**T.A.D.C. Defamation/Libel/Slander Newsletter**

**Update on Texas Defamation Cases**

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***In Re Lipsky*, No. 13-0928, slip op. (Tex. April 24, 2015), *available at* http:// www.txcourts.gov/media/943997/130928.pdf.**

This case involves a defamation claim asserted by an oil company against an outspoken critic of the Texas fracking industry. In 2011, Steven Lipsky and his wife filed complaints with the Environmental Protection Agency (EPA) alleging that Range Resources Corporation ("Range") was responsible for contaminating their water well through oil and gas drilling activities. While the EPA's investigation found that Range's activities contaminated the water, the Texas Railroad Commission found that the contamination was not caused by Range. Around that time, Lipsky posted a YouTube video that showed him holding a garden hose that he claimed was hooked up to his water well. He held up a lighter, flicked the switch, and the water spewing from the hose burst into flames. The Lipskys went on to launch a vocal press campaign against Range and the Texas fracking industry. The EPA ultimately withdrew its findings against Range in 2012.

The Lipskys eventually sued Range for contamination of their water well. In response, Range counterclaimed for defamation, among other causes of action, and contended that their deep shale fracking could not have contaminated the Lipskys' shallow water well. The Lipskys moved to dismiss the oil company's counterclaims under the Texas Citizens Participation Act, but the trial court denied the motions. On appeal (*via mandamus*), the court dismissed most of Range's claims against the Lipskys. But, the appeals court found that Range satisfied a prima facie case for each essential element of their defamation claim against the Lipskys, thus precluding dismissal of that claim under the Texas Citizens' Participation Act.

The Texas Supreme Court heard oral argument for this case December 4, 2014 and rendered a decision on April 24, 2015. This was a unanimous opinion written by Justice Devine. The Court agreed to allow Range's defamation claim against Lipsky to return to the trial court for trial on the merits, ultimately finding that "[t]he trial court . . . did not abuse its discretion in denying Lipsky's motion to dismiss."

The Court's rationale for its decision was based in large part on the notion that environmental responsibility is an attribute particularly important to those in the energy industry, including natural gas producers, such as Range, who employ horizontal drilling and hydraulic fracturing in their business. The opinion expressed concern that "[a]ccusations that Range's fracking operations contaminated the aquifer thus adversely affect the perception of Range's fitness and abilities as a natural gas producer." The Court further maintained that "[c]orporations and other business entities have reputations that can be libeled apart from the businesses they own, and such entities can prosecute an action for defamation in their own names."

*Lipsky* is significant in that it opens the door to potential liability for those openly critical of the oil and gas industry, particularly those who publicly criticize activities such as fracking without double-checking the accuracy of the claims made. While hydraulic fracturing is currently a booming industry in Texas, it is not without its controversy. Steven Lipsky was neither

the first nor the only person to openly criticize fracking in a public forum. A quick search on YouTube brings up dozens of videos of people claiming that fracking has made their tap water flammable. Most of these videos have views numbering in the thousands or tens of thousands, with some reaching over a million views.

Overall, *Lipsky* provides a new avenue for the oil and gas industry—and arguably corporations and other businesses in general—to pursue defamation claims against those who make disparaging statements against them on YouTube, Facebook, and Twitter. In light of the Court's opinion in *Lipsky*, an oil company has legitimate grounds to sue those openly and publically critical of its drilling activities for defamation, so long as the company sufficiently proves the essential elements of its claim and said criticism is, in fact, false.

***Velocity Databank, Inc. v. Shell Offshore, Inc.*, 2014 WL 7473797, __ S.W.3d ____ (Tex. App.—Houston [1st Dist.] 2014, pet. filed).**

*Velocity* is a case where a seller of geophysical data, Velocity Databank, Inc. ("Velocity"), brought a defamation action against various Shell Oil Company entities and a Shell employee (collectively, "Shell") arising out of allegedly defamatory statements about Velocity that were published in a database on a federal agency's website.

In 1988, Shell and Velocity entered into a license agreement under which Velocity allowed Shell access to its Gulf of Mexico geophysical data, including velocity surveys. In December 1998, the United States Minerals Management Service ("MMS") began a Historical Well Data Cleanup Project, which was intended to correct, complete, and update the agency's historical data on wells drilled on offshore blocks in the Gulf of Mexico. To that end, MMS required certain operators and leaseholders, including Shell, to identify a contact person within their organization to facilitate the identification and transfer of requested data regarding wells in the region to MMS. MMS then loaded the data onto its web-based, publicly accessible geophysical database known as the Technical Information Management System ("TIMS"). TIMS is accessible to the public through the MMS website.

In October 2000, MMS analyst Scott Cranswick contacted Faye Schubert, a Shell employee, to request velocity surveys for two offshore wells in the Gulf of Mexico. On October 19, 2000, Schubert responded to Cranswick in an email that stated in part: "These velocity DB surveys are sometimes not very good . . . . The bottom line is that we only have the one digital survey and it is questionable."

After receiving the email from Schubert, MMS posted the velocity survey on TIMS, along with the following notations interspersed among lines of data:

> [S]urvey data is bogus. 10/19/2000 Faye Schubert said this velocity survey is from Velocity Databank, Inc. which has dubious value because the time/depth pairs were generated by this company using a velocity model and likely are not actual check shot. . . . This survey was acquired from Velocity Databank, Inc., which means it might be a fictitious survey generated from a regional grid of velocity functions that were mapped by Velocity Databank who would provide fictitious velocity surveys from their com.

It would not be until November 10, 2010 when William Gray, a Velocity Databank consultant, reviewed and downloaded a file containing the above-mentioned velocity survey from TIMS. In light of Gray's discovery, Velocity sued Shell for defamation and libel and pleaded the discovery rule on November 9, 2011—more than ten years after MMS published the statements in question.

The central issue in *Velocity* was whether the discovery rule applies to an action for defamation when the alleged defamatory statements were published in a database on a federal agency's public website. Shell's position was that, because the statements were posted on the MMS website, they constituted "public knowledge" and were not "inherently undiscoverable." Velocity's position was that the "public knowledge" exception to application of the discovery rule to defamation claims does not apply because "[i]t is extremely unlikely that a member of the public would simply sit down and read this material." Velocity maintained that TIMS is not the equivalent of "mass media" and its material cannot be considered "public knowledge."

The court ultimately disagreed with Velocity and found in favor of Shell, holding that "statements published on a website owned and maintained by a federal government agency and accessible to the public without charge" are "public knowledge" and are "not 'inherently undiscoverable.'" The court relied heavily on *Shell Oil Co. v. Ross*, 356 S.W.3d 924 (Tex. 2011)—a case in which the Texas Supreme Court characterized prices published in the El Paso Permian Basin Index as "[r]eadily accessible and publicly available information"—as authority for its decision. *Id.* at 929.

The court also discussed the Texas Supreme Court case *Kelley v. Rinkle*, 532 S.W.2d 947 (Tex. 1976), at length. The plaintiff *Kelley* sued for damages caused by the defendant's filing of a credit agency report stating that the plaintiff owed the defendant money on a past due account. *Id.* at 947. The Court held that the discovery rule applied in Kelley's case because "the period of limitations for causes of action for libel of one's credit reputation by publication of a defamatory report to a credit agency begins to run when the person defamed learns of, or should by reasonable diligence have learned of, the existence of the credit report." *Id.* at 949. The Court decided *Kelley* with an important caveat, however: "[w]e would not apply the discovery rule where the defamation is made a matter of public knowledge through such agencies as newspapers or television broadcasts." *Id.*

In its brief and oral arguments, Velocity tried to argue that statements posted on a government agency's website are not a "mass medium" like newspapers or television broadcasts. The *Velocity* court, however, viewed *Kelley*'s "newspapers or television broadcasts" language as mere examples of instances where defamatory statements are matters of public knowledge, and interpreted the "public knowledge" exception to the discovery rule quite broadly. The *Velocity* court viewed items posted on the internet, in particular, as readily accessible matters of public knowledge, citing *Hamad v. Ctr. for Jewish Cmty. Studies*, 265 Fed. App'x. 414, 416–17 (5th Cir. 2008) (concluding that Internet is "mass medium" under Texas law for purposes of single-publication rule) and *Serv. Emps. Int'l Union Local 5 v. Prof'l Janitorial Serv. of Houston, Inc.*, 415 S.W.3d 387, 394 (Tex. App.–Houston [1st Dist.] 2013, pet. filed) ("That Internet websites fall within the broadest of these definitions as an

electronic 'means of mass communication' is clear."), as authority.

***Paulsen v. Yarrell*, 455 S.W.3d 192 (Tex. App.—Houston [1st Dist] 2014, no pet.).**

In *Paulsen*, a South Texas College of Law professor by the name of James W. Paulsen sued family-law attorney Ellen Yarrell for defamation and tortious interference with contract arising out of a letter Yarrell sent to Paulsen's employer, colleague, and Office of Chief Disciplinary Counsel of Texas State Bar. Yarrell sent the letter in response to a letter that Paulsen sent, purporting to act as an amicus curiae, to a trial judge presiding over a court proceeding in which Yarrell represented a party.

Essentially, what happened in *Paulsen* was that Yarrell first moved for summary judgment as to Paulsen's tortious interference and defamation claims. The trial court granted partial summary judgment in Yarrell's favor. In response to the trial court's decision, Paulsen filed a third amended petition, in which he divided his defamation claims into two separate counts.

Upon receipt of Paulsen's third amended petition, Yarrell then moved to dismiss one of Paulsen's defamation claims pursuant to pursuant to Chapter 27 of the Civil Practice and Remedies Code—otherwise known as the Texas Citizens Participation Act ("TCPA"). Yarrell's argument was that Paulsen's "claims for defamation and tortious interference should be dismissed because they are based on, related to, or in response to [her] exercise of her right to petition the State Bar." Yarrell further sought attorney's fees and costs in accordance with TEX. CIV. PRAC. & REM. CODE § 27.009. In addition to her TCPA motion to dismiss, Yarrell filed another motion for summary judgment as to Paulsen's defamation and tortious interference claims.

In response to Yarrell's motion to dismiss, Paulsen filed his own TCPA motion to dismiss Yarrell's motion to dismiss. Paulsen argued that Yarrell's TCPA motion to dismiss was itself a "legal action" under the TCPA and sought dismissal of her motion to dismiss and attorney's fees and costs as provided by the statute.

The trial court ended up granting Yarrell's motion for summary judgment, but denying her TCPA motion to dismiss. The court also granted Paulsen's TCPA motion to dismiss Yarrell's TCPA motion to dismiss, but denied Paulsen's request for attorney's fees and court costs. Both Paulsen and Yarrell filed notices of interlocutory appeal. Paulsen appealed the trial court's denial of attorney's fees in conjunction with his TCPA motion, which the trial court granted. Yarrell appealed only the trial court's denial of her TCPA motion to dismiss.

*Paulsen* presented two key issues. The first was whether the trial court's denial of Paulsen's motion for attorney fees and costs upon granting of his TCPA motion to dismiss was appealable via interlocutory order. The second was whether an amended pleading that adds additional details not included in the original petition in an attempt to distinguish two distinct defamation claims restart the 60-day filing deadline for filing a motion to dismiss under the TCPA.

With regards to the first issue, the trial court found that an "order denying Chapter 27 attorney's fees is an order from which no statutory right to interlocutory appeal lies." The rationale for the trial court's decision was that TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) only permits interlocutory appeals from an order that "denies a motion

to dismiss filed under Section 27.003." The court noted that the aspect of Paulsen's motion that was denied—the request for attorney's fees—was a distinct ruling that did not deny a "motion to dismiss filed under Section 27.003." The court further maintained that it is obliged to interpret the scope of its interlocutory appellate jurisdiction narrowly.

With regards to the second issue, the court found that Paulsen's third amended petition did not restart the 60-day filing deadline for filing a motion to dismiss under the TCPA because the amended petition merely added additional details in an attempt to distinguish two distinct defamation claims. The court noted that "[a]n amended pleading that does not add new parties or claims does not restart the deadline for filing a motion to dismiss under the TCPA." Given that Paulsen's original petition alleged that Yarrell published allegedly false and defamatory statements to an official of the State Bar of Texas, the additional details asserted in the third amended petition still relied on the same factual allegations stated in the original petition.

***Function One Consulting Group, LLC v. Accudata Systems Inc.*, No. 2009-79590; 5 Tex. J.V.R.A. 10:7, 2014 WL 2964359 (113th Dist. Ct., Harris County, Tex. March 13, 2014).**

In *Function One*, a technology company based in Houston initiated a defamation lawsuit after a competitor made allegedly false accusations of tax violations to plaintiff's then-largest customer. The case's plaintiff, Function One Consulting Group LLC ("Function One"), is a provider of global IT consultancy and technology services in the Houston area. Function One's largest client was BG Group, a multinational oil and gas company based in the United Kingdom.

The *Function One* lawsuit began after plaintiff Function One hired several former employees of defendant and Function One competitor, Accudata Systems Inc. ("Accudata"). In retaliation, Accudata began sending defaming emails to BG Group making accusations of Function One tax violations. Accudata additionally submitted false reports to the FBI, IRS and Texas Workforce Commission.

In response to the BG Group emails, as well as its false reports to state and federal authorities, Function One filed suit in the 113th District Court of Harris County, accusing defendant Accudata of defamation. Accudata responded with a counterclaim for mental anguish based on Function One's use of a private investigator and plaintiff's owner parking his Lamborghini sports car in front of Accudata's offices. Unfortunately for Accudata, this counterclaim was later dismissed in a directed verdict.

At trial, Function One called the defendant's actions a "spiteful war" to punish plaintiff for hiring several of the defendant Accudata's former employees. The jury was shown emails sent by Accudata's employees in which the alleged defamation occurred. The jury was also shown a Texas Workforce Commission letter affirming there to be no issue with plaintiff Function One's employee classification. The plaintiff asserted that no other agency took any action respecting the defendant's accusations.

In the end, the jury found for the Function One and awarded $11.4 million in damages, including $1 million in punitive damages. *Function One* should serve as a stark warning to those considering sending defamatory emails and filing false

governmental reports in an attempt to seek retribution against a business competitor.

***TV Azteca v. Ruiz*, No. 13–12–00536–CV, 2014 WL 346031 (Tex. App.—Corpus Christi 2014, pet. granted Jan 30, 2015).**

*TV Azteca* is another case to be on the lookout for, as the Texas Supreme Court heard oral arguments for this case on February 25, 2015 (Case 14-0186). This defamation case arose out of an over-air broadcast from a Monterrey, Mexico TV station allegedly defaming Ms. Gloria de los Angeles Trevino Ruiz (known in Mexico as "Gloria Trevi") that spilled over into Texas and was viewed by Texas residents.

The main issue in *TV Azteca* is whether Texas courts may exercise specific personal jurisdiction in a defamation/libel action over a nonresident foreign defendant that broadcasted television signals containing allegedly defamatory statements into the United States. At the trial level, the court found that Texas has specific jurisdiction over defendant TV Azteca, S.A.B. De C.V. and related individuals and entities (collectively, "TV Azteca").

The appeals court affirmed the trial court's decision that Texas has specific jurisdiction over TV Azteca. The court reasoned that TV Azteca had the minimum contacts required under due process analysis for exercise of specific personal jurisdiction in a defamation action. Specifically, the court was persuaded by evidence showing that TV Azteca programs can be viewed by South Texas residents, and that TV Azteca purposefully directed broadcast of its various television programs to Texas, including the "Ventaneando" program that allegedly defamed Ms. Ruiz. The court further maintained that a connection between allegedly defamatory statements and Texas was not required in order to find that TV Azteca purposefully directed its Spanish-language television programs to Texas.

Decision on *TV Azteca* is expected soon from the Texas Supreme Court. While it is likely that the Court will find in favor of TV Azteca having the minimum contacts required for exercise of specific personal jurisdiction, it will be particularly interesting to see what further guidance the Court gives regarding the assertion of specific personal jurisdiction against foreign entities broadcasting television, radio and other media into the United States.