

HOUSTON COURT OF APPEALS
OVERTURNS LIBEL JUDGMENT OBTAINED BY MAYORAL CANDIDATE
by Bob Latham

In an opinion that reinforces the ability of journalists to do investigative pieces on candidates for public office, the Houston Court of Appeals reversed a judgment obtained by Sylvester Turner, a Texas state representative and an unsuccessful candidate for mayor of Houston in 1991, and rendered judgment for KTRK Television, Inc. of Houston and its investigative reporter, Wayne Dolcefino. *Dolcefino v. Turner*, No. 14-97-240-CV, December 30, 1998 (Tex. Civ. App. — Houston (14th Dist.)). Turner had asserted in the highly publicized six week libel trial, covered live by Court TV, that a broadcast by KTRK six days before the 1991 mayoral run-off election accused him of being a knowing participant in a multi-million dollar fraud. Turner attributed his loss in the mayoral election to the KTRK broadcast. He obtained a \$3.2 million judgment against KTRK and Dolcefino.

The lengthy opinion of the Court of Appeals reversing the judgment relied on the absence of actual malice. However, in analyzing the actual malice issue, the court also addressed the substantial truth of the complained of statements in the broadcast. Consequently, the opinion not only is useful in defending allegations of actual malice in public official or public figure libel cases, but also in establishing that “technical errors in nomenclature” do not equate with falsity.

The Faked Death of Turner’s Legal Client

The facts of the Turner case are intriguing, to say the least. KTRK’s broadcast detailed the saga of Sylvester Foster, a male model and owner of several beauty salons in Houston, who supposedly drowned after falling overboard from a pleasure boat in the Gulf of Mexico on June 22, 1986. In the months before his disappearance, Foster had applied for multiple life insurance policies, had purchased several luxury cars all with credit life insurance, and had applied for an

emergency passport. He was also the subject of criminal investigations in Houston and Las Vegas and indeed was facing trial in Las Vegas on June 23, 1986, the day after his supposed “death.” In 1989, Foster turned up alive in a Spanish prison on drug charges.

Information regarding Foster and his connection to mayoral candidate Sylvester Turner, a Harvard educated attorney in Houston, came to Dolcefino and KTRK ten days before the mayoral run-off election in 1991. Dolcefino investigated the story of Foster’s faked death and the efforts to collect life insurance proceeds over the next four days. The KTRK broadcast reported on, among other things, Turner’s involvement in preparing and probating Foster’s will and his efforts to get the insurance money released. One of Dolcefino’s sources was a private investigator, Liz Colwell, who had been appointed by the probate court in which Turner had attempted to probate Foster’s will on behalf of the named executor of Foster’s estate, Dwight Thomas. KTRK’s investigation also revealed that during the time Turner was running for mayor, he was sharing a residence with none other than Thomas, who in addition to being named Foster’s executor was the beneficiary of at least one of Foster’s life insurance policies. Evidence at trial showed that the Secret Service, which investigated the Foster insurance conspiracy, listed Thomas and Turner as suspects.

The Substantial Truth of the Complained of Statements

Interestingly, the Houston Court of Appeals addressed the issue of substantial truth in the context of actual malice, holding in effect that KTRK could not have knowingly broadcast a false statement if the complained of statement in the broadcast was substantially true. The Court of Appeals stated that “the central premise of Turner’s argument on appeal is that the broadcast charged that he was a knowing participant in a multi-million dollar fraud.” However, the court noted that Turner could not cite any statement in the broadcast where such an accusation was

made. Instead, the court found that the broadcast “raised questions about the suspicious circumstances of Foster’s ‘death’ and how much Turner knew, as well as questioning Turner’s choice of business and personal associates.” The Court of Appeals did not address the issue of whether the defamatory implication alleged by Turner was present or whether such an implication could support a judgment. Rather, in reversing the judgment on actual malice grounds, the court analyzed the substantial truth of actual statements in the broadcast and the technical errors that Turner tried to urge.

For instance, the broadcast asserted that Turner “pursued the estate money even after significant evidence of a possible scam in Foster’s death had already surfaced.” Turner argued that the life insurance proceeds were non-probate and therefore not “estate money.” The Court of Appeals held that “whether the funds were probate or non-probate does not change the import of the statement to the average viewer of the broadcast. Technical errors in legal nomenclature do not cause a statement to be false.” Likewise, Turner claimed that there were only \$1.7 million in potential insurance benefits available rather than \$6.5 million as had been stated in the broadcast. The court held that even if that were the case, “insurance fraud of \$1.7 million is no less defamatory than \$6.5 million” and therefore Turner could not demonstrate the falsity of this statement. Similarly, Turner took issue with the statement that the will was “drawn up” on June 19. He alleged that he had prepared the will weeks earlier and that it was only “signed” on June 19 — three days before Foster’s disappearance. The court found no meaningful distinction between “signing” and “drawing up” a will that gave rise to a defamation claim.

The Absence of Actual Malice

Liz Colwell, the probate court appointed investigator, testified at trial that she confirmed to Dolcefino prior to the broadcast every statement of which Turner complained. She also

testified that she had told Dolcefino before the broadcast that Turner was “in it up to his eyeballs,” a statement that was not used in the broadcast. Her testimony would seemingly make it impossible for Turner to prove actual malice since, as the Court of Appeals held, citing *New York Times v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966), a reporter is entitled to rely upon one source and discount information coming from other sources. Turner, however, attempted to draw an analogy to the fact pattern in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

In *Harte-Hanks*, the Supreme Court upheld a finding of actual malice when a newspaper relied upon a single source in charging that a candidate for public office had used dirty tricks, offered bribes and suborned perjury. In the Turner case, however, the Court of Appeals found Turner’s reliance on *Harte-Hanks* misplaced since in *Harte-Hanks* there was one sole source who was not credible and the information was highly improbable. By contrast, in *Turner*, the court determined that “Dolcefino based his story on reliable information from trustworthy sources, which were primarily the [probate] court records, a Secret Service agent and the official probate court investigator [Colwell].” The court also rejected Turner’s contention that the information KTRK uncovered was highly improbable since “there had been several items in the news that would tend to raise questions about Turner’s qualifications and ability to serve as Houston’s mayor.”

The Court Rejects Political Motivation as Evidence of Actual Malice

One of Turner’s primary arguments was that “the source” of the broadcast was a man with the alliterative name of Peary Perry, who Turner claimed was a representative of the campaign of the victorious mayoral candidate, Bob Lanier. Turner contended that he had shown actual malice by KTRK’s attempt to “conceal” that its “source” was affiliated with a rival

political campaign. The court rejected this argument finding, first of all, that Perry was *not* “the original source” of the story. In a pronouncement that strongly benefits reporters covering political campaigns, the court further found that “even assuming Perry was the initial source for the broadcast and was motivated by a strong political bias against Turner, that amounts to *no* evidence of actual malice, let alone clear and convincing evidence.” (Emphasis added)

No Actual Malice by the Rebroadcast of the Story

KTRK aired the complained-of story twice: once on the 5:30 p.m. news and again on the 10:00 p.m. news. Between the two broadcasts, at 8:00 p.m., Turner called a press conference to denounce the 5:30 broadcast. With him at the press conference were a probate court judge who had presided over the Foster probate case and an attorney who had represented one of the insurance companies that contested the fact that Foster was dead. Neither the judge nor the attorney had seen the 5:30 broadcast and instead were relying on what Turner had told them about it in making their comments at the press conference. They each stated that they did not believe Turner had done anything “dishonest” or “inappropriate” and had been “professional” in his conduct in the Foster probate case.

In the 10:00 broadcast, KTRK included Turner’s comments from his 8:00 p.m. press conference, denying that he had anything to do with the Turner insurance fraud conspiracy, but did not air the comments from the judge or the attorney. Turner stated that this omission was intentional and “was probably the most compelling evidence of [Dolcefino’s] recklessness offered at trial.” The appellate court disagreed. In the first instance, the court held that because actual malice involves a publisher’s state of mind “at the time of publication,” the omission of the statements of the probate judge and the attorney could not support a finding of actual malice with respect to the 5:30 p.m. broadcast. With regard to the 10:00 p.m. broadcast, the court found

that neither the judge nor the attorney refuted any specific statements in the 5:30 p.m. broadcast, and in particular did not refute any of the statements that Turner claimed were libelous. They also did not offer any facts that would refute the challenged statements in the broadcast. Therefore, the omission of their comments could not support the conclusion that Dolcefino entertained serious doubt as to the truth of the broadcast and was *not* evidence of actual malice. Perhaps more importantly, the court held that even if the comments of the judge and the attorney had directly challenged the truth of any of the allegedly defamatory statements in the 5:30 p.m. broadcast, there still would be legally insufficient evidence to constitute actual malice since Dolcefino was “free to rely on and believe his original sources.” “A publisher’s failure accurately to guess which of two conflicting accounts a jury might later believe does not demonstrate actual malice,” quoting *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987).

The Protection of Editorial Discretion

There are several additional factors in the court’s analysis of the actual malice issue that are worth noting. First, the court placed importance on the fact that Dolcefino, KTRK’s investigative reporter, did not operate without management. Rather, the court noted that the news director, the executive producer, and the president and general manager of KTRK all were involved in the editorial process and “did not doubt Dolcefino or the information he reported.” Secondly, the court found it significant that KTRK in its investigation in no way sought to avoid Turner. Rather, Dolcefino interviewed Turner “extensively and repeatedly asked Turner’s press secretary for denials and contradictory evidence.” Finally, in rejecting Turner’s argument that KTRK could have included information that would have placed Turner in a more favorable light,

the court upheld the role of editorial discretion, stating: “[t]he exercise of editorial judgment to omit information favorable to the plaintiff is no evidence of actual malice.”

Turner has filed for *en banc* reconsideration of the decision.

Bob Latham, a partner with Jackson Walker L.L.P. in Houston and Dallas, was part of the defense team for KTRK and Dolcefino at trial, along with Jackson Walker partners Chip Babcock, as lead counsel, and Leon Carter. Stephanie Abrutyn of ABC, Inc. also participated in the defense. Jackson Walker appellate specialist David Moran joined the team for the appeal.