
Texas Court Upholds Sanctions Against Public Official Libel Plaintiff Who Sued a Law Firm for its Prepublication Review

By Robert P. Latham

A Texas appellate court has issued a strong opinion in favor of a law firm that had been sued by a public official libel plaintiff for the firm's actions in representing a television station prior to the broadcast of news stories regarding the public official. *Randolph v. Jackson Walker L.L.P.*, ___ S.W.2d ___, slip op. 14-99-00744-CV, September 14, 2000 (Tex. App. — Houston [14th Dist.]). The court reinforced an absolute privilege for statements made by an attorney in contemplation of judicial proceedings and for an attorney's actions in conducting prepublication review of a news story.

The Sanctions Against the Libel Plaintiff in the Trial Court

The suit was brought by former Houston City Controller Lloyd Kelley and one of his executive assistants, Cynthia Randolph, against KTRK Television, Inc., a Houston TV station. The station had broadcast a series of reports regarding how Kelley had discharged his duties as City Controller, and included in the report surveillance footage of Kelley and Randolph at a water amusement park called "Splashtown" during normal business hours.

Kelley's allegations against the TV station were the subject of a prior appellate court opinion in Houston in which the same court found that all of the statements in the broadcasts were true or substantially true. See *LibelLetter*, March 2000, at 8. However, Kelley filed an amended petition in which he named Jackson Walker L.L.P., the television station's lawyers, and a Jackson Walker partner, David Bleisch, as defendants based on 1) Jackson Walker's prebroadcast review of the stories regarding Kelley, and 2) a telephone call to Kelley and a letter to Kelley from Bleisch in an attempt to gain access on behalf of KTRK to the Controller's office.

Kelley complained about Bleisch's statement, made only to Kelley, that a "public entity's denial of access to a particular member of the media in the absence of a compelling governmental interest to the contrary is

unlawful." Kelley alleged that this statement by Bleisch and Jackson Walker accused him of a crime and was therefore libelous. Kelley further claimed that Bleisch's statements, made in a letter and over the telephone, were "published" by virtue of the fact that there were other people in the room with Kelley when he was talking over a speaker phone to Bleisch and that Kelley himself sent Bleisch's letter to the City Attorney's office pursuant to city policy.

Jackson Walker moved for sanctions in the trial court alleging that Kelley had brought the claims against Jackson Walker for purposes of harassment and that the claims were groundless. Jackson Walker alleged that the reason Kelley had brought the firm into the suit was to prevent Jackson Walker from representing KTRK with regard to Kelley's claims against the station. The trial court agreed and entered "death penalty sanctions," dismissing Kelley's claims and striking his pleadings as they related to Jackson Walker and Bleisch.

The Court of Appeals Upholds the Sanctions

The Texas Court of Appeals upheld the "death penalty" sanctions, finding that the trial court did not abuse its discretion in holding that Kelley's claims were groundless and were brought for purposes of harassment. In reaching this conclusion, the court of appeals issued strong pronouncements in favor of the absolute privilege for statements made by attorneys not only in judicial proceedings but also in contemplation of judicial proceedings.

The court noted that Bleisch's statement to the effect that it was impermissible under Texas law to deny one media access that is enjoyed by other media was a correct statement of law. Even if it were not, the court referenced two earlier Texas cases, *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex. App.—San Antonio 1997, no pet.) and *Russell v. Clark*, 620 S.W.2d 865, 870 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) and held:

public policy demands that attorneys be granted the utmost freedom in their efforts to represent their clients. To grant immunity short of absolute

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privilege to communications relating to pending or proposed litigation, and to subject an attorney to liability for defamation, might tend to lessen an attorney's efforts on behalf of his client.

Thus, the court concluded that Bleisch had made the complained of statements in anticipation that KTRK might be forced to file a suit to obtain its rightful access if the City Controller's Office continued to stonewall KTRK. The court held that the attorney's communications simply "cannot constitute the basis of a civil action."

As for Kelley's claims regarding "publication" of the Bleisch letter by virtue of his passing it on to the City Attorneys' Office pursuant to city policy, the court held that the publication was accomplished by Kelley, not Jackson Walker. Consequently, even if the statement were not true, and even if it were not absolutely privileged, the court held that Kelley would still have no libel claim against Jackson Walker.

Finally, and of perhaps prime importance to First Amendment practitioners, the Texas court reiterated that a law firm could not be liable to a defamation plaintiff by virtue of its prepublication review of a news story. The court cited the D.C.'s circuit's opinion in *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1302 (D.C. Cir. 1988) and stated emphatically

[T]here can be no claim against a lawyer who allegedly wrongfully advised another party, thus leading to the other party's alleged defamatory statements.

The court found that a libel plaintiff has "no standing to sue the attorneys for the advice" given to their media clients.

The Texas case is useful not only for its

reinforcement of these protections afforded to attorneys representing media clients, but it is also important for its procedural context. The appellate court approved of the trial court's findings that the claims brought by Kelley against Jackson Walker were groundless and designed to try to prevent Jackson Walker from being able to represent its own client in litigation. Kelley's assertions against the law firm were therefore properly subject to the ultimate sanction of striking of the pleadings. The opinion should serve as a strong deterrent for other defamation plaintiffs who may contemplate a similar maneuver.

Robert P. Latham is a member of Jackson Walker LLP.

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