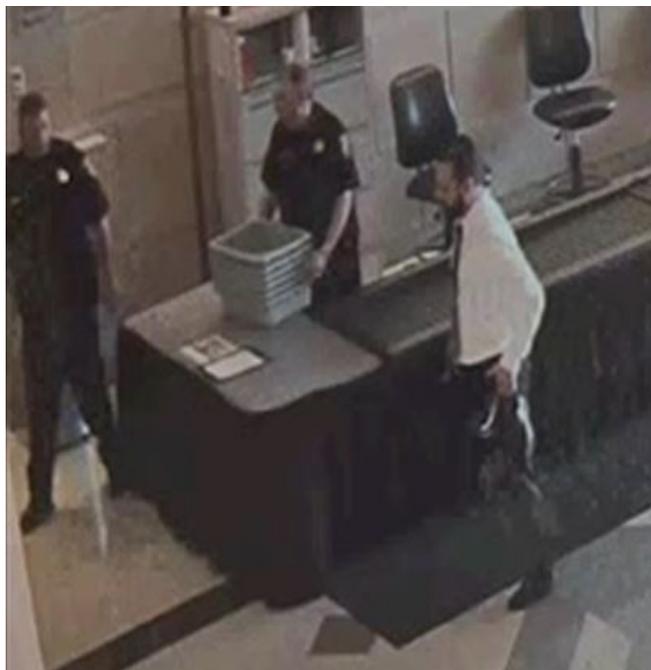


McGibney made offensive and provocative contact with Retzlaff and then said “I am going to kill you.”





McGibney tries to flee the scene only to have several Sheriff's deputies come out and bring him into custody. An audio recording of this attack was also made. See Retzlaff's June 14, 2017, letter to the Clerk of this Court reporting this incident.



Violence in courthouses (and especially within the Tarrant County courthouse!) is an all too common event. Should any portion of the sanctions award be reversed, Retzlaff anticipates that this incident will be brought to the attention of the trial court and the video and audio recordings will be introduced into evidence while Retzlaff sits front and center of the courtroom. An increase in the sanctions award is not beyond the realm of possibility.

Retzlaff would further point out that appellants' attorney, Mr. Stone, was a witness to this assault; it is clear from the video that he was less than 10 feet away. If the case gets remanded for a new sanctions hearing, and if this assault is brought up and used as further evidence of Aggravating Misconduct, Mr. Stone would be forced to testify adversely to his client on several essential facts as to what he saw and would be disqualified from any further representation of appellants pursuant to Rule 3.08 of the Disciplinary Rules of Professional Conduct.

For these reasons, for the reasons stated by Rauhauser in his briefs, and in the interests of justice and fairness, the Court should uphold the entirety of the TCPA sanctions and attorney's fees order of the trial court.

Respectfully submitted,

A handwritten signature in black ink that reads "Tom". The letters are cursive and fluid.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 1,586 words, including footnotes, (excepting caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix).

In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Respectfully submitted,



Thomas Retzlaff

CERTIFICATE OF SERVICE

I certify that on July 10, 2017, a copy of this document was electronically filed with the Texas e-Filing system, which will automatically serve a Notice of Electronic Filing on the following counsel of record:

Jeffrey Dorrell, Hanszen Laporte Law Office, 11767 Katy Frwy., Suite 850, Houston, TX 77079 – attorney for appellee Rauhauser.

Evan Stone, Stone & Vaughan, PLLC, 624 W. University Dr., #386, Denton, TX 76201 – attorney for appellants McGibney and ViaView.



Thomas Retzlaff

Debra Spisak, Clerk
2nd Court of Appeals
401 West Belknap, Suite 9000
Fort Worth, Texas 76196 -0211

June 14, 2017

Re: McGibney v. Rauhauser
COA# 02-16-00244-CV

Dear Ms. Spisak,

I wish to report to the Court the fact that, after oral arguments yesterday at noon, I was confronted and assaulted by the opposing party, James McGibney, on the courthouse steps. I understand that Justice Sudderth may have already been informed about this. So I wish to make sure that Justice Meier and Visiting Justice Fitzgerald are also informed, as well, as their votes in this case count, too.

The Tarrant County Sheriff's Office detained McGibney and took him in for questioning. Both I and Mr. Dorrell gave statements.

After the conclusion of the oral arguments, myself and Mr. Dorrell held back to allow McGibney and his attorney Evan Stone an opportunity to leave. But at the elevators, they were still here. Two elevators arrived at the same time. Stone and his assistant got into one. Then, at the last moment, McGibney jumped into the elevator me and Mr. Dorrell were in. Also in with us were the two attorneys who were on the 1 pm docket for your Court. They are also witnesses and will testify.

McGibney then tried to engage me in conversation. He was told NOT to be talking to me. In the lobby he held back in the elevator and then followed myself

and Mr. Dorrell through the lobby in a predatory fashion. When Mr. Dorrell and I determined what exit to take, McGibney then followed us out the doors and onto the steps. He then tried to engage me in conversation again – and was told not to. Then he came at me from 20 feet away, got into my face so that his nose touched my nose. He called me a “bitch” and a “faggot” and said that he was going to kill me. He made unwanted and offensive physical contact with me, and then repeatedly said “hit me, hit me” three times over and over.

Unbeknownst to McGibney I was recording every word he said from the very beginning upstairs.

I called out to a nearby Deputy. McGibney then raced off, trying to flee the area despite repeated orders to stop. The deputy finally caught up with McGibney, detained him, and brought him back into the courthouse for questioning. Both I and Mr. Dorrell gave statements to the officers.

In the security footage McGibney’s stalking actions going from your offices, jumping into the elevator, following us throughout the lobby, out the doors, and then rushing at me and making offensive and provocative physical contact on the courthouse steps – and then threatening to kill me – is all clearly documented. When we left to go to the airport, as far as I know, McGibney was still in custody.

Should this case be remanded back for any kind of hearing on sanctions, you can certainly bet that yesterday’s assault and threat to kill me will be played out on

the largest HD television set that can be rolled into Judge Cosby's courtroom as this attack is clear and convincing evidence of Aggravating Factors justifying the highest in TCPA sanctions.

While I am certain that Mr. Stone will try to spin this as best as he can and will claim that, because I am a "bad person" that I cannot also be a crime victim, the video and audio recordings are what they are, and they are quite compelling.

Two elevators arrived on the 9th floor at the very same time. Yet McGibney intentionally and knowingly chose to get onto the one that I and Mr. Dorrell were on instead of the one that his lawyer was already on. McGibney planned this from the very beginning. He had many opportunities to reconsider his actions and stop at several different times, yet he did not.

Respectfully yours,



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cc:

e-Filing on all parties of record