

Texas Appellate Court Upholds the Ability of a Source for a News Story to Use the Texas Interlocutory Appeals Statute

By Robert P. Latham

The continuing saga of former Houston City Controller Lloyd Kelley's litigation against KTRK Television in Houston has produced another appellate court opinion favorable to the station, as well as to a source used for KTRK's news broadcasts. *Dolcefino v. Randolph*, No. 14-00-00602-CV slip op., June 7, 2001 (Tex. App.—14th Dist.).

Kelley, who was elected City Controller in 1995, ran unsuccessfully for re-election in November 1997. In the summer of 1997, KTRK Television and its investigative reporter, Wayne Dolcefino, received information from an employee in the City Controller's office, Larry Homan, regarding, among other things, Kelley's work habits as City Controller.

To investigate the information provided by Homan, KTRK conducted surveillance of Kelley at various public places during business hours. One surveillance tape showed Kelley and Cynthia Randolph, a member of his executive staff, spending a workday afternoon at "Splashtown," a local water park, accompanied by Kelley's children and another child.

Dolcefino v. Randolph I

The surveillance led to a series of broadcasts in August 1997 regarding Kelley. Kelley and his executive assistant, Randolph, sued KTRK, its reporter and various employees, over these broadcasts. KTRK's initial motion for summary judgment was denied, and KTRK took advantage of the Texas interlocutory appeal statute to appeal the denial of its summary judgment motion. In *Dolcefino v. Randolph*, 19 S.W.3d 906, 913-16 (Tex. App.—Houston [14th Dist.] 2000, writ denied), the Houston Court of Appeals held that the series of broadcasts was substantially true and rendered judgment for KTRK.

Dolcefino v. Randolph II

Meanwhile, back in the trial court, Kelley and Randolph amended their petition after the denial of KTRK's first motion for summary judgment and added

as a defendant Larry Homan, the Controller's office employee who had spoken to Dolcefino. In addition, Kelley also added a claim alleging that in conversations with another City Controller's office employee, Jerry Miller, during KTRK's investigation, reporter Dolcefino had made defamatory statements regarding Kelley. Finally, Kelley added a wiretapping claim based on KTRK's newsgathering and surveillance.

The KTRK defendants filed a second motion for summary judgment on these claims that was also denied by the trial court. Again the KTRK defendants, as well as Larry Homan, invoked their statutory right to appeal from the denial of the motion for summary judgment.

In its most recent opinion, the Houston Court of Appeals reversed and rendered judgment for the KTRK defendants and for Homan. The court found that the wiretapping claims brought by Kelley were barred by the statute of limitations — finding that Kelley had not asserted such claims until more than two years after the alleged "wiretapping" had taken place, that Kelley had not specified such a wiretapping claim in any petition filed within two years of the actions complained of, and that his petition asserting the wiretapping claim did not relate back to his previous petitions.

In reversing and rendering judgment for Larry Homan and in reversing and rendering judgment for the KTRK defendants on the issue of the alleged statements made to Jerry Miller, the court helped to establish precedent which should prove to be very favorable to media defendants.

The Interlocutory Appeal by the News Source

Perhaps most importantly, the court found that Homan, as the source of a news broadcast, did have a right to appeal the denial of his motion for summary judgment under the Texas interlocutory appeal statute. The Texas statute grants an interlocutory appeal from an order that:

denies a motion for summary judgment that is based in whole or in part upon a claim against or

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Source for a News Story Entitled to Use Texas Interlocutory App. Statute

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defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution or Article 1, Section 8 of the Texas Constitution, or Chapter 73.

Tex. Civ. Prac. & Rein. Code Ann. § 51.014 (a)(6). The court found that this statute entitled Homan to appeal, even though he is not a member of electronic or print media, because his summary judgment motion was based in whole or in part upon a defense arising under the First Amendment and that the claim brought against him was based on a “communication” by Homan that “appeared in or was published by the electronic or print media.” The court held that the interlocutory appeal statute does not require that Homan “personally appear in or be quoted in the news broadcast” in order to have a right to an interlocutory appeal. Thus, the court found that it had jurisdiction over Homan’s appeal and that Homan’s motion for summary judgment should have been granted because Kelley had not presented any evidence of actual malice on the part of Homan.

Presumed Damages Can be Rebutted as a Matter of Law

In their motion for summary judgment in the trial court on reporter Dolcefino’s alleged statements to source Jerry Miller (the “Miller claims”), the KTRK defendants alleged that there was no fact issue regarding the essential elements of a libel claim. The appellate court agreed that Kelley and Randolph did not come forward at summary judgment with evidence raising a genuine issue of fact as to these elements.

In so doing, the court included an important analysis at footnote 18 of the opinion, in which the court highlighted that the KTRK defendants had conclusively negated any damages resulting from the statements at issue. With their motion for summary judgment, the KTRK defendants had submitted an affidavit from Jerry

Miller stating that Miller did not repeat any of reporter Dolcefino’s alleged statements to anyone and that his opinion and perception of Kelley and Randolph did not change in any way based on anything that the reporter ever said to him. The court found that even in libel *per se* cases, where damages are presumed, summary judgment should still be granted when it can be shown that there is no genuine issue of fact as to whether the alleged defamatory statements have *in fact* caused the plaintiff any damage. In other words, damages in libel *per se* cases are a rebuttable presumption, not a conclusive presumption.

Kelley and Randolph have indicated that they will file a motion for rehearing.

Bob Latham is a partner in the Houston and Dallas offices of Jackson Walker L.L.P., which represented the KTRK defendants in the Kelley litigation.