No. _____

IN THE
SUPREME COURT OF TEXAS

ROBERT KINNEY
PETITIONER

VS.

ANDREW HARRISON BARNES, BCG ATTORNEY SEARCH, INC.
EMPLOYMENT CROSSING, INC. AND JD JOURNAL, INC.
RESPONDENTS

ON PETITION FOR REVIEW
FROM THE THIRD DISTRICT COURT OF APPEALS
AUSTIN, TEXAS

PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the case:	This is a suit for defamation brought by a Texas business owner, **Robert Kinney** ("Plaintiff" or "Kinney"), against Defendants **Andrew Harrison Barnes** ("Barnes"), **BCG Attorney Search, Inc.** ("BCG"), **Employment Crossing, Inc.** ("ECI") and **JD Journal, Inc.** ("JDJ") (collectively "Defendants"), each of which is a person residing in California.
Trial court	The Honorable David Phillips, County Court at Law Number 1 of Travis County, Texas.
Course of trial court proceedings:	After a hearing on Defendants' Motion for Summary Judgment, the trial court granted the Defendants' motion and entered an order dismissing all of the Plaintiff's claims.
Course of appellate court proceedings:	On appeal to the Third Court of Appeals in Austin, Cause No. 03-10-00657-CV, Kinney challenged the trial court's summary judgment on the basis that the requested relief could not be considered a prior restraint of free speech since it sought to enjoin prior speech. The Third Court of Appeals affirmed the trial court's dismissal in an opinion authored by Justice Goodwin and dated November 21, 2012. The panel consisted of Chief Justice J. Woodfin Jones, and Justices Diane Henson and Melissa Goodwin. *See Robert Kinney v. Andrew Harrison Barnes, BCG Attorney Search, Inc. Employment Crossing, Inc. and JD Journal, Inc.*, NO. 03-10-00657-CV, 2012 SWL 5974092 at *1 (Tex.App.—Austin Nov. 21, 2012).

STATEMENT OF JURISDICTION

The Supreme Court of Texas has jurisdiction of this appeal under Texas Government Code § 22.001(a)(6) which grants the Court jurisdiction when it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction. Tex. Gov. Code § 22.001(a)(6). This is not a case in which the jurisdiction of the court of appeals is made final by statute. *Id.*

ISSUE PRESENTED

1. Whether an injunction ordering removal of certain statements posted on a website after adjudication that those statements are false and defamatory is constitutionally permissible or would constitute a prior restraint of free speech.

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RESPONDENTS

ON PETITION FOR REVIEW
FROM THE THIRD DISTRICT COURT OF APPEALS
AUSTIN, TEXAS

PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Robert Kinney ("Kinney") submits this Petition for Review requesting that the Supreme Court grant this Petition, reverse the court of appeals' judgment, reverse the trial court's summary judgment and remand this case for trial.

STATEMENT OF FACTS

Kinney is a former employee of Appellee BCG Attorney Search, Inc., a legal recruiting company owned and operated by Barnes. [Clerk's Record ("C/R"), at 5, ¶

10]. In 2004, Kinney created a competing legal recruiting firm based in Austin, Texas. [Id.]. In August of 2001, Barnes posted on his website, JD Journal, as part of a "news item" the following statement:

> When Kinney was an employee of BCG Attorney Search in 2004, he devised an unethical kickback scheme, attempting to pay an associate under the table at Preston Gates and Ellis (now K&L Gates) to hire one of his candidates. Barnes says that when he discovered this scheme, he and the other BCG Attorney Search recruiters immediately fired Kinney. The complaint in the action even contains an email from Kinney where he talks about paying the bribe to an associate at Preston Gates in return for hiring a candidate.

[C/R at 43].

After a requested retraction was refused by Barnes, Kinney timely filed the instant lawsuit. [C/R at 7 ¶ 14]. In his Original Petition, Kinney alleged that he had no scheme to pay cash kickbacks to anyone, that Barnes knew this at the time of Kinney's departure from BCG's employment, and that it was Kinney who had repeatedly refused to participate and cooperate in BCG's unethical business practices. [C/R at 6 ¶ 12]. As his remedy, Kinney requested only injunctive relief following trial; he did not request damages. [C/R at 7-8]. Specifically, Kinney asked the lower court to issue a permanent injunction that ordered the Defendants, and their agents, servants, employees, and those persons in active concert or participation with them who received actual notice of the order by personal service or otherwise, to:

a. remove the defamatory statements from the places where they were posted on websites operated by the Defendants;

b. send electronic mail, make telephone calls and transmit certified letters, as necessary and at the sole cost and expense of the Defendants, to all website operators, web hosting companies or ISP's which host any website that contains a secondary publication of the false statements of material fact set forth in Kinney's Original Petition (including Google and Yahoo), as well as the Internet Archive site http://www.archive.org/, and request that such information be removed, and provide each such third party website or hosting company a copy of the Permanent Injunction; and

c. conspicuously post a copy of the Permanent Injunction, a retraction of the statements and a letter of apology, on the home pages for "www.jdjournal.com" and "www.bcgsearch.com" for six continuous months following entry of the Permanent Injunction. [C/R. at 7-8].

The Defendants moved for summary judgment on Kinney's request for injunctive relief and made only one argument. [C/R at 30,33-36]. The Defendants contended that Kinney's request for injunctive relief, if allowed, would constitute an impermissible prior restraint on the Defendants' right to freedom of speech and would therefore violate the Texas Constitution. [C/R at 34-35]. In response, Kinney pointed out that the Defendants had erroneously relied upon the "prior restraint" doctrine commonly used to defeat a litigant's request for temporary injunctive relief. [C/R. at 40-41, 44-49]. By contrast, Kinney was not seeking a temporary injunction; he sought only a permanent injunction to force the removal of statements that were already made on the web *after* they were adjudicated as unprotected defamatory speech. [Id.]. A day after the September 9, 2010 summary judgment hearing, the trial court granted the Defendants' Motion for

Summary Judgment and dismissed the case. [C/R. at 76]. Kinney timely appealed. [C/R. at 77-78].

The order of dismissal was affirmed by the Third Court of Appeals in an opinion dated November 21, 2012. [Mem. Op. at 1]. The court held "that Barnes satisfied his summary judgment burden to show that a permanent injunction requiring the removal of the alleged defamatory statement from Barnes's website would act as a prior restraint on constitutionally protected speech," even if the injunction followed an adjudication that the speech was false and defamatory. [Mem. Op. at 8]. The court of appeals held that Kinney had waived any argument that the speech was unprotected defamatory speech by arguing only that the requested relief would not constitute a prior restraint of free speech. [Mem. Op. at 4].

SUMMARY OF THE ARGUMENT

The issuance of a permanent injunction requiring Defendants to remove statements from the Internet after final judgment does not constitute a prior restraint on speech. Additionally, Texas should elect to follow the modern rule allowing the injunction of statements ruled to be defamatory.

The California Supreme Court has allowed injunctions restraining a defendant from repeating or republishing specific defamatory statements. The United States Supreme Court has upheld state law authorizing injunctive relief prohibiting the

post-judgment dissemination of obscene materials. In making that ruling, the United States Supreme Court specifically rejected an argument that such injunctions constitute prior censorship. Additionally, Kentucky recently adopted the modern rule in defamation cases holding that once a judge or jury has made a determination that the speech is defamatory, such false speech may be enjoined.

Importantly, none of the cases cited by Defendants involved statements which had been ruled defamatory, instead these cases involved plaintiffs seeking temporary injunctions *before* any judgment was issued. Based upon the current state of Texas jurisprudence, claimants are left without a mechanism to permanently remove defamatory statements published on the Internet even after they are adjudged to be defamatory. It would be unjust to continue to categorically deny such a necessary remedy.

Regardless, even without adopting the modern rule, a simple clarification by this Court that specific statements made on the Internet constitute a single publication made in the past is enough to require reversal of the opinion of the court of appeals in this case. Considerations of judicial resources and economy as well as other public policy issues further support the adoption of the modern rule.

ARGUMENT

A. Kinney Seeks Post-Judgment Removal of Defamatory Statements on Barnes' Websites

Kinney's request for injunctive relief asked the Travis County Court to require Defendants to perform two actions: (1) remove the defamatory publication made by Defendants from any public source, such as the internet, that is under Defendants' control; and (2) request that the defamatory publication be removed from any public source, such as the internet, that is not under Defendants' control and provide these publishers with a copy of the permanent injunction. Kinney did not request that Defendants be prohibited from reposting their defamatory statements in the future. Neither of these requested injunctive actions constitutes a prior restraint on Defendants' speech, but rather a punishment for defamatory publications. *See Alexander v. U.S.*, 509 U.S. 544, 553-554 (1993).

B. Texas Should Adopt the Modern Rule Regarding Defamation Injunctions

Although Texas case law is largely silent on this point, multiple courts, including the California Supreme Court, the Kentucky Supreme Court, and the United States Supreme Court, have specifically addressed the issue of whether a party may be enjoined from republishing statements after they have been found to be defamatory. These courts have unequivocally held that post-judgment injunctions

do not offend a defendant's constitutional right to be free of prior restraints on speech.

1. California Allows Injunctions Preventing Repeated or Republished Defamatory Statements

In *Balboa Island Village Inn, Inc. v. Lemen*, the jury found that the defendant defamed the plaintiff, and enjoined the defendant from repeating the specific defamatory statements. 156 P.3d 339, 342 (Cal. 2007). In determining that such an injunction is permissible, the California Supreme Court distinguished between an injunction preventing someone from making a statement that is allegedly defamatory from an injunction preventing someone from repeating or republishing a statement that a jury has already found to be defamatory:

> The attempt to enjoin the initial distribution of a defamatory matter meets several barriers, the most impervious being the constitutional prohibitions against prior restraints on free speech and press.... In contrast, an injunction against continued distribution of a publication which a jury has determined to be defamatory may be more readily granted. The simplest procedure is to add a prayer for injunctive relief to the action for damages.... Since the constitutional problems of a prior restraint are not present in this situation, and the defendant has not been deprived of a jury determination, injunctions should be available as ancillary relief for ... personal and political defamations.

See id. at 344-45.

Further, the *Balboa* court specifically rejected the argument that the only remedy for defamation is an action for damages, because that "would mean that a defendant harmed by a continuing pattern of defamation would be required to bring

a succession of lawsuits if an award of damages was insufficient to deter the defendant from continuing the ... behavior." *Id.* at 351. Thus, the court recognized that "a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation." *Id.* at 351. Consequently, the court held that "following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory." *Id.* at 349. However, the court noted that the injunction needed to be limited to prohibiting the defendant from repeating or republishing the statements found to be defamatory. *See id*. at 352.

2. United States Supreme Court Upholds State Law Prohibiting Future Dissemination of Obscene Materials

In *Kingsley Books, Inc. v. Brown*, the United States Supreme Court upheld a state law authorizing a "limited injunctive remedy" prohibiting "the sale and distribution of written and printed matter found after due trial to be obscene." 354 U.S. 436, 437, 441 (1957). The Supreme Court rejected the very argument that Defendants raise here – namely that issuance of an injunction "amounts to a prior censorship" in violation of the First Amendment. *Id.* at 440 (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931) for the proposition that "the protection even as to previous restraint is not absolutely unlimited."). The Court recognized that the

term "prior restraint" was "not a self-wielding sword" that could "serve as a talismanic test" to be indiscriminately applied. *Id*.

The Court pointed out that the defendants in *Kingsley Books* "were enjoined from displaying for sale or distributing only the particular booklets theretofore published and adjudged to be obscene." *Id*. at 444. This fact distinguished *Kingsley Books* from the decision in *Near v. Minnesota*, which had ruled that the abatement as a public nuisance of a newspaper was an invalid prior restraint, noting that the abatement in *Near* "enjoin[ed] the dissemination of *future* issues of a publication because its past issues had been found offensive," which is "'the essence of censorship.'" *Kingsley Books*, 354 U.S. at 445 (emphasis added). The Supreme Court in *Kingsley Books* observed that the injunction was "glaringly different" from the prior restraint in *Near*, because it "studiously withholds restraint upon matters not already published and not yet found to be offensive." *Kingsley Books*, 354 U.S. at 445.

3. Kentucky Adopts the Modern Rule Allowing Injunction of Statements Adjudicated as Defamatory

More recently, in *Hill v. Petrotech Resources Corporation*, the Kentucky Supreme Court has taken up these same issues with a similar result. *Hill v. Petrotech Resources Corp*., 325 S.W.3d 302 (Ky. 2010). The court adopted what it called the "modern rule" regarding injunctions in defamation cases, holding that "once a judge or jury has made a final determination that the speech at issue is

defamatory, the speech determined to be false may be enjoined." *Id*. The court held that once such an adjudication is made, an injunction may issue when there is no adequate remedy at law because of the recurrent nature of the defendant's invasions of the plaintiff's rights, there would be a need for a multiplicity of actions to assert the plaintiff's rights, there is imminent threat of continued emotional and physical trauma, and there is difficulty in evaluating the injuries in monetary terms. *Id.*

C. Kinney Seeks Removal of Published Statements Previously Adjudicated as Defamatory

The present case presents facts analogous to *Kingsley Books*, *Balboa* and *Hill*, except that Kinney's requested relief is even more narrowly tailored than the relief permitted in those cases. Not only has Kinney not requested that the court issue a temporary injunction, Kinney has not requested an injunction that would stop Defendants from re-stating their prior defamatory statements after they have removed the statements that currently (and for more than the last three years) have resided on the Internet. Instead, Kinney has requested the trial court to adjudicate the issues and, if it finds that Defendants' publications were in fact defamatory, then Kinney has asked the court to issue an injunction requiring Defendant to take all necessary steps to ameliorate the harm resulting from the defamatory statements – *i.e.*, prevent Defendants from continuing to host those specific defamatory statements on websites controlled by them and take commercially reasonable steps

to retract the statements. As such, Kinney's request did not seek an impermissible prior restraint, and consequently, the court should have denied Defendants' Motion for Summary Judgment.[1]

D. Defendants' Authority Does Not Address Statements Already Ruled Defamatory

The opinions that Defendants cited to support their Motion for Summary Judgement and the opinions cited by the lower court in this case are clearly distinguishable. Not a single case cited by Defendants covers a fact pattern in which the statements in question have been found to be defamatory. Instead, nearly all of the opinions upon which Defendants rely possess a common theme: the plaintiff seeks a temporary injunction against the publication of statements before the Court actually rules that the statements were defamatory. *See e.g. Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 917-18 (Tex. App.—Dallas, 2006, no pet.); *Texas Mutual Ins. Comp. v. Surety Bank, N.A.*, 156 S.W3d 125, 128-29 (Tex. App.—Fort Worth 2005, no pet.) (noting that a "prior restraint on speech is an 'administrative and judicial order [ ] forbidding certain communications *when issued in advance of the time that such communications are to occur*" (emphasis added)); *Brammer v. KB Home Lone Star, L.P.*, 11 S.W.3d 101, 106-07

[1] Notably, at least one Travis County District Court has applied the modern rule and allowed a permanent injunction restraining continued publication of entire websites adjudged to be defamatory. *See Michael Victor Baumer v. Scott Alexander Morris*, No. D-1-GN-12-000508 (419th Dist. Ct., Travis County, Tex. Jan. 22, 2013).

(Tex. App. – Austin 2003, no pet.); *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983).

E. Single Publication Rule Further Supports Kinney's Requested Injunctive Relief is Not Prior Restraint

Even if Texas will not follow the modern rule to permit specific, *future*, false, and defamatory statements to be enjoined, the decision of the court of appeals in this matter to forbid an injunction seeking removal of specific, *past* statements from the Internet after their adjudication as defamatory is troubling. Texas courts have adopted the single publication rule in cases involving mass media publications. *Williamson v. New Times, Inc*., 980 S.W.2d 706, 710 (Tex. App.—Fort Worth 1998, no writ). Under this rule the one-year limitations period begins to run when publication of the defamatory statement is complete. *Id.*

In Texas, despite lack of any specific precedent from this Court or any Texas court of appeals, federal courts applying Texas law have repeatedly held that the single publication rule mandates that a false and defamatory statement made on the internet be considered a single, specific publication no matter how many times it is viewed for purposes of calculating the appropriate statute of limitations period. *See e.g. Nationwide Bi–Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 142–43 (5th Cir. 2007) (an "*Erie* guess" that the Texas Supreme Court would hold that the single publication rule applies to information widely available on the Internet and that the one-year statute of limitations begins to run when publication of a libelous statement

is complete, i.e., the date of mass distribution of copies of printed matter; on the Internet it would begin to run on the first day the publication is posted.); *see also Hamad v. Center for Jewish Community Studies*, 265 Fed. App'x 414, 416–17 (5th Cir. 2008); *see also TMIRS Enterprises, Ltd. v. Godaddy.com*, 2010 WL 3063659 at *3 (S.D. Tex. Aug. 3, 2010); *see also Kaufman v. Islamic Soc. of Arlington*, 291 S.W.3d 130, 140 (Tex. App.—Fort Worth 2009, pet denied) (noting that "authority that we consider instructive on this issue indicates that articles communicated through the internet equate in legal effect in some circumstances to words published by more traditional electronic or print media").

If the single publication rule indeed applies in Texas, then clearly an injunction forcing deletion of those past-published statements cannot be a *prior* restraint. By requesting deletion of specific, past statements, Kinney has not sought to forbid any communication "in advance of the time that such communications [were] to occur"; rather, Kinney has sought an injunction requiring matters already posted and still residing on websites owned and controlled by the Barnes Defendants to be removed after a full adjudication that they are the type of speech that is not protected by the constitution of the State of Texas or the United States. Whether the Defendants wish to re-post those matters in the future and subject themselves to the risk of a new lawsuit is entirely up to the Defendants.

F. Texas Lacks Mechanism to Compel Permanent Removal of Defamatory Internet Statements

Absent a decision by this Court to take up this issue, Texas residents will be left without any mechanism to compel the permanent removal of statements which have already been posted online even after they are adjudged to be defamatory. As the injury in defamation cases arises from third-party access to these statements, it would be unjust to categorically deny such a necessary remedy. Additionally, future courts of appeal will be tempted in Internet cases such as this one to rely on strained analogies to inapplicable cases. For example, in the present case, the Third Court of Appeals relied on an analogy to *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 254 (Tex. 1983) (per curiam), "a case in which the plaintiff sought to enjoin the defendant from 'driving his vehicle in the community with a defamatory message painted on all four sides that [stated the plaintiff] sold him a 'lemon.'" [Mem. Op. at 6].

The problem with drawing this analogy to *Hajek* is that every trip around town by the *Hajek* defendant with his painted truck created a new set of allegedly defamatory statements to the community. Moreover, access to view the truck was only available during each new trip, a situation more akin to republication in a new forum than to a persisting Internet publication with indefinite availability. In the Internet world, *Hajek* would be more analogous to a web site programmed to repost allegedly defamatory statements on an intermittent basis. Unless Texas decides to

follow the modern rule set forth in *Hill* and *Balboa*, such an injunction would be unconstitutional. Likewise, without the modern rule, an injunction to prevent future postings by the Defendants in this case of the same false and defamatory statements about Kinney on their websites would also be an unconstitutional prior restraint.

Even without adopting the modern rule, a simple clarification by this Court that specific statements made on the Internet constitute a single publication made in the past is enough to require reversal of the opinion of the court of appeals in this case. If those statements were indeed made in the past, and if there is a full adjudication that the statements were false and defamatory, then there should be no prior restraint issue at play**.**

G. Public Policy Supports Kinney's Requested Relief

Plaintiff's suit sought a remedy (a "subsequent punishment") for past speech adjudged to be defamatory, which the U.S. Supreme Court explicitly permitted in *Alexander* and *Kingsley Books*, and which was persuasively approved by the California Supreme Court in the *Balboa* case and by the recent *Hill* case. *See also Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992) ("[I]t has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs."). Furthermore, Plaintiff's request is strictly limited to Defendants' statements made the basis of this case. It would be unconscionable to require

Kinney – as Defendants would have this Court do – to file a succession of lawsuits to deter Defendants from continuously republishing defamatory statements. *See Balboa Island Village Inn, Inc.*, 156 P.3d at 351. Such an unreasonable requirement would be a waste of judicial resources and economy. Therefore, consistent with *Kingsley Books* and *Balboa*, the Court should deny Defendants' Motion for Summary Judgment.

PRAYER

Kinney respectfully requests that the Court (1) grant this Petition for Review, (2) reverse the judgment of the court of appeals, (3) reverse the judgment of the trial court, and (4) remand this case to the Travis County Court at Law Number 1 for trial.

Respectfully submitted,

KANE RUSSELL COLEMAN & LOGAN PC

By: *\/s/ Andrew J. Sarne*

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CERTIFICATE OF COMPLIANCE

I certify that this document brief/petition was prepared with Microsoft Word 2010, and that, according to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 3,535 words.

/s/ Andrew J. Sarne
Andrew J. Sarne

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was transmitted to counsel of record for all parties of record at the address listed below and by certified mail, return receipt requested on this the 6th day of February, 2013.

Certified Mail No. 70111570000059422507,
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/s/ Andrew J. Sarne
Andrew J. Sarne

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APPENDIX TO PETITION FOR REVIEW

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CAUSE NO. C-1-CV-10-004331

ROBERT KINNEY,	§	**IN THE COUNTY COURT**
Plaintiff,	§	
	§	
v.	§	
	§	**AT LAW NO. 1**
ANDREW HARRISON BARNES (a/k/a A. HARRISON BARNES, A.H. BARNES, ANDREW H. BARNES, HARRISON BARNES) BCG ATTORNEY SEARCH, INC., EMPLOYMENT CROSSING, INC. and JD JOURNAL, INC.	§	
Defendants.	§	**TRAVIS COUNTY, TEXAS**

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On the 9th day of September, 2010, came on for hearing Defendants' Motion for Summary Judgment. The Court, after hearing the evidence and argument of counsel, is of the opinion that Defendants' Motion should be GRANTED in its entirety.

IT IS THEREFORE ORDERED that Plaintiff's claims against all Defendants are DISMISSED and that Plaintiff take nothing by way of the above and foregoing cause of action. Costs are to be paid by the party incurring same.

This final order disposes of all claims as to all parties and is appealable. Plaintiff requested leave to amend his pleadings on 9/9/10. Leave was denied.

Signed September 10, 2010 at 3:30 p.m.

JUDGE PRESIDING

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-10-00657-CV

Robert Kinney, Appellant

v.

Andrew Harrison Barnes a/k/a A. Harrison Barnes, A. H. Barnes, Andrew H. Barnes, Harrison Barnes, BCG Attorney Search, Inc., Employment Crossing, Inc.; and JD Journal, Inc., Appellees

FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY
NO. C-1-CV-10-004331, HONORABLE J. DAVID PHILLIPS, JUDGE PRESIDING

MEMORANDUM OPINION

Appellant Robert Kinney sued Appellees Andrew Harrison Barnes and BCG Attorney Search, Inc., Employment Crossing, Inc., and JD Journal, Inc., companies owned by Barnes (sometimes collectively "Barnes"), for defamation and defamation per se based on a statement made by Barnes and published on his companies' websites. The only relief Kinney sought was an injunction requiring Barnes to remove the allegedly defamatory content from his companies' websites, take steps to have it removed from the websites of third-party republishers, and post a retraction, apology, and copy of the injunction on the homepages of his companies' websites for a specified amount of time. Barnes filed a motion for summary judgment claiming the injunction is unavailable as a matter of law because it would constitute a prior restraint on and an unconstitutional

compulsion of speech.[1] The trial court granted Barnes's motion for summary judgment. For the reasons set forth below, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Kinney was an employee of BCG, a legal recruiting company run by Barnes. In 2004 Kinney left BGC to create a competing legal recruiting firm. Barnes subsequently sued Kinney in California state court for "anonymously maligning Barnes and his companies online." In August of 2007, Barnes posted on his website, JD Journal,[2] as part of a "news item" the following statement summarizing the allegations in the California action:

> The complaint also alleges that when Kinney was an employee of BCG Attorney Search, in 2004, he devised an unethical kickback scheme, attempting to pay an associate under the table at Preston Gates and Ellis (now K&L Gates) to hire one of his candidates. Barnes says that when he discovered this scheme, he and other BCG Attorney Search recruiters immediately fired Kinney. The complaint in the action even contains an email from Kinney where he talks about paying the bribe to an associate at Preston Gates in return for hiring a candidate.

Kinney responded to the statement by filing a lawsuit in Travis County district court asserting that the statement made by Barnes constituted defamation and defamation per se and requesting monetary damages. Kinney later filed a voluntary notice of nonsuit in that proceeding and filed the present case. In this suit, the only relief Kinney requests is a permanent injunction that would require Barnes

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[1] Barnes has maintained, and continues to maintain, that the complained-of statement is not defamatory. However, Barnes's motion for summary judgment was based solely on the grounds that regardless of the nature of the statement, Kinney could not obtain the remedy he sought as a matter of law and therefore the claim should be dismissed.

[2] The statement was republished on Barnes's other website, Employment Crossing.

to (a) remove the false statements from his websites, (b) contact third-party republishers of the statement to have them remove the statement from their publications, and (c) conspicuously post a copy of the permanent injunction, a retraction of the statement, and a letter of apology on the home pages of Barnes's websites for six continuous months.

Barnes filed a motion for summary judgment claiming the injunction Kinney sought would violate the Texas Constitution since it would act as a prior restraint on and compulsion of Barnes's speech. Barnes asserted that because the only relief Kinney sought is unavailable as a matter of law, Kinney's complaint should be dismissed. Kinney, in his response to Barnes's motion, asserted that the injunction is constitutionally permissible as it would act not as a prior restraint, but instead as a subsequent punishment. The trial court granted Barnes's motion, and this appeal followed.

STANDARD OF REVIEW

A court of appeals reviews a trial court's decision to grant summary judgment de novo. *Valance Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When a court reviews a summary judgment, all evidence favorable to the non-movant is taken as true, *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009), every reasonable inference is indulged, *Nixon v. Mr. Prop. Mgmt. Co*, 690 S.W.2d 546, 549 (Tex. 1985), and any doubts are resolved in the non-movant's favor, *id.*

At trial and on appeal, the movant has the burden of showing that there was no genuine issue of material fact and that he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon*, 690 S.W.2d at 548. The non-movant has no burden to respond to the motion for

summary judgment unless the movant conclusively establishes his cause of action or defense. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999). The trial court may not grant summary judgment by default because the non-movant did not respond to the motion for summary judgment if the movant's summary judgment proof is legally insufficient. *Id.* at 223.

DISCUSSION

Commercial or Private Speech

Kinney presents one issue on appeal—that the trial court erred in dismissing his claim because the injunction would not violate the Texas Constitution. Among the arguments Kinney asserts in support of this position are that (1) the statement Barnes made was false or misleading commercial speech and therefore not subject to the protections of the constitution and (2) Barnes's statement was not protected since "[t]he Texas Constitution does not protect private, defamatory speech." Barnes contends that because Kinney did not raise these arguments in his response to Barnes's motion for summary judgment, they have been waived, and Kinney cannot bring them up for the first time on appeal. We agree.

"Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." Tex. R. Civ. P. 166a(c); *see also* Tex R. App. P. 33.1(a) ("As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion . . . ."). The non-movant "may not urge on appeal as a reason for reversal of the summary judgment any and every *new* ground that he can think of, nor can he resurrect grounds that he

abandoned at the hearing." *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979) (emphasis in original). The rule summarily stated is as follows:

> With the exception of an attack on the legal sufficiency of the grounds expressly raised by the movant in his motion for summary judgment, the non-movant must expressly present to the trial court any reasons seeking to avoid the movant's entitlement. . . . [T]he movant [need not] negate all possible issues of law and fact that *could* be raised by the non-movant in the trial court but were not. . . . *[T]he non-movant must now . . . expressly present to the trial court those issues that would defeat the movant's right to summary judgment and failing to do so, may not later assign them as error on appeal.*

Id. at 678–79 (second emphasis added). One of the bases for Barnes's motion for summary judgment was an assertion that the injunction Kinney seeks would constitute a prior restraint on speech. Kinney's sole argument in his response to Barnes's motion was that the injunction would act as a subsequent punishment not a prior restraint. For the first time on appeal Kinney raises the additional argument that the speech he seeks to have enjoined is not even protected speech, making the prohibition against prior restraint inapplicable. Since Kinney failed to raise this issue at the trial court, he cannot now raise it on appeal. *See Clear Creek*, 589 S.W.2d at 678–79; *Taylor v. American Fabritech, Inc.*, 132 S.W.3d 613, 618 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (cross-appellants challenging reliability of expert's testimony waived additional basis presented for first time on appeal).

Prior Restraint

As part of his issue, Kinney also contends the injunction that he seeks would not act as a prior restraint on speech but rather as a subsequent punishment for speech already adjudged to

be defamatory. A prior restraint is "an administrative or judicial order forbidding certain communications when issued in advance of the time that such communications are to occur." *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 393 (Tex. App.—Austin 2000, no pet.).[3] Essentially, it is Kinney's position that since the alleged defamatory speech has already taken place, the injunction would not be "in advance of the time" when the communication would occur. We do not find this argument persuasive.

In *Hajek v. Bill Mowbray Motors, Inc.*, the plaintiff sought to enjoin the defendant from "driving his vehicle in the community with a defamatory message painted on all four sides that [stated the plaintiff] sold him a 'lemon.'" 647 S.W.2d 253, 254 (Tex. 1983) (per curiam). The trial court issued a temporary injunction, which the court of appeals upheld. *Id.* In reversing this decision, the supreme court stated that the temporary injunction constituted a prior restraint on speech. *Id.* at 255. The situation here is very similar. As in *Hajek*, the alleged defamatory statement has already been published. By seeking to have it removed, Kinney is essentially trying to obtain the same relief the plaintiff in *Hajek* sought—i.e., the prevention of the continued publication of the defamation every time someone new reads the message.

Kinney seeks to distinguish *Hajek* and the other cases cited by Barnes on the basis that they all involved temporary injunctions, whereas he is seeking a permanent injunction. Kinney contends that in the case of a permanent injunction the only speech to be enjoined is speech already adjudged to be defamatory. Therefore, Kinney claims the injunction would act as a subsequent

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[3] *See Davenport v. Garcia*, 864 S.W.2d 4, 9–10 (Tex. 1992) (prior restraint only permissible when "essential to the avoidance of an impending danger").

punishment.[4] However, while *Hajek* dealt with a temporary injunction, nothing in the holding of *Hajek* suggests that the rule concerning prior restraint should be limited to temporary injunctions. *See generally* 647 S.W.2d 254. An examination of the authority upon which *Hajek* is based further supports this conclusion. As the court in *Ex parte Tucker* observed, "[t]he Constitution leaves [a person] free to speak well or ill; and if he wrongs another, he is responsible in *damages* or punishable by the criminal law." 220 S.W. 75, 76 (Tex. 1920) (emphasis added); *see also Tackett v. KRIV-TV (Channel 26)*, No. CIV. A. H-93-3699, 1994 WL 591637, at *2 (S.D. Tex. May 5, 1994) ("[The plaintiff] may not obtain equitable relief from defendants in the form of a retraction, public apology, or permanent injunction. Defendants cannot be compelled to publish or be enjoined from publishing future materials regarding [the plaintiff], regardless of their nature, as equity does not enjoin a libel or slander and the only remedy for defamation is an action for damages."); *Brammer*,

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[4] Kinney further asserts that his "requested relief pose[s] less of a threat to the Constitution than the injunction this Court upheld in *Minton.*" Essentially, Kinney argues that the injunction he seeks here is less offensive to the constitution than the injunctions approved in *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387 (Tex. App.—Austin 2000, no pet.), *Jenkins v. TransDel Corp.*, No. 03-04-00033, 2004 WL 1404364 (Tex. App.—Austin June 24, 2004, no pet.) (mem. op.), *Karamchandani v. Ground Technology, Inc.*, 678 S.W.2d 580 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd), and *Hawks v. Yancey*, 265 S.W.233 (Tex. Civ. App.—Dallas 1924, no writ) because in those cases, the injunction was a temporary injunction, and there had been no determination of fault, whereas here, the injunction would issue only upon a determination of fault on the part of Barnes.

This view, however, misses the point. In all those cases, the courts determined the language to be enjoined was not constitutionally protected and therefore not subject to the prohibition against prior restraints either because it was false or misleading commercial speech, *see Minton*, 33 S.W.3d at 394; *Jenkins*, 2004 WL 1404364, at *5, private communication, *see Karamchandani*, 678 S.W.2d at 582, or dealt with instances of stalking, theft, threats, assault, abuse of process, and interference with contractual relations, *see Hawks*, 265 S.W. at 234–36. Here, none of the exceptions to the general protection of speech are applicable, so the statement, even if determined to be defamatory, is still constitutionally protected. *See Hajek*, 647 S.W.2d at 254 ("Defamation alone is not sufficient justification for restraining an individual's right to speak freely.").

114 S.W.3d at 107 ("Texas courts will not grant injunctive relief in defamation or business disparagement actions if the language enjoined evokes no threat of danger to anyone, even though the injury suffered often cannot easily be reduced to specific damages."). Therefore, the supreme court's holding in *Hajek* that an injunction preventing the continued publication of a defamatory statement would constitute a prior restraint on speech is equally applicable to a permanent injunction as it is to a temporary injunction. Consequently, we conclude that Barnes satisfied his summary judgment burden to show that a permanent injunction requiring the removal of the alleged defamatory statement from Barnes's website would act as a prior restraint on constitutionally protected speech.[5] *See* Tex. R. Civ. P. 166a(c); *Hajek*, 647 S.W.2d at 255. We overrule Kinney's issue.[6]

CONCLUSION

Having overruled Kinney's single issue, we affirm the trial court's summary judgment.

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[5] Because Kinney waived his challenge that the speech was not protected and we have determined that an injunction requiring its removal would constitute a prior restraint, we need not reach the policy arguments raised by Kinney. *See* Tex. R. App. P. 47.1.

[6] In his motion for summary judgment, Barnes argued that the parts of the injunction requiring Barnes to speak would constitute compelled speech in violation of the Texas Constitution. Because Kinney has not challenged this argument, we need not address it. *Leffler v. JP Morgan Chase Bank, N.A.*, 290 S.W.3d 384, 386 (Tex. App.—El Paso 2009, no pet.) ("When a ground upon which summary judgment may have been rendered, whether properly or improperly, is not challenged, the judgment must be affirmed."); *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 206 (Tex. App.—Dallas 2005, no pet.) (holding that because appellant presented arguments on appeal seeking reversal of summary judgment as to only some of his claims, summary judgment was proper as to judgment on claims he did not argue on appeal should be reversed).

Melissa Goodwin, Justice

Before Chief Justice Jones, Justices Henson and Goodwin

Affirmed

Filed: November 21, 2012

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED NOVEMBER 21, 2012

NO. 03-10-00657-CV

Robert Kinney, Appellant

v.

Andrew Harrison Barnes a/k/a A. Harrison Barnes, A. H. Barnes, Andrew H. Barnes, Harrison Barnes; BCG Attorney Search, Inc.; Employment Crossing, Inc.; and JD Journal, Inc., Appellees

APPEAL FROM COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY BEFORE CHIEF JUSTICE JONES, JUSTICES HENSON AND GOODWIN AFFIRMED -- OPINION BY JUSTICE GOODWIN

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's summary judgment: **IT IS THEREFORE** considered, adjudged and ordered that the summary judgment of the trial court is in all things affirmed. It is **FURTHER** ordered that the appellant pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.

COURT OF APPEALS
FOR THE
THIRD DISTRICT OF TEXAS

P.O. BOX 12547, AUSTIN, TEXAS 78711-2547
(512) 463-1733

Date: November 21, 2012

Case Number: 03-10-00657-CV
Trial Court No.: C-1-CV-10-004331

Style: Robert Kinney v. Andrew Harrison Barnes a/k/a A. Harrison Barnes, A. H. Barnes, Andrew H. Barnes, Harrison Barnes; BCG Attorney Search, Inc.; Employment Crossing, Inc.; and JD Journal, Inc.

The enclosed opinion and judgment were sent this date to the following persons:

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Vernon's Texas Statutes and Codes Annotated Currentness
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle A. Courts
Chapter 22. Appellate Courts
Subchapter A. Supreme Court
§ 22.001. Jurisdiction

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty

of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

(e) For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

CREDIT(S)

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 1106, § 1, eff. June 20, 1987; Acts 2003, 78th Leg., ch. 204, § 1.04, eff. Sept. 1, 2003.

Current through the end of the 2011 Regular Session and First Called Session of the 82nd Legislature

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