

No. D-130,018-C

HOLLIE TOUPS, MARISSA DEITZ,
MARISSA JEFFCOTT, MARIANNA
TASCHINGER, CAITLYN LAGRONE,
MEEGHAN FALLS, CORINA LUMMUS,
KELSI COOK, KINSEY STAUDT,
JESSICA DUPUY, JILLIAN HOWARD,
MALLORY PETRY, LARAMIE GILBERT,
PATRICIA HINSON, MARGARET NOBLE
AND OTHER SIMILARLY SITUATED
PERSONS

IN THE DISTRICT COURT OF

ORANGE COUNTY, TEXAS

vs.

GODADDY.COM, TEXXXAN.COM,
UNIDENTIFIED DEFENDANTS THAT
INCLUDE, (1) THE PERSONS AND/OR
ENTITIES HOSTING TEXXXAN.COM,
AND (2) ALL SUBSCRIBING MEMBERS

260TH JUDICIAL DISTRICT

PLAINTIFFS' OPPOSITION TO GODADDY.COM'S MOTION TO DISMISS
PURSUANT TO TEX. R. CIV. P. 91A

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, PLAINTIFFS in the above-entitled and numbered cause, and file their
Opposition to GoDaddy.com's Motion to Dismiss Pursuant to Tex. R. Civ. P. 91a, and in
support would show the Court the following:

BACKGROUND

I. The Plaintiffs are women whose intimate photographs and personal information were
taken without their permission, and published on the website Texxxan.com and its
companion website Texxans.com. These websites are part of the genre of "revenge porn."

which is not constitutionally protected pornography. This activity's purpose is to harass, humiliate and threaten its innocent victims. These websites are actively involved in the publication of unlawful obscenity and child pornography. These websites, and the persons who administer them (*i.e.*, the individual defendants), are under federal and state investigation for criminal child pornography violations. As briefed *herein*, these "revenge porn" websites are not entitled to the protections of the First Amendment of the United States Constitution, and hence they have absolutely no immunity under the Federal Communications Decency Act (the "Federal Act"). These websites constitute nothing but unlawful obscenity and child pornography, in violation of the Texas Penal Code.

2. GoDaddy.com ("GoDaddy") is a website hosting company, who wants to hide behind the alleged protections of the Federal Act, while it profits from this illicit business. GoDaddy.com is well-known for its sexually charged advertised campaigns. This company has intentionally developed its marketing niche by appealing to the prurient interests of potential consumers. GoDaddy now claims federal law provides it a right to be an international purveyor of immorality, by hosting illegal obscenity and child pornography for a profit. GoDaddy's claim is absurd.

3. In this matter, Plaintiffs are suing GoDaddy.com for its intentional torts and gross negligence *per se* under Texas law for hosting and continuing to host these illicit websites. GoDaddy has full knowledge that these sites are engaging in criminal obscenity and child pornography, as well as in the wrongful appropriation of the images, likenesses, and personal

information of the women victims and minor victims at issue. That is, GoDaddy.com wants this Court to rule that GoDaddy.com has immunity under federal and state law to profit from knowing participation in tortious criminal conduct that include the international distribution of unlawful obscenity and child pornography by these websites. Under the facts at issue, GoDaddy.com does have any protections whatsoever under the Federal Act.

SUMMARY OF ARGUMENT

4. GoDaddy has filed a Motion to Dismiss pursuant to Tex. R. Civ. P. 91a. Under this Rule, GoDaddy must show that the Plaintiffs' lawsuit is entirely legally frivolous, and that GoDaddy has blanket immunity under federal law to participate knowingly in illegal obscenity and child pornography, in the unlawful expropriation and publication of Plaintiffs' intimate photographs and personal information, and to commit torts actionable under Texas law.

5. GoDaddy's Motion fails as a matter of law for several reasons. First, the Federal Act does not preempt Plaintiffs' state law tort claims against GoDaddy. Our Ninth Court of Appeals has recently affirmed this lack of preemption and immunity for state law tort claims. This authority is binding upon this Court. Further, numerous federal courts have also held that the Federal Act does not preempt the state law tort claims at issue in this case.

6. Even if the Federal Act provides immunity for a website hosting company, like GoDaddy, in certain limited circumstances, those circumstances are not satisfied under the facts at issue in this case. The activities of these "revenge porn" websites, such as

Texxxan.com and Texxxans.com, are not constitutionally protected. The Federal Act's limited immunity, therefore, is not applicable to this case. These websites engage in unlawful obscenity and child pornography in violation of the Texas Penal Code. The United Supreme Court holds that federal law cannot, and does not, provide immunity for activities that are criminal in nature and violate Texas penal codes.

STANDARD OF REVIEW

7. The purpose of Tex. R. Civ. P. 91a is to provide the equivalent of Federal Rule 12(b)(6), which provides that a defendant's motion to dismiss should be granted **only** if there are no set of facts which could possibly lead to relief for the Plaintiffs on the grounds set forth in their Petition. This Court's task in ruling on GoDaddy's Motion is to assess whether the Plaintiffs' allegations are legally feasible; that is, to determine whether Plaintiffs' live Petition could potentially state a viable cause of action. This Court should not weigh the evidence, since that is a function more appropriate for a summary judgment proceeding after full discovery has occurred. *Unsecured Creditor of Color Tile, Inc. v. Coopers and Lybrand*, 322 F.3d 147, 158 (2d Cir. 2003). This Court must accept all of Plaintiff's factual allegations as true in considering GoDaddy's Motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L.Ed. 2d 929 (2007). If this Court determines an amendment to the Plaintiffs' Petition would cure any defect under Rule 91a, then this Court must order such a repleading, even if Plaintiffs do not seek leave to amend. *Traveler Indemnity Co. v. Damman & Co.*, 594 F.3d 238, 256 n. 14 (3d Cir. 2010). That is, a trial court cannot dismiss

a cause of action if the live petition states a valid cause of action, but yet is vague, overbroad, or otherwise susceptible to a repleading. *Gallien v. Washington Mutual Home Loans*, 209 S.W.3d 856, 862-63 (Tex. App. - - Texarkana 2006, no pet.).

ARGUMENT AND AUTHORITIES

8. The Federal Communications Decency Act, 47 U.S.C. §230, provides a limited immunity to companies hosting websites, such as Google, Yahoo, or GoDaddy, under certain circumstances. Numerous federal cases, and also our Ninth Court of Appeals, have expressly held that the Federal Act's immunity does not preempt state law causes of action, such as Plaintiffs' causes of action in this case. Further, the Federal Act does not apply in this case, because the underlying websites at issue engage in criminal activities (obscenity and child pornography), for which there is no constitutional protection under the First Amendment to the U.S. Constitution.

1) The Communications Decency Act, 42 U. S. C. § 230, does not provide GoDaddy immunity from the Texas tort claims in this case.

9. The heart of GoDaddy's Motion is based upon misrepresentations of the Federal Act's scope and purpose. Well-settled law provides the Federal Act does not immunize a website hosting company, such as GoDaddy, against state law tort claims. Further, the Federal Act provides no protection for unconstitutional activities or for illegal activities in violation of Texas Penal Codes. Multiple cases have held that the Federal Act does not preempt state law intentional tort claims against a website hosting company, even if the Federal Act is applicable.

10. The controlling authority in this case is from our Ninth Court of Appeals. In *In re: Milo*, 311 S.W.3d 210 (Tex. App. - - Beaumont 2010, no pet.), the Ninth Court through Justice Hollis Horton held that Section 230 of the Federal Act does not preempt state law tort claims. *Id.* at 217-18. In that case, the plaintiffs filed a defamation lawsuit against an interactive website due to statements posted by third-parties on the website's guest book. The trial court in Montgomery County granted the website's no-evidence motion for summary judgment, and the plaintiff appealed. The Ninth Court of Appeals affirmed, holding that Section 230 does not preempt the Texas state law claims; but the summary judgment evidence was not sufficient to support the plaintiff's cause of action for intentional infliction of emotional distress. The Court analyzed the summary judgment evidence, finding the interactive website's failure to remove allegedly defamatory anonymous posts to its guest book, after the plaintiff's attorney requested that it did so, did not arise to the level of extreme and outrageous conduct sufficient to support the plaintiff's claim for intentional infliction of emotional distress under Texas law.

11. Notably, the Ninth Court did not hold that the website had blanket immunity under the Federal Act. To the contrary, the Ninth Court held that the Federal Act does not preempt Texas state law tort claims.

12. GoDaddy erroneously miscites *In re: Milo* by not informing this Court that this case specifically holds that Texas tort claims are not preempted by the Federal Act. To the contrary, Justice Horton's opinion in *In re: Milo* specifically discusses and analyzes the

summary judgment evidence supporting the Texas tort claims that were pled against the website. *Id.* at 211-12 (discussing the elements of the state law tort and also the applicable Restatement Section). The Court discussed 47 U. S. C. § 230 (e)(3), which explicitly provides that nothing in the federal law “shall be construed to prevent any state from enforcing any state law that is consistent with this section.” Due to that section of the Federal Act, the Court ruled that the Texas state law tort claims had to be analyzed for viability based upon the factual sufficiency of the summary judgment evidence.

13. Justice Gaultney wrote a concurring opinion in that case, in which he held: “Section 230 bars many causes of action, but not every claim is barred. Specifically, the Act does not bar an intentional tort claim grounded on the defendant’s alleged malicious conduct.” *Id.* at 219. Justice Gaultney’s concurrence is based upon the federal Ninth Circuit Court of Appeals en banc ruling in *Fair Housing Counsel v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc) (holding “the Communications Decency Act was not meant to create a lawless no-man’s land on the internet”). After analyzing several federal court decisions, Justice Gaultney concludes: “By its terms, Section 230(c)(2)(A) protects an action taken in ‘good faith’ - that is, with an absence of malice. A provider that acts maliciously, and that would be held civilly liable under state law, does not enjoy federal immunity under Section 230(c)(2)(A).” *Id.* at 221. This holding is based upon the Federal Act’s clear statutory language, which provides immunity for a “provider or user of interactive computer service” only for “an action voluntarily taken in good faith to restrict access to or availability

of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” The Federal Act, Section 230c(2)(A).

14. Similarly to Justice Horton, Justice Gaultney then analyzed the summary judgment evidence under the elements of the plaintiff’s Texas cause of action for intentional infliction of emotional distress. Justice Gaultney’s concurrence concluded that under the facts at issue, the plaintiff had not produced sufficient summary judgment evidence to satisfy the elements of that cause of action.

15. In addition to the authority cited above, Federal Judge Haney held in *Cisneros v. Sanchez*, 403 F. Supp. 2d 588 (S. D. Tex. 2005), in the context of a state-court libel action against an administrator of an internet site, that federal law did not preempt the plaintiff’s cause of action. Judge Haney, therefore, granted the plaintiff’s motion to remand to state court, holding the Federal Act did not preempt all of the plaintiff’s state law remedies. In order for any claim to be entirely preempted by federal law, “the federal law must ‘so completely preempt a field of state law that the plaintiff’s complaint must be recharacterized as stating a federal cause of action.’” *Id.* at 590, citing *Aaron v. Nat’l Union Fire Ins.*, 876 F. 2d 1157, 1161 (5th Cir. 1989). The court relied upon the Federal Act’s statutory language, which expressly provides that Section 230(e)(3) does not “prevent any State from enforcing any State Law that is consistent with this section.” Judge Haney concluded that due to the Federal Act’s clear statutory language and the lack of a civil enforcement remedy, the

preemptive effect of the Federal Act only applies to "certain causes of action." *Id.* at 593.

Accordingly, the court remanded the matter back to state court for handling.

16. This case law establishes clearly there is no immunity for GoDaddy in this cause of action. Plaintiffs' Petition asserts only claims under Texas state law, including claims for Texas intentional torts, gross negligence per se for Texas Penal Code violations, and claims for knowingly participating in activities that are illegal and socially and morally outrageous. There is no case in any federal or state court that would provide GoDaddy with immunity under the facts at issue in this case.

2) **The Federal Communications Decency Act does not apply to this case, because the websites at issue are not constitutionally or statutorily protected. There is no constitutional or statutory immunity for illegal or obscene actions.**

17. It is well-settled that the United States Constitution's First Amendment does not provide any protections for an illegal activity in violation of a federal or state penal code. *See generally Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991), *citing United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968). Further, there is no First Amendment protection for obscenity. *McKinney v. Alabama*, 424 U.S. 669, 96 S. Ct. 1189 (1976); *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). *In Miller*, the Supreme Court established a three-part test for determining whether a work is unlawful obscenity, as follows: (1) whether the average person, applying contemporary community standards, would find that the work [here, the websites], taken as a whole, appeals to the prurient interest; (2) whether the websites depict or describe, in a patently offensive way,

sexual conduct specifically defined by applicable state law; and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24-25. In order to have constitutional protection under the First Amendment, the websites must have "redeeming social importance," or stated conversely, these websites are obscenity if they are "utterly without redeeming social importance." *Id.*, citing *Memoirs v. Massachusetts*, 383 U. S. 413, 86 S. Ct. 975, 16 L. Ed. 2d1 (1966).

18. An analysis of these factors leads to the clear conclusion that these websites are obscenity, and are not constitutionally protected. The purpose of these websites is to publish, without permission, intimate photographs of women (and also in some cases children), typically when they are naked. This is designed to target these women and children. The websites taken as a whole, are clearly designed to appeal to the prurient interests of those who view and subscribe to the websites. Also, these websites clearly are patently offensive to both the women and children victims, and also to any reasonable person, by the websites' sexual objectification of these women and children. Finally, these websites have absolutely no literary, artistic, political, or scientific value. These websites are designed solely to humiliate, harass, target, and cyber-stalk innocent women and children. Any reasonable person would find that these websites are completely "without redeeming social importance." *Miller*, 413 U. S. 24-25. In addition to failing the *Miller* standards, these websites' participation in child pornography and obscenity obviate any constitutional protection. Further, these websites contain no age verification for any of the intimate photographs at

issue, and GoDaddy has never requested any age verification. These websites obtain no consent for the publication of any of these images and personal information, which means the images and information posted by these websites are not the result of consenting adults engaging in consensual activities. These websites contain no useful social content, and there is no way to interpret the content on these websites as something artistic or as having any social value whatsoever. Instead, these websites are intentional criminal enterprises in violation of Tex. Penal Code Sections 43.21-23, as obscenity and child pornography. A copy of these Texas Penal Statutes are attached as Exhibit "1". For all these reasons, these websites are not constitutionally protected pornography. Since there is no constitutional protection for these websites, the Federal Act's limited scope of immunity has no application to this case. *See generally* the Federal Act, Section 230c(2)(A) (providing limited immunity for actions undertaken in good faith that are constitutionally protected).

CONTENTS OF PLAINTIFFS' LIVE PETITION

19. The Plaintiffs' live Petition clearly sets forth facts (which this Court must accept as true) demonstrating that GoDaddy is not entitled to any immunity either under federal or state law. GoDaddy had actual knowledge that these websites, and the persons who administer them and post information on them, deal in child pornography and obscenity. GoDaddy had actual knowledge that the posting and re-posting of these websites constitute ongoing violations of Texas Penal Codes. GoDaddy had actual knowledge that these websites do not engage in any constitutionally protected activities. Knowing all that, GoDaddy profited from

this criminal venture, and now GoDaddy cynically claims it is protected by federal law. To the contrary, GoDaddy has no immunity from Plaintiffs' intentional tort claims and gross negligence per se claims.

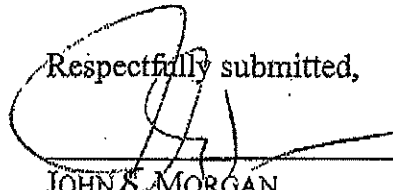
20. Under the facts at issue, GoDaddy cannot be perceived as an innocent website hosting company. Instead, GoDaddy is a company that deliberately encourages and profits from obscenity and child pornography that is disseminated through the internet. GoDaddy's participation strips it of all arguments for any constitutional protection or federal immunity. GoDaddy asks this Court to rule that GoDaddy has the unfettered right to host illegal obscenity and child pornography if and whenever GoDaddy chooses to do so – so long as it makes a profit, of course. Such a result is outrageous. These facts demonstrate that GoDaddy refuses to be a reputable corporate citizen. Plaintiffs, therefore, are entitled to proceed to a jury trial against it in order to force GoDaddy to be a reputable and responsible corporate citizen. The law must put the dignity of innocent people (the women and children in this case) over the callous profit motives of a nefarious corporation.

CONCLUSION

21. For these reasons, this Court should deny the Motion to Dismiss on behalf of GoDaddy.com.

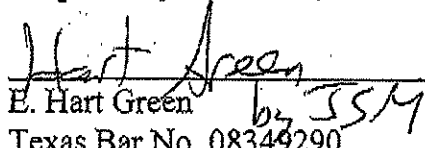
WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS pray this Court deny Defendant GoDaddy.com's Motion to Dismiss, and grant Plaintiffs such other and further relief, at law or in equity, to which they may be justly entitled.

Respectfully submitted,



JOHN S. MORGAN
Texas Bar No. 14447475
MORGAN LAW FIRM
2175 North Street, Suite 101
Beaumont, Texas 77701
Telephone: (409) 239-5984
Facsimile: (409) 835-2757
ATTORNEY FOR ALL PLAINTIFFS

Respectfully submitted,



E. Hart Green *by JSM*
Texas Bar No. 08349290
Weller, Green, Toups & Terrell
2615 Calder Avenue, Suite 400
Beaumont, Texas 77702
(409) 838-0101
(409) 832-7823 facsimile
ATTORNEY FOR PLAINTIFFS AND THE POTENTIAL
CLASS OF PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been properly transmitted to all appropriate parties via facsimile and/or email on this 9th day of April, 2013.

Hunter Taylor
8325 Bridgefield
Orange, Texas 77630

Via CM/RRR-#7011 3500 0001 0664 5014
& Regular U. S. First Class Mail

Jim Sharon Bearden, Jr.
The Bearden Law Firm
116 Border
Orange, Texas 77630

Via facsimile (409) 883-0259

Steve Carlton
Carlton Law Practice
805 Henderson Avenue
Orange, Texas 77630

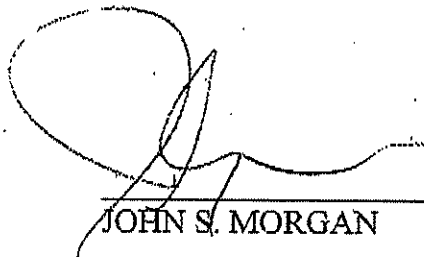
Via facsimile (409) 886-5926

Aaron M. McKown
Paula L. Zecchini
Wrenn Bender, LLLP
2 Park Plaza, Suite 550
Irvine, CA 92614

Via facsimile (949) 679-7939

Mark Simon
Scheef & Stone, LLP
500 N. Akard, Suite 2700
Dallas, Texas 75201

Via facsimile (214) 706-4242



JOHN S. MORGAN

EXHIBIT "1"

PENAL CODE
CHAPTER 43. PUBLIC INDECENCY
§§43.04 - 43.21



PEN §43.04. AGGRAVATED PROMOTION OF PROSTITUTION

(a) A person commits an offense if he knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes.

(b) An offense under this section is a felony of the third degree.

History of Pen. Code §43.04: Acts 1973, 63rd Leg., ch. 399, §1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 909, §1.01, eff. Sept. 1, 1994.

ANNOTATIONS

Armentrout v. State, 645 S.W.2d 298, 302 (Tex. Crim.App.1983). "Though not defined by our penal code, 'prostitution enterprise,' as used in §43.04 ... has been construed by the Court to mean 'a plan or design for a venture or undertaking in which two or more persons offer to, agree to, or engage in sexual conduct in return for a fee payable to them.'"

Smithwick v. State, 762 S.W.2d 232, 234 (Tex. App.—Austin 1988, pet. ref'd). "[W]ithin the context of §43.04, the term prostitute is capable of only one meaning—a person who engages in prostitution."

§ 43.05. COMPELLING PROSTITUTION

The amended text in §43.05 is effective for offenses committed on or after Sept. 1, 2011. Offenses in which any element of the offense was committed before Sept. 1, 2011, are governed by the former law in effect at that time.

(a) A person commits an offense if the person knowingly:

(1) causes another by force, threat, or fraud to commit prostitution; or

(2) causes by any means a child younger than 18 years to commit prostitution; regardless of whether the actor knows the age of the child at the time the actor commits the offense.

(b) An offense under Subsection (a)(1) [this section] is a felony of the second degree. An offense under Subsection (a)(2) is a felony of the first degree.

History of Pen. Code §43.05: Acts 1973, 63rd Leg., ch. 399, §1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, §1.01, eff. Sept. 1, 1994; Acts 2009, 81st Leg., ch. 1002, §9, eff. Sept. 1, 2009; S.B. 24, §1.03, 82nd Leg., eff. Sept. 1, 2011.

ANNOTATIONS

Davis v. State, 635 S.W.2d 737, 739 (Tex.Crim.App. 1982). "The actual commission of the offense of pros-

titution is not a prerequisite to the commission of the offense of compelling prostitution."

Tubbs v. State, 670 S.W.2d 407, 408 (Tex.App.—Dallas 1984, no pet.). "We interpret ... §43.05(a)(2) as stating that a person commits an offense if he knowingly causes a person younger than 17 years [now 18 years] to commit prostitution regardless of the means used. Thus, because an offense occurs if a defendant compels prostitution regardless of the means used to compel the prostitution, it logically follows that an indictment is not fundamentally defective for failing to describe the specific means used."

PEN §43.06. ACCOMPLICE WITNESS; TESTIMONY & IMMUNITY

(a) A party to an offense under this subchapter may be required to furnish evidence or testify about the offense.

(b) A party to an offense under this subchapter may not be prosecuted for any offense about which he is required to furnish evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury.

(c) For purposes of this section, "adjudicatory proceeding" means a proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(d) A conviction under this subchapter may be had upon the uncorroborated testimony of a party to the offense.

History of Pen. Code §43.06: Acts 1973, 63rd Leg., ch. 399, §1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, §1.01, eff. Sept. 1, 1994. See also CCP art. 38.14.

ANNOTATIONS

J.A.F.R. v. State, 752 S.W.2d 216, 216-17 (Tex. App.—El Paso 1988, no pet.). "Section 43.06 allows conviction [for prostitution] on uncorroborated testimony of a party to the offense."

SUBCHAPTER B. OBSCENITY

PEN §43.21. DEFINITIONS

(a) In this subchapter:

(1) "Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

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(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

(2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.

(3) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

(5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(6) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.

(7) "Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

(b) If any of the depictions or descriptions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawfully included herein, this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

History of Pen. Code §43.21: Acts 1973, 63rd Leg., ch. 399, §1, eff. Jan. 1, 1974; Amended by Acts 1975, 64th Leg., ch. 163, §1, eff. Sept. 1, 1975; Acts 1979, 65th Leg., ch. 778, §1, eff. Sept. 1, 1979; Acts 1993, 73rd Leg., ch. 900, §1.01, eff. Sept. 1, 1994.

ANNOTATIONS.

Larue v. State, 637 S.W.2d 934, 935 (Tex.Crim.App. 1982). "[T]he proper community scope for determination of the obscenity issue is not limited to one county. [I]t [is] error for the court to charge on a county-wide standard over the objection made by the defendant."

Varkonyi v. State, 276 S.W.3d 27, 36 (Tex.App.—El Paso 2008, pet. ref'd). "Section 43.21(a)'s definition of obscene comports with the test set forth in *Miller v. California*, 413 U.S. 15 ... (1973)."

State v. Stone, 137 S.W.3d 167, 181 (Tex.App.—Houston [1st Dist.] 2004, pet. ref'd). "[A]n accused's knowledge of the content and character of obscene material may be shown by either direct or circumstantial evidence."

Porter v. State, 638 S.W.2d 249, 251 (Tex.App.—Fort Worth 1982), *overruled on other grounds*, *Davis v. State*, 658 S.W.2d 572 (Tex.Crim.App.1983). "So long as the fact finder does not employ personal subjective reactions and uses as one factor what is tolerated by the average person in determining a contemporary community standard of decency the Texas [obscenity] statute is not overly broad."

**PEN §43.22. OBSCENE DISPLAY
OR DISTRIBUTION**

(a) A person commits an offense if he intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person is present who will be offended or alarmed by the display or distribution.

(b) An offense under this section is a Class C misdemeanor.

History of Pen. Code §43.22: Acts 1973, 63rd Leg., ch. 399, §1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, §1.01, eff. Sept. 1, 1994.

PEN §43.23. OBSCENITY

(a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.

(b) Except as provided by Subsection (h), an offense under Subsection (a) is a state jail felony.

(c) A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

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(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(d) Except as provided by Subsection (h), an offense under Subsection (c) is a Class A misdemeanor.

(e) A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of his business is presumed to do so with knowledge of its content and character.

(f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.

(g) It is an affirmative defense to prosecution under this section that the person who possesses or promotes material or a device proscribed by this section does so for a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose.

(h) The punishment for an offense under Subsection (a) is increased to the punishment for a felony of the third degree and the punishment for an offense under Subsection (c) is increased to the punishment for a state jail felony if it is shown on the trial of the offense that obscene material that is the subject of the offense visually depicts activities described by Section 43.21(a)(1)(B) engaged in by:

(1) a child younger than 18 years of age at the time the image of the child was made;

(2) an image that to a reasonable person would be virtually indistinguishable from the image of a child younger than 18 years of age; or

(3) an image created, adapted, or modified to be the image of an identifiable child.

(i) In this section, "identifiable child" means a person, recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature:

(1) who was younger than 18 years of age at the time the visual depiction was created, adapted, or modified; or

(2) whose image as a person younger than 18 years of age was used in creating, adapting, or modifying the visual depiction.

(j) An attorney representing the state who seeks an increase in punishment under Subsection (h) is not required to prove the actual identity of an identifiable child.

History of Pen. Code §43.23: Acts 1973, 63rd Leg., ch. 399, §1, eff. Jan. 1, 1974; Amended by Acts 1979, 66th Leg., ch. 773, §2, eff. Sept. 1, 1979; Acts 1983, 73rd Leg., ch. 900, §1.01, eff. Sept. 1, 1994; Acts 2003, 78th Leg., ch. 1065, §1, eff. Sept. 1, 2003.

ANNOTATIONS

Burden v. State, 55 S.W.3d 608, 613 (Tex. Crim. App. 2001). "We see nothing in the language of §43.23(c)(1) that requires a defendant to have knowledge that what he promotes is legally obscene. All §43.23(c)(1) requires is that a defendant have knowledge of the material's sexually explicit character and content."

Shealy v. State, 675 S.W.2d 215, 217 (Tex. Crim. App. 1984). "[W]hen the promoted [obscene] material is protected by the provisions of the First Amendment to the Federal Constitution, or by the provisions of [Tex. Const.] Art. 1, §8, ... and the trial court errs by instructing the jury that the prosecution may establish through the use of the statutory presumption [in Pen. Code §43.23(e)] that the accused had knowledge of the content and character of the promoted material, such cannot ever be harmless error."

Video News, Inc. v. State, 781 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1989), *pet. ref'd*, 786 S.W.2d 356 (Tex. Crim. App. 1990). Penal Code §43.23 is "a statute denouncing the possession of [obscene] material for sale and utilizing the prurient interest test. [T]he statute is constitutional under [Tex. Const.] Art. 1, §8...." See also *Ex parte Dave*, 220 S.W.3d 154, 160 (Tex. App.—Fort Worth 2007, *pet. ref'd*) (affirming the constitutionality of §43.23 under the U.S. Const. 1st and 14th Amendments).

Burch v. State, 695 S.W.2d 264, 265-66 (Tex. App.—Houston [1st Dist.] 1985), *pet. ref'd*, 712 S.W.2d 163 (Tex. Crim. App. 1986). Both the appellate court "and the trial court are obligated to evaluate the obscene material in question to determine whether it [is] factually and constitutionally obscene. The stipulation of evidence [by the parties] does not eliminate this need for independent review."

Gholson v. State, 667 S.W.2d 168, 177 (Tex. App.—Houston [14th Dist.] 1983, *pet. ref'd*). A "person who sells refreshments [at an adult movie theater] may not be prosecuted under the obscenity statutes because he is engaged in conduct 'merely incidental to the exhibition of obscenity.'"

PEN §43.23