IN THE UNITED STATES DISTRICT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION

JASON LEE VAN DYKE,	§	
Plaintiff,	§	
v.	§	
	§	
THOMAS CHRISTOPHER RETZLAFF, a/k/a DEAN ANDERSON, d/b/a BV FILES, VIA VIEW FILES, L.L.C., and VIAVIEW FILES,	§	**NO. 4:18-CV-247-ALM**
Defendants	§	

RETZLAFF'S MOTION FOR FINAL SUMMARY JUDGMENT

The Court should grant final summary judgment in favor of defendant Thomas Retzlaff and against plaintiff Jason Van Dyke on all claims because Van Dyke lacks evidence of key elements of his claims as a matter of law.

I. INTRODUCTION

1. Plaintiff Jason Van Dyke sued defendant Thomas Retzlaff for $100,000,000.00 for libel and other causes of action after Retzlaff filed a grievance against him with the State Bar of Texas.[1]

2. The discovery period ended on June 23, 2020. (Doc. 117).

3. The deadline file dispositive motions is July 31, 2020. (Doc. 146).

4. This case is set for trial during the period January 4-29, 2021. (Doc. 117).

[1] Van Dyke denies the grievance is the basis of his claims. Plaintiff's Third Amended Complaint ("TAC") ¶ 5.33.

II. FACTS

5. Complaining that Retzlaff filed a "frivolous" grievance against him with the State Bar of Texas, (TAC ¶ 5.4), Van Dyke sues basing his claims on statements posted on a "blog"[2] Retzlaff allegedly owns[3] and in e-mails Retzlaff allegedly sent.[4] Van Dyke alleges Retzlaff made approximately ten false "statements of fact" about Van Dyke, including the following:

(i) Van Dyke is a "Nazi;"

(ii) Van Dyke is a pedophile;[5]

(iii) Van Dyke is a drug addict;

(iv) Van Dyke is a white supremacist;

(v) Van Dyke is involved in revenge pornography;

(vi) Van Dyke has a criminal record for abusing women;

(vii) Van Dyke was being treated and was medicated for bipolar disorder;

(viii) Van Dyke has engaged in unwanted sexual solicitations;

(ix) Van Dyke suffers from syphilis; and

(x) Van Dyke has engaged in other sexual misconduct including, but not limited to, a homosexual relationship with one or more witnesses.

TAC, ¶ 6.2.

6. The pungent comments on the "BV Files" blog use loose, figurative language to express the opinion that Van Dyke was ill-suited to be employed as

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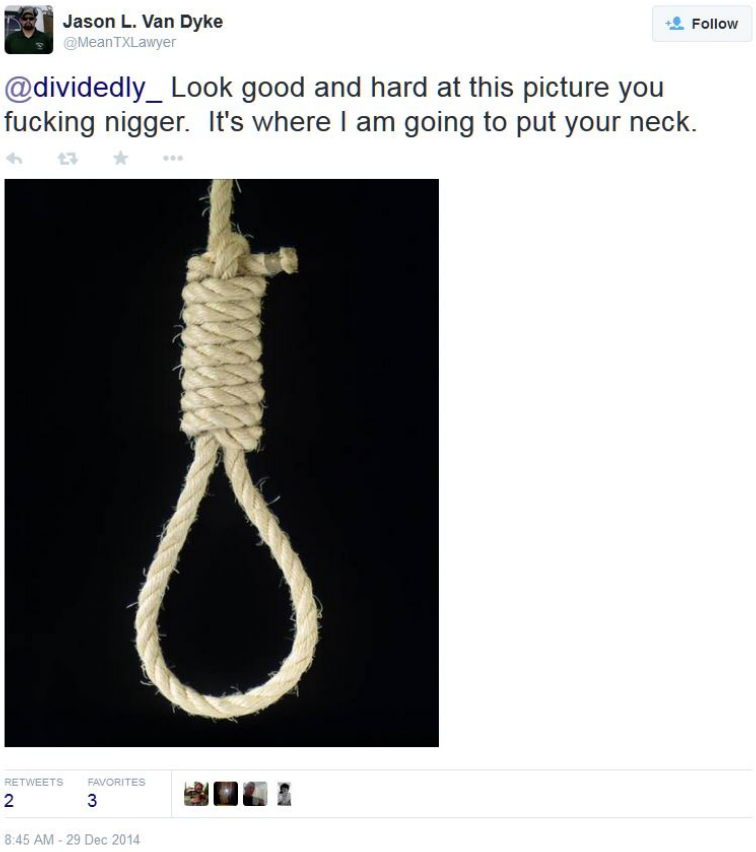
2 The blog is known as "BV Files" and can be found at www.viaviewfiles.net.
3 *See* TAC ¶¶ 5.5-5.11, 5.18-5.20 and Exhibit 3, 4, 9 and 10.
4 *See* TAC ¶¶ 5.12 and Exhibit 5.
5 The actual statement was that Van Dyke "has *the look of* a pedophile" (whatever that is).

either an assistant district attorney or an attorney with the firm of Karlseng, Leblanc, & Rich, LLC. The "BV Files" authors, whoever they are, are entitled to express their opinions about Van Dyke's frequent projection of his violent, racist beliefs onto an Internet audience of 7.5 billion people with posts such as this:



7. No matter how acrid or offensive, the statements attributed to Retzlaff are constitutionally protected expressions of opinion and rhetorical hyperbole.

III. ARGUMENT & AUTHORITIES

8. The purpose of a summary judgment is to pierce the pleadings and to assess the proof to determine whether there is a genuine need for trial. ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp***., 475 U.S. 574, 587 (1984). Summary judgment is particularly appropriate when the questions to be decided are questions of law. ***Flath v. Garrison Pub. Sch. Dist***., 82 F.3d 244, 246 (8th Cir. 1996). Retzlaff moves for summary judgment pursuant to FED. R. CIV. P. 56(b) in favor of Retzlaff and against Van Dyke on *all* claims Van Dyke asserts. Retzlaff need not submit evidence in support of his motion on claims on which Van Dyke bears the burden of proof. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323-24 (1986). Retzlaff need only "point to an absence of evidence" in order to shift the burden to Van Dyke. ***Lindsey v. Sears Roebuck & Co***., 16 F.3d 616, 618 (5th Cir. 1994 (per curiam).

9. Retzlaff is entitled to summary judgment if Van Dyke fails to bring forth evidence to support each challenged element of Van Dyke's causes of action against Retzlaff. FED. R. CIV. P. 56(c). "The plain language of Rule 56(c) mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party has the burden of proof at trial." ***Celotex***, 477 U.S. at 322.

10. Rule 56(e) requires Van Dyke to go beyond the pleadings and by his own affidavits, or by "depositions, answers to interrogatories, and admissions on

file" designate "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); ***Celotex***, 477 U.S. at 324.

11. Retzlaff moves for summary judgment against Van Dyke on the following seven claims:

(i) libel per se; (Doc. 113, Plaintiff's Third Amended Complaint ("TAC"), ¶¶ 6.2-6.11)

(ii) business disparagement; (TAC ¶¶ 6.12-6.17)

(iii) intrusion on seclusion; (TAC ¶¶ 6.18-6.20)

(iv) tortious interference with an existing contract (plaintiff's at-will employment by the law firm of Karlseng, Leblanc, & Rich, LLC) (TAC ¶¶ 6.21-6.24).

(v) tortious interference with prospective relations (plaintiff's future relations with the law firm of Karlseng, Leblanc, & Rich, LLC) (TAC ¶¶ 6.25-6.30).

(vi) malicious criminal prosecution; (TAC ¶¶ 6.31-6.37) and

(vii) intentional infliction of emotional distress. (TAC ¶¶ 6.38-6.42)

A. Summary Judgment on Van Dyke's Claim for Libel Per Se is Proper Because Van Dyke's Evidence is of Only Opinion and Rhetorical Hyperbole

12. Van Dyke sues for libel per se. (TAC ¶¶ 6.2-6.11). "Libel" is "defamation expressed in written or other graphic form that tends to … injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or to impeach any person's honesty, integrity, virtue, or reputation…." TEX. CIV. PRAC. & REM. CODE § 73.001. Libel is defamatory per se if, on its face, the statement falls into this statutory definition. ***Gartman v. Hedgpeth***, 157 S.W.2d 139, 140-41 (Tex. 1941). Libel is also defamatory per se if

it (i) injures a person in his office, profession, occupation;[6] (ii) imputes a crime;[7] or (iii) imputes a loathsome disease;[8] or (iv) imputes sexual misconduct.[9] *See* ***Dallas Morning News, Inc. v. Tatum***, 554 S.W.3d 614, 623 (Tex. 2018), *cert. denied*, 139 S.Ct. 1216 (2019).[10]

13. At first blush, some of the statements Van Dyke alleges Retzlaff published appear to come close to the definition of libel per se—that Van Dyke (i) is a "Nazi;" (ii) is a "pedophile;" (iii) is a "drug addict;" (iv) has a criminal record for abusing women; (v) "i[s] involved with revenge pornography;" (vi) has engaged in unwanted sexual solicitations; (vii) has been treated for bipolar disorder, and other mental illness; (viii) has syphilis; and (ix) has engaged in "a homosexual relationship with one or more witnesses." (TAC, ¶ 6.2.) Of course, this does not end the Court's inquiry. The Court must determine whether each statement was reasonably capable of a defamatory meaning. ***Tatum***, 554 S.W.3d at 625; *see also* ***Clifford v. Trump***, No. 18-56351 at 4 (9th Cir. July 31, 2020) (slip op.) (Tweet calling a sketch a "total con job" not actionable). This is a question of law that uses an objective standard. *Id*. at 637. The Court must consider the type of defamation alleged and whether the statement was ambiguous. *Id*., at 631-32.

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6 ***Bedford v. Spassoff***, 520 S.W.3d 901, 905 (Tex. 2017).

7 ***D. Mag. Partners v. Rosenthal***, 529 S.W.3d 429, 439 (Tex. 2017).

8 ***Memon v. Shaikh***, 401 S.W.3d 407, 421 (Tex. App.—Houston [14th Dist. 2013, no pet.).

9 ***Memon***, 401 S.W.3d at 421.

10 In ***Tatum***, the Texas Supreme Court presented a new, comprehensive framework for courts to use when evaluating defamation claims. Courts historically used the terms "defamation per se" and "defamation per quod" to classify types of defamatory statements by their defamatory nature and the nature and type of proof required to establish damages. In ***Tatum***, the court limited the use of those terms to the damages issue and introduced new terms for courts to use when evaluating a statement's defamatory nature.

14. A statement incapable of being proved true or false cannot be the basis of a defamation action. *See, e.g.*, ***Harvest House Publ'rs v. Local Ch***., 180 S.W.3d 204, 211 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (whether labeling a church as a "cult" is defamatory depends on religious beliefs). Because the First Amendment allows only provably *false* statements to be potentially actionable as defamation, subjective characterizations and opinions cannot give rise to a valid claim as a matter of law. ***Milkovich v. Lorain Journal Co***., 497 U.S. 1, 19-20 (1990). And even when a statement *is* verifiable as false, it does not give rise to liability if the 'entire context in which it is made' discloses that it is merely an opinion masquerading as fact." ***Tatum***, 554 S.W.3d at 639. "Even if susceptible to verification, [statements] do not expose the speaker to liability if their entire context discloses that they were not intended to assert a fact." ***Castleman v. Internet Money Ltd***., 2018 WL 5093857, at *5 (Tex. App.—Amarillo 2018, pet. denied). Statements not intended to assert a fact "are 'called an opinion.'" *Id.*

15. "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." ***Gertz v. Robert Welch, Inc***., 418 U.S. 323, 340 (1974). As noted above, the "Texas Supreme Court has repeatedly recognized that the Texas Constitution provides greater rights of expression than its federal equivalent." ***Dolcefino v. Turner***, 987 S.W.2d 100, 110-111 (Tex. App.—Houston [14th Dist.] (collecting cases). The Texas Constitution *expressly* protects opinions:

> **Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.**

TEX. CONST. art. I, § 8.

16. In ***Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,*** 398 U.S. 6 (1970), a developer, Bresler, was negotiating with the city for a variance on certain of his land, while also negotiating on other land the city wanted to buy from him. A newspaper reported that some persons characterized his negotiating position as "blackmail." Bresler sued for libel, claiming the articles imputed to him the crime of blackmail. *Id*. at 8. The Court held: "[A]s a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review." *Id.* at 13. "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized." *Id.* at 14.

17. The ***Bresler*** court further held:

> **No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.**

Id.; *see also* ***Hustler Magazine, Inc. v. Falwell***, 485 U.S. 46, 50 (1988) (First Amendment precluded recovery for ad which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); ***Letter***

Carriers v. Austin, 418 U.S. 264 (1974) ("List of Scabs" in newsletter, together with pejorative definition of "scab" using words like "traitor," did not support a defamation action since terms were used "in a loose, figurative sense" and were "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"). "Rhetorical hyperbole" is "extravagant exaggeration … [used] for rhetorical effect." ***Backes v. Misko***, 486 S.W.3d 7, 26 (Tex. App.—Dallas 2015, pet. denied) (internal quotation omitted). "For example, the use of 'rewarding,' 'ripping off,' and 'bilking' when reviewed in context have been considered rhetorical hyperbole." *Id.* (citing ***Rehak Creative Services, Inc. v. Witt***, 404 S.W.3d 716, 729 (Tex. App.—Houston [14th Dist. 2013, *disapproved on other grounds,* ***In re Lipsky***, 460 S.W.3d 579 (Tex. 2015)).

18. "Context is important." ***Rehak***, 404 S.W.3d at 729. "[P]ublications alleged to be defamatory must be viewed as a whole—including accompanying statements, headlines, pictures, and the general tenor…." *Id.* "This is also true in determining whether a publication is an actionable statement of fact or a constitutionally protected expression of opinion." ***Bentley v. Bunton***, 94 S.W.3d 561, 579 (Tex. 2003). "The statements … must be viewed in their context; they may be false, abusive, unpleasant, or objectionable to the plaintiff and still not be defamatory in light of the surrounding circumstances." ***Ezrailson v. Rohrich***, 65 S.W.3d 373, 376 (Tex. App.—Beaumont 2001, no pet.).

19. A communication is viewed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it. ***Turner v. KTRK Television, Inc***., 38 S.W.3d 103, 114 (Tex. 2000). Falsity is

determined based on "the meaning a reasonable person would attribute to a publication, and not to a technical analysis of each statement." ***New Times, Inc. v. Isaacks***, 146 S.W.3d 144, 154 (Tex. 2004). The irreverent tone and format of the "BV Files" blog Van Dyke accuses Retzlaff of authoring "notifies readers to expect speculation and personal judgment." *See* ***Milkovich***, 110 S.Ct. at 2712 (Brennan, J., dissenting). It is "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage." *Id*. The language is "loose and figurative," not precise and literal, and is "employed as a metaphor or hyperbole, not to convey actual facts." ***Yiamouyiannis v. Thompson***, 764 S.W.2d 338, 339-40 (Tex. App.—San Antonio 1988, writ denied), *cert. denied*, 110 S.Ct. 722 (1990). The ***Yiamouyiannis*** court held, "[R]eferences to [plaintiff] as a quack, a hoke artist, and a fearmonger are assertions of pure opinion, as are the statements that he was exposed for quackery, lacks solid credentials, and expresses incomprehensible mumbo jumbo." *Id*. at 341.

> **These terms of derision, considered in context and in light of the fluoridation debate, are vintage hyperbole and … the speaker's shorthand way of opining [plaintiff] is not worthy of belief, his views are confused nonsense, and he is not qualified to instruct the public about fluoridation.**

Id. "While other commentators might have taken a more ratiocinative approach, [defendant] was entitled to use instead these particular terms of invective in this context." *Id.* "As to each of these utterances, the absolute constitutional privilege applies…." *Id*.

20. The Supreme Court has made a point of vigilantly enforcing the Free Speech Clause even when the speech at issue made no great contribution to public

debate. *See* ***Iancu v. Brunetti***, 239 S.Ct. 2294 (2019), upholding the right of a manufacturer of jeans to register the trademark "F.U.C.T." In ***Matal v. Tam***, 137 S.Ct. 1744 (2017) the court held that a rock group called "The Slants" had the right to register its name. In earlier cases, the court went even further. In ***United States v. Alvarez***, 567 U.S. 709 (2012), the court held that the First Amendment protected a man's false claim that he had won the Congressional Medal of Honor. In ***Snyder v. Phelps***, 562 U.S. 443 (2011) the successful party had viciously denigrated a deceased soldier outside a church during his funeral. In ***United States v. Stevens***, 559 U.S. 460, 466 (2010), the First Amendment claimant had sold videos of dog fights. If the speech in all of these cases had been held to be unprotected, our nation's system of self-government would likely not have been placed in serious jeopardy. Yet, the protection of even speech as trivial as a naughty trademark can serve an important purpose: it can demonstrate that the U.S. Supreme Court is deadly serious about protecting freedom of speech.

21. The blog statements Retzlaff allegedly published were not "hard news" like that on the front page of a newspaper or a scholarly article. *See* ***Milkovich***, 497 U.S. at 32 ("Certain formats … signal the reader to anticipate a departure from what is actually known by the author as fact"); *see also* ***Obsidian Fin.***, 740 F.3d at 1293 ("[T]he general tenor of Cox's blog posts negates the impression that she was asserting objective facts."); ***Gardner v. Martino***, 563 F.3d 981, 988 (9th Cir. 2009) ("elements that would reduce the audience's expectation of learning an objective fact [include]: drama, hyperbolic language, an opinionated

and arrogant host [speaker] and heated controversy"). Such elements are scattered liberally across the "BV Files" blog. For example, on March 25, 2018, was this:

> **So why does Bob Karlseng give money and economic support to Nazis? And what do each and every one of the corporate clients of Maverick Title of Texas LLC dba Texas Title Company think about their monies going into the pocket of a racist ass-hat who likes to post ridiculous stuff on the interwebs? That, our teeming MILLIONS of readers, listeners, and supporters will be the subject of an upcoming article. STAY TUNED!**
>
> **We here at the BV Files have a very special message for Denton, TX, attorney Jason Lee Van Dyke:**
>
> **Go Fuck Yourself Jason Van Dyke. Woof, bitch!**

www.viaviewfiles.net, last accessed February 26, 2020. Especially relevant to whether the blog makes statements of *fact* is this:

> ***ALL CONTENT ON THIS BLOG, BEING A MIXTURE OF PARODY, SATIRE, AND LAME HUMOR, IS FOR ENTERTAINMENT PURPOSES ONLY AND NOT TO BE TAKEN SERIOUSLY. WHEN IT COMES TO PARODY, THE LAW REQUIRES A REASONABLE READER STANDARD, NOT A "MOST GULLIBLE PERSON ON FACEBOOK" STANDARD. THE FIRST AMENDMENT DOES NOT DEPEND ON WHETHER EVERYONE IS IN ON THE JOKE. NEITHER IS IT BOTHERED BY PUBLIC DISAPPROVAL, WHETHER TEPID OR RED-HOT.***[11]

22. Given this context, Van Dyke cannot bring forth evidence of actionable libel by Retzlaff. The blog statements are nonactionable statements of opinion or rhetorical hyperbole that no reasonable person of ordinary intelligence would believe stated facts about Van Dyke. The Court should grant summary judgment in favor of Retzlaff and against Van Dyke on Van Dyke's libel claim.

B. Summary Judgment is Proper on Van Dyke's Tortious Interference and Intentional Infliction of Emotional Distress Claims Because the "Criminal Stalking" Statute is Unconstitutional

23. Throughout his third amended complaint, Van Dyke repeatedly complains about Retzlaff's alleged "criminal stalking" behavior and "criminally harassing" acts.[12] Although Van Dyke does not appear to attempt a civil cause of action for "stalking," he nevertheless affirmatively pleads these alleged "criminal acts" as the basis for at least two other torts—Van Dyke's claims against Retzlaff for tortious interference and for intentional infliction of emotional distress.[13] But there is a problem with this predicate that appears to have escaped Van Dyke's notice—it is not a crime to repeatedly send e-mails *even if the e-mails are sent with the intent to harass, annoy, alarm, abuse, torment, or embarrass the recipient*. Here is why.

24. Since 2001, there *has been* a statute entitled "Harassment" that criminalizes the act of sending "repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another."[14] TEX. PENAL CODE § 42.07(a)(7). Although Van Dyke never cites this statute, this is almost certainly the statute he is relying on to describe Retzlaff's behavior as "criminally harassing."

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[11] This language can be viewed by any visitor to the BV Files blog by clicking the "About" button. *See* http://www.viaviewfiles.net/about/, last accessed January 3, 2020.

[12] *See, e.g.*, TAC ¶ 5.3 (Retzlaff's decision to "criminally stalk" Van Dyke); heading on p. 7, ("Criminal Stalking Behavior"); ¶ 5.21 ("criminal acts"), ¶ 5.23 ("harassing e-mails"); ¶ 5.31 ("criminally harassing acts"); ¶ 6.28 ("criminal harassment"); and ¶ 6.39 ("Retzlaff's ongoing tortious activity and criminal staking (sic)").

[13] *See, e.g.*, TAC ¶ 6.27 (basis for Van Dyke's tortious interference claim); ¶ 6.39 (basis for Van Dyke's claim for intentional infliction of emotional distress).

25. On October 3, 2019, a Texas court of appeals held the 2001 version of § 42.07(a)(7) unconstitutionally vague and overbroad on its face. ***Ex Parte Barton***, 586 S.W.3d 573, 575 (Tex. App.—Fort Worth 2019, pet. granted).

> **A statute is overbroad in violation of the First Amendment guarantee of free speech if in addition to proscribing activity that may be constitutionally forbidden, it sweeps within its coverage a substantial amount of expressive activity that is protected by the First Amendment.**

Id. at 580-81. The ***Barton*** court held that § 42.07(a)(7) did this. Both the Fifth Circuit and the Texas Court of Criminal Appeals have also held prior versions of § 42.07 unconstitutionally vague because of the words used to describe the offensive behavior—"harass, annoy, alarm, abuse, torment, or embarrass." ***Kramer v. Price***, 723 F.2d 1164, 176 (5th Cir. 1984) (en banc opinion); ***Long v. State***, 931 S.W.2d at 285, 297 (Tex. Crim App. 1996). And while § 42.07 was amended effective September 1, 2017, there was *no change* to § 42.07(a)(7), which retains the language found unconstitutional by the ***Ex Parte Barton*** court in 2019.

26. As a matter of law, Van Dyke cannot bring forth evidence of the underlying tort required to support Van Dyke's claims of tortious interference and intentional infliction of emotional distress. Accordingly, the Court should grant summary judgment in favor of Retzlaff and against Van Dyke on Van Dyke's claims for tortious interference and intentional infliction of emotional distress.

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[14] *See* Act of June 15, 2001, 77th Leg., R.S., ch. 1222, 2001 Tex. Gen. Laws 2795 (amended 2013) (current version at TEX. PENAL CODE § 42.07(a)(7).)

C. Summary Judgment is Proper on Van Dyke's Claim for Business Disparagement Because There is No Evidence of Actual Malice

27. To survive Retzlaff's no-evidence challenge to Van Dyke's business disparagement claim, Van Dyke must bring forth evidence of the following elements:

(i) Retzlaff's publication of disparaging words about Van Dyke;

(ii) Retzlaff's words were false;

(iii) Retzlaff published the words with malice;

(iv) Retzlaff published the words without privilege; and

(v) Retzlaff's published words caused Van Dyke special damages.

In re Lipsky, 460 S.W.3d 579, 592 (Tex. 2015).

28. Van Dyke mechanically recites that Retzlaff's words "cast doubt on the existence, quality, or ownership of plaintiff's land, chattels, or intangible things." (TAC ¶ 6.13.) But Van Dyke has no evidence that any words published by Retzlaff referred to "the existence, quality, or ownership of plaintiff's land, chattels, or intangible things." Van Dyke claims Retzlaff's statements "concerned a product that Plaintiff was forced to sell, its financial position, or the character of his business." (TAC ¶ 6.14.) However, Van Dyke's evidence thereof is lacking.

29. Business disparagement is not properly understood as "an alternative theory of recovery" to a libel claim, as Van Dyke mistakenly appears to believe.[15] Statements referring to a plaintiff personally—as Van Dyke alleges in his Third Amended Complaint—are governed by defamation law. ***Hurlbut v. Gulf Coast***

Atl. Life Ins., 749 S.W.2d 762, 766 (Tex. 1987). Van Dyke appears not to understand the difference.

30. In an action for business disparagement by a public figure such as Van Dyke, the ***New York Times*** standard for "actual malice" applies.[16] ***Forbes, Inc, v. Granada Biosciences, Inc***., 124 S.W.3d 167, 170-71 (Tex. 2003). The Texas Supreme Court—in recognizing that the Texas Constitution provides greater rights of free expression than its federal equivalent[17]—has consistently held that proof of actual malice requires sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication.[18] But Van Dyke has no such evidence.

31. Accordingly, the Court should grant summary judgment in favor of Retzlaff and against Van Dyke Van Dyke on Van Dyke's claim for business disparagement.

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[15] "Plaintiff contends as an alternative theory of recovery that Retzlaff is liable to him for business disparagement." (TAC ¶ 6.12.)

[16] Under the ***New York Times*** standard, "actual malice" means the statement was made with actual knowledge of its falsity or with reckless disregard for the truth. *See* ***New York Times Co. v. Sullivan***, 376 U.S. 254, 279-80 (1964.)

[17] *See, e.g*., ***Cain v. Hearst Corp.***, 878 S.W.2d 577, 584 (Tex. 1994); ***Davenport v. Garcia***, 834 S.W.2d 4, 8 (Tex. 1992) (noting that the continued inclusion in our state constitution of "an expansive freedom of expression clause and rejection of more narrow protections indicates a desire in Texas to ensure broad liberty of speech); ***O'Quinn v. State Bar of Texas***, 763 S.W.2d 397, 402 (Tex. 1988) (concluding "it is quite obvious that the Texas Constitution's affirmative grant of free speech is more broadly worded than the first amendment.").

[18] *See, e.g*., ***Hagler v. Proctor & Gamble Mfg. Co***., 884 S.W.2d 771, 772 (Tex. 1994) (holding ill will cannot prove malice); ***Channel 4, KGBT v. Briggs***, 759 S.W.2d 939, 941 (Tex. 1988) (mistake was not actionable where broadcaster denied subjective awareness of the error); ***Doubleday & Co., Inc. v. Rogers***, 674 S.W.2d 751, 755-57 (Tex. 1984) (proof that a prudent person would not have published or would first have investigated is not actual malice); ***Foster v. Upchurch***, 624 S.W.2d 564, 566 (Tex. 1981) (naming the wrong person as a killer was a "mistake" and not actual malice); ***Dun & Bradstreet, Inc. v. O'Neil***, 456 S.W.2d 896, 900 (Tex. 1970) (no evidence of actual malice where publisher admitted, "I didn't look at it, I'm afraid, as carefully as I should," because of "an executive breathing down my neck"); ***El Paso Times, Inc.***

D. Summary Judgment is Proper on Van Dyke's Claim for Intrusion on Seclusion Because Van Dyke Has No Evidence of an "Intrusion"

32. Van Dyke's formbook recitation of the elements of a claim for intrusion upon seclusion (TAC ¶¶ 6.18-6.20) provides no facts showing how Retzlaff allegedly committed this tort except to allege that Retzlaff "contacted [Van Dyke's] private employer for the purpose of having [Van Dyke's] employment terminated." Actionable "intrusion" has been held to include wiretapping,[19] putting a camera in plaintiff's bedroom without permission,[20] making harassing phone calls,[21] entering a home without permission,[22] and searching an employee's personal locker and her purse.[23] If the intrusion involves a public place or public matters, the defendant is not liable. *See, e.g.*, ***Floyd v. Park Cities People, Inc.***, 685 S.W.2d 96, 97-98 (Tex. App.—Dallas 1985, no writ). No authority supports an "intrusion upon seclusion" by making written comments about a person's qualifications or fitness to be a Texas lawyer or to be employed in a particular job.

33. The Court should grant summary judgment in favor of Retzlaff and against Van Dyke on Van Dyke's claim for intrusion on seclusion because there is no evidence of an actionable "intrusion."

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v. Trexler, 447 S.W.2d 403, 406 (Tex. 1969) (complete failure to investigate amounted to no evidence of constitutional malice).

[19] ***Billings v. Atkinson***, 489 S.W.2d 858, 860 (Tex. 1973).

[20] ***Clayton v. Richards***, 47 S.W.3d 149, 156 (Tex. App.—Texarkana 2001, pet. denied).

[21] ***Household Credit Servs. v. Driscoll***, 989 S.W.2d 72, 84-85 (Tex. App.—El Paso 1998, pet. denied).

[22] ***Gonzales v. Southwestern Bell Tel. Co.***, 555 S.W.2d 219, 222 (Tex. App.—Corpus Christi 1977, no writ).

E. Summary Judgment is Proper on Van Dyke's Claim for Tortious Interference With Existing Contract

34. To survive Retzlaff's motion for no-evidence summary judgment on Van Dyke's claim for tortious interference with an existing contract, Van Dyke must bring forth evidence that:

(i) Van Dyke had a valid contract;

(ii) Retzlaff willfully and intentionally interfered with the contract;

(iii) Retzlaff's interference proximately caused Van Dyke's injuries; and

(iv) Van Dyke incurred actual damage or loss.

Walker, 938 F.3d at 749, citing ***Butnuru v. Ford Motor Co***., 84 S.W.3d 198, 207 (Tex. 2002). Van Dyke must have evidence that "some obligatory provision of a contract has been breached." ***Walker***, 938 F.3d at 749, citing ***Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.***, 441 S.W.3d 345, 361 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Van Dyke has none.

35. Van Dyke cannot bring forth evidence that Retzlaff induced or caused another party to breach its contract with Van Dyke. ***John Paul Mitchell Sys. v. Randall's Food Markets, Inc***., 17 S.W.3d 721, 730-31 (Tex. App.—Austin 2000, pet. denied). Inducing a party to do what it had a right to do does not constitute tortious interference. ***ACS Investors, Inc. v. McLaughlin***, 943 S.W.2d 426, 430 (Tex. 1977). The Texas Supreme Court has strongly implied that an at-will employment contract is incapable of being interfered with. *See* ***El Paso Healthcare Sys. v. Murphy***, 518 S.W.3d 412, 422 (Tex. 2017) (at-will employee

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[23] ***K-Mart Corp. v. Trotti***, 677 S.W.2d 632, 637-38 (Tex. App.—Houston [1st Dist.]

of medical practice did not establish that hospital interfered with her employment by asking medical practice not to schedule her for any shifts because the medical practice was not required to schedule her for any shifts at all). There is no evidence that the contract Retzlaff allegedly interfered with was anything other than at-will employment.

36. Furthermore, a defendant must have actual knowledge of a contract in order to interfere with it. ***Frost Nat'l Bank v. Alamo Nat'l Bank***, 421 S.W.2d 153, 156 (Tex. App.—San Antonio 1967, writ ref'd n.r.e.). Van Dyke has no evidence that Retzlaff subjectively knew of any "contract" with Van Dyke's employer. The failure to show evidence of a breach of contract is fatal.

> **[Plaintiff] does not identify an actual breach of the contract. Rather, his actual complaint appears to be that his contract was not renewed at the end of its term.**

Walker v. Beaumont Ind. Sch. Dist., 938 F.3d 724, 749 (5th Cir. 2019). Van Dyke has evidence only that Retzlaff's interference may have caused the loss of Van Dyke's employment by the law firm of Karlseng, Leblanc, & Rich, LLC. (TAC ¶ 6.23.) This is not enough.

37. The Court should grant summary judgment in favor of Retzlaff and against Van Dyke on Van Dyke's claim for tortious interference with existing contract.

1984, writ ref'd n.r.e.).

F. Summary Judgment is Proper on Van Dyke's Claim for Intentional Infliction of Emotional Distress

38. To survive Retzlaff's no-evidence challenge to a claim for intentional infliction of emotional distress ("IIED"), Van Dyke must have evidence that:

(i) Retzlaff acted intentionally or recklessly;

(ii) Retzlaff's conduct was extreme and outrageous;

(iii) Retzlaff's actions caused the plaintiff emotional distress; and

(iv) the resulting emotional distress was severe.

Kroger Tex. Ltd. P'ship v. Suberu, 216 S.W.3d 788, 796 (Tex. 2006). The Texas Supreme Court has set a high standard for "extreme and outrageous" conduct, holding that this element is satisfied only if the conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." ***Hersh***, 526 S.W.3d at 468 (citing ***Kroger Tex. Ltd. P'ship***). Emotional distress is embarrassment, fright, horror, grief, shame, humiliation, worry, and severe emotional distress that is so severe no reasonable person could be expected to endure it. ***GTE Sw., Inc. v. Bruce***, 998 S.W.2d 605, 618 (Tex. 1999). Mere worry, anxiety, vexation, embarrassment, or anger are not enough, and there must be a high degree of mental pain and distress. ***Parkway Co. v. Woodruff***, 901 S.W.2d 434, 443-44 (Tex. 1995). Van Dyke has no evidence that statements on a blog or in e-mails are "so outrageous in character, and so extreme in degree," as to be "utterly intolerable in a civilized community."

39. Furthermore, IIED is a "gap-filler" tort that exists for the "limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." ***Hoffmann-La Roche, Inc. v. Zeltwanger***, 144 S.W.3d 438, 447 (Tex. 2004). IIED was "never intended to supplant or duplicate existing statutory or common-law remedies." ***Creditwatch, Inc. v. Jackson***, 157 S.W.3d 814, 816 (Tex. 2005). The tort's clear purpose is to supplement existing forms of recovery by providing a cause of action for egregious conduct that might otherwise go unremedied. *See* ***Hoffmann-La Roche***, 144 S.W.3d at 447. IIED has no application when the actor intends to invade some other legally protected interest, even if emotional distress results. *Id*. Thus, where the gravamen of a complaint is another tort—such as defamation—IIED is not available as a cause of action. *See* ***Creditwatch***, 157 S.W.3d at 816 (citing ***Hoffmann-La Roche***, 144 S.W.3d at 447); *see also* ***Draker v. Schreiber***, 271 S.W.3d 318, 322-23 (Tex. App.—San Antonio 2008, no pet.) (applying ***Hoffman-La Roche*** where the gravamen of plaintiff's complaint was defamation). If a plaintiff "does not allege facts that are independent of her defamation claim and that could support a claim for IIED," the plaintiff's IIED claim "fails as a matter of law." ***Tubbs v. Nicol***, 675 Fed.Appx. 437, 440 (5th Cir. 2017).

40. Van Dyke has no evidence that the alleged emotional distress he claims to have suffered was severe or was inflicted in such an unusual way as to leave Van Dyke no other remedy. Summary judgment in favor of Retzlaff and against Van Dyke on Van Dyke's IIED claim is proper.

G. Summary Judgment is Proper on Van Dyke's Claim for Malicious Criminal Prosecution

41. To survive Retzlaff's motion for no-evidence summary judgment on a claim for malicious criminal prosecution, Van Dyke must have evidence to show:

(i) A criminal prosecution was commenced against Van Dyke;

(ii) Retzlaff initiated or procured the prosecution;

(iii) The prosecution was terminated in Van Dyke's favor;

(iv) Van Dyke was innocent of the charge;

(v) Retzlaff did not have probable cause to initiate or procure the prosecution;

(vi) Retzlaff acted with malice; and

(vii) Van Dyke suffered damages as a result of the prosecution.

Kroger Tex., L.P. v. Suberu, 216 S.W.3d 788, 792 (Tex. 2006). Van Dyke can bring forth no evidence of at least elements (ii) and (iv).

42. A defendant "initiates" a criminal prosecution by making a formal charge to law enforcement authorities. A defendant does *not* "initiate" criminal proceedings when the complaint was executed by a police officer and the charging instrument was filed by the prosecutor. ***Gonzalez v. Grimm***, 479 S.W.3d 929, 936-37 (Tex. App.—El Paso 2015, no pet.). "Causation is an indispensable element" of malicious prosecution. ***In re Bexar County Criminal District Attorney's Office***, 224 S.W.3d 182, 185 (Tex. 2007). But Van Dyke has no evidence that the affidavit initiating Van Dyke's criminal prosecution was signed by Retzlaff.

> **[T]o recover for malicious prosecution when the decision to prosecute is within another's discretion, the plaintiff has the burden of proving that that decision would not have been made but for the false information supplied by the defendant.**

In re Bexar County Criminal District Attorney's Office, 224 S.W.3d at 185, quoting ***King v. Graham***, 126 S.W.3d 75, 78 (Tex. 2003) (per curiam). Van Dyke has claimed that the criminal prosecution against him was commenced "on the special request and insistence of Retzlaff." (TAC ¶ 6.31.) This is not enough. Van Dyke cannot bring forth evidence that the decision to prosecute "would not have been made *but for false information* supplied by" Retzlaff. And not only that, Van Dyke has no evidence that he was actually innocent.

43. The Court should grant no-evidence summary judgment on Van Dyke's claim of malicious prosecution.

IV. CONCLUSION

44. As shown above, various issues of law are dispositive against Van Dyke on all of his claims. Accordingly, the Court should grant final summary judgment in favor of Retzlaff and against Van Dyke on all of Van Dyke's claims.

V. PRAYER

45. For these reasons, Retzlaff prays that the Court grant final summary judgment in favor of Retzlaff and against Van Dyke on all of Van Dyke's claims. Retzlaff prays for such other and further relief, at law or in equity, as to which he shall show himself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 7-31, 2020, the foregoing was electronically filed using the Court's CM/ECF filing system, which will provide notice and a copy of this document to the following if a registered ECF filer in the United States District Court for the Eastern District of Texas, Sherman Division.

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