Two Opinions Fortify Media Companies' Defenses To Defamation Claims

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PRACTICES Media and Entertainment Litigation, Media Entertainment and Sports

Recently, the Texas Supreme Court issued two very important decisions on First Amendment law that could have a broad impact on media companies doing business in Texas. Both cases evolved from defamation claims filed by Salem Abraham, a school board member in Canadian, Texas.

Actual Malice Standard applies to public officials, even if the story does not refer to their official capacity

Abraham is the longest serving member of the Canadian ISD board of trustees and, as such, is a public figure. In *Greer v. Abraham*[1], Agenda Wise, an internet blog, published a story stating that Abraham was forcibly removed from a campaign event for Jim Landtroop, a candidate for state representative. The Landtroop event had no connection to Abraham's work on the school board, although Landtroop's campaign had criticized Abraham's fellow school board member. Agenda Wise, and its executive director, Daniel Greer, later determined that Abraham had not been forcefully removed from the event—rather he was asked to leave and did so voluntarily. After Agenda Wise published two clarifications, Abraham sued Greer and the blog for defamation. Defendants Agenda Wise and Greer filed a motion to dismiss under the Texas Citizens Participation Act ("**TCPA**"), which, because the statements were on a matter of public concern, required Abraham to present clear and specific evidence of each of the elements of his defamation claim, including actual malice.

The trial court found that Abraham had not presented evidence of actual malice and dismissed the claim pursuant to the TCPA. But the court of appeals reversed, holding that because the article didn't mention Abraham's work as a school board member and didn't relate to his conduct as a public figure or his fitness for office, a negligence standard applied, not actual malice. The appeals court further determined that because the article was published on the internet, Abraham's status as a public figure was not implied because the blog was viewable throughout the world and there was no evidence that Abraham was known worldwide as a member of the school board.

Granting a petition for review, the Texas Supreme Court reversed, holding that Abraham was a public figure for purposes of the article in question, and the actual malice standard applied to the case. First, the high court explained that statements about a public figure relate to their official conduct not only when it relates to their performance of public duties, but also when it relates to their fitness for office, and the allegations in the article related to Abraham's fitness for office. Second, it is not necessary to mention a public official's connection to public office if that connection can be implied—and it is implied if the official is so well known within his or her community that the general public associates the official with that office. This association is tied to the community in which the public official serves, not to the audience of the publication, which may very well go beyond the immediate community of the official. Thus the standard in Texas is now more clear: if an article mentions a public official, actual malice is required for a claim of defamation if the story relates to their fitness for office—even if the story does not relate directly to their work as a public

figure. In addition, a reference to the person's official capacity is not necessary if they are so well known in their community that they are generally associated with their position. The relevant community is the community in which the public official serves, not the circulation reach of the story.

The Texas Supreme Court refuses to apply a "justice and equity" standard to attorneys' fees for a prevailing defendant's motion to dismiss under the Texas Citizens Participation Act.

The companion case to *Greer v. Abraham*, (*Sullivan v. Abraham*[2]) is significant to practitioners for two reasons: (1) it settles a contested statutory interpretation and may have the indirect effect of reducing frivolous claims under the TCPA, or at least punishing them, and (2) reminds all of us to be careful with our punctuation.

At issue in the case is the statutory construction of a phrase in the TCPA: "the court shall award to the moving party [for dismissal] … (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require" (emphasis added). The trial court applied the "justice and equity" standard to reduce Sullivan's claim for attorneys' fees. The appellate court upheld the trial court, partly based on a 1998 Texas Supreme Court decision under the Declaratory Judgment Act that uses similar statutory text.

The Court was faced with whether to apply the "last-antecedent canon" or the "series-qualifier canon," to construe the provision. Although the Court noted that the use of one or the other canon is to be neither controlling nor inflexible, it ultimately used the "last-antecedent canon" for the last part of the quoted phrase and, effectively, the "series-qualifier canon" for the first part of the quoted phrase. Had the phrase "… as justice and equity may require" been preceded by a comma, the Court would have construed the phrase to apply to the entire series. Since it did not, the Court construed the phrase to apply only to the last item in the series, "other expenses."

The final result is that court costs and attorneys' fees are recoverable; court costs, attorneys' fees, and other expenses must have been incurred in defending the TCPA action; and "other expenses" are recoverable only as "justice and equity" may require.

For more information please contact one of the lawyers below.

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[1] *Greer v. Abraham*, -- S.W.3d---, No. 14-0669, 2016 WL 1514425 (Tex. Apr. 15, 2016).

[2] *In Sullivan v. Abraham*,-- S.W.3d --, No. 14-0987, 2016 WL 1513674 (Tex. Apr. 15, 2016), Abraham sued Michael Quinn Sullivan for defamation and Sullivan prevailed on a motion to dismiss under the TCPA. The only issue on appeal to the Supreme Court of Texas was the application of the TCPA's attorney's fees provision.