United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 10, 2021
Lyle W. Cayce
Clerk

No. 20-10103

WAYNE M. KLOCKE, INDEPENDENT ADMINISTRATOR OF THE ESTATE OF THOMAS KLOCKE,

Plaintiff—Appellant,

versus

NICHOLAS MATTHEW WATSON,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CV-285

ON PETITION FOR REHEARING

Before DAVIS, STEWART, and OLDHAM, *Circuit Judges*.

W. EUGENE DAVIS, *Circuit Judge*:*

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is GRANTED. The opinion

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

previously issued, *Klocke v. Watson*, 861 F. App'x 524 (5th Cir. 2021), is withdrawn and the following is substituted in its place:

Plaintiff, Wayne M. Klocke ("Klocke"), Independent Administrator of the Estate of his son, Thomas Klocke ("Thomas"), appeals the district court's summary judgment in favor of Defendant, Nicholas Matthew Watson ("Watson"), dismissing Klocke's state law defamation claim. As set forth below, in determining that there was no genuine issue of material fact as to the elements of falsity and fault, the district court made impermissible credibility determinations based on conclusions this Court rendered in Klocke's prior appeal of his Title IX claim. The district court further erred in determining that Klocke waived the argument that his allegations constituted defamation per se and that Klocke is unable to present competent evidence of compensable damages. Therefore, we REVERSE the district court's summary judgment and REMAND for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

On May 19, 2016, Watson and Thomas were sitting next to each other in a class taught by Professor Dwight Long at the University of Texas at Arlington ("UTA").[1] In sworn testimony by affidavit and deposition, Watson gave the following account of what occurred between the two students, who previously had no interactions and did not know each other. While participating in a classroom discussion led by Long, he (Watson) made a comment regarding privilege in today's society. Thereafter, Thomas opened his laptop and typed on his computer, "Gays should die." Thomas then turned his computer toward Watson and pointed to the computer screen

[1] Watson sat on Thomas's left, while another student named Blake Lankford sat on Thomas's right.

so that Watson would view it. After Watson saw what Thomas had typed, Watson typed on his computer, "I'm gay," so that Thomas could see it and gave Thomas a confused look, trying to understand why Thomas would type such a statement. Thomas then pretended to yawn and told Watson, "Well then you're a faggot." Watson responded, "I think you should leave." Thomas then stated, "You should consider killing yourself."

Watson reported that Thomas's statements made him feel very scared and uncomfortable. While the class was ongoing, Watson emailed Long, describing what had just occurred between him and Thomas. Watson also posted an update on his Facebook account describing the incident. At some point shortly after the interaction between the two students, Thomas left the classroom and then returned, sitting on the other side of the classroom away from Watson.

At the conclusion of the class, Watson informed Long that he had emailed Long during class about what occurred between him and Thomas. Long stated that he did not have a chance to look at his emails during class, and, after Watson told Long what happened, Long suggested that Watson go to support services to report the incident. Watson then went to see Heather Snow, the Dean of Students at UTA. Snow requested that Watson send her an email describing the incident with Thomas, and Watson did so. Snow told Watson that she would forward the email to another person with UTA who would then reach out to him.

Watson was subsequently contacted by Daniel Moore, Associate Director of Academic Integrity at UTA, whom Snow assigned to investigate the incident. In sworn testimony, Moore stated that after reviewing Watson's email to Snow, he sent letters to both Thomas and Watson telling them to have no contact with each other. Thomas was also restricted from entering the building where Long's class was held.

Moore further testified as follows: On May 20, 2016, the day after the incident, he telephoned Thomas regarding Watson's allegations. During the call, Thomas "did not dispute the allegations" and "was very stoic and unemotional." Moore thereafter met with Watson, Thomas, and Blake Langford, the student sitting on the opposite side of Thomas from Watson.

In Moore's interview with Watson, Watson described the incident with Thomas consistent with the description he gave in his email to Snow. Watson additionally told Moore that after Thomas left the classroom and sat in a different chair, Watson passed a note to Lankford who was sitting next to Thomas's empty seat, describing what had just happened between him and Thomas. During his interview with Watson, Moore "observed that Watson seemed genuinely scared and worried," perceived that Watson "was emotionally upset and fearful of Thomas," and "found [Watson] to be credible."

In Moore's interview with Thomas, Thomas confirmed that he and Watson were sitting next to each other during Long's class. However, Thomas gave a different description of what occurred between him and Watson. Thomas contended that it was not he who began communicating with Watson, but that it was Watson who initiated conversation with Thomas. Specifically, Thomas said that Watson told him he was "beautiful" and kept glancing at him. Thomas, typing on his computer that he was "straight," requested Watson to "stop." Although Watson complied with Thomas's request to stop, Watson kept laughing at something on his phone and causing a distraction, so Thomas got up and changed seats.

Moore testified that, during his meeting with Thomas, "[Thomas] had a sheet of paper with him that he kept referring to," which "appeared to be a script or outline." Moore further observed that Thomas's responses to his follow-up questions lacked substance. For example, although Thomas

stated that "he was scared of his accuser," he was not able to explain why. Additionally, there were often long pauses before Thomas would say anything in response to Moore's questions. Thomas further "lacked any emotion, even when he said he was scared of his accuser." Based on these observations, Moore found Thomas's description of the incident with Watson "suspect."

Moore lastly interviewed Lankford. Lankford stated that "he heard Watson tell [Thomas] that he should leave"[2] and that when "he looked over . . . both students looked really tense." Lankford also stated that Thomas left the classroom, then came back about ten minutes later, and sat on the other side of the room. Lankford also saw Watson approach Long after class and that "[Thomas] was looking at Watson when this happened." Lankford further told Moore that after Thomas left, he leaned over and asked Watson what had happened. Watson then slid over a note of what Thomas had said to him. Lankford stated that the note described the incident consistent with Watson's description of what occurred. Lankford further stated that he did not hear or see Watson laughing or causing a distraction during class.

Based on his investigation, Moore concluded that Thomas violated the student code of conduct and should be placed on probation at UTA. On May 25, 2016, Moore informed Thomas of the results of his investigation and that Thomas was entitled to submit an appeal by June 8, 2016. Tragically, on

[2] Klocke contends that Lankford testified in his deposition that, after Klocke got up and moved seats, he heard Watson say, "Well, if you don't like it, you should leave." Klocke asserts that Lankford's testimony creates a genuine issue of material fact regarding falsity. However, the deposition testimony to which Klocke cites is redacted such that Lankford's testimony about what he heard Watson say has been blocked out and is unreadable. The admissibility of Lankford's testimony regarding what he heard Watson say after Thomas got up and moved seats is another evidentiary question which should be addressed by the district court in the first instance.

June 2, 2016, two weeks after the incident, Thomas died by suicide using a gun he purchased on May 20, 2016, the day after the incident.

II. PROCEDURAL HISTORY

On April 4, 2017, Klocke filed suit against UTA and Watson. He alleged that UTA violated Title IX by discriminating against Thomas on the basis of his gender and his status as an accused male aggressor. Klocke alleged that Watson made unwelcome sexual advances to Thomas and then defamed Thomas by publishing false and defamatory statements about him.

A. Title IX Claim Against UTA

UTA filed a Rule 12(b) motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction. The district court denied the motion and suggested that a motion for summary judgment would be a more appropriate request for summary disposition. UTA subsequently moved for summary judgment seeking dismissal of Klocke's Title IX claim, and Klocke filed a cross motion for partial summary judgment as to UTA's liability under Title IX. The district court granted UTA's motion for summary judgment and denied Klocke's cross motion for partial summary judgment. Klocke timely appealed.

On appeal, this Court affirmed the district court's summary judgment in favor of UTA dismissing Klocke's Title IX suit.[3] We held that "UTA's disciplinary decisions were reasonable and justifiable on non-discriminatory grounds."[4] Pertinent to the issues presented by this appeal, we determined that, based on what Moore learned, perceived, and believed as a result of his investigation of the incident, there was no triable issue under Title IX that

[3] *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204 (5th Cir. 2019).

[4] *Id.* at 212.

the disciplinary proceeding had an "erroneous outcome."[5] Specifically, we noted that it was uncontradicted that Moore knew that Watson told the same, consistent story in a contemporaneous in-class email to Long and in a contemporaneous note passed to Lankford.[6] Moore also knew that Watson had reported the same story in after-class emails and in-person discussions with Long, Snow, and Moore.[7] We further noted that Moore perceived Watson to be credibly fearful of Thomas. On the other hand, in his interview with Thomas, Moore observed that Thomas relied on a written script and that Thomas could not meaningfully answer follow-up questions. We further noted that Moore's investigation found nothing supportive of Thomas's account of the incident, and that Moore's common sense suggested to him that Thomas's account was not credible.[8] Lankford had additionally told Moore that he did not notice Watson behaving in a distracting manner as Thomas had alleged. We concluded that based on these facts, "Moore made a finding of responsibility after developing a meaningful record."[9]

B. Defamation Claim Against Watson

Watson also filed a motion to dismiss, asserting that Klocke's defamation claim should be dismissed pursuant to the Texas Citizens Participation Act ("TCPA").[10] Although Klocke argued that the TCPA was

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[5] *Id.* at 211.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] TEX. CIV. PRAC. & REM. CODE § 27.003. As this Court has noted, "[t]he Texas Citizens Participation Act is an anti-SLAPP (Strategic Litigation Against Public Participation) statute designed to "'encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law.'" *Klocke v. Watson*, 936 F.3d 240, 244 (5th Cir.

inapplicable in federal court, the district court disagreed and determined that Klocke failed to meet the TCPA's requirements. The court therefore granted Watson's motion to dismiss, denied Klocke's motion to reconsider that ruling, and then entered a final judgment as to Watson only, as allowed by Rule 54(b). Klocke timely appealed.

On appeal, this Court reversed the district court's decision, holding that the TCPA was inapplicable in federal diversity cases because the statute conflicts with Rules 12 and 56 of the Federal Rules of Civil Procedure.[11] After the defamation suit was remanded to the district court, Klocke filed an amended complaint restating his defamation claim against Watson. Specifically, Klocke alleged that Watson falsely published on Facebook and to UTA, through Snow and Moore, that Thomas wrote on his computer "all gays should die" or "gays should die," that Watson falsely published that Thomas told him he "should kill himself" or "should consider killing himself," and that Watson falsely published that Thomas called him a "faggot." Klocke further alleged that Watson falsely published that other students heard Thomas call Watson a faggot and that Thomas was "an aggressor." Klocke additionally alleged that Watson omitted material facts from his publications to create the false impression that Thomas threatened him and that the threat was unabated. Finally, Klocke alleged that Watson falsely published fact statements (1) that damaged Thomas's occupation as a student and any future occupation, (2) that Thomas made threats against Watson, and (3) that accused Thomas of sexual misconduct.

2019) (quoting TEX. CIV. PRAC. & REM. CODE § 27.003). "Other states have passed similar anti-SLAPP statutes because they 'have expressed concerns over the use (or abuse) of lawsuits that have the purpose or effect of chilling the exercise of First Amendment rights.'" *Id.* (citation omitted).

[11] *Klocke*, 936 F.3d at 245-46.

Watson subsequently moved for summary judgment seeking dismissal of Klocke's amended complaint based on numerous grounds. The district court granted the motion, entering summary judgment in favor of Watson and dismissing Klocke's defamation claim.[12] Klocke timely appealed.

III. DISCUSSION

On appeal, Klocke argues that the district court erred in granting summary judgment because "[g]enuine issues of material fact existed as to whether Watson defamed Thomas, under one or more pled theories of defamation." Klocke further asserts that in granting summary judgment the district court made "impermissible credibility determinations." He requests reversal of the district court's summary judgment and remand for trial.

A. Standard of Review

This Court reviews a district court's grant of summary judgment de novo, applying the same legal standards as the district court.[13] Under Rule 56, "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."[14] "The [district] court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[15] "In deciding whether a fact issue has been created, the court must draw all reasonable inferences in

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[12] *Klocke v. Watson*, No. 4:17-CV-285-A, 2020 WL 438114 (N.D. Tex. Jan. 28, 2020).

[13] *Warren v. Fed. Nat'l Mortg. Ass'n*, 932 F.3d 378, 382 (5th Cir. 2019); *Bellard v. Gautreaux*, 675 F.3d 454, 460 (5th Cir. 2012).

[14] FED. R. CIV. P. 56(a).

[15] *Id.*

favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."[16]

Rule 56 further provides that "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by" (1) citing to particular parts of materials in the record, (2) demonstrating that the materials cited do not establish the absence or presence of a genuine dispute, or (3) showing "that an adverse party cannot produce *admissible* evidence to support the fact."[17] With respect to the admissibility of evidence, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."[18]

B. Defamation under Texas Law

As articulated by the Texas Supreme Court, "[t]o state a defamation claim, a plaintiff must show (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, at least amounting to negligence, and (4) damages, in some cases."[19] A statement is "defamatory" when it tends to "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[20] "In

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[16] *Garcia v. Professional Contract Serv., Inc.*, 938 F.3d 236, 240 (5th Cir.2019) (internal quotation marks and citation omitted).

[17] FED. R. CIV. P. 56(c)(1) (emphasis added).

[18] FED. R. CIV. P. 56(c)(2).

[19] *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 417 (Tex. 2020) (citation omitted).

[20] *Id.* (internal quotation marks and citations omitted).

defamation suits brought by private individuals, truth is an affirmative defense."[21]

C. Analysis

Watson moved for summary judgment based on several different grounds. He argued that Klocke could not present competent summary judgment evidence establishing a genuine issue of material fact as to the elements of a defamation claim under Texas law, i.e., that his published statements regarding Thomas were false, that the statements were defamatory, that he had acted negligently in publishing the statements, or that his statements caused Thomas any pain and suffering to constitute compensable damages.[22] He also moved for summary judgment as to his affirmative defense of truth.

1. Falsity and Fault

With respect to his argument that Klocke could not present competent summary judgment evidence establishing that his published statements were false, Watson argued that Klocke would "likely attempt to show that the statements were false through the second-hand, hearsay testimony of family members." Watson contended such testimony was inadmissible under the Federal Rules of Evidence and thus not competent summary judgment evidence. Watson additionally asserted that Thomas's statements to Moore, as reflected in Moore's interview notes, were double hearsay and consequently also inadmissible and not competent summary

[21] *Warren v. Fed. Nat'l Mortg. Ass'n*, 932 F.3d 378, 383 (5th Cir. 2019) (citation omitted); *see* TEX. CIV. PRAC. & REM. CODE § 73.005(a) ("The truth of the statement in the publication on which an action for libel is based is a defense to the action.").

[22] As to the Facebook post, Watson additionally argued that Klocke failed to comply with the Texas Defamation Mitigation Act and that consequently any claim based on the post should be dismissed.

judgment evidence. Watson asserted that, on the other hand, he had presented competent summary judgment evidence, in the form of his sworn testimony by affidavit and deposition, that his published statements regarding what Thomas communicated to him were true.

In his opposition to Watson's motion for summary judgment, Klocke argued that Moore's interview notes were not hearsay under the Federal Rules of Evidence, and he objected to any testimony by Watson about what Thomas allegedly communicated to him during the May 19, 2016 class. Like Watson, Klocke argued that such testimony was hearsay under the Federal Rules of Evidence. He additionally contended that the testimony was prohibited by Texas Rule of Evidence 601, the "Dead Man's Rule," and that the exceptions to the rule did not apply because Watson's testimony was not corroborated, and he was not calling Watson to testify at trial.[23] Watson countered that his testimony was not hearsay under various provisions of the Federal Rules of Evidence. Relying on Texas appellate court decisions, Watson further asserted that Klocke waived protection of the "Dead Man's Rule" by questioning him about Thomas's statements during his deposition and later relying on that deposition testimony in opposition to his motion for summary judgment.

As already mentioned, Rule 56 allows a party to move for summary judgment on the basis "that an adverse party cannot produce *admissible* evidence" to establish a genuine issue of material fact for trial. Furthermore, Rule 56 permits a party to object to the admissibility of material cited to

[23] *See* TEX. R. EVID. RULE 601(b)(3) (providing that a party may testify against another party about an oral statement by the decedent if "(A) the party's testimony about the statement is corroborated; or (B) the opposing party calls the party to testify at the trial about the statement.")

support or dispute a fact.[24] Watson's motion for summary judgment, which challenged the admissibility of Klocke's evidence, and Klocke's summary-judgment opposition, which similarly objected to Watson's evidence as inadmissible, were properly filed under those provisions of Rule 56.

Although the parties' summary-judgment filings presented the district court with numerous evidentiary issues, the district court did not resolve those questions prior to granting summary judgment.[25] Instead, the district court relied on this Court's decision from Klocke's prior appeal of his Title IX claim to determine that there was no genuine fact issue as to Klocke's allegations that Watson lied about what Thomas communicated to him during the May 19, 2016 class.

In the appeal involving Klocke's Title IX claim, we considered whether UTA's disciplinary proceeding had an "erroneous outcome." The district recounted our findings on this issue, and in particular, our observations regarding what informed Moore's disciplinary decision: that Moore knew Watson told the same, consistent story to him, Snow, Long, and Lankford; that Moore perceived Watson as credibly fearful of Thomas; that Moore observed Thomas relying on a written script during his interview and could not meaningfully answer follow-up questions; that Lankford did not notice Watson behaving in a distracting manner during the class as Thomas had alleged; that Moore's common sense suggested to him that Thomas's explanation of the incident was not credible; and that Moore's investigation uncovered no evidence to support Thomas's account of what occurred. The

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[24] FED. R. CIV. P. 56(c)(2).

[25] "Although this court may decide a case on any ground that was presented to the trial court, we are not required to do so." *Breaux v. Dilsaver*, 254 F.3d 533, 538 (5th Cir. 2001). We leave it to the district court to decide, in the first instance, the numerous evidentiary issues presented in this case.

district court then concluded: "In sum, defendant did not publish false statements of fact about Thomas."[26]

In so concluding, the district court erred because it relied on our conclusions regarding Moore's knowledge, observations, and beliefs from his investigation of the incident to determine that Watson's version of the incident was credible. As stated above, the district court is not permitted to make credibility determinations at the summary judgment level.[27] Although we stated in the prior appeal that Moore reasonably determined that Watson's account of the incident was credible, the district court was not permitted to rely on that determination or adopt Moore's credibility determination as its own on summary judgment.

The district court similarly erred in concluding that there was no genuine issue of material fact as to the element of fault, i.e., that Watson at least acted negligently,[28] because that conclusion was founded upon its impermissible credibility determination. Specifically, the district court determined that "no other conclusion could be reached but that defendant believed the statements he made regarding Thomas were true. He did not know or have reason to know that the statements were false." Here again, the district court made a credibility determination regarding Watson to arrive at

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[26] *Klocke v. Watson*, No. 4:17-CV-285-A, 2020 WL 438114, at *4 (N.D. Tex. Jan. 28, 2020).

[27] *Garcia v. Professional Contract Serv., Inc.*, 938 F.3d 236, 240 (5th Cir.2019) (internal quotation marks and citation omitted).

[28] "The status of the person allegedly defamed determines the requisite degree of fault. A private individual need only prove negligence, whereas a public figure or official must prove actual malice." *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (citation omitted).

its conclusion that there was no genuine issue for trial regarding fault. The district court erred in doing so.

2. Defamatory Nature of Statements and Damages

Another element of a defamation claim under Texas law is that the published statements must be defamatory. In his motion for summary judgment, Watson argued that none of the statements Klocke alleged to be defamatory fit within the definition of "defamation per se," as defined by Texas law, and that, at best, such statements could constitute only "defamation per quod." Because, Watson contended, the statements did not constitute defamation per se, Texas law required Klocke to prove that Watson acted with the requisite degree of fault and that Thomas suffered actual damages.

As explained by the Texas Supreme Court, "[d]efamation per se refers to statements that are so obviously harmful that general damages, such as mental anguish and loss of reputation, are presumed."[29] Examples of defamation per se are "[a]ccusing someone of a crime, of having a foul or loathsome disease, or of engaging in serious sexual misconduct."[30] "Remarks that adversely reflect on a person's fitness to conduct his or her business or trade are also deemed defamatory per se."[31] "[W]hether a statement qualifies as defamation per se is generally a question of law."[32]

Defamation per quod is defamation that "either (1) is not apparent but is proved by extrinsic evidence showing its injurious meaning or (2) is

[29] *Id.* at 596 (citation omitted).

[30] *Id.* (citation omitted).

[31] *Id.* (citation omitted).

[32] *Id.* (citation omitted).

apparent but not a statement that is actionable per se."[33] Nominal damages are not recoverable, and actual damages must be proven.[34]

In his summary-judgment opposition, Klocke argued that Watson's published statements, in particular his statements that Thomas made homophobic comments were reasonably capable of defamatory meaning. He argued that Watson's statements made him out to be a "homophobic aggressor" and that, based on those statements, UTA sanctioned him in the form of excluding him from the class. Klocke further argued that Watson's statements constituted defamation per se because the statements accused Thomas of conduct which imputed a crime. Specifically, Klocke argued that the statements described an assault as defined in Section 22.01(a)(2) of the Texas Penal Code, which provides that a person commits assault if he "intentionally or knowingly threatens another with imminent bodily injury."

The district court determined that Klocke had waived the issue that Watson's published statements were defamation per se, and that, in any event, "[n]one of the statements fit[] any of the [defamation per se] categories."[35] The district court erred in determining that Klocke waived this issue because Klocke clearly addressed it in his summary-judgment opposition. Moreover, the district court provided no explanation for its conclusion that none of Watson's statements could constitute defamation per se. Because the district court wrongly determined that Klocke waived his argument that Watson's published statements were defamation per se, and otherwise failed to explain its decision determining that the statements could

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[33] *Brady v. Klentzman*, 515 S.W.3d 878, 886 n.4 (Tex. 2017) (internal quotation marks and citations omitted).

[34] *Id.*

[35] *Klocke v. Watson*, No. 4:17-CV-285-A, 2020 WL 438114, at *4 (N.D. Tex. Jan. 28, 2020).

not constitute defamation per se, we reverse and remand the district court's summary judgment on this issue.

As explained by the Texas Supreme Court, in a defamation case, "when the damages are for non-economic losses, such as mental anguish or lost reputation, the jury must be given some latitude because these general damages are, by their nature, incapable of precise mathematical measure."[36] But the evidence of loss of reputation should be more than theoretical—"there must be evidence that people believed the statements and the plaintiff's reputation was actually affected."[37]

Klocke clarified in his summary-judgment opposition that he seeks to recover damages to Thomas's reputation and the "attendant mental anguish and humiliation." He specifically stated that he is not seeking recovery of lost wages or the costs of Thomas's education, nor is he seeking wrongful death damages. There is evidence that UTA officials believed Watson's published statements and that Thomas's reputation was actually affected—Thomas was investigated and ultimately excluded from class. Therefore, the district court further erred in determining that Klocke is unable to present competent evidence of compensable damages.

IV. CONCLUSION

Based on the foregoing, the district court's summary judgment in favor of Defendant, Nicholas Matthew Watson, is REVERSED, and this matter is REMANDED for further proceedings consistent with this opinion.

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[36] *Brady*, 515 S.W.3d at 887 (citation omitted).

[37] *Id.* (citation omitted).