

IN THE SUPREME COURT OF TEXAS

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No. 99-0419
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SYLVESTER TURNER, PETITIONER

v.

KTRK TELEVISION, INC. AND WAYNE DOLCEFINO, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS
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Argued on March 1, 2000

JUSTICE BAKER, joined by JUSTICE ENOCH and JUSTICE HANKINSON, concurring in part and dissenting in part.

I concur with parts I and II of the Court’s opinion. However, after independently examining the record, I believe Turner provided clear and convincing evidence that Dolcefino published the story knowing it would present the false impression that Turner participated in a conspiracy to commit insurance fraud. Accordingly, I dissent to part III of the Court’s opinion.

I. APPLICABLE LAW

A. STANDARD OF REVIEW

In cases implicating the First Amendment, federal constitutional law requires appellate courts to independently examine the whole record to insure that the judgment does not improperly intrude upon free expression. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284, 285 (1964); *Doubleday & Co., Inc. v. Rogers*, 674 S.W.2d 751, 755 (Tex. 1984). Under this standard, a court “must independently decide whether

the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’” *Bose*, 466 U.S. at 510. Nevertheless, when applying this constitutional standard of review, a court must be faithful to the fact-finder’s role in the process.

Under established Texas jurisprudence, a reviewing court must defer to the fact-finder’s credibility determinations because the jury is the exclusive judge of the facts, the witnesses’ credibility, and the weight given to their testimony. *Benoit v. Wilson*, 239 S.W.2d 792, 796 (Tex. 1951). The court may not substitute its findings and conclusions for that of the jury. *Benoit*, 239 S.W.2d at 796. Once it resolves credibility questions in favor of the jury’s verdict, it must independently evaluate the statements and circumstances to see whether the First Amendment protects them. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989).

B. ACTUAL MALICE

As a public figure, Turner must provide clear and convincing evidence of actual malice. *New York Times*, 376 U.S. at 279-80, 285-86; *Doubleday*, 674 S.W.2d at 755. Actual malice is a term of art, focusing on the defamation defendant’s attitude toward the truth of what it reported. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 573 (Tex. 1998). To establish actual malice, a public figure must prove that the defendant made the statement with “knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times*, 376 U.S. at 279-80; *Huckabee v. Time Warner Entm’t Co.*, 19 S.W.3d 413, 420 (Tex. 2000). Reckless disregard is also a term of art. To establish reckless disregard, the public official or public figure must prove that the publisher entertained serious doubts about the publication’s truth. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Huckabee*, 19 S.W.3d at 420. This standard protects innocent but erroneous speech on

public issues yet still deters “calculated falsehoods.” *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

While the First Amendment protects the exercise of editorial discretion, it does not protect the publisher who abuses that discretion knowingly to create a false impression of events. *See Huckabee*, 19 S.W.3d at 426. Although actual malice focuses on the defendant’s state of mind, a plaintiff can prove it through objective evidence about the publication’s circumstances. *Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982), *aff’d*, 466 U.S. 485 (1984); *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 621 (Tex. App.--Houston [14th Dist.] 1984, writ ref’d n.r.e.).

When a defendant knowingly omits critical facts and thereby distorts the entire character of a story, such actions raise an inference that the defendant acted with actual malice. *See Huckabee*, 19 S.W.3d at 426; *see also Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1256 (9th Cir. 1997)(concluding that actual malice requires that defendants know that language choice was misleading); *Newton v. National Broad. Co.*, 930 F.2d 662, 680 (9th Cir. 1990)(concluding that defendant must know that the broadcast’s arrangement of material created a false impression); *Dixon v. Ogden Newspapers, Inc.*, 416 S.E.2d 237, 244 (W.Va. 1992)(concluding that evidence of a defendant’s intentional omission misleading readers supports an actual malice finding). One may infer that the defendant knew the story would convey a false impression of events, or, at a minimum, that the defendant entertained serious doubts about the story’s overall truthful impression. *See St. Amant*, 390 U.S. at 731; *Huckabee*, 19 S.W.3d at 426; *see also Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1092 (3d Cir. 1987). But merely presenting an unbalanced story or failing to include details favorable to the plaintiff does not raise such an inference. *See Huckabee*, 19 S.W.3d at 426.

II. ANALYSIS

After reviewing the entire record and applying the proper standard of review, I conclude that there is clear and convincing evidence of actual malice. Here, Turner's evidence clearly and convincingly shows that Dolcefino manipulated the facts to exaggerate Turner's role in the Foster matter and that the defendants knew the communication as a whole could present a false and defamatory impression of events. See *Huckabee*, 19 S.W.3d at 426 ; see also *Perez v. Scripps-Howard Broadcasting Co.*, 520 N.E.2d 198, 204 (Ohio 1988)(“Where sensationalism is sought at the expense of truth, actual malice may be inferred.”).

At trial, Dolcefino repeatedly admitted that he had no proof that Turner participated in a criminal insurance conspiracy. The record of Dolcefino's investigation confirms this. Although Elliott, Colwell, and Fry told Dolcefino their suspicions about Turner, all admitted that there was no evidence to support the suspicions. Johannsen also told Dolcefino that he knew of no evidence in the public record linking Turner to an insurance conspiracy. Dolcefino also knew before the 10 p.m. broadcast that both Hutchison and McConn had stated that, to their knowledge, Turner was innocent of any wrongdoing.

This record raises a strong inference that Dolcefino, through omission and juxtaposition, manipulated the facts to increase suspicion about Turner. This manipulation is clear and convincing evidence of actual malice. See *Huckabee*, 19 S.W.3d at 426; *Schiavone*, 847 F.2d at 1092.¹

I recognize that merely presenting an unbalanced story and failing to include details favorable to the plaintiff does not raise an inference that the defendant knew, or recklessly disregarded, that

¹ Many cases on which I rely in reaching this conclusion, including *Huckabee* and *Schiavone*, are summary judgment cases using lower standards of review. However, despite their differing procedural postures, each case espouses a valid rule of law: actual malice may be inferred through intentional omissions that so distort a viewer's perception that the viewer receives a substantially false impression of events. See, e.g., *Eastwood*, 123 F.3d at 1256; *Newton*, 930 F.2d at 680; see also *Dixon*, 416 S.E.2d at 244; *Perez* 520 N.E.2d at 204.

the story would convey a false impression of events. Thus, in *Huckabee*, we held that the defendant's failure to list all evidence supporting a judge's decision was not evidence of actual malice, especially when the broadcast aired a part of the judge's explanation for his ruling. See *Huckabee*, 19 S.W.3d at 426. However, Dolcefino did more than merely present an unbalanced story. He omitted key facts, particularly in regard to Turner's representation of the estate, and these omissions significantly changed the story's character. An accurate report would have portrayed Turner as a lawyer drafting a will and probating an estate, albeit for a suspicious client under suspicious circumstances. But, here, the broadcast's omission of crucial facts suggests that Turner acted unethically or even criminally. This distortion is part of the evidence that raises the inference that Dolcefino acted with actual malice.

Other critical evidence supporting an inference of actual malice includes Dolcefino's not reporting that he knew Foster's will named Thomas as executor. A reasonable viewer could be left with the false impression that it was Turner's idea to place Thomas in control of the estate. Similarly, after reading the probate records, Dolcefino should have known that Turner worked on the will for over a month and was not in his office when Foster signed it. Dolcefino never mentioned these facts. Instead, Dolcefino's broadcast gave the impression that Turner hurriedly drafted the will three days before Foster disappeared. Nor did the broadcast mention that the testamentary trust and most of the other life insurance policies primarily benefitted Foster's father, not Thomas or Turner. Furthermore, Dolcefino did not report that Turner did not probate the will until the Coast Guard issued a formal report stating that Foster was presumed "drowned." The probate records included the Coast Guard report and the deposition of an officer who investigated the incident.

The discussion of Turner's disqualification and fee rejection provides additional evidence

that Dolcefino knowingly manipulated the facts to present the false impression that Turner was involved in criminal conduct. The probate records make clear that the only conflict Turner faced was between his roles as the estate's attorney and as a potential fact witness. Dolcefino did not mention this in the broadcast, though he admitted at trial that he knew accusing a public official of conflicts of interest had serious implications. Dolcefino's decision to juxtapose the "conflict of interest" statement with the discussion of Turner's fee rejection also indicates actual malice. *See Crane v. The Arizona Republic*, 972 F.2d 1511, 1524 (9th Cir. 1992); see also *Eastwood*, 123 F.3d at 1256. Placing these two items together suggests the temporary administrator rejected Turner's fee *because of* conflicts of interest, when nothing in the probate records linked the two events. In fact, Johanssen had earlier told Dolcefino that Turner's fee request had been rejected because it was not timely filed.

Because of its half-truths and misleading juxtapositions, the broadcast's version of Turner's representation of the estate differed significantly from the account revealed in the probate records. The disparity between these two accounts raises an inference that Dolcefino, who had read the probate records, was aware that the broadcast created a false impression. While the jury could have believed Dolcefino's assertion that he did not know that the broadcast was false, they clearly rejected his testimony as not credible. We must defer to the jury's judgment. *See Harte-Hanks*, 491 U.S. at 688; *Benoit*, 239 S.W.2d at 796.

The addendum that Dolcefino prepared for the 10 p.m. broadcast also demonstrates actual malice. First, Dolcefino broadcast the Lanier campaign's denial that the story was connected to their campaign, despite the fact that he knew that his primary source, Peary Perry, was "on the Lanier side of the equation." Perry was in fact a member of the Lanier campaign-finance committee. He gave Dolcefino a one-page memo about the Foster-Turner situation, and was responsible for Dolcefino's

receiving a copy of the probate record. Then KTRK's anchor, reading from a script Dolcefino prepared, appeared to endorse the Lanier campaign's position by stating that "KTRK and Wayne Dolcefino stand by the story." By broadcasting the Lanier campaign's denial and then appearing to endorse it, Dolcefino made it appear that Turner lied about the story's source, when he knew Turner's claim about the story's source was true. Further, suggesting the story was not politically motivated falsely made the story more credible than if Dolcefino had disclosed Perry's connection with the Lanier campaign.

Moreover, in the days following the story, Dolcefino continued to hide the true facts of the political connection, even when KTRK produced a non-political source, Clyde Wilson, as the story's "real source" and castigated Turner for not apologizing to the Lanier campaign. Although this conduct does not directly bear on the broadcasts at issue, it is additional evidence of a deceptive pattern on Dolcefino's part that supports the jury's finding. *See Herron v. King Broad. Co.*, 746 P.2d 295, 303 (Wash. 1987), *clarified on rehearing*, 776 P.2d 98 (Wash. 1989).

III. CONCLUSION

I recognize that "vigorous reportage of political campaigns is necessary for the optimal functioning of our democratic institutions and central to our history of individual liberty." *Harte-Hanks*, 491 U.S. at 687. But a calculated falsehood, inserted into the midst of a heated political campaign, can unalterably distort the process of self-determination. "For the use of a known lie . . . is at once at odds with the premises of democratic government and the orderly manner in which economic, social, and political change is to be effected." *Garrison*, 379 U.S. at 75. Half-truths strung misleadingly together are no less destructive of democracy than an outright lie.

The record as a whole convinces me that Turner provided clear and convincing evidence that

Dolcefino published the story knowing that it would present the false impression that Turner participated in a conspiracy to commit insurance fraud. Because the Court's opinion concludes otherwise, I respectfully dissent to section III.

James A. Baker, Justice

Opinion delivered: December 21, 2000