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UPDATE ON TEXAS DEFAMATION CASES

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***Lippincott v. Whisenhunt,* 462 S.W.3d 507 (Tex. 2015). *Per curiam*.**

In *Lippincott v. Whisenhunt*, the Texas Supreme Court reversed the Court of Appeals for the Sixth District of Texas to provide a more expansive definition of what constitutes "a communication made in connection with a matter of public concern" under the Texas Citizens Participation Act (TCPA), an anti-SLAPP (strategic lawsuits against public participation) statute. The Court held that a communication made in connection with a matter of public concern can, in fact, be a private statement under certain circumstances and is not solely limited to public communications.

In May 2012, Creg Parks and Matthew Lippincott allegedly made disparaging comments about Warren Whisenhunt, a certified registered nurse anesthetist contracted to provide anesthesiology services for patents at First Surgery Suites, LLC (First Surgery). Parks and Lippincott were administrators at First Surgery. As proof of these disparaging comments, Whisenhunt provided copies of several emails sent by Lippincott to four recipients that summarized reports Lippincott claimed to have received and, in some instances, investigated about Whisenhunt. These reports alleged that Whisenhunt falsely represented himself to be a doctor, sexually harassed employees, and endangered patients for his own financial gain.

Upon learning about the reports, Whisenhunt filed suit against Lippincott and Parks asserting claims for defamation, tortious interference with existing and prospective business relations, and conspiracy to interfere in business relations. Lippincott and Parks moved to dismiss all the claims based on the TCPA. The trial court ended up granting Lippincott and Parks's motion to dismiss in part and denying it in part, concluding that Whisenhunt met the minimum threshold to proceed with the defamation claim but failed to provide sufficient evidence to proceed with the other claims.

The trial court's decision was appealed to the Court of Appeals for the Sixth District of Texas, which found that because the TCPA does not apply to private communications, it was inapplicable to private communications pertaining to Whisenhunt. The appeals court's rationale was that because the purpose of the TCPA, as described in section 27.002, includes the phrase "otherwise participate in government," the Act only protects public communication.

In a *per curiam* opinion, the Texas Supreme Court unanimously reversed and remanded the Sixth Court of Appeals, noting in the opinion's first two sentences: "A court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written." The Court went on to explain that "the plain language of the [TCPA] merely limits its scope to communications involving a public subject—not communications in public form."

The Court paid close attention to the specific text of Tex. Civ. Prac. & Rem. Code § 27.001(1), which defines communication as "the making or submitting of a statement or

document in any form or medium, including oral, visual, written, audiovisual, or electronic." The Court used this definition to point out that the "plain language" of the statute "imposes no requirement that the form of the communication be public" and that "[h]ad the Legislature intended to limit the Act to publicly communicated speech, it could have easily added language to that effect." "In the absence of such limiting language," the Court writes, "we must presume that the Legislature broadly included both public and private communication."

Applied to the facts of *Lippincott*, because there was a communication pertaining to a matter of public concern (in this case, the provision of medical services by a health care professional), Lippincott and Parks successfully demonstrated the applicability of the Act. The Court went on to reverse and remand the case back to the Sixth Court of Appeals for it to consider whether Whisenhunt met the prima facie burden the TCPA requires.

Interestingly, the Court specifically directed the Sixth Court of Appeals to consider the facts of the *Lippincott* case in light of the Court's recent decision in *In re Lipsky*: "Because *In re Lipsky*, 460 S.W.3d. 579, 587 (Tex. 2015), squarely addresses the standard a plaintiff must meet in order to establish a prima facie case, we reverse the court of appeals' judgment without hearing oral argument, see Tex. R. App. P. 59.1, and remand this case to that court for further proceedings consistent with this opinion and in light of our analysis in *Lipsky*."

Lippincott echoes *In re Lipsky* in that the Court takes a more expansive view towards allowing defamation lawsuits to survive past the motion to dismiss stage. The *Lippincott* decision is also consistent with the Court's emphasis in strictly construing and applying the "plain language" of statutes as written. For a detailed account of *In re Lipsky*, *see* the Spring 2015 TADC Defamation, Libel & Slander Update.

***Shell Oil Company v. Writt*, 464 S.W.3d 650 (Tex. 2015).**

In *Shell Oil Company v. Writt*, the Texas Supreme Court was faced with the issue of whether providing a report regarding possible criminal activity to a government agency was an absolutely privileged communication or a conditionally privileged one. The Supreme Court reversed the First Court of Appeals, holding that the providing of a report regarding possible criminal activity to a government agency *was* an absolutely privileged communication, and not a conditionally privileged one.

The dispute in *Shell* began when Shell Oil Company and Shell International E & P, Inc. (collectively, Shell) received an inquiry from the Department of Justice (DOJ) regarding possible violations of the Foreign Corrupt Practices Act (FCPA) by one of Shell's contractors, Vetco Gray. In February 2007, Vetco Gray entered into a plea agreement with the DOJ wherein Vetco Gray was criminally convicted and fined $26 million for FCPA violations. Vetco Gray pled guilty to paying bribes to Nigerian customs officials through a freight forwarding and customs clearing company, Panalpina, Inc. that was used to import equipment for a Shell deepwater oil and gas project off the coast of Nigeria.

Approximately five months after Vetco Gray was convicted, the DOJ sent Shell a letter notifying the company that the DOJ had become aware that Shell engaged Panalpina "to provide freight forwarding and other services . . . and that certain of

those services may violate the [FCPA]." Shell ended up meeting with the DOJ and agreed to conduct an internal investigation into its dealings with Panalpina and to report its findings to the DOJ, with the understanding that the report would be treated as confidential.

During Shell's investigation, a man by the name of Robert Writt was identified as the individual responsible for approving Vetco Gray's reimbursement requests. During the course of the investigation, Writt was interviewed several times about his knowledge of possible illegal payments made by Panalpina.

In February 2009, Shell provided the investigators' findings and its report to the DOJ. This report detailed Writt's actions as they related to, Panalpina and stated that Writt was aware of "several red flags" concerning Panalpina's customs clearance process and that he provided inconsistent information about his knowledge of Panalpina's questionable Acts. In addition, Shell terminated Writt's employment on the grounds that his conduct was a "significant, substantial and unacceptable" violation of Shell's General Business Principles and Code of Conduct.

Writt sued Shell for defamation and wrongful termination, claiming that Shell falsely accused him of approving bribery payments and participating in illegal conduct in the report that Shell provided to the DOJ. In response, Shell filed a traditional motion for summary judgment as to the defamation claim on the grounds that the statements contained within the DOJ report are protected by absolute privilege.

The district court agreed that the investigative report Shell provided to the DOJ was protected by absolute privilege and granted Shell's motion for summary judgment. The First Court of Appeals reversed the district court's decision, however, on the grounds that the summary judgment evidence did not conclusively establish that a criminal judicial proceeding against either Shell or Writt was ongoing, actually contemplated, or under serious consideration by either the DOJ or Shell at the time Shell provided its report to the DOJ. The appeals court reasoned that merely cooperating with the DOJ during an ongoing investigation was not enough to conclusively establish that Shell provided the report under a serious threat of prosecution.

Interestingly, in contrast to *Lippincott* and *In re Lipsky*, the Texas Supreme Court actually allowed for the dismissal of a defamation case and found in favor of Shell. The Court sharply disagreed with the First Court of Appeals, holding instead that "the summary judgment evidence is conclusive that when Shell provided its internal investigation report to the DOJ, Shell was a target of the DOJ's investigation and the information in the report related to the DOJ's inquiry." The Court further found it "conclusive" that "Shell acted with serious contemplation of the possibility that it might be prosecuted" when it provided the report to the DOJ.

The case *Hurlbut v. Gulf Atlantic Life Insurance Co.*, 749 S.W.2d 762 (Tex. 1987) was cited by both Shell and Writt in support of their positions. Writt argued that Shell's report was provided during an ongoing investigation, but not as a communication preliminary to a judicial proceeding, or as part of a quasi-judicial proceeding. Shell, on the other hand, argued that no Texas court, including the Supreme Court in *Hurlbut*, has held that sufficient information to file criminal charges must have been accumulated by the government before a

communication can be deemed absolutely privileged.

The Texas Supreme Court sided with Shell, noting that "[f]rom the time Shell was first contacted by the DOJ to the time it provided its report to the DOJ, FCPA compliance was of great concern for U.S. businesses operating overseas and potential violations were not taken lightly." Citing to a document from the U.S. Department of Justice and Securities and Exchange Commission titled "A Resource Guide to the U.S. Foreign Corrupt Trade Practices Act," the Court further observed that "[f]ederal prosecutors and the U.S. Sentencing Guidelines 'place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matter.'"

The implications of *Shell* are a bit cloudy moving forward, as it is unclear as to how broadly this decision will be interpreted. The Court seems to draw the absolute/conditional privilege line at whether the person who made the allegedly defamatory statement was the "target" of an investigation. However, in the particular context of *Shell*, the Court seemed to be particularly interested in encouraging businesses to cooperate with law enforcement, noting: "Moreover, businesses that [choose] not to cooperate [are] subjected to substantially greater punishments if a DOJ prosecution [is] successful."

DOJ cooperation actually worked out well for Shell, as the company was able to benefit from a Deferred Prosecution Agreement with the DOJ after the DOJ filed an information charging Shell with conspiracy to violate the FCPA and aiding and abetting the making of false books and records. Upon full compliance with the Deferred Prosecution Agreement, the criminal charges against Shell were to be dropped in full.

***Campbell v. Clark*, ___S.W.3d ___, No. 05–14–01056–CV, 2015 WL 4722236 (Tex. App.—Dallas Aug 10, 2015, no pet. h.).**

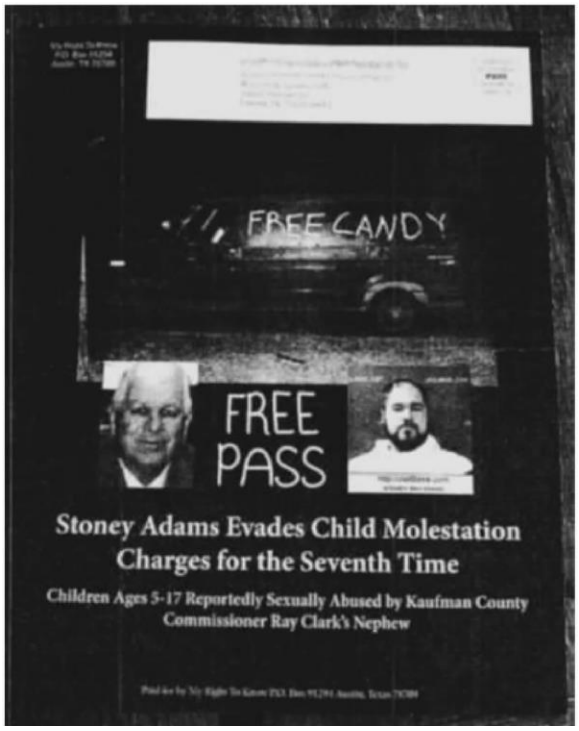
In *Campbell v. Clark*, an incumbent candidate for the office of county commissioner brought a defamation action against political advertisers who published allegedly false claims that the candidate had used his office to derail attempts to prosecute his nephew for child molestation. The political advertisers moved to dismiss the lawsuit under the Texas Citizens Participation Act (TCPA) and the trial court denied the motion. On accelerated interlocutory appeal, the Dallas Court of Appeals affirmed the trial court's decision, finding clear and specific evidence to establish a prima facie case on the element of actual malice against the political advertisers.

The dispute in *Campbell* begins with the 2014 Republican primary election for the office of county commissioner of precinct 2 in Kaufman County in March 2014. Ray Clark was the incumbent running for reelection. Two days before the primary, the website myrighttoknow.org posted an article accusing Clark of helping his nephew avoid prosecution for child molestation. The article was titled: "Stoney Adams Evades Child Molestation Charges for the Seventh Time," with the subtitle: "Children Ages 5–17 Reportedly Sexually Abused by Kaufman County Commissioner Ray Clark's Nephew[.]"

The My Right to Know website essentially accused Ray Clark of being "very close" with his nephew, Stoney Adams, who, according to the article, has had a series of

serious child abuse charges dismissed over the years. The article is quick to claim that Clark "would talk on the phone for hours" with Adams, and that the two would "get together at least once a week." The article then goes on to quote Adams's ex wife, Lacie Adams, saying: "My children would never have been put through what they have been if Stoney had not been protected by his powerful connections."

My Right to Know also sent the following mailer to Kaufman County residents right before the primary, which included pictures of Clark and Stoney Adams, and repeated several of the allegations in the article:



Not coincidentally, one of the directors behind the My Right to Know website, Michael Hendrix, also happened to be in charge of Precise Agency LLC, the advertising company for Clark's opponent, Skeet Phillips.

Also not coincidentally, Clark lost the primary election to Phillips—an event that inspired Hendrix to make the following post on a personal webpage:

> Precise Agency and Red Digital Media Brought It Home In The 2014 Texas Republican Primary Elections!
>
> I Will Sleep Well Knowing That Precise Agency Has Been Nominated for Campaign and Elections MVP. I almost forgot to show some "Love" to the InForneyNews for their "Share" on some of my work even if they did think it was a little hard core . . . [.]
>
> MY RESPONSE to the To The [sic] Press Is Simply Stated: My job is to win elections for my clients. After looking back on the Texas Primary Elections I have no regrets. We Get Paid After All To Bring It Home and We Do!

After Clark lost, he sued Ben Campbell, individually and d/b/a My Right to Know, myrighttoknow.org, Your Right to Know, and Your Right to Know, Inc. (collectively, Campbell) for defamation (libel per se and libel per quod). Campbell moved to dismiss Clark's lawsuit under the TCPA and requested sanctions under chapter ten of the Texas Civil Practice and Remedies Code.

In response to the Motion to Dismiss, Clark filed an affidavit that stated in part:

> Stoney Ray Adams is not my nephew. I have never referred to him as such. We are not related by consanguinity. My wife has a sister who is married. My wife's sister's husband has a sister. That person is the mother of Stoney Adams. I do not consider us to be relatives.
>
> . . . .

> I have never contacted the 86th District Court or the District Attorney in regard to any pending criminal case. I have never had anyone do so on my behalf. I have never provided any support or assistance to Stoney Adams regarding any criminal case.

Campbell also filed an affidavit attesting that he had "no knowledge that anything in the releases was factually incorrect."

The trial court denied Campbell's motion to dismiss, finding that "the Plaintiff, Ray Clark, has established by clear and specific evidence a prima facie case for each element of the claim in question[.]" The Dallas Court of Appeals affirmed, relying in large part on the recent *In re Lipsky* case. The appeals court agreed that the statements in question were "matters of public concern" protected by the TCPA, but found that Clark presented "clear and specific evidence" sufficient to "provide enough detail to show the factual basis for [Clark's] claim."

Much of the *Campbell* decision centered around whether Clark presented clear and specific evidence to establish a prima facie case that the statements Campbell published alleging that Clark had used his office to derail attempts to prosecute his nephew for child molestation were made with actual malice. Campbell argued that there was a "complete absence" of any evidence of knowledge of actual falsity or reckless disregard for the truth. The court disagreed, however. Citing to *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex. 2002), the court noted that "although Campbell testified by affidavit that he 'had no knowledge that anything in the releases was factually incorrect [,]' Campbell's 'self-serving protestations of sincerity' cannot solely defeat 'proof of actual malice.'"

Also persuasive to the court was the fact that the only apparent source for the statements contained in the article and mailer was Lacie Adams, who was the former wife of Stoney Adams. Lacie's accusations that Stoney could not have "escaped justice" without "very powerful help" and that "Kaufman County has allowed this injustice to continue" were unverified by another source. Citing to *Harte–Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 692 (1989), the court observed: "Given the seriousness of the allegations against Clark in the publications, appellants' 'inaction' in confirming Lacie Adams's statements and the other allegations in the article and mailer likely may reflect a 'deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges.'"