

Three Texas Supreme Court Decisions Affecting Media Companies (and others who have been SLAPP-ed)

July 13, 2016 Catherine Robb

The Texas Supreme Court has recently issued three important First Amendment decisions that help clarify First Amendment and TCPA jurisprudence, addressing reports of official proceedings, the actual malice standard for public officials, and the standard for attorneys' fees.

KBMT Operating Company, LLC, et. al. v. Toledo

Most recently, in *KMBT Operating Company, LLC, et. al. v. Toledo*,¹ the Texas Supreme Court clarified the media's common law privilege for reporting on official proceedings, ruling that "the truth of a media report of official proceedings of public concern must be measured against the proceedings themselves, not against information outside the proceedings." In short, the Supreme Court found that the media may report on the official proceedings themselves without being required to independently investigate the underlying matters involved.

The case involved a pediatrician, Toledo, who was disciplined by the Texas Medical Board for "unprofessional conduct." KTMB broadcast a 30-second report of the Board's actions, reporting that Toledo was disciplined for "engag[ing] in sexual contact with a patient and bec[oming] financially or personally involved with a patient in an inappropriate manner." KTMB's report was based on the information found on the Board's website, including the press release, the disciplinary order itself, and Toledo's Board profile. Based on that information, KTMB reported on the reason for Toledo's discipline (sexual contact with a patient and inappropriate financial or personal involvement with a patient) and the punishment. Although Toledo was a pediatrician, the patient with whom she was involved was a 60-year-old man with whom she had been in a long-term relationship. Neither any of the documents located on the Board's website or KTMB's broadcast mentioned the age of the patient with whom she was involved. Toledo sued KTMB for defamation alleging that the broadcast was defamatory because, by not advising that the patient was an adult, it implied she had sexual contact with a child. At the heart of the case was the question of whether KTMB, who reported on Toledo's disciplinary proceeding based on information contained on the Board's website (which did not include information about the patient's age), was required to conduct additional research on the matter and to report on that additional information. The trial court denied the TCPA motion and the appellate court affirmed the denial, finding that Toledo had demonstrated the requisite falsity because the gist of the broadcast was that Toledo had sexual contact with a child. On review, the Texas Supreme Court reversed the lower courts' denial of KTMB's TCPA motion and remanded the matter to the trial court, finding that KTMB was not required to independently investigate the underlying proceedings, but only to accurately report on the official proceedings, which, in this case, did not mention the patient's age. Because Toledo did not prove that the gist of the broadcast was not substantially true, she failed to meet her burden under the TCPA.

Greer v. Abraham

The other two recent Texas Supreme Court opinions concerned defamation claims filed by Salem Abraham, a school board member in Canadian, Texas. In *Greer v. Abraham*,² AgendaWise, an

internet blog, published a story stating that Abraham, the longest serving member of the Canadian ISD board of trustees and, as such, a public figure, 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. After later determining that Abraham had not been forcibly removed, but rather had left voluntarily after being asked to do so, AgendaWise published two clarifications. Nevertheless, Abraham sued AgendaWise and its executive director, Daniel Greer, for defamation. Defendants 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.

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

Granting a petition for review, the Texas Supreme Court reversed, holding that Abraham was a public figure for purposes of the blog article in question, and that the actual malice standard applied to the case. The high court explained that statements about public figures relate to their official conduct not only when they relate to their performance of public duties, but also when they relate to their fitness for office, as was the case with the article. Additionally, the Court found that 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, there are two important takeaways from this case as they concern public official status in Texas. First, if an article mentions a public official, actual malice is required for a claim of defamation if the story relates to his or her fitness for office—even if the story does not relate directly to the individual's work as a public figure. And, a reference to the person's official capacity is not necessary if that person is so well known in that community that he or she is generally associated with that position. Furthermore, the relevant community is the community in which the public official serves, not the circulation reach of the story.

Sullivan v. Abraham

The other Abraham case, *Sullivan v. Abraham*,³ concerned the award of attorneys' fees under the TCPA. At issue in that case was the statutory construction of the TCPA's phrase "as justice and equity may require" in awarding costs, fees, and expenses to a prevailing movant under the TCPA. Pursuant to 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." Tex. Civ. Prac. & Rem. Code Sec. 27.009 (emphasis added). At issue was whether the phrase "as equity and justice may require" applied to the award of attorney's fees or only to "other expenses." The trial court applied the "justice and equity" standard to reduce Sullivan's claim for attorneys' fees, which was upheld by the appellate court, partly based on a 1998 Texas Supreme Court decision under the Declaratory Judgment Act that uses similar statutory text.

After undergoing an extensive analysis, the Court construed the phrase to apply only to the last item in the series, “other expenses.” As the Court explained, 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. Thus, while court costs, attorneys’ fees, and other expenses must have been incurred in defending the TCPA action, only the award of “other expenses” are tempered by the requirement of “justice and equity.”

¹ *KMBT Operating Company, LLC, et. al. v. Toledo*, -- S.W.3d --, No 14-0456 (Tex. June 17, 2016),

² *Greer v. Abraham*, -- S.W.3d---, No. 14-0669, 2016 WL 1514425 (Tex. Apr. 15, 2016).

³ 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.