

No. 13-0043

IN THE SUPREME COURT OF TEXAS

ROBERT KINNEY,

Petitioner,

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.,

Respondents.

On Petition for Review from the Third Court of Appeals

PETITIONER ROBERT KINNEY'S BRIEF ON THE MERITS

Andrew J. Sarne
State Bar No. 00797380
KANE RUSSELL COLEMAN
& LOGAN, P.C.
919 Milam, Suite 2200
Houston, Texas 77002
Telephone: (713) 425-7400
Asarne@krcl.com

Martin J. Siegel
State Bar No. 18342125
LAW OFFICES OF
MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana, Suite 2300
Houston, Texas 77002
Telephone: (713) 226-8566
Martin@siegelfirm.com

Attorneys for Petitioner

IDENTITY OF PARTIES AND COUNSEL

Petitioner:

Robert Kinney

Petitioner's counsel in this Court:

Martin J. Siegel
Law Offices of Martin J. Siegel, P.C.
Bank of America Center
700 Louisiana St., Suite 2300
Houston, TX 77002

Andrew J. Sarne
Kane Russell Coleman & Logan PC
919 Milam, Suite 2200
Houston, Texas 77002

Petitioner's counsel in the court of appeals:

Andrew J. Sarne
Kane Russell Coleman & Logan PC
919 Milam, Suite 2200
Houston, Texas 77002

Petitioner's counsel in the trial court:

Stewart Hoffer
Hicks Thomas LLP
700 Louisiana, Suite 2000
Houston, Texas 77002

Respondents:

Andrew Harrison Barnes
BCG Attorney Search, Inc.
Employment Crossing, Inc.
JD Journal, Inc.

Respondents' counsel in all courts:

Dale L. Roberts
Daniel Byrne
Eleanor Ruffner
Fritz, Byrne, Head & Harrison, PLLC
98 San Jacinto Blvd., Suite 2000
Austin, Texas 78701

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL	i
TABLE OF CONTENTS	iii
INDEX OF AUTHORITIES	v
STATEMENT OF THE CASE	xiii
STATEMENT OF JURISDICTION	xiv
ISSUE PRESENTED	xiv
INTRODUCTION	1
STATEMENT OF FACTS	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT.....	7
I. A Permanent Injunction Removing Speech Found To Be Defamatory Would Not Violate the Texas Constitution.....	7
A. First Amendment Standards Should Guide the Court’s Decision.....	7
B. The First Amendment Does Not Proscribe Kinney’s Requested Injunction.....	10
1. Speech May Be Enjoined After a Final Judicial Judicial Determination that it Lacks Constitutional Protection.....	11
2. Injunctions That Do Not Give Censors Leeway to Ban Permissible Speech Are Constitutional.....	16

3.	The Permanent Injunction Kinney Seeks is Consistent With First Amendment Principles Permitting Orders Limiting Speech.....	19
II.	Texas Should Join the Jurisdictions That Have Recently Decided to Permit Permanent Injunctions Against Defamation.....	23
A.	This Court Has Never Faced This Question Before.....	24
B.	The Increasingly Widespread “Modern Rule” Would Permit the Injunction.....	26
C.	Sound Legal and Policy Reasons Support Adopting the Modern Rule	30
D.	The Internet’s Role in Facilitating Defamation Further Supports Allowing Permanent Injunctions	35
	CONCLUSION AND PRAYER.....	39
	CERTIFICATE OF SERVICE.....	40
	CERTIFICATE OF COMPLIANCE.....	41
	APPENDIX EXCERPT: MEMORANDUM OPINION OF THE COURT OF APPEALS	42

INDEX OF AUTHORITIES

	page
Cases:	
<i>Advanced Training Sys., Inc. v. Caswell Equip. Co.</i> , 352 N.W.2d 1 (Minn. 1984).....	28
<i>Alexander v. United States</i> , 509 U.S. 544 (1993).....	11, 14, 18
<i>Allen-Burch, Inc. v. Tex. Alcoholic Beverage Comm'n</i> , 104 S.W.3d 345 (Tex. App. – Dallas 2003)	26
<i>Am. Univ. of Antigua Coll. of Med. v. Woodward</i> , 837 F. Supp. 2d 686 (E.D. Mich. 2011)	29
<i>Amalgamated Acme Affiliates, Inc. v. Minton</i> , 33 S.W.3d 387 (Tex. App. – Austin 2000)	26
<i>Auburn Police Union v. Carpenter</i> , 8 F.3d 886 (1 st Cir. 1993), <i>cert denied</i> , 511 U.S. 1069 (1994).....	16, 17, 29
<i>Balboa Island Village Inn, Inc. v. Lemen</i> , 156 P. 3d 339 (Cal. 2007)	27, 30, 32, 33
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963).....	18
<i>Bentley v. Bunton</i> , 94 S.W.3d 561 (2002).....	8, 9
<i>Carpenters and Joiners Union of Am., Local No. 213 v. Ritter's Café</i> , 149 S.W.2d 694 (Tex. Civ. App. – Galveston 1941, writ ref.), <i>aff'd</i> 315 U.S. 722 (1942)	26
<i>Casso v. Brand</i> , 776 S.W. 3d 551 (Tex. 1989).....	9, 10

<i>Chambers v. Scutieri</i> , 2013 WL 1337935 (N.J. Super. Ct. App. Div. April 4, 2013)	28
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942).....	20
<i>City of Lakewood v. Plain Dealer Publishing Co.</i> , 486 U.S. 750 (1988).....	17
<i>Davenport v. Garcia</i> , 834 S.W.2d 4 (Tex. 1992).....	7, 8, 9, 19
<i>DePuis v. Kemp</i> , 2006 WL 401125(Mich. Ct. App. Feb. 21, 2006).....	28
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985).....	20
<i>Ex Parte Tucci</i> , 859 S.W.2d 1 (1993).....	<i>passim</i>
<i>Ex Parte Tucker</i> , 220 S.W. 75 (Tex. 1920).....	5, 25, 31
<i>Farah Mfg. Co. v. Amalgamated Clothing Workers of Am.</i> , 483 S.W.2d 271 (Tex. Civ. App. – San Antonio 1972)	35
<i>Fin. Comm'n of Tex. v. Norwood</i> , __ S.W.3d __, 2013 WL 3119481 (Tex. June 21, 2013).....	7
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965).....	18, 22
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964).....	19
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	19

<i>Hajek v. Bill Mowbray Motors, Inc.</i> , 647 S.W.2d 253 (Tex. 1983).....	5, 24, 25, 35
<i>Hancock v. Variyam</i> , __ S.W.3d __, 2013 WL 2150468 (Tex. May 17, 2013).....	9
<i>Hawks v. Yancey</i> , 265 S.W. 233 (Tex. Civ. App. – Dallas 1923).....	26, 32
<i>Hill v. Petrotech Resources Corp.</i> , 325 S.W.3d 302 (Ky. 2010)	27
<i>Karamchandani v. Ground Tech., Inc.</i> , 678 S.W.2d 580 (Tex. App. – Houston [14 th Dist.] 1984)	26
<i>Kelley v. Tex. State Bd. of Med. Examiners</i> , 467 S.W.2d 539 (Tex. App. – Ft. Worth 1971, writ ref’d n.r.e.), <i>cert. denied</i> , 405 U.S. 1073 (1972)	26
<i>Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Southeast, Inc.</i> , 326 S.W.3d 352 (Tex. App. – Houston [1 st Dist.] 2010).....	25
<i>Kingsley Books, Inc. v. Brown</i> , 354 U.S. 436 (1957).....	11, 13, 21
<i>Kramer v. Thompson</i> , 947 F.2d 666 (3d Cir. 1991).....	16, 28, 34
<i>Kuntz v. New York</i> , 340 U.S. 290 (1951).....	17
<i>Kwass v. Kersey</i> , 81 S.E.2d 237 (W. Va. 1954).....	30, 31
<i>Lawson v. Murray</i> , 515 U.S. 1110 (1995).....	15
<i>Locke v. State</i> , 516 S.W.2d 949 (Tex. Civ. App. – Texarkana 1974)	26

<i>Lothschuetz v. Carpenter</i> , 898 F.2d 1200 (6 th Cir 1990).....	29
<i>Madsen v. Women’s Health Ctr., Inc.</i> , 512 U.S. 753 (1994).....	15
<i>Murphy v. Daytona Beach Humane Soc., Inc.</i> , 176 So. 2d 922 (Fla. Dist. Ct. App. 1965).....	32
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931).....	<i>passim</i>
<i>Nebraska Press Assoc. v. Stuart</i> , 427 U.S. 539 (1976).....	14
<i>Neely v. Wilson</i> , __ S.W.3d __, 2013 WL 3240040 (Tex. June 28, 2013).....	9
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971).....	12
<i>Nolan v. Campbell</i> , 690 N.W.2d 638 (Neb. App. 2004, rev. overruled)	28
<i>O’Brien v. University Comm. Tenants Union, Inc.</i> , 327 N.E.2d 753 (Ohio 1975).....	28
<i>Operation Rescue-National v. Planned Parenthood of Houston and S.E. Tex., Inc.</i> , 975 S.W.2d 546 (Tex. 1998).....	8
<i>O’Quinn v. State Bar of Tex.</i> , 763 S.W.2d 397 (Tex. 1988).....	8
<i>Org. for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971).....	18, 21, 28
<i>Paris Adult Theatre I v. Slaton</i> , 413 U.S. 49 (1973).....	13, 14

<i>Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations</i> , 413 U.S. 376 (1973).....	12, 21, 28, 29
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	20
<i>Retail Credit Co. v. Russell</i> , 218 S.E.2d 54 (Ga. 1975).....	28
<i>Rosenblatt v. Baer</i> , 383 U.S. 75 (1966).....	2
<i>Saadi v. Maroun</i> , 2009 WL 3617788 (M.D. Fl. Nov. 2, 2009).....	29, 30
<i>Saia v. New York</i> , 334 U.S. 558 (1948).....	18, 22
<i>Schneider v. State of New Jersey</i> , 308 U.S. 147 (1939).....	17, 22
<i>Schneider Nat. Carriers, Inc. v. Bates</i> , 147 S.W.3d 264 (Tex. 2004).....	31
<i>Schussler v. Webster</i> , 2009 WL 648925 (S.D. Cal. March 9, 2009).....	30, 33
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975).....	11, 18, 22
<i>St. James Healthcare v. Cole</i> , 178 P.3d 696 (Mont. 2008)	28
<i>Tex. Dept. of Transp. v. Barber</i> , 111 S.W.3d 86 (Tex. 2003), <i>cert denied</i> , 540 U.S. 1177 (2004).....	8
<i>The Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus.</i> , 999 A.2d 184 (N.H. 2010)	28

<i>Times Film Corp. v. City of Chicago</i> , 365 U.S. 43 (1961).....	11
<i>Tory v. Cochran</i> , 544 U.S. 734 (2005).....	15
<i>Turner v. KTRK Television</i> , 38 S.W.3d 103 (Tex. 2000).....	9, 10
<i>United States v. Alvarez</i> , 132 S. Ct. 2537 (2012).....	20
<i>Vance v. Universal Amusement Co., Inc.</i> , 445 U.S. 308 (1980).....	14
<i>Wagner Equip. Co. v. Wood</i> , 893 F. Supp. 2d 1157 (D.N.M. 2012).....	29
<i>Walling v. Metcalfe</i> , 863 S.W.2d 56 (Tex. 1993).....	24
<i>Weiss v. Weiss</i> , 5 So.3d 758 (Fl. Dist. Ct. App. 2009).....	28
<i>WFAA-TV, Inc. v. McLemore</i> , 978 S.W.2d 568 (Tex. 1998), <i>cert. denied</i> 526 U.S. 1051 (1999).....	10

Constitutional Provisions and Statutes:

U.S. CONST. amend. I	<i>passim</i>
TEX. CONST. art. I, § 8	<i>passim</i>
TEX. CONST. art. I, § 13	9
TEX. GOV'T CODE § 22.001	xiv

Other Authorities:

Greg Abbott, *Preventing Bullying and Cyber Bullying* (June 1, 2011),
www.oag.state.tx.us/alerts/alerts_view.php?id=260&type=337

42 AM. JUR. 2d *Injunctions* § 96 (2000).....35

Julian Baumrin, *Internet Hate Speech and the First Amendment, Revisited*,
37 RUTGERS COMPUTER & TECH. L.J. 223 (2011)37, 38

C.C.S., *Recent Case, Injunction – Restraint of Libel to Preserve Business*, 16 TEX. L. REV. 111 (Dec. 1937).....26

43A C.J.S. *Injunctions* § 255 (2004)35

Erwin Chemerinsky, *Injunctions in Defamation Cases*,
57 SYRACUSE L. REV. 157 (2007)34

Abraham H. Foxman, Christopher Wolf, Letter to the Editor,
Internet Hate Speech, N.Y. TIMES, June 3, 2013,
available at http://www.nytimes.com/2013/06/04/opinion/internet-hate-speech.html?_r=037

Estella Gold, *Does Equity Still Lack Jurisdiction to Enjoin a Libel or Slander?*, 48 BROOK. L. REV. 231 (Winter 1982) 31, 32, 33

Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L. J. 855 (Feb. 2000)36

Jacqueline D. Lipton, *Combating Cyber-Victimization*,
26 BERKELEY TECH. L.J. 1103 (2011)36, 37

David McCarthy, *Equity Will Not Enjoin Libel: Was an “Iron Law” Saved by the Death of Johnnie Cochran?*,
21 DCBA BRIEF 8 (July 2009) 15

Michael I. Myerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295 (2001)..... 30, 31, 34

<i>Note, The Restraint of Libel by Injunction</i> , 15 HARV. L. REV. 734 (1902).....	34
Matt Peckham, <i>The Geography of U.S. Hate, Mapped Using Twitter</i> , TIME, May 20, 2013, available at http://newsfeed.time.com/2013/05/20/ the-geography-of-u-s-hate-mapped-using-twitter/	38
Roscoe Pound, <i>Equitable Relief Against Defamation and Injuries to Personalty</i> , 29 HARV. L. REV. 640 (1916).....	21, 34
RESTATEMENT (SECOND) OF TORTS § 623, Special Note on Remedies for Defamation Other Than Damages	31, 35
Robert D. Sack, SACK ON DEFAMATION § 10:6.1 (4 th ed. 2010).....	34
W.E. Shipley, <i>Injunction as Remedy Against Defamation of Person</i> , 47 A.L.R.2d 715 (1956).....	34
Stephen A. Siegel, <i>Injunctions for Defamation, Juries and the Clarifying Lens of 1868</i> , 56 BUFF. L. REV. 655 (July 2008).....	27
Rodney A. Smolla, LAW OF DEFAMATION § 9.95 (2d ed. 2013)	26, 31, 35
TEX. CONST. art. I, § 8, Interpretive Commentary (Vernon’s 2007)	25
Lawrence Tribe, AMERICAN CONSTITUTIONAL LAW § 12-37 (2d ed. 1988).....	27

STATEMENT OF THE CASE

Nature of the case: This is a suit for defamation brought by Plaintiff Robert Kinney against Defendants Andrew Harrison Barnes; BCG Attorney Search, Inc.; Employment Crossing, Inc.; and JD Journal, Inc.

Trial court and Judge: The Honorable David Phillips, County Court at Law Number 1 of Travis County, Texas.

Disposition in the trial court: The trial court granted the Defendants' motion for summary judgment and entered an order dismissing Plaintiff's claims.

Course of proceedings in the court of appeals: Kinney appealed to the Third Court of Appeals in Austin. All defendants remained parties to the appeal. The panel consisted of Chief Justice J. Woodfin Jones and Justices Diane Henson and Melissa Goodwin. The court of appeals affirmed the trial court's judgment in an unpublished memorandum opinion authored by Justice Goodwin. *See Kinney v. Barnes*, No. 03-10-00657-CV, 2012 WL 5974092 (Tex. App. – Austin, Nov. 21, 2012).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under § 22.001(a)(3) of the Texas Government Code because the construction of Article I, Section 8 of the Texas Constitution is necessary to the determination of this case.

The Court also has jurisdiction over this appeal under § 22.001(a)(6) of the Texas Government Code because the court of appeals has committed an error of law that is of such importance to the jurisprudence of this state that it requires correction by this Court, and the court of appeals' jurisdiction is not final under any statute.

ISSUE PRESENTED

Whether a permanent injunction ordering the removal of statements online that have been found to be defamatory after a full adjudication on the merits is permissible under the Texas Constitution.

INTRODUCTION

Suppose someone posts an outrageously false and offensive description of a private figure on a website. The victim sues and wins a verdict that the statements are defamatory, but the court holds the lies have to remain on the website anyway, and that the only remedy is damages. Never mind that whoever launched the attack might have no money, or so much money that the prospect of serial awards is no deterrent. The smear can remain online *forever* regardless, though all its target really wanted is for it to be taken down so fewer people might see or believe it.

This result seems absurd and would likely dumbfound ordinary citizens, who might assume courts are empowered to stop illegal character assassination. Yet it is endorsed by the court of appeals' decision in this case. Robert Kinney sued Andrew Barnes and his companies alleging that they defamed him in a statement on their websites. The only relief he seeks is a permanent injunction ordering them to remove the defamation and to ask other websites to do the same. But the trial court dismissed the case on summary judgment and the court of appeals affirmed, holding that an injunction against defamation would violate the Texas Constitution even if it is entered after discovery and trial on the merits. The court relied on two decades-old decisions of this Court that do not involve the sort of order

Kinney seeks. It also ignored key authority from the U.S. Supreme Court holding that injunctions against constitutionally unprotected speech such as defamation are permissible if they follow full adjudication on the merits.

The decision below reflects the traditional principle that “equity will not enjoin a libel.” But numerous states have abandoned that outdated rule over the last several years, and this Court should now do likewise. Once speech is found at trial to be defamatory, there is no justification for granting it eternal life online. This is particularly true given the power of the internet, which postdates this Court’s last consideration of these issues. The internet enables damaging lies to reach millions of readers after only a few moments of effort. It can also facilitate harmful and unprotected expression like cyber-bullying and online hate speech, which are mushrooming. Injunctive relief should be available to address these evils where appropriate.

Justice Stewart once wrote that “[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.” *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). This Court should uphold this fundamental value, grant the petition, and reinstate Kinney’s case.

STATEMENT OF FACTS

BCG employed Kinney as a legal recruiter until 2004, when he left to form his own recruiting firm. App. 003, CR 5.¹ Barnes is BCG's president. CR 3. In 2009, Barnes sued Kinney in California and posted an article or press release about the case on the website JDJournal.com. CR 5-6. Barnes is the President of JD Journal, Inc. CR 4. The article included a three-sentence paragraph accusing Kinney of orchestrating "an unethical kickback scheme" and paying a "bribe" to an associate at a law firm where Kinney hoped to place a candidate:

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.

App. 003, CR 6, 16-17. This statement also appeared on another of Barnes's websites, Employmentcrossing.com. App. 003, CR 3-6.²

¹ "App." refers to the appendix filed with the petition for review. "CR" refers to the clerk's record. An excerpt of the appendix containing the memorandum opinion of the court of appeals is attached to this brief.

² The articles remain online today. See <http://www.jdjjournal.com/2009/08/07/bcg-attorney-search%E2%80%99s-barnes-sues-competitor-kinney-recruiting/> (last visited August 6, 2013); <http://www.employmentcrossing.com/lcviewblog.php?id=4220> (last visited August 6, 2013).

Kinney sued Barnes and the other defendants in County Court at Law Number One in Travis County. App. 002, CR 2-25. He alleges that “Barnes knew... [he] had no scheme to pay cash kickbacks to anyone” and therefore asserts that the paragraph accusing him of paying the associate is false and defamatory. CR 6-7. He brings claims for defamation and defamation per se and seeks only injunctive relief. App. 003, CR 7-8, 15. Specifically, Kinney requests a permanent injunction following trial on the merits ordering the defendants to remove the text relating to kickbacks from their websites and to ask other website operators that are republishing the defamatory statements to remove them as well. App. 003-04, CR 7-8.³

The defendants moved for summary judgment on the sole ground that the permanent injunction Kinney requests would constitute a prior restraint in violation of Article I, Section 8 of the Texas Constitution. App. 004, CR 24-25. The trial court granted the motion and also denied leave for Kinney to amend his petition. App. 001, CR 76.

The Third Court of Appeals affirmed the summary judgment and held that Kinney’s requested order would violate Article I, Section 8. App. 006-08. The court decided that affirmance was required by two of this Court’s

³ Kinney’s petition additionally requested that the injunction require defendants to post a copy of the court’s order, a retraction, and a letter of apology on their websites, but he does not appeal this aspect of the summary judgment. CR 8, App. 004, 009 n. 6.