

IN THE SUPREME COURT OF TEXAS

No. 15-0790

D MAGAZINE PARTNERS, L.P. D/B/A D MAGAZINE, MAGAZINE LIMITED PARTNERS, L.P., AND ALLISON MEDIA, INC., PETITIONERS,

v.

JANAY BENDER ROSENTHAL, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUSTICE GUZMAN, concurring.



The Court holds that Janay Bender Rosenthal may proceed with her defamation lawsuit against D Magazine because the gist of “The Park Cities Welfare Queen” article, considered under

¹ Screenshot of unsaved edits to *Welfare Queen*, WIKIPEDIA, https://en.wikipedia.org/wiki/Welfare_queen.

the appropriate legal standard, is false and defamatory.² I agree with the Court’s analysis and join the Court’s opinion and judgment. I write separately, however, to emphasize the perils of relying on *Wikipedia: The Free Encyclopedia*³ as an authoritative source for any controverted, decisive, or critical issue. As a general proposition, I believe Wikipedia is not a sufficiently reliable source of information to serve as the leading authority on a case-determinative matter, particularly when the court’s reliance is *sua sponte* without notice to the parties, as it was in this case.⁴

Wikipedia has many strengths and benefits,⁵ but reliance on unverified, crowd-generated information to support judicial rulings is unwise. Mass-edited collaborative resources, like

² See TEX. CIV. PRAC. & REM. CODE § 27.005(b), (c) (“[A] court shall dismiss a legal action . . . [that] is based on, relates to, or is in response to the party’s exercise of . . . the right of free speech . . . [unless] the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.”).

³ <https://www.wikipedia.org>.

⁴ 475 S.W.3d 470, 482 n.8 (Tex. App.—Dallas 2015); see Eugene Volokh, *Questionable Use of Wikipedia by the Seventh Circuit?*, VOLOKH CONSPIRACY (July 30, 2008), <http://bit.ly/2mWmg0I> (link shortened from <http://volokh.com/2008/07/30/questionable-use-of-wikipedia-by-the-seventh-circuit/>) (“If the judges wanted to argue [the meaning of a key term] based on their experience, based on logic, or based on contrary lexicographic authorities . . . that’s fine, and they did that in some measure. But they cited Wikipedia as the lead authority supporting their conclusion, and as the source for their important and controversial definition; and this strikes me as troubling.”) (citing *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 666–67 (7th Cir. 2008)).

⁵ See, e.g., Eola Barnett & Roslyn Baer, *Embracing Wikipedia as a Research Tool for Law: To Wikipedia or not to Wikipedia?*, 45 LAW TCHR. 194, 210 (2011) (“There are arguments for accepting the discerning use of Wikipedia, particularly as an informal and initial starting point for legal and incidental research and not discarding Wikipedia outright. Wikipedia has a role to play in the public domain dissemination of information and features which make it a viable option for initiating research.”); Diane Murley, *In Defense of Wikipedia*, 100 LAW LIBR. J. 593, 595 (2008) (“In general, students and lawyers should not be citing to articles from Wikipedia, or any other encyclopedia. However, Wikipedia can be a great quick reference source or a starting point for identifying other, authoritative sources.”); Beth Simone Noveck, *Wikipedia and the Future of Legal Education*, 57 J. LEGAL EDUC. 3, 4 (2007) (“Unlike Google, which presents a hit list of search results without context, Wikipedia includes hyperlinks to other materials and reintroduces the serendipity of browsing and discovering new sources. At the very least, this is an excellent way for students and legal professionals to begin their research.”); Rachel Anderson, Marc-Tizoc Gonzalez & Stephen Lee, *Toward a New Student Insurgency: A Critical Epistolary*, 94 CAL. L. REV. 1879, 1901 n.92 (2006) (“While Wikipedia is not usually used in academic works, its articles can provide excellent introductions to specialized knowledge or encyclopedic overviews of obscure events.”).

Wikipedia, are malleable by design,⁶ raising serious concerns about the accuracy and completeness of the information, the expertise and credentials of the contributors, and the potential for manipulation and bias. In an age when news about “fake news” has become commonplace, long-standing concerns about the validity of information obtained from “consensus websites” like Wikipedia are not merely the antiquated musings of luddites.⁷ To the contrary, as current events punctuate with clarity, courts must remain vigilant in guarding against undue reliance on sources of dubious reliability. A collaborative encyclopedia that may be anonymously and continuously edited undoubtedly fits the bill.⁸

Legal commentators may debate whether and to what extent courts could properly rely on online sources like Wikipedia, but the most damning indictment of Wikipedia’s authoritative force comes directly from Wikipedia:

- “WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY”
- “Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information.”
- **“Wikipedia cannot guarantee the validity of the information found here.”**
- “Wikipedia is not uniformly peer reviewed.”

⁶ See Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1, 3 (2009).

⁷ See generally Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites is Appropriate*, 84 ST. JOHN’S L. REV. 633 (2010).

⁸ *Wikipedia: About*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:About> (last visited Mar. 8, 2017).

- “[A]ll information read here is without any implied warranty of fitness for any purpose or use whatsoever.”
- “Even articles that have been vetted by informal peer review or *featured article* processes may later have been edited inappropriately, just before you view them.”⁹

Indeed, “Wikipedia’s radical openness means that any given article may be, at any given moment, in a bad state: for example, it could be in the middle of a large edit or it could have been recently vandalized.”¹⁰ Even if expeditiously remediated, transient errors are not always obvious to the casual reader. As Wikipedia states more pointedly, “Wikipedia is a wiki, which means that anyone in the world can edit an article, deleting accurate information or adding false information, which the reader may not recognize. Thus, you *probably shouldn’t be citing Wikipedia*.”¹¹

Apart from these candid self-assessments, which no doubt apply with equal force to other online sources and encyclopedias, a more pernicious evil lurks—“opportunistic editing.”¹² Because “[a]nyone with Internet access can write and make changes to Wikipedia articles” and “can

⁹ *Wikipedia: General Disclaimer*, WIKIPEDIA, <http://bit.ly/2npgBaH> (link shortened from https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer) (last visited Mar. 8, 2017) (emphases in original).

¹⁰ *Wikipedia: Researching with Wikipedia*, WIKIPEDIA, <http://bit.ly/2mEub2k> (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia#Citing_Wikipedia) (last visited Mar. 8, 2017) (explaining, in a nutshell, that Wikipedia should not be used, by itself, for primary research on any topic other than Wikipedia).

¹¹ *Wikipedia: Citing Wikipedia*, WIKIPEDIA, <http://bit.ly/2mTfTLH> (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Citing_Wikipedia#A_caution_before_citing_Wikipedia) (last visited Mar. 8, 2017) (emphasis in original).

¹² *See generally Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802, 808 n.3 (Utah Ct. App. 2012) (Voros, J., concurring) (“Among its shortcomings—and strengths—is Wikipedia’s fluidity. Anyone can edit a Wikipedia entry at any time, making it vulnerable to ‘opportunistic editing.’ Thus, ‘an unscrupulous lawyer (or client) could edit the Web site entry to frame the facts in a light favorable to the client’s cause.’” (quoting Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. TIMES (Jan. 29, 2007), <http://www.nytimes.com/2007/01/29/technology/29wikipedia.html>)).

contribute anonymously, [or] under a pseudonym,” reliance on Wikipedia as an authoritative source for judicial decision-making incentivizes self-interested manipulation.¹³ Case in point: a Utah court of appeals recently described how the Wikipedia definition of “jet ski” provided “stronger support” for one of the parties in a subsequent appeal than it had when considered by the court in the parties’ previous appeal.¹⁴ The court observed the difficulty of discerning whether the change was instigated by the court’s prior opinion, perhaps “at the instance of someone with a stake in the debate.”¹⁵

Still, some have argued Wikipedia is “a good source for definitions of new slang terms, for popular culture references, and for jargon and lingo including computer and technology terms.”¹⁶ Perhaps, but not necessarily. While Wikipedia’s “openly editable” model may be well suited to capturing nuances and subtle shifts in linguistic meaning, there is no assurance that any particular definition actually represents the commonly understood meaning of a term that may be central to a legal inquiry.¹⁷ In truth, Wikipedia’s own policies¹⁸ disclaim the notion: “**Wikipedia is not a**

¹³ *Wikipedia: About*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:About> (last visited Mar. 8, 2017).

¹⁴ *Fire Ins. Exch. v. Oltmanns*, 370 P.3d 566, 569 n.3 (Utah Ct. App. 2016), *cert. granted*, 379 P.3d 1182 (Utah 2016).

¹⁵ *Id.*

¹⁶ Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1, 31 (2009); *see also id.* at 32 (“The collaborative and democratic nature of Wikipedia entries makes them potentially attractive sources for courts to consider when called upon to determine the perception of the public or community standards.”); *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 666–67 (7th Cir. 2008) (relying on Wikipedia definition of “wear and tear” in analysis of key contract language); *Fire Ins. Exch.*, 285 P.3d at 806 n.1 (noting “where an understanding of the vernacular or colloquial is key to the resolution of a case . . . Wikipedia is tough to beat”); *id.* at 807–09 (Voros, J., concurring) (defending the use of Wikipedia as a source for definitions).

¹⁷ *See English Mountain Spring Water Co. v. Chumley*, 196 S.W.3d 144, 149 (Tenn. Ct. App. 2005) (rejecting Wikipedia as authority for defining “bottled water” as a “beverage” because “this source is open to virtually anonymous editing by the general public, the expertise of its editors is always in question, and its reliability is indeterminable”); *cf. Order of Affirmance at 3–4, Nev. Dep’t of Motor Vehicles v. Junge*, No. 49350 (Nev. July 7, 2009) (concluding “a

dictionary, phrasebook, or a slang, jargon or usage guide.”¹⁹ Whatever merit there may be to crowdsourcing the English language, Wikipedia simply lacks the necessary safeguards to prevent abuse and assure the level of certainty and validity typically required to sustain a judgment in a legal proceeding.²⁰

Take, for example, the Wikipedia entry for “welfare queen,” which was first created in November 2006 by the user Chalyres.²¹ Since the entry was first drafted, 239 edits have been made

reasonable mind would not accept the Urban Dictionary entries alone as adequate to support a conclusion that [a certain word] is offensive or inappropriate” because the user-contributed definitions “can be personal to the user and do not always reflect generally accepted definitions for words”).

¹⁸ Wikipedia policies “have wide acceptance among editors and describe standards that all users should normally follow.” *Wikipedia: Policies and Guidelines*, WIKIPEDIA, <http://bit.ly/2lTKPfa> (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines) (last visited Mar. 8, 2017).

¹⁹ *Wikipedia: Wikipedia Is not a Dictionary*, WIKIPEDIA, <http://bit.ly/2n1JVxu> (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Wikipedia_is_not_a_dictionary) (last visited Mar. 8, 2017) (emphasis in original).

²⁰ *Cf. Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 348 (Tex. 2015) (“Qualified experts may offer opinion testimony if that testimony is both relevant and based on a reliable foundation.”); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 349 (Tex. 2014) (“In concluding that studies showing more than a doubling of the risk may be supportive of legal causation, provided that other indicia of reliability are met, we explained that this standard corresponds to the legal requirement that the plaintiff prove his case by a preponderance of the evidence.”); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006) (“Admission of expert testimony that does not meet the reliability requirement is an abuse of discretion.”); *Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 199 (Tex. 2004) (“In the absence of express statutory language prohibiting judicial review, a legislative intent to prohibit judicial review must be established by specific legislative history or other reliable evidence of intent.”); *Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002) (“Lost profits are damages for the loss of net income to a business measured by reasonable certainty.”); *cf. also* TEX. R. CIV. P. 166a(c) (authorizing summary judgment based on interested-party affidavit only if “the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted”); TEX. R. EVID. 201(b) (limiting judicial notice of adjudicative facts to those “not subject to reasonable dispute,” meaning “(1) generally known within the trial court’s territorial jurisdiction or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned”).

²¹ *Information for “Welfare Queen”*, WIKIPEDIA, <http://bit.ly/2mk0iBT> (link shortened from https://en.wikipedia.org/w/index.php?title=Welfare_queen&action=info#mw-pageinfo-watchers) (last visited Mar. 8, 2017).

by 146 users.²² But there is no reliable way to determine whether these edits (1) deleted or added accurate information, (2) deleted or added false or biased information,²³ (3) were made by individuals with expertise on the term's usage, or (4) were made by individuals actually representative of the community.

As a court, one of our “chief functions” is “to act as an animated and authoritative dictionary.”²⁴ In that vein, we are routinely called upon to determine the common meaning of words and phrases in contracts, statutes, and other legal documents.²⁵ Though we often consult dictionaries in discharging our duty,²⁶ rarely, if ever, is one source alone sufficient to fulfill the task. To that end, I acknowledge that Wikipedia may be useful as a “*starting point* for serious research,”²⁷ but it must never be considered “an endpoint,” at least in judicial proceedings.²⁸

²² *Statistics for Welfare Queen*, WIKIHISTORY, <http://bit.ly/2mQu417> (link shortened from https://tools.wmflabs.org/xtools/wikihistory/wh.php?page_title=Welfare_queen) (last visited Mar. 8, 2017).

²³ At times, edits also may add offensive and racist content. *See, e.g.*, <http://bit.ly/2mJqGYj> (link shortened from <https://en.wikipedia.org/w/index.php?title=Mexicans&diff=362223560&oldid=362223553>) (last visited Mar. 8, 2017) (showing an example of offensive and racist edit to the Wikipedia entry “Mexicans”).

²⁴ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 415 (2012) (quoting LORD MACMILLAN, *LAW AND OTHER THINGS* 163 (1938)).

²⁵ *Id.*

²⁶ *See, e.g., Paxton v. City of Dallas*, ___ S.W.3d ___, 2017 WL 469597, at *7 (Tex. 2017).

²⁷ *Wikipedia: Researching with Wikipedia*, WIKIPEDIA, <http://bit.ly/2mEub2k> (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia#Citing_Wikipedia) (last visited Mar. 8, 2017) (emphasis in original); *see* sources cited *supra* note 5.

²⁸ *Wikipedia: Researching with Wikipedia*, WIKIPEDIA, <http://bit.ly/2mEub2k> (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia#Citing_Wikipedia) (last visited Mar. 8, 2017); *see* R. Jason Richards, *Courting Wikipedia*, 44 TRIAL 62 (2008) (“To be sure, Wikipedia is a useful tool from which legal professionals may *begin* their research. However, because the site’s content is subject to random manipulation by anyone with an Internet connection, relying on it as an authoritative source in legal pleadings and opinions is reckless.” (emphasis in original)).

Wikipedia’s valuable role in today’s technological society cannot be denied. Our society benefits from the fast, free, and easily-accessible information it provides. A wealth of information is now available at the touch of a few key strokes, and a community of Wikipedia editors serves to increase the accuracy and truth of that information, promoting the public good through those efforts. However, in my view, Wikipedia properly serves the judiciary only as a compendium—a source for sources—and not as authority for any disputed, dispositive, or legally consequential matter.²⁹

Eva M. Guzman
Justice

Opinion delivered: March 17, 2017

²⁹ See *Wikipedia: No Original Research*, WIKIPEDIA, <http://bit.ly/2f3qc8x> (link shortened from https://en.wikipedia.org/wiki/Wikipedia:No_original_research) (last visited Mar. 8, 2017) (stating that Wikipedia adheres to a “[n]o original research” policy and that “all material added to articles must be *attributable* to a reliable, published source, even if not actually *attributed*” (emphases in original)); *Wikipedia: Researching with Wikipedia*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia#Citing_Wikipedia (last visited Mar. 9, 2017) (“It will usually be more acceptable to cite those *original sources* rather than Wikipedia since it is, by nature, a *secondary or tertiary source*.”(emphases in original)); see also Daniel J. Baker, *A Jester’s Promenade: Citations to Wikipedia in Law Reviews, 2002–2008*, 7 I/S: J.L. & POL’Y FOR INFO. SOC’Y 361, 369 (2012).