

# FOR THE DEFENSE

May 2017

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 2:27

## Greetings from Joanna Salinas

Greetings from Joanna in Austin. Happy May to you all. May is our last ditch effort in Texas to hold on to some decent weather before the heat of summer is full upon us. The month of May also means that we have our Fletcher Farley 2017 Dallas Texas Law Update behind us. We want to thank everyone who attended this year's event - from understanding the worker's comp bar to defending traumatic brain injuries to handling premise liability claims to claims handling ethics, there was something for everyone: plenty of learning and laughing. Fletcher Farley is a leader among Texas defense firms in presenting educational and entertaining legal updates that are approved for Department of Insurance adjuster credit. Our presentations give you the tools you need to better understand Texas law and Texas claims. If you can't attend one of our day-long seminars in Dallas or Chicago (hold the date: October 20, 2017), then let Fletcher Farley come to you with an abbreviated Lunch & Learn or a full-day presentation. With 25 years of defending litigation claims in Texas, we love sharing what we have learned with the people who have made these years possible. Thank you for the continued opportunity to serve your needs, and we look forward to many more years of working together.



## Defamation by Yelp: Handling Claims Arising from Online Speech

### Kristi L. Kautz

Undoubtedly, the internet promotes a greater exchange of ideas and information than ever contemplated before in human society. However, when the information exchanged concerns a business' products or services or an individual's actions or omissions, a claim may arise with allegations of defamation or business disparagement. The good news for resolving and defending those claims is that Chapter 27 of the Texas Civil Practice and Remedies Code - the Texas Citizens' Participation Act (the "TCPA") provides a procedural mechanism to seek early dismissal of lawsuits arising out of protected speech.

Recently, numerous Texas courts have tackled whether a negative online review of a business or service provider is protected speech



## In This Issue

Featured Article

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Welcome to the latest edition of Fletcher Farley's Newsletter, which we hope you find interesting and helpful.

If you have any comments, questions or would like more information from us, please contact Doug or Joanna.

### Contact:

**Doug Fletcher**  
Firm Managing Partner  
214-987-9600  
[doug.fletcher@fletcherfarley.com](mailto:doug.fletcher@fletcherfarley.com)

**Joanna Salinas**  
Austin Office Managing Partner  
512-476-5300  
[joanna.salinas@fletcherfarley.com](mailto:joanna.salinas@fletcherfarley.com)

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**Congrats to  
Keith A. Robb**



under the TCPA. The TCPA protects the exercise of the right of free speech, which includes all "communication[s] made in connection with a matter of public concern." The TCPA defines "matter of public concern" to broadly include any issue related to "economic or community well-being" as well as "a good, product, or service in the marketplace." Recent holdings have confirmed the broad application of this statute to protect persons or businesses who are sued for online reviews. For example, the Dallas Court of Appeals has held that an online business review and rating of BH DFW, a builder of residential swimming pools, by the Better Business Bureau ("BBB") amounted to protected speech under the TCPA because the review and rating related to a good, product, or service in the marketplace. In a case which made headlines in 2016, Michelle Duchouquette posted a negative review of a pet sitting service on Yelp alleging that the company "potentially harmed their fish" and that a camera they had on the bowl allowed she and her husband to "watch the water go from clear to cloudy" and observe that "there was a layer of food on the bottom from way too much being put in it." In response to this negative review, the pet sitting business filed a suit against Mrs. Duchouquette and her husband alleging defamation and business disparagement. The 160th Judicial District Court of Dallas County granted a Motion to Dismiss pursuant to the TCPA and found that a negative review on Yelp clearly concerned a good, product, or service in the marketplace such that Ms. Duchouquette's review was protected free speech. This finding has recently been upheld by the 5<sup>th</sup> Court of Appeals.

Last month the Texas Supreme Court broadened the reach of the TCPA even further by holding that the speech at issue does not even have to specifically "mention" economic concerns or have anything more than a tangential relationship to the same. Instead, the Supreme Court held that the statute requires only that the defendant's statements are "in connection with" "issues related to" health, safety, environmental, economic or other identified matters of public concern chosen by the Legislature. As a result, in the *ExxonMobil* case, statements made about an employee's alleged failure to gauge a tank were protected even though they were never transmitted to the public since the failure to gauge the tank had the potential to cause safety or environmental concerns.

The TCPA is clearly a powerful weapon in the defense of a defamation or disparagement claim. If you have a claim arising out of an online review or exercise of free speech, early dismissal may be possible. Our Firm has obtained dismissal orders under the TCPA in multiple lawsuits including HOA disputes and business reviews. If you need help with any of your claims, please give us a call.

## Conflicts Resolved

### Summary Judgment Granted

A Denton County District Court recently granted a motion for summary judgment arising from a slip-and-fall incident at a local medical facility. Attorneys Paul Bennett, David Colley and Alex Bell represented a roofing contractor who had been hired to replace the roof. The contractor was told to stop work and tarp the roof in the middle of the replacement. The Contractor warned that stopping work and tarping the roof was a bad idea, as serious thunderstorms were expected and tarping would likely be ineffective. Despite these warnings, Plaintiff, the project coordinator for the medical center, insisted that the roof be tarped. Early the next morning, Plaintiff went to check on the building and found water had leaked through the tarp, just as the contractor predicted. Wading through several inches of water, Plaintiff slipped and fell and claimed damages for a shoulder injury and a closed head injury. The Court agreed that the

Fletcher Farley is proud to announce that Keith A. Robb received the NESA Outstanding Eagle Scout Award (NOESA). This is a prestigious recognition awarded by the local council's NESA committee to Eagle Scouts who have demonstrated outstanding achievement at the local, state, or regional level whose efforts have made a positive impact close to home.

### Honoring 25 Years with 25 Acts of Kindness

#### Fletcher Farley Sponsored Young Life Golf Tournament

The 44th Annual Young Life North Central Texas Golf Tournament was held on April 24 at Bent Tree Country Club in Dallas, TX.

Young Life in the North Central Texas Region benefits our inner-city neighborhoods including 38 local areas from Denton to Duncanville and Aledo to Rockwall. The geographic area covered by this region is relatively small, but the impact on kids' lives is huge.

water was an open and obvious condition of which Plaintiff had actual knowledge and granted the contractor's motion for summary judgment, which disposed of all claims in the litigation.

Dwanna Gassaway  
Fletcher Farley Shipman & Salinas LLP  
214-987-9600

Fletcher Farley Shipman & Salinas LLP, Dallas and Austin,  
9201 N Central Expressway, Suite 600, Dallas, TX 75231,  
1717 W. 6th St, Suite 300, Austin, TX 78703

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