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Defamation and Invasion of Privacy: Piggie Porn in the Fifth Circuit

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DEFAMATION AND INVASION OF PRIVACY: PIGGIE PORN IN THE FIFTH CIRCUIT

Interpreting Texas law, the Fifth Circuit recently held that a woman who worked with a pig as part of a novelty act at an amusement park was not a public figure, that the woman could not recover damages for both defamation and invasion of privacy when a picture of the woman with the pig was published in a hard core men's magazine, and that it was proper for the trial court to admit into evidence the entire issue of the magazine in which the picture appeared.

Jeannie Braun, the plaintiff in *Braun v. Flynt*,[1] was employed by Aquarena Springs, an amusement park in Texas. Mrs. Braun's work activities included participating in a show with Ralph, the Diving Pig. In the show, Mrs. Braun would tread water in a pool while holding a bottle of milk with a nipple on it. Ralph would dive into the pool, swim to Mrs. Braun, and feed from the bottle. The amusement park made pictures and postcards of the act, showing Ralph diving toward Mrs. Braun.

Chic magazine was a Larry Flynt publication. Its dominant theme was female nudity. The magazine was alleged to depict "unchastity in women," and contained caricatures that were "indecent." The Fifth Circuit described *Chic* as a "glossy, oversized, hard-core men's magazine."[2] "Chic Thrills" was a regular feature in *Chic* which contained brief stories about current events. Most of the stories concerned sex overtly, or were accompanied by a photograph or cartoon of a sexual nature.[3]

In May 1977, one of *Chic's* editors saw the "Ralph, the Diving Pig" act at Aquarena Springs. He saw some postcards of Ralph, the Diving

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1. 726 F.2d 245 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 252 (1984).

2. *Id.* at 247.

3. The court described the "Chic Thrills" feature of the December 1977 issue of *Chic* magazine as follows:

> On the same page on which Mrs. Braun's picture appeared were stories about "10 Things that P--- Off Women" with accompanying cartoon of a woman whose large breasts are partially exposed; a story entitled "Mammaries Are Made of This" about men whose breasts have been enlarged by exposure to a synthetic hormone, with an accompanying cartoon showing a man with large breasts; and a story entitled "Chinese Organ Grinder" about the use of sexual organs from deer, dogs and seals as a Chinese elixir. On the facing page is a picture showing a nude female model demonstrating navel jewelry and an article on "Lust Rock Rules" about a "throbbing paean" to sex written by "the Roman Polanski of rock." The cover of the issue shows a young woman sitting in a chair with her shirt open so as partially to reveal her breasts, one hand to her mouth and the other hand in her tightly-fitting, unzipped pants.

Braun, 726 F.2d at 248.

Pig, and thought that a picture of Ralph should appear in "Chic Thrills." The editor contacted the amusement park's public relations director and requested photographs of Ralph. When the public relations director inquired about the nature of the magazine, the editor replied that *Chic* was a men's magazine featuring fashion, travel and humor. The editor added that *Chic* had the same readership as *Redbook* and *McCall's*. Aquarena Springs then supplied *Chic* with photographs of Ralph and Mrs. Braun.

A picture of Ralph and Mrs. Braun appeared with a caption[4] in the "Chic Thrills" section of the December 1977 issue of *Chic*. Mrs. Braun learned of her inclusion in the magazine shortly after the issue was published and she quickly filed suit, alleging defamation and false light invasion of privacy.

At trial the jury awarded Mrs. Braun $5,000 in actual damages and $25,000 in punitive damages for defamation, plus $15,000 in actual damages and $50,000 in punitive damages for invasion of privacy, for a total award of $95,000.[5] *Chic* appealed the decision.

The Fifth Circuit affirmed, holding that Mrs. Braun was not a public figure,[6] and that the trial court did not err in admitting the entire December 1977 issue of *Chic* into evidence to show the context in which Mrs. Braun's picture appeared.[7] However, the court held that the jury gave Mrs. Braun a double recovery by awarding damages for both defamation and invasion of privacy.[8] The court resolved the double recovery problem by allowing Mrs. Braun to retry the issue of damages or to accept the damage award for invasion of privacy only.[9]

Mrs. Braun as a Private Figure

The seminal case in modern defamation law for media defendants is *New York Times v. Sullivan*,[10] where the United States Supreme Court held that a public official may not recover for defamatory statements relating to official conduct unless the public official proves that the statement was made with "actual malice"; that is, with the knowledge that it

4. SWINE DIVE—A pig that swims? Why not? This plucky porker performs every day at Aquarena Springs Amusement Park in bustling San Marcos, Texas. Aquarena staff members say the pig was incredibly easy to train. They told him to learn quick, or grow up to be a juicy ham sandwich.

Braun, 726 F.2d at 248, n.2.

5. *Id.* at 248.

6. *Id.* at 250.

7. *Id.* at 254.

8. *Id.* at 251.

9. *Id.* at 251-52.

10. 376 U.S. 254 (1964).

was false or with reckless disregard of its truth or falsity.[11]

In *Curtis Publishing Co. v. Butts*,[12] the Supreme Court applied the *New York Times* actual malice standard to public figures as well as public officials.[13] In a concurring opinion, Chief Justice Warren reasoned that the distinctions between the public and private sectors have become blurred, due to the merging of the two to solve problems previously solved solely in the public sector.[14] As a result there is a heavier concentration of power in the private sector, and many who do not hold public office are nonetheless intimately involved in the resolution of "important public questions."[15] The public's interest in the conduct of these "public figures" is as legitimate as the interest in the conduct of public officials, and "uninhibited debate" concerning the involvement of public figures in public issues is just as crucial.[16] Furthermore, these "public figures" have as much access to media as public officials, and are able to use the media to influence policy and respond to criticism.[17]

The Supreme Court elaborated further on the public figure concept in *Gertz v. Robert Welch, Inc.*[18] One whose achievements have brought notoriety or who has vigorously and successfully sought public attention is a public figure.[19] One who has thrust himself to the forefront of a public controversy in order to influence the resolution of a public issue, and who by doing so invites attention and comment, is a public figure.[20]

Applying the standards set forth in *New York Times*, *Curtis*, and *Gertz*, the *Braun* court held that Mrs. Braun was not a public figure.[21] Thus, Mrs. Braun was not required to prove that *Chic* acted with "actual malice," that is, with knowledge of falsity or reckless disregard of truth or falsity. The Fifth Circuit reasoned that Mrs. Braun's limited public exposure as a passive assistant in a novelty act did not make her a public

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11. The *New York Times* court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

New York Times, 376 U.S. at 279-80.

12. 388 U.S. 130 (1967).
13. *Id.* at 164.
14. *Id.* at 163-64.
15. *Id.*
16. *Id.* at 164.
17. *Id.*
18. 418 U.S. 323 (1974).
19. *Id.* at 342.
20. *Id.* at 345.
21. *Braun*, 726 F.2d at 250.

figure.[22] The court found no public controversy or issue in which Mrs. Braun had become involved.[23] The court stated that Mrs. Braun, in her limited role as an entertainer, "cannot be said to have relinquished interest in protecting her name and reputation. . . ."[24]

Double Recovery for Defamation and False Light Invasion of Privacy

Under Texas law, a communication is defamatory if it tends to injure one's reputation and "thereby expose[s] him to public hatred, contempt or ridicule, or financial injury, or to impeach [his] honesty, integrity, or virtue, or reputation."[25] In addition, the *Gertz* test requires that a private person—one who is not a public official or a public figure—must prove at least that the person making the defamatory statement knew or should have known that the statement was false.[26] In order to recover compensatory damages, *Gertz* requires that a private person must demonstrate actual injury, or meet the *New York Times* standard of actual malice for damages to be presumed.[27] A private person must also meet the *New York Times* actual malice standard to recover punitive damages.[28] A recent United States Supreme Court decision has limited the *Gertz* restrictions on presumed and punitive damages in defamation cases involving private persons to cases in which a private person sues for defamation involving a matter of public concern.[29] Thus, the states need only require that a private person who sues for defamation involving a matter of private concern prove that the defendant negligently published the false statement.

Under Texas law, a person who, by giving publicity concerning another, places the other in a false light, is liable for invasion of privacy if "(a) the false light in which the other was placed would be highly offen-

22. *Id.*

23. *Id.* A recent United States Supreme Court decision has made this consideration an especially relevant one. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2948 (1985), the Court held that states may permit recovery for presumed and punitive damages absent a showing of actual malice when the defamatory statements do not involve matters of public concern.

24. *Braun,* 726 F.2d at 250. However, even a public figure does not completely relinquish the interest in his or her good name and reputation; rather, under *New York Times* and its progeny such an interest is protected if the defamatory statement was made without "actual malice," that is, without knowledge of falsity or reckless disregard of truth or falsity.

25. TEX. STAT. ANN. art. 5430 (Vernon 1958).

26. *Gertz,* 418 U.S. at 348-49. Texas has applied this minimum negligence standard to defamation cases involving private individuals. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex. Civ. App. 1976).

27. *Gertz,* 418 U.S. at 348-49.

28. *Id.*

29. *Dun & Bradstreet,* 105 S. Ct. at 2941, 2948.

sive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[30]

Although defamation and false light invasion of privacy are two different torts with substantially different elements, the instructions the trial court in *Braun* gave the jury were identical in many aspects.[31] The Fifth Circuit found that the elements of the two causes of action were not sufficiently distinguished from each other to assure that there was no double compensation.[32] Such double compensation runs counter to "[t]he policy which motivates the holding of *Gertz* [which] requires that there be only a single recovery where the same items of damages are alleged under both defamation and invasion of privacy theories."[33]

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30. Gill v. Snow, 644 S.W.2d 222, 224 (Tex. Civ. App. 1982) (*quoting* Restatement (Second) of Torts § 652E (1977)). Comment b to § 652E states in relevant part:

> *Relation to defamation.* The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander . . . . In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.
>
> It is not, however, necessary to the action for invasion of privacy that the plaintiff be defamed. It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation.

False light invasion of privacy is but one of four different causes of action for invasion of privacy recognized by the Second Restatement. The other three are:

"(a) unreasonable intrusion upon the seclusion of another . . .

(b) appropriation of the other's name or likeness . . .

(c) unreasonable publicity given to the other's private life . . . ."

Restatement (Second) of Torts § 652A (1977).

31. The jury was given the following instructions regarding damages:

> In order to recover damages to compensate for the defamation, Mrs. Braun must show that she has suffered or will suffer an impairment of her reputation or standing in her community, personal humiliation or mental anguish and suffering as a direct result of the publication of her picture in *Chic*. . . .
>
> If you find that Mrs. Braun's privacy was wrongfully invaded, then you may consider an award of compensatory damages. Do not consider the elements of the cause of action for defamation in awarding damages for invasion of privacy. In awarding compensatory damages, you may consider Mrs. Braun's personal humiliation, mental anguish and suffering.

Braun, 726 F.2d at 251 n.7.

32. *Id.* at 251.

33. *Id.* at 250. Apparently, the "policy" underlying *Gertz* was set forth in the following statements in the *Gertz* opinion:

> Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by

The court found that the evidence Mrs. Braun submitted dealt almost exclusively with her personal pain and suffering over the publication of her picture in *Chic*, and concluded that the jury had compensated Mrs. Braun primarily for false light invasion of privacy.[34] The court then proposed two solutions to the double recovery problem: to remand the case for trial on the issue of damages, or to allow Mrs. Braun to accept the award for false light invasion of privacy only.[35]

The Context in Which the Picture Appeared

At trial, *Chic* moved to exclude from admission into evidence the contents of the December 1977 issue of *Chic* magazine which were unrelated to Mrs. Braun's picture. The trial court denied the motion and admitted the entire magazine into evidence.[36] The Fifth Circuit found the issue to be whether Mrs. Braun's picture should have been admitted by itself or whether the entire magazine should have been admitted.[37] The court held that the trial court properly admitted the entire issue into evidence.[38] The court relied heavily on its ruling in *Golden Bear Distributing Systems of Texas v. Chase Revel, Inc.*[39]

New York Times. . . . But this countervailing state interest [in compensating private individuals for injury to reputation] extends no further than compensation for actual injury . . . .

[T]he States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury. . . .

It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved.

Gertz, 418 U.S. at 348-49.

The *Braun* court's refusal to uphold an award of damages for both causes of action is in line with the position taken by the Second Restatement. *See infra* note 30 at § 652E, comment b.

34. *Braun*, 726 F.2d at 251.

35. *Id.* at 251-52. The court did not allow Mrs. Braun the choice of accepting the award for defamation because the court found that the jury had primarily compensated Mrs. Braun for humiliation and embarrassment, injuries which give rise to an action for false light invasion of privacy.

36. *Id.* at 253.

37. *Id.* at 254.

38. *Id.*

39. 708 F.2d 944 (5th Cir. 1983). In *Golden Bear*, the defendant was a magazine which published a monthly "Fraud" feature which exposed instances of consumer and investor fraud. A particular feature concerned the activities of several companies which operated in different states under the name of Golden Bear Distributing Systems. Each company was operated as a franchise of the parent company, Golden Bear of California. However, other than common advertising and sales techniques, the different companies had no connection with one another. The allegedly defamatory "Fraud" feature discussed an investment fraud lawsuit which had been brought against Golden Bear of California and legal difficulties experienced by Golden Bear of Utah. The feature stated that Golden Bear's sales techniques were used by all Golden Bear companies. The article gave as an example a sales presentation used by a Golden Bear of

In *Golden Bear*, as in *Braun*, the defendant sought to allow admission of only the part of a magazine article which mentioned the plaintiff. In holding that the entire article should be admitted into evidence, the Fifth Circuit stated that the allegedly defamatory statements should be considered in the context of the whole article, so that the jury could determine how the ordinary reader of the publication would perceive the statements.[40] Even though the statements which mentioned the plaintiff may be true if considered outside of the context of the article, the statements are defamatory if the overall effect of the publication is defamatory.[41]

Citing *Golden Bear* for the proposition that the truth of a statement depends on the overall impression created by the context in which it was published, the *Braun* court held that a jury could find that the ordinary reader of *Chic* would form an unfavorable opinion of the character of a woman whose photograph appeared in *Chic*.[42] The *Braun* court held that it was proper to admit the entire December 1977 issue of *Chic*, "a magazine devoted exclusively to sexual exploitation and to disparagement of women," so that the jury could assume the place of an ordinary reader of *Chic* magazine.[43]

The United States Supreme Court first considered allegedly defamatory material in the context in which the material was published in *Washington Post v. Chaloner*.[44] The *Chaloner* court held that " '[a] publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item . . . should be read and construed together, and its meaning and signification thus determined.' "[45]

The *Chaloner* reasoning has been embodied in section 563 of the Second Restatement of Torts: "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."[46]

Texas marketing director. The feature did not expressly state that Golden Bear of Texas had perpetrated fraud or was under investigation for fraud.

40. *Id.* at 948.

41. *Id.* at 949.

42. *Braun*, 726 F.2d at 254.

43. *Id.*

44. 250 U.S. 290 (1919).

45. *Id.* at 293, *quoting* Commercial Publishing Co. v. Smith, 149 F. 704, 706-07 (6th Cir. 1907).

46. Restatement (Second) of Torts, § 563 (1977). Comment d to § 563 states:

> In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context. Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by

The *Chaloner*/Restatement view has been adopted in many states, including California.[47] However, the cases adopting this view have dealt with statements contained in articles published in magazines and newspapers, statements contained in chapters of books, or statements made during segments of television broadcasts. The courts in these cases have

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their context as to make such an interpretation unreasonable. So too, words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood. The context of a defamatory imputation includes all parts of the communication that are ordinarily heard or read with it.

47. Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985) (the entire newspaper article in which the allegedly defamatory statements appeared was admitted to show the context of the statements); Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983) (under Kansas law, eighteen separate statements about a psychiatrist in a book critical of the quality of mental health care could be examined individually for their truth or falsity as long as they were read in context); Pierce v. Capital Cities Communications, 576 F.2d 495 (3d Cir. 1978), *cert denied*, 439 U.S. 861 (1978) (under Pennsylvania law, inclusion of a former public official in a television broadcast about corruption on the part of public officials was incapable of defamatory meaning even if considered in the context of the broadcast where no material mistatement of fact occurred); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761 (D.N.J. 1981) (under New Jersey law, a photograph in a sociology textbook showing a police officer prodding a black man with a night stick followed by a caption questioning whether the suspect would be treated the same if he were white is to be considered in the educational context in which it appeared); Desert Sun Publishing Co. v. Superior Court, 97 Cal. App. 3d 49, 158 Cal. Rptr. 519 (1979) (letter to newspaper editor which lambasted a political candidate was considered in the context of a statement of opinion in the spirit of political debate); Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940) (letters accusing plaintiff of financial improprieties were published to others, and this constituted a cause of action for defamation because the letters suggested that plaintiff had committed a crime and thus exposed him to hatred and ridicule); McCall v. Courier-Journal and Louisville Times, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) (statements in a newspaper article which accused a criminal defense attorney of using legal fees paid by his client to fix a case or bribe a judge should be considered in the context of the whole article); Myers v. Boston Magazine Co., 380 Mass. 336, 403 N.E.2d 376 (1980) (plaintiff sports announcer, whose name appeared in a magazine article stating that the plaintiff was the only newscaster in town enrolled in a course for remedial speaking, did not state a cause of action for defamation where the allegedly defamatory statements appeared in the context of a humorous article); Pentuff v. Park, 194 N.C. 146, 138 S.E. 616 (1927) (a newspaper article in which plaintiff minister was referred to as an "immigrant ignoramus," "unmannerly," "discourteous," and "ignorant," when considered in the context in which it was written, defamed plaintiff); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P.2d 847, (1933) (statements in a newspaper article falsely accusing a sheriff of selling confiscated liquor stills, when construed in the sense in which they would ordinarily be understood by those reading the article, were defamatory); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W. Va. 1984) (where there was unauthorized use of a photograph of a female coal miner, in a newspaper article discussing sexual harassment of female miners, and where the miner had suffered no sexual harassment, there existed a triable issue of fact whether the plaintiff had suffered sexual harassment); Samuelson v. Tribune Publishing Co., 42 Wyo. 419, 296 P. 220 (1931) (plaintiff, who was acquitted of first degree murder, who alleged that defendant published a newspaper article which conveyed to its readers that plaintiff had been liberated without punishment for an admitted homicide and that plaintiff had committed perjury in connection with his acquittal, stated a cause of action for defamation even though the article did not state that plaintiff had committed murder).

focused on the particular article, chapter, or broadcast segment, but have not gone so far as to view the entire newspaper, magazine, book, or broadcast.

In admitting the entire December 1977 issue of *Chic* magazine, the *Braun* court has gone beyond the area charted by *Chaloner* and developed by the jurisdictions that have confronted the context issue. The fact that "Chic Thrills" and *Chic* magazine both contained sexually oriented material is not, by itself, sufficient to warrant the admission of the entire issue into evidence. "Chic Thrills," because of its factual orientation and strictly humorous tone, stands apart from the rest of *Chic* magazine, which, according to the *Braun* court, "is a glossy, oversized, hard-core men's magazine" which "depicts unchastity in women."[48]

Admission of the entire issue of *Chic* into evidence could have actually distorted the jury's perception of the effect "Chic Thrills" had on the ordinary reader. Furthermore, the entire issue's probative value may have been outweighed by its prejudicial impact on the jury. It is entirely possible that Mrs. Braun prevailed, not because *Chic* invaded her privacy, but because the jury found *Chic* magazine to be in poor taste.[49]

The *Braun* court could have admitted only the "Chic Thrills" section of the magazine and excluded the remainder. However, the court never discussed this possibility. By framing the issue in terms of admitting the picture of Mrs. Braun "in isolation" or admitting the entire magazine, the court foreclosed itself from considering Mrs. Braun's picture in the context in which it actually appeared—that is, in the "Chic Thrills" section.

The broad scope of the *Braun* decision may operate as an infringement upon the first amendment rights of the media. If a magazine publishes an article which contains statements about a person who happens to find the magazine distasteful, under *Braun* that person may sue the magazine and have the entire issue in which the article appeared admitted into evidence at trial. The entire issue will be admitted even if nothing in the article was untrue or portrayed the person in a false light, even if the tone and style of the article was strikingly different from that of the magazine, and even if it is clear that the ordinary reader of the magazine would view the statements in the context of the article but not in the

48. *Braun*, 726 F.2d at 247.

49. The *Braun* court admitted that "the evidentiary impact of the portions of the magazine was significant," but stated that admission of the entire magazine was not "*unfairly* prejudicial" (original emphasis) because "[the] trial court instructed the jury that it was not to be governed by bias, prejudice, sympathy, or public opinion." *Id.* at 254 n.12.

However, presenting highly prejudicial material to the jury while instructing it not to be prejudiced is like going into a crowded theater and shouting, "There's a fire, but don't panic."

context of the entire issue.[50]

A subsequent district court decision indicates that the *Braun* court may have gone too far. In *Faloona v. Hustler Magazine*,[51] a Texas federal district court attempted to rescue *Braun* from its overextension of the law by stating that even though the *Braun* court admitted the entire magazine into evidence, the *Braun* court did *not* hold that the contents of *Chic* magazine placed Mrs. Braun in a false light.[52] However, if the entire contents of *Chic* magazine did not place Mrs. Braun in a false light, either the entire issue of the magazine (except for the "Chic Thrills" section in which Mrs. Braun's picture appeared) was irrelevant or its prejudicial impact substantially outweighed its probative value, and it should not have been admitted.

Apparently, the *Faloona* decision was a district court's attempt to bring *Braun* in line with decisions by other courts in defamation and invasion of privacy cases. In time, perhaps courts will continue to narrow the *Braun* court's overextension of the law by misstating the *Braun* holding, with the result that *Braun* will in effect be overruled.

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50. For instance, if a magazine which caters to a homosexual readership published a photograph of a non-homosexual, along with an innocuous caption, under *Braun* the magazine could be held liable for defamation or invasion of privacy, even if the context in which the photograph was published did not suggest or create the impression that the non-homosexual was gay.

51. 607 F. Supp. 1341 (N.D. Tex. 1985).

52. The *Faloona* court stated:

> *Braun*, of course, states that the entire *Chic* magazine should be introduced into evidence "so that the jury could, in effect, be placed in the position of the ordinary reader." (726 F.2d at 253-54) . . . .
>
> However, the Fifth Circuit *did not* hold that Mrs. Braun was placed in a false light merely because she objected to the contents of *Chic* . . . . Instead, the court took pains to describe the actual context in which Mrs. Braun's picture appeared in the "Chic Thrills" section at the beginning of the issue in question . . . *[T]his is the context in which Mrs. Braun's picture was published.* (726 F.2d at 247).

Faloona, 607 F. Supp. at 1356-57 (original emphasis).

According to the *Faloona* court, the *Braun* court held:

> [T]he "complained-of" publication was capable of conveying "derogatory or false meaning" because: (i) the ordinary reader could form an unfavorable opinion about the character of Mrs. Braun (i.e., that she was unchaste or promiscuous); or (ii) the ordinary reader could assume that Mrs. Braun approved the opinions expressed in *Chic* or that she had consented to the publication of her picture in *Chic*.

Faloona, 607 F. Supp. at 1357-58.

The *Faloona* court's misstatement of the *Braun* court's holding is based on footnote 11 of the *Braun* opinion, 726 F.2d at 254. There, the *Braun* court discussed an "implicit" jury finding that the ordinary reader of *Chic* would form an unfavorable opinion about a woman whose picture appeared in *Chic*.