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PUBLISHER LOSES INTERLOCUTORY APPEAL IN LIBEL SUIT BROUGHT BY LAWYER

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An Eagle Pass lawyer who was counsel to the Kickapoo Traditional Tribe of Texas in 2006 during a leadership dispute is not a limited-purpose public figure, San Antonio's 4th Court of Appeals has ruled in an interlocutory appeal.

In its Jan. 26 opinion in *Hernandez v. ZYZY Corp.*, a three-justice panel noted that lawyer Gloria Hernandez is not a limited-purpose public figure and quoted case law saying a lawyer does not achieve that status simply for representing clients in "difficult, unpopular, high

profile or sensational types of cases."

"A lawyer representing a client in a very public controversy . . . does not, by virtue of the legal representation, make himself a public figure," wrote 4th Court Justice Steven Hilbig, quoting *Gertz v. Robert Welch Inc.*, a 1974 U.S. Supreme Court case. Justices Karen Angelini and Sandee Bryan Marion joined Hilbig in the unanimous 4th Court opinion.

The panel affirmed an order by 365th District Judge Amado Abascal III of Maverick County. Abascal denied the motion for summary judgment filed by ZYZY Corp., the publisher of the *Eagle-Pass News-*

Guide who is the defendant in a libel suit Hernandez filed in 2007. The 4th Court affirmed Abascal's decision.

The 4th Court wrote that ZYZY sought a summary judgment in *Hernandez* on two grounds: Hernandez's suit was barred by the statute of limitations, and the evidence established an absence of malice as a matter of law. However, the 4th Court held that Hernandez's suit was timely filed, and ZYZY failed to prove as a matter of law that Hernandez was a limited-purpose public figure.

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"To recover damages in a libel case against a media defendant, a general or limited purpose public figure or public official must prove by clear and convincing evidence that the defendant published the statement with 'actual malice,'" Hilbig wrote quoting *Gertz*.

The panel does not define "actual malice" in the opinion. But media lawyer Paul Watler, a partner in Jackson Walker in Dallas, says actual malice in a libel suit means publishing a false statement, either by knowing it was false or by entertaining doubts about its truth. Watler says a private figure in a libel or defamation action has greater protection of his or her reputation.

"A person found to be a public figure has a higher hurdle to surpass to prevail in a defamation action, so finding a lawyer to be a private figure is more protective of the lawyer's reputation," he says.

Watler says, in his experience, lawyers frequently are libel plaintiffs against news media defendants. "[T]ypically, in those cases, because of the *Gertz* line of cases and [*New York Times v. Sullivan*], defendants will make some effort, if it's at all justified, to make a lawyer out to be a public figure."

Hernandez, of the Law Office of Gloria E. Hernandez, did not return two telephone calls seeking comment. But her attorney, San Antonio solo Carl Kolb, says he is pleased with the 4th Court's decision, because it means Hernandez may get her day in court.

"The court made a real good decision, because, really, Gloria Hernandez never really stepped out of her role as a lawyer. She never sent out any press releases," Kolb says.

Mark Cannan, who represents ZYZY of San Antonio, says he disagrees with the panel's opinion but it was "professionally handled."

"The court's description and handling of the public-figure issue was nothing that I can take strong exception to," notes Cannan, a shareholder in Clemens & Spencer in San Antonio.

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The 4th Court sets out the following background: Hernandez filed a libel suit against ZYZY in Bexar County on April 30, 2007, which subsequently was transferred to Maverick County, Hilbig wrote.



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tribal hearing that she made "roughly about 10 percent of my income from the tribe."

ZYZY filed a motion for summary judgment in Maverick County, alleging, among other things, that Hernandez is a limited-purpose public figure because she "played more than a trivial or tangential role" in the dispute that was the subject of the April 26, 2006, Tribal District Court hearing. ZYZY also claimed the evidence established an absence of actual malice as a matter of law.

The libel suit Hernandez filed against ZYZY in 2007 stemmed from an article the *Eagle-Pass News-Guide* published on April 27, 2006, reporting on a hearing of the Kickapoo tribe. A subheadline to the article said: "Gloria Hernandez admits she's skimming 10% of casino profits off the top."


But in fact Hernandez, who is not a member of the tribe, testified at the

After Abascal denied the motion for summary judgment, ZYZY filed an interlocutory appeal with the 4th Court.

The appeals court wrote that ZYZY's summary judgment evidence showed Hernandez provided legal advice and representation to tribe members who sought a change in tribe leadership in 2002; she was hired as the tribe's lawyer after that leadership change; and she continued in that capacity through the April 2006 tribal court hearing and the *Eagle-Pass News-Guide*'s publication of the article in question.

"The evidence does not show that she became involved in the controversy regarding the tribe leadership beyond her role as a legal advocate, that she thrust herself into the public eye by engaging the media, had any special access to the media, or that she used the media in an attempt to influence the outcome of the controversy," Hilbig wrote.

Since the 4th Court held that ZYZY did not establish as a matter of law that Hernandez is a limited-purpose public figure, it did not decide whether the summary judgment evidence negated actual malice.

Cannan says the *Eagle Pass News-Guide* is no longer published. Working telephone numbers for the newspaper and ZYZY could not be located. 

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The 4th Court of Appeals' opinion in *Hernandez v. ZYZY Corp.* is online at www.texaslawyer.com. Look for the link within the online version of this article.