

TURNER V. KTRK: PLAINTIFF CAN SUE FOR BROADCAST “AS WHOLE”

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Despite the victory in the KTRK appeal, the lawyers say there are still concerns about the case.

In a divided 5-3 decision (with one member of the court recusing herself) that ultimately may be relegated to the facts of the particular case, the Texas Supreme Court held that former Houston mayoral candidate Sylvester Turner had not presented clear and convincing evidence of actual malice in the broadcast of a story by Houston television station KTRK.

In so holding however, the *Turner* court appeared to expand the scope of the libel actions by allowing a public official to sue for the “false impression” created by a publication “as a whole” rather than requiring proof of the falsity of the individual statements in the publication.

1991 Houston Mayoral Race

The broadcast at issue aired on Dec. 1, 1991, six days before a run-off mayoral election between the plaintiff Sylvester Turner, and the ultimate winner of the election, Bob Lanier.

The broadcast revealed that Turner had a legal client in 1986 named Sylvester Foster. Foster, faced with criminal charges in Houston and in Las Vegas, disappeared from a sailboat off the coast of Galveston in June 1986 and was presumed dead.

Turner had drafted Foster’s will shortly before the disappearance and, after Foster disappeared under suspicious circumstances, handled the probate matters on behalf of the independent executor named in Foster’s will, Dwight Thomas – a mutual friend of Turner and Foster. The broadcast also revealed that Turner, for purposes of establishing legal residency within the Houston city limits for the election, was currently sharing a house with Dwight Thomas.

Four days before the 1991 broadcast, KTRK received a tip that Foster was not dead but had turned up alive in jail in Spain, awaiting extradition to the United States. The broadcast discussed the Foster saga, revealed Turner’s association with Foster and Thomas, and raised the question: “what did Sylvester Turner know and when did he know it?”

Turner alleged in his lawsuit that the overall impression created by the broadcast was that he was a knowing participant in a multi-million dollar insurance fraud (Foster having taken out large amounts of life insurance in the months preceding his staged disappearance).

The case was tried in 1996 and a Houston jury returned a verdict against the media defendants, which was later reduced by the trial judge to \$3.2 million.

KTRK and its reporter, Wayne Dolcefino, appealed from that judgment.

In 1998, the Houston Court of Appeals reversed the trial court judgment based on the jury verdict and rendered judgment that Turner take nothing.

The Court of Appeals held that KTRK and Dolcefino could not have acted with actual malice when the individual statements in the broadcast were true or substantially true.

The Texas Supreme Court let stand the judgment rendered by the appellate court in favor of the media defendants on actual malice grounds but found that the broadcast as a whole had created a “false impression.”

Substantial truth

KTRK had defended the broadcast, in part, on the basis that the statements contained in the broadcast were true or substantially true. Indeed, in the majority opinion, the Texas Supreme Court twice acknowledged that an accurate broadcast would have raised “serious” and “troubling” questions about Turner’s associations and yet still would not have been actionable.

The Texas Supreme Court also concluded “that most of the broadcast’s individual statements are literally true and that most of those not literally true are substantially true.”

The court held, however, that a publication “can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all of the story’s individual statements” are substantially true.

The court reasoned that since the substantial truth doctrine allows for defendants to support the truth of a story based on the story’s “gist” or “sting,” the converse should also apply – that a plaintiff should be able to impose liability based on the story’s “gist” or “sting.”

In this case, the court opined that the gist of the broadcast was that Turner was a knowing participant in a multi-million dollar insurance fraud.

The court took pains to avoid labeling such a cause of action “libel by implication,” instead authorizing a plaintiff to sue based on the impression created by the publication “as a whole.”

This is perhaps a distinction without a difference, and not one that was developed by the majority opinion.

Likewise absent from the majority opinion was a discussion of the Texas libel statute which provides, as the Texas Supreme Court had previously found in *Randall’s Food Markets, Inc. v. Johnson*, 891 S.W.2d 640 (Tex. 1995), that “truth is a complete defense.”

The Texas Supreme Court in the *Turner* opinion did not overrule or even question its previous holding in *Randall’s*, stating instead that *Randall’s* simply held that the defendant “cannot

be held liable for presenting a true account of events, regardless of what someone might conclude from this account.”

It is hard to reconcile this language of the opinion with the court’s holding that “allegedly defamatory publications should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.”

The court also made clear that it was not restricting its previous opinion in *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) either – a case which rejected the tort of false light invasion of privacy.

The court found no inconsistency with *Cain*, and emphasized that a plaintiff claiming defamation based on a publication as a whole must nevertheless prove that the publication’s “gist” is false and defamatory and therefore the procedural and substantive safeguards in a libel cause of action are still intact, whereas they would not be in a false light case.

The Texas Supreme Court acknowledged that the courts of several other states have disagreed with its analysis in the context of a public official or public figure.

Specifically, in *Schaefer v. Lynch*, 406 So.2d 185 (La. 1981) and *Dieseny v. Hessburg*, 455 N.W.2d 446 (Minn. 1990) the supreme courts of Louisiana and Minnesota, respectfully, held that public figures could not claim defamation “based on the whole of a communication when all of its individual statements are literally or substantially true.”

The Texas Supreme Court rejected these state supreme court decisions and opined that the United States Supreme Court cases of *Milkovich v. Lorraine Journal Co.*, 497 U.S. 1 (1990) and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) are consistent with the proposition that a public figure can sue for defamation “when a publication as a whole conveys a false and defamatory meaning either by omission or juxtaposition.”

Proof, review for actual malice

The majority opinion and the dissenting and concurring opinions all recognized that the appellate courts had a duty to review the record for clear and convincing evidence of actual malice.

One of the primary sources of contention on the issue of actual malice was how the court should view a jury’s apparent determinations of the lack of credibility of a witness.

The majority opinion rejected Turner’s argument that the United States Supreme Court’s decision in *Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 485 (1984).

The Texas Supreme Court in *Turner* found, consistent with *Bose*, that a witness’s lack of credibility could not constitute clear and convincing evidence of actual malice.

Rather, “the plaintiff must offer clear and convincing affirmative proof to support a recovery.”

In a very troubling dissent on the issue of actual malice, three justices (Baker, Hankinson and Enoch – all from Dallas) advocated relying upon the jury’s determination on credibility issues and would have supported a finding of actual malice against the TV station for presenting a false impression that Turner “participated in a conspiracy to commit insurance fraud.”

The dissent urged that the jury must have found that the testimony of reported Dolcefino that he believed Turner was a knowing participant in an insurance fraud, as well as the testimony of a court-appointed private investigator who opined to Dolcefino before the broadcast that Turner was a knowing participant, was not credible.

If appellate courts were to go as far as the dissent apparently suggests – that a jury, in finding actual malice, must have made a determination on the lack of credibility of witnesses – they seemingly would be bound to uphold a finding of actual malice in virtually every case.

The three-justice dissent on the issue of actual malice presents additional analysis that would seem to weaken the actual malice standard.

The dissent states that the “record raises a strong inference that Dolcefino, through omission and juxtaposition, manipulated the facts to increase suspicion about Turner” and then equates that “strong inference” with clear and convincing proof of actual malice.

In another portion of the dissent, the three justices Dolcefino for creating the impression that Turner hurriedly drew up the will for Foster three days before Foster’s disappearance when, the justices concluded. Turner had been working on the will for a period of several weeks. The dissent holds that Dolcefino “should have known” this fact by reading probate records – apparently applying a “should have known” standard to an analysis of actual malice.

Proof required for falsity

The Texas Supreme Court recognized the debate acknowledged in *Harte Hanks*, 491 U.S. at 661 n.2 as to whether a public figure plaintiff must prove falsity by clear and convincing evidence or by a preponderance of the evidence.

The *Turner* court assumed “without deciding” that the trial court properly instructed the jury to determine falsity by a preponderance of the evidence.

Thus, this issue remains unsettled in Texas.

A two-justice dissent from the majority’s finding of falsity advocated a standard whereby a plaintiff alleging that a publication is false because of “the omission or juxtaposition of facts” should be required to prove such a falsity by clear and convincing evidence.

This dissent from the falsity finding recognized that all news reports involve some editorial discretion and contended that the majority opinion fashioned too “lenient” a standard, since *any* facts omitted from a broadcast might have led a reasonable viewer to form a less adverse impression of a public official.

Legacy of *Turner* opinion

The two-justice dissent on the issue of truth stated that the majority's authorization of a public official's ability to bring a claim for a publication "as a whole" based on "omission or juxtaposition of facts," even though the individual statements in the publication may be substantially true, "significantly threatens open and vigorous discourse about matters of public interest."

Whether that proves to be the case remains to be seen.

What is clear is that it is extremely difficult to reconcile the *Turner* opinion with the Texas Supreme Court's previous opinion in *Randall's*.

The answer may lie in where the court in each case chose to protect in the interests of robust speech.

In the *Turner* case, a case involving a public official, the court may have been willing to shift its protection of free speech to its analysis of the actual malice element rather than to make the falsity element the ultimate battleground.

Indeed, in *Turner*, the court stated that a public official's burden of proving actual malice by clear and convincing evidence adequately protects the interest of "free expression and robust debate."

That would not have been the case in *Randall's*, a case brought by a private individual against a non-media defendant.

Thus, the court in *Randall's* may have been more inclined to apply a more rigorous test for falsity when it did not have the actual malice standard as a backstop, and required proof of falsity of the statements themselves rather than proof of a false impression created by speech "as a whole."

Nevertheless, the complicated *Turner* opinion is unsettling for journalists and private speakers alike, and the apparent inconsistency between *Turner* and *Randall's* may be the subject of further analysis from the court in future cases.