

Defamation and Privacy

The following cases cover the period of April 1, 2013 September 30, 2013.

Michael Morrison

DEFAMATION

Exceptions to the Texas Public Information Act are Personal, not Relational

Greg Abbott, in his Official Capacity as Attorney General of the State of Texas, Appellant v. Dallas Area Rapid Transit, --- S.W.3d ----, 2013 WL 4820356, No. 03-11-00630-CV. (Tex.App.-Austin, Aug. 30, 2013) [Opinion not yet released for publication].

Dallas Area Rapid Transit (DART), objected to disclosing an investigation report regarding a claim of racially discriminating hiring practices and brought suit to contest the Attorney General's determination that the Texas Public Information Act (PIA), Tex. Gov't Code §§ 552.001-353, requires disclosure of the names, positions, and hire dates of the public employees whose interviews are summarized in the investigation report

It is undisputed that the investigation report at issue here is core public information that is only exempt from disclosure if it is "expressly confidential under other law." DART argued that the report is confidential under concepts of common-law privacy, federal and state anti-retaliation laws, and the "informer's privilege." It also contended that two PIA exceptions to disclosure apply.

Under *Industrial Foundation of the South v. Texas Industrial Accident Board* *Industrial*, See 540 S.W. 2d 668, 686 (Tex.1976), information is protected from mandatory disclosure as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts about the person potentially affected by disclosure that, if disclosed, would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

The information in the report is not, however, about the interviewees themselves nor is it

intimate or highly embarrassing. Additionally, in dicta, the court noted without deciding that the information at issue may be of legitimate public concern.

The court also considered and rejected DART's arguments against disclosure under anti-retaliation statutes, the informer's privilege and PIA exceptions. It ordered the identities, job positions, and hire dates of the interviewees in the investigation report disclosed without redaction.

Defamation Per Se Must be Apparent on its Face

In *KTRK Television, Inc. v. Robinson*, --- S.W.3d ----, 2013 WL 3483773, No. 01-12-00372-CV. (Tex.App.-Hous. (1 Dist.), July 11, 2013) [Opinion not yet released for publication], the plaintiff argued that statements made by KTRK, when viewed in the context of information subsequently posted on KTRK's website by readers, are defamatory per se because they falsely imputed criminal behavior to her by insinuating that the plaintiff embezzled over \$3 million.

The court held that the plaintiff failed to establish defamation per se because of her need to rely on the third-party postings on KTRK's comment board. Defamation per se requires that the defamatory nature of the challenged statement be apparent on its face without reference to extrinsic facts or innuendo, like those on the comment board. If the court must resort to innuendo or extrinsic evidence to determine whether a statement is defamatory, then it is defamation per quod and requires proof of injury and damages.

Here, the court found nothing intrinsically defamatory about KTRK's statements and held that the third party comments posted on its website cannot transform the publication into per se defamation.

Substantial Truth Defense Discussed

In *Neely v. Wilson, CBS Stations Group of Texas*, --- S.W.3d ----, 2013 WL 3240040

(Tex.), 56 Tex. Sup. Ct. J. 766 (Tex. June 28, 2013) [Opinion not yet released for publication], the supreme court wrote at considerable length on whether the evidence raised a genuine issue of material fact as to the substantial truth of the gist of the publication. While the opinion is largely fact-based both the majority and dissenting opinions, which duel over the proper interpretation of the record, are well worth reading.

No Absolute Judicial Privilege Found to Apply

In, *Robert Witt v. Shell Oil Company and Shell International, E & P, Inc.*, --- S.W.3d ---, 2013 WL 3198426, No. 01-11-00201-CV (Tex.App.-Hous. (1 Dist.) June 25, 2013), [Opinion not yet released for publication], the trial court granted the defendants' motion for summary judgment based on its determination that an absolute privilege applied to the publication that formed the basis of the plaintiff's defamation claim. The court of appeals reversed and remanded reasoning that the circumstances justified only the conditional privilege applicable to communications made in the public interest.

The summary-judgment evidence was that the DOJ met with Shell to discuss its business dealings with another company and that Shell agreed to "voluntarily investigate its business dealings" with the company and provide the DOJ with certain documents and Shell's "proposed investigative plan." Eighteen months later, Shell provided its investigative report, which contained the complained-of statements. It was twenty months later before the DOJ "open[ed] a judicial proceeding and file[d] a criminal information against Shell." Without a criminal case having been filed or, at least being proposed either at the time the DOJ first contacted Shell or when Shell submitted its report, the court of appeals held that the Shell did not conclusively establish the applicability of the absolute privilege.

The dissent, characterizing the issue as one of "extraordinary importance to the many international companies in Texas that face

FCPA [Federal Corrupt Practices Act] inquiries from the DOJ", argued that the communications should, nonetheless, be absolute privileged. "Absolute privilege is recognized in limited circumstances because it creates a bright-line rule upon which witnesses may depend, thereby incentivizing witnesses to make expressions that may serve important public interests without fear of being subjected to civil litigation. Shell's statements here did not trigger or instigate a criminal investigation; they were part of Shell's communication to the DOJ reporting the results of its internal self-investigation and information gathering, spurred by the DOJ's request for information and cooperation in its ongoing investigation to determine whether and whom to prosecute for violations of the FCPA. As such, they should be, and I believe under existing law are, absolutely privileged."
