

JOSEPH H. HART
Senior District Judge

May 26, 2005

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Re: Cause No. GN-301481; *Paul Clayton, et al. v. Bill Ceverha, Individually and as Treasurer of Texans for a Republican Majority Political Action Committee, et al.*

Dear Counsel:

I have set out below my decision in this case. This letter should not be considered formal findings of fact or conclusions of law. It is, rather, an outline of my ruling on several major issues and my conclusions on liability and damages. Formal findings and conclusions, if requested after the signing of a final judgment, may include more detail.

My decision covers only liability for alleged reporting violations of Chapter 254 of the Texas Election Code. I rule that alleged violations of Chapter 253 are not before me at this time and can be pursued at a subsequent trial. Addressing a housekeeping matter, numerous exhibits were offered by both sides with objections to their admissibility from the opposing party. All objections are overruled, and all offered exhibits are received in evidence.

Basic Background Facts

Plaintiffs were candidates for the Texas House of Representatives in the 2002 Election. Texans for a Republican Majority Political Action Committee (TRMPAC) registered as a general-purpose committee under the Election Code. TRMPAC received contributions and made expenditures during the 2002 election. Defendant Bill Ceverha was appointed and served as treasurer for TRMPAC during the 2002 election.

Standing and Individual Responsibility

The evidence shows that Plaintiffs' races were "targeted" races by TRMPAC. Each Plaintiff was an "opposing candidate" within the meaning of Section 254.231(b) of the Election Code. Pursuant to Section 254.231(a), each has standing and is entitled to file suit to recover statutory damages against Defendant. To the extent damages are awarded, Defendant is responsible individually.

Liability

Statutory Framework

Section 254.031 of the Election Code requires the treasurer of a general-purpose committee such as TRMPAC to include political contributions and expenditures in certain reports to the Texas Ethics Commission. A "general-purpose committee" means a "political committee" that has among its principal purposes supporting or opposing two or more candidates. [Sec. 251.001(14)]. A "political committee" means a group of persons that has as a principal purpose accepting political contributions or making political expenditures. [Sec. 251.001(12)]. TRMPAC is both a political committee and a general-purpose committee.

A "political contribution" [Sec. 251.001(5)] is defined as a "campaign contribution" [Sec. 251.001(3)], which means a "contribution to a...political committee that is...given with the intent that it be used in connection with a campaign for elective office...." A "political expenditure" [Sec. 251.001(10)] is defined as a "campaign expenditure" [Sec. 251.001(7)], which means an "expenditure made by any person in connection with a campaign for an elective office...."

Primary Issue

The issue generally is whether defendant Bill Ceverha, as treasurer of TRMPAC, failed to report certain political contributions and expenditures as required by Chapter 254 of the Texas Election Code. There is no question that some funds received and paid by TRMPAC were not reported; the question is whether they should have been.

Preliminary Issue: "Express Advocacy"

Defendant urges that for the Election Code's financial reporting requirements to comply with the free speech provision of the First Amendment of the United States Constitution, the funds must be used for "express advocacy," that is, for communications that expressly advocate the election or defeat of a clearly identified candidate. Among the authorities cited are the United States Supreme Court case, *Buckley v. Valeo*, 424 U.S. 1 (1976), and the Texas Supreme Court case, *Osterberg v. Peca*, 12 S.W. 3d 31 (Tex. 2000) (applying the holding in *Buckley* to the Texas Election Code). Defendant points out that none of the TRMPAC funds in question were used for express advocacy; therefore, he urges that they did not have to be reported.

Neither *Buckley* nor *Osterberg* limits what must be reported under the facts of this case, however. “Express advocacy” is a constitutionally imposed protection for individuals and groups other than political committees; its application, when dealing with individuals and non-political committees, ensures that a reporting statute is not impermissibly broad. *Buckley*, 424 U. S. at 80. Such protection is not necessary for organizations like TRMPAC, “the major purpose of which is the nomination or election of a candidate.” Expenditures of such organizations “are...by definition, campaign related.” *Buckley*, 424 U. S. at 79.

As TRMPAC’s principal purposes, by definition and in fact, are supporting or opposing candidates as well as accepting political contributions and making political expenditures, I hold that campaign contributions and expenditures of TRMPAC need not meet the “express advocacy” test to be reportable by its treasurer.

Political Contributions

Intent

Political, or campaign, contributions must be reported. However, as noted above, an essential element of the definition is that a contribution be “given with the intent that it be used in connection with a campaign for elective office....” [Sec. 251.001(3)] (Emphasis added).

Defendant urges that there was legally insufficient evidence of intent of the contributors to TRMPAC. In essence, Defendant is arguing that Plaintiffs have failed to produce direct evidence that contributions were intended to be used in connection with campaigns for elective office. In other words, if there are no letters or check memos expressing intent (or they exist but do not survive a hearsay objection), presumably each and every one of the hundreds or thousands of contributors would have to be subpoenaed and called to the witness stand to establish her or his intent.

Direct evidence is not the only kind of evidence that can be used to establish a fact, however. A fact, including intent, can also be proven by circumstantial evidence, that is, when it can fairly and reasonably be inferred from other facts proved. Here, TRMPAC’s widely published purpose or mission was to “help Republican candidates successfully run and win campaigns in Texas....” It solicited money from contributors stating that “[e]very dollar you contribute will go directly toward helping win the tough races in November.” TRMPAC did exactly what it represented to the public and to contributors: dollars contributed were used in connection with campaigns for public office. Furthermore, not surprisingly, there is no evidence that anyone complained that the donated funds were used for purposes other than what the contributor intended.

The logical extension of Defendant's argument is essentially as follows:

Defendant should be able to assume that every dollar given by a contributor was intended that it not be used in connection with a campaign for public office (and, therefore, that he does not have to report it) unless the contributor expressly tells him otherwise, even though:

- 1) TRMPAC's published mission is to help run and win campaigns,
- 2) TRMPAC solicits money and expressly tells potential contributors that it will use the money to elect candidates, and
- 3) TRMPAC in fact does use the money to elect candidates.

Defendant's implicit (if not explicit) message to contributors is the following: "If you don't tell me how you want us to use your money, I don't have to report it, and I won't report it." I do not believe that the legislature intended that a campaign treasurer could avoid performing his statutory duties by turning a blind eye to obvious facts. I cannot interpret the Election Code in the manner suggested by Defendant.

I conclude that there is overwhelming evidence from which the intent of the donors to TRMPAC can be fairly and reasonably inferred. I find that the contributions were intended to be used in connection with a campaign for elective office. Therefore, they were "political contributions", or "campaign contributions," within the meaning of Sections 254.031, 251.001(5) and 251.001(3) of the Election Code.

Reporting Exception

As "political contributions" they should have been reported by Defendant, unless they fall within the exception for funds given by corporations "to finance the...administration of a general-purpose committee [i.e., TRMPAC]." [Sec. 253.100 (a), (d)] (Emphasis added).¹

Plaintiffs do not dispute that some of the corporate contributions were used for administrative purposes; however, they assert that over \$500,000 were not used for administrative purposes and should have been reported. Defendant claims that all the unreported corporate funds in dispute were used for administration of TRMPAC. The issue is the breadth of what is included in the term "administration."

¹ The Texas Ethics Commission has stated that Section 253.100 clearly contemplates that a contribution to a general-purpose political committee is a political contribution. It makes no difference whether it was meant to fund the committee's specific election activities or its general administrative costs, it is still a political contribution. Op. Tex. Ethics Comm'n No. 132 (1993).

This issue has been addressed several times by the Texas Ethics Commission. In general, the Commission's guide for determining whether a particular expense is "administrative" is "whether the expense is one that would be incurred in the normal course of business by any active organization, whether or not it engaged in political activity." Op. Tex. Ethics Comm'n No. 132 (1993) (Emphasis added). Examples given by the Commission of administrative expenditures include office rent, utilities (gas, water, electric), and general office supplies.

Defendant, on the other hand, urges that expenditures for political fundraising, polling, staff salary for political activity, political conferences and candidate meetings, political direct mail, a corporate campaign contribution to the national party, political research and political printing should all be considered for "administration." What Defendant is urging is a much broader definition of "administration" than the Texas Ethics Commission would allow.

I find the Commission's reasoning persuasive. I hold that \$532,333 in corporate contributions were not in fact "to finance the...administration" of TRMPAC and should have been reported by Defendant. In addition, TRMPAC accepted \$81,100 in non-corporate campaign contributions which fit within no exception and which should have been reported by Defendant.² I find that the contributions, corporate and non-corporate, that should have been reported total \$613,433.³

Expenditures

I find that all of the expenditures by TRMPAC were made "in connection with a campaign for an elective office" and fit within the statutory definition of "campaign expenditure." Unlike corporate contributions for administration of a general-purpose committee, there are no exceptions for reporting of expenditures. I find the expenditures that should have been reported by Defendant, including the \$65,000 in-kind expenditure for a voter list given to the Texas Association of Business, to total \$684,507.

Damages

Having determined that there were campaign contributions and expenditures that should have been reported, the next question is what, if any, damages should be awarded to Plaintiffs.

² See, Op. Tex. Ethics Comm'n No. 132 (1993) which states that the exception from reporting requirements for funding the administration of a general-purpose committee extends only to contributions from corporations or labor organizations.

³ Of course, if a contribution to a general-purpose committee is for an unregulated activity, it does not have to be reported, so long as it is earmarked for such purpose. Op. Tex. Ethics Comm'n No. 131 (1993) (lobbying), Op. Tex. Ethics Comm'n No. 409 (1998) (scholarship fund). All activity at issue was regulated activity; further, there is no evidence of earmarking contributions for unregulated activities in this case.

Statutory Framework

Section 254.231 of the Election Code governs liability to opposing candidates and the amount of damages that may be awarded. It reads, in pertinent part, as follows:

§ 254.231. Liability to Candidates

(a) A...campaign treasurer...who fails to report in whole or in part a campaign contribution or expenditure as required by this chapter is liable for damages as provided by this section.

(b) Each opposing candidate whose name appears on the ballot is entitled to recover damages under this section.

(c) In this section, "damages" means:

(1) twice the amount not reported that is required to be reported;
and

(2) reasonable attorney's fees incurred in the suit.

(Emphasis added).

Paraphrased, the key elements are:

- a treasurer
- who improperly fails to report campaign contributions or expenditures
- is liable to each opposing candidate whose name appears on the ballot
- for twice **the amount not reported that is required to be reported.**

Unfortunately, the statute, in several key and disputed respects, is not a model of clarity. For example, one reading of Section 254.231 would allow each opposing candidate to recover twice the total contributions and expenditures that should have been reported in the whole election, whether or not they specifically were donated for or used in that candidate's race.

Another reading would allow an opposing candidate to recover twice the contributions and expenditures that should have been reported only if they were earmarked for, or spent specifically, in his or her race

Issue

The issue is whether “the amount not reported that is required to be reported” (the core amount on which damages are based) encompasses contributions and expenditures in the whole election (including races other than Plaintiffs’) or only contributions and expenditures specifically relating to the races of each of the five named Plaintiffs in this case.

Application of the Different Approaches

The difference in interpretation is staggering in result. For example, if damages are awarded to “each opposing candidate” (twenty-three in number) based on the amount that should have been reported for the whole election, the grand total for Defendant’s potential liability is \$59,705,240, calculated as follows:

Contributions that should have been reported:	\$613,433
Expenditures that should have been reported:	<u>684,507</u>
Total unreported amount	\$1,297,940
Statutory penalty	<u>X 2</u>
Recovery for each opposing candidate	\$2,595,880
Number of candidates	<u>X 23</u>
TOTAL	\$59,705,240

Limiting damages just to the five Plaintiffs, but using the amount that should have been reported for the whole election, the amount Defendant would be required to pay in this suit is **\$12,979,440** (5 X \$2,595,880). There is at least one other pending case in which other opposing candidates are seeking damages. If this measure of damages is used, then Defendant would be subject to an increase in liability of \$2,595,880 for each additional plaintiff.

In contrast, if the damages are limited, as suggested by Defendant, to only what is proven to have been contributed or expended specifically for the opposing candidates’ races, then Defendant is subject to only a small fraction of the damages calculated on an election wide basis.

Problems with Each Approach

Each approach has its problems. If the statute is construed to give each opposing candidate the right to recover two times the amount of contributions and expenditures that should have been reported for the whole election, then, as pointed out above, the potential exposure for a treasurer is astronomical. This approach results in an exorbitant windfall for plaintiffs and a penalty of Draconian proportions that the legislature could not have intended. Furthermore, such an interpretation would face serious constitutional challenges. In *Ragsdale v. Progressive Voters League*, 790 S.W. 2d 77, 83 (Tex. App.—Dallas 1990), *aff’d in part*, 801 S.W. 2d 880 (Tex. 1990) the Court of

Appeals noted that the amount of a statutory penalty is within the power and discretion of the Legislature “except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind.” The Texas Supreme Court suggested that “punishment for reporting violations can rise to the level of being so severe and so extreme that it amounts to an unconstitutional infringement of rights under the First Amendment.” *Osterberg*, 12 S.W.3d at 50, n.24.

On the other hand, if damages are based on only what is proven in each specific race, Plaintiffs urge the lion’s share of improperly unreported amounts is not considered in the damage calculation--eviscerating the enforcement provisions of the statute. By their very nature contributions to a general-purpose committee are not tied to a specific race; likewise, many, if not most, expenditures benefit all PAC-supported candidates generally and may not be tied to a specified opposing candidate. For example, in this case Plaintiffs can point to only \$98,330 in expenditures that allegedly are specifically related to their races. Contrast that amount with the total election wide contributions and expenditures that I have ruled should have been reported: \$1,297,940--thirteen times the race-specific number.

Perhaps in an attempt to remove the potential constitutional problems, Plaintiffs have suggested another approach that neither awards Plaintiffs damages calculated solely on an election wide basis nor solely on a race-specific basis: 1) Each Plaintiff recovers the amount that specifically relates to his or her race, and 2) for all election wide funds that should have been reported but are not race-specific, divide by the total number of opposing candidates and award each plaintiff only his or her fractional part of that amount. Using this method, each of the five Plaintiffs would recover over \$100,000, with the total for all five (for race-specific and non-race-specific funds) exceeding \$600,000.

This approach has some equitable appeal. Cases cited by Plaintiffs, while involving other types of injuries, support the general proposition that the full amount of damages should not be denied, and that a defendant/wrongdoer should not escape liability, just because the damages are difficult to ascertain or apportion. For several reasons, however, I do not believe that this approach can be used.

First, no language of Section 254.231 hints at apportionment among opposing candidates as a possible approach. The statute states that “each” candidate is entitled to recover “twice the amount not reported that is required to be reported.” To follow Plaintiffs’ suggestion would be to engraft into Section 254.231 a totally new method of awarding damages.

Second, the cases cited by Plaintiffs have one common, material distinction from this case: Plaintiffs in the cited cases had suffered actual damages at the hands of the defendants (for example, as the result of anti-trust violations, patent infringement, and misappropriation of oil reserves); they would not have been made whole had the courts not tailored the damages to the facts of the case. Here, on the other

hand, Plaintiffs have not contended that they have suffered actual, compensable monetary damage as a result of Defendant's failure to report. They are, rather, seeking to enforce a statutory penalty as private citizens/candidates as allowed by Section 254.231.

Restricting each Plaintiff in this case to recovery based on race-specific funds does not deny anyone recovery of damages actually suffered.

Third, while I agree with the court in *Ragsdale* that enforcement is the essence of the statute and that enforcement promotes compliance with provisions of the Election Code, 790 S.W.2d at 84, the goal of deterring wrongful failure to report is not lost by limiting plaintiff/candidates to recovery based on race-specific, as opposed to election wide, funds. If private enforcement were the only means of deterring such wrongdoing, then Plaintiffs would have a stronger argument. However, the next section of Chapter 254 clearly provides an enforcement mechanism in which damages for wrongfully unreported funds can be election wide and are not limited to specific races:

§ 254.232. Liability to State

A...campaign treasurer...of a political committee who fails to report...a political contribution or political expenditure as required by this chapter is liable in damages to the state in the amount of triple the amount not reported that is required to be reported.

In addition, as noted in *Ragsdale*, statutes "imposing penalties are strictly construed, and one who seeks to recover a penalty must bring himself clearly within the terms of the statute." 790 S.W.2d at 84. I do not believe that Plaintiffs have clearly demonstrated that the Election Code gives them the right to recover damages based on election wide, as opposed to race-specific contributions and expenditures.

Race-specific Damages

Plaintiffs have proven by a preponderance of the evidence that the race-specific amount not reported that was required to be reported totals \$98,330. As provided by statute, I will award twice that amount⁴, or \$196,660, to be divided as follows: \$17,332 each to Plaintiffs Clayton, Head and Lengefeld; \$57, 332 to Plaintiff Duncan; and \$87,332 to Plaintiff Kitchen.

Attorneys Fees

Plaintiffs will be awarded reasonable attorneys fees as allowed by Section 254.231(d). I ask counsel to confer, and if you cannot agree, we will have a hearing to determine the amount to include in a judgment.

⁴ Defendant does not contest the constitutionality of doubling the amount of race-specific damages.

Conclusion

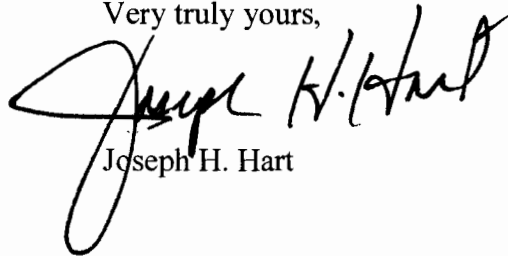
As I have ruled above, the issue that is before me now is whether there was a failure to report contributions and expenditures that should have been reported; the legality of the contributions or expenditures themselves is an issue for another trial. The Texas Supreme Court, citing the United States Supreme Court in *Buckley*, has emphasized the importance of full reporting to our democratic society:

[D]isclosure advances a strong “informational interest because it ‘helps voters to define more of the candidates’ constituencies.”

A requirement that a spender report the amount and use of money spent in candidate elections is thus “a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of [the] election system to public view.” *Osterberg*, 12 S.W.3d at 42

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joseph H. Hart". The signature is fluid and cursive, with a large loop at the beginning and a long tail that extends downwards and to the left.

Joseph H. Hart

Copy to District
Clerk for filing