

LIBEL AND SLANDER—PRIVILEGE IN REPORTS REGARDING POSSIBLE CRIMINAL ACTIVITY

By Joseph Ty Vessels*

Shell Oil Co. v. Witt, No. 13-0552, 2015 WL 2328678 (Tex. May 15, 2015).

In *Shell Oil Co. v. Witt*, the Texas Supreme Court grappled with the question of whether providing a report regarding possible criminal activity to a government agency was an absolutely privileged communication or a conditionally privileged communication.¹ The court would determine that the report was given under the specter of impending litigation and should be absolutely privileged.² In order to reach this conclusion, the court considered public policy, and compared and contrasted case law.³

In 2007 The Department of Justice (DOJ) began an investigation involving a possible violation of the Foreign Corrupt Practices Act (FCPA) by Shell Oil Company (Shell) and Shell's employee Robert Witt.⁴ Witt served as the contract holder and expense manager between Shell and Vecto Gray.⁵ Gray had recently pled guilty to bribing a Nigerian official through a freight forwarding and customs clearing company known as Panalpina, Inc.⁶ Panalpina was used to import equipment for Shell's deep-water oil and gas project off the coast of Nigeria—the Bonga Project.⁷ Shell received a letter from the DOJ approximately five months after Gray's conviction revealing the DOJ had become aware that certain services Panalpina provided Shell may have violated the FCPA.⁸

The DOJ identified several witnesses and persons of interest, one of which was Shell employee Robert Witt.⁹ Shell agreed to conduct an internal investigation on its dealings with Panalpina.¹⁰ Witt was questioned several times about his knowledge of Panalpina's possible illegal payments.¹¹ Shell provided the DOJ their finished report in February 2009.¹² The report stated that Witt's actions in relation to the Bonga project had violated Shell's General Business Principles and Code of Conduct, finding Witt was aware of several red flags in Panalpina's customs clearance process and that Witt provided inconsistent knowledge of the suspect actions.¹³ Witt, in turn, sued Shell for defamation and wrongful termination.¹⁴ He

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¹ *Shell Oil Co. v. Witt*, No. 13-0552, 2015 WL 2328678, at *1 (Tex. May 15, 2015).

² *See id.* at *8.

³ *See id.* at *5–8.

⁴ *Id.* at *1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at *2.

argued Shell falsely accused him of approving bribery payments and participating in illegal conduct.¹⁵ Shell responded with a motion for summary judgment based on the grounds of absolute privilege.¹⁶ The DOJ then filed an information charging Shell with conspiracy to violate the FCPA, arguing Shell aided in the making of false books and records, while the motion for summary judgment was still pending.¹⁷ Shell acquiesced to a deferred prosecution agreement in which the DOJ acknowledged that Shell cooperated in the investigation, agreed to further ongoing investigations, and agreed to pay a reduced fine.¹⁸

Afterwards, the district court granted Shell's motion for summary judgment, holding that Shell was absolutely privileged to provide the investigative report to the DOJ.¹⁹ Writt's wrongful termination claim proceeded to trial where a jury found for Shell.²⁰ Writt appealed only the summary judgment on his defamation claim.²¹ The court of appeals reversed the district court's ruling, holding that the evidence did not conclusively establish a criminal judicial proceeding against Shell, or Writt, was ongoing at the time Shell provided its report to the DOJ.²² Therefore, the report was only conditionally privileged, rather than absolutely privileged.²³ In response, Shell argued absolute privilege extends to the report because it was given to the DOJ under the veil of an eminent judicial proceeding.²⁴ Furthermore, Shell argued the information about Writt in the report was solicited by the DOJ during an ongoing FCPA investigation.²⁵ Shell asserted it compiled and provided the report in good faith contemplation of a judicial proceeding and the facts are adequate to provide a holding for absolute privilege.²⁶ Shell relied upon the precedent in *Hurlbut v. Gulf Atlantic Life Insurance Co.*, 749 S.W.2d 762, 768 (Tex.1987) and *Hurlbut's* contrasting circumstances to support its position.²⁷ In *Hurlbut* the alleged defamatory statements were unsolicited statements not instigated by a government investigation and, thus, only conditionally privileged.²⁸ Shell, on the other hand, was a target of a criminal investigation and solicited the report and information to the DOJ at the urging of the DOJ.²⁹ Writt argued that the court of appeals was correct in its classification of the information as conditionally rather than absolutely privileged and that the summary judgment evidence was not enough to establish the DOJ had progressed to prosecution by the time Shell provided the report.³⁰

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Writt v. Shell Oil Co.*, 409 S.W.3d 59, 76 (Tex. App.—Houston [1st Dist.] 2013).

²³ *Id.*

²⁴ *Shell Oil Co.*, 2015 WL 2328678, at *3.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1988).

²⁹ *Shell Oil Co.*, 2015 WL 2328678, at *3.

³⁰ *Id.*

Full and free disclosure of information as to criminal activity is essential for the proper functioning of the justice system.³¹ For that reason, Texas recognizes absolute and conditional privileges concerning defamation suits.³² The Texas Supreme Court has held an absolute privilege arises for the communications of a witness when such communications occur before a judicial proceeding or as part of a judicial proceeding, as long as the information has some relation to the proceeding.³³ This test is comprised of objective and subjective components.³⁴ An actual formal proceeding does not eventually have to occur.³⁵ However, the possibility of a proceeding must have been a serious possibility.³⁶ To that end, Texas has recognized absolute privilege for communications given in quasi-judicial proceedings and scenarios where the benefit of the communication to the general public outweighs the harm to an individual.³⁷

The court held that the rule of law above, affirmed in *Hurlbut*, was applicable in Shell's case.³⁸ *Hurlbut* involved two insurance agents, C. Daniel Hurlbut and A.C. Hovater, who formed an insurance agency to sell group insurance policies from Gulf Atlantic Insurance Company.³⁹ However, state approval was never obtained by Gulf.⁴⁰ Gulf was to obtain regulatory approval in order to underwrite, and therefore, Hurlbut did not have a master exemplar policy to present to clients.⁴¹ Gulf's representative encouraged Hurlbut to proceed with the sales anyway when confronted by Hurlbut and Hovater.⁴² When questioned by a city attorney regarding said policy, Hurlbut referred him to Gulf for confirmation.⁴³ Gulf revealed it was not underwriting the policy and Assistant Attorney General Bill Flanary was assigned to investigate Hurlbut and his agency.⁴⁴ After a meeting with Gulf's president, William Barnes, Flanary became certain that Hurlbut's actions were illegal.⁴⁵ At a meeting between the three parties, Barnes reiterated that Hurlbut was not authorized by Gulf to market a group policy, nor was Gulf involved with said policy.⁴⁶ Flanary then took Hurlbut to the Dallas Attorney General's office where he gave statements about the group policy.⁴⁷ When Barnes was told that Gulf might be the true culprit, Gulf immediately cut off communications.⁴⁸ Following

³¹ *See id.*

³² *Id.*

³³ *See Hurlbut*, 749 S.W.2d at 768.

³⁴ *See* Restatement (Second) of Torts § 588 cmt. e (1977).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Shell Oil Co.*, 2015 WL 2328678, at *4; *Bird v. W.C.W.*, 886 S.W.2d 767, 771 (Tex. 1994); *see also* *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 913 (Tex. 1942).

³⁸ *Shell Oil Co.*, 2015 WL 2328678, at *6.

³⁹ *Hurlbut*, 749 S.W.2d at 763.

⁴⁰ *Id.*

⁴¹ *Id.* at 763–64.

⁴² *Id.*

⁴³ *Gulf Atlantic Life Ins. Co. v. Hurlbut*, 696 S.W.2d 83, 89–90 (Tex. App.—Dallas 1985).

⁴⁴ *Id.* at 90.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

these events, Hurlbut's assets were seized and liquidated, his insurance license revoked.⁴⁹ Hurlbut sued Gulf on several claims, including business disparagement.⁵⁰ The trial court ruled in favor of Hurlbut, however, the court of appeals reversed holding that false statements made by Barnes during the meeting where Hurlbut was present were absolutely privileged because evidence established that the statements were made to Mr. Flanary, a public official, during a quasi-judicial proceeding.⁵¹ The Texas Supreme court concluded that the statements were more akin to persons communicating information of public interest to a public officer or private citizen authorized to take action if the information is true, rather than a testimony of a witness at a judicial proceeding.⁵² Therefore the information was only conditionally privileged.⁵³ However, the facts and communications differed from those of Shell's resulting in the categorization of Shell's report as absolutely privilege.⁵⁴

Hurlbut is not the only case that has asked a Texas court to consider the question of privilege. For example, in *Clemens v. McNamee*, a federal district court ruled that statements by a witness in an investigation of money laundering and the distribution of illegal substances was privileged due to public policy concerns involved in compelled confession.⁵⁵ The court in *Clemens* believed that had conditional privilege been applied to the statements, the government's ability to assure that justice was served would have been harmed.⁵⁶ The witness in *Clemens*, Brian McNamee, was interviewed by a special commission.⁵⁷ McNamee was told that if he did not fully cooperate with the commission his status as a witness would be reassessed.⁵⁸ Assistant United States Attorneys attended every interview.⁵⁹ McNamee voluntarily gave information, but because of the coercive circumstances, the court held for all intents and purposes he was in fact compelled to make such statements.⁶⁰ Therefore, the information was held to be absolutely privileged.⁶¹

The court in *Shell Oil*, using *Hurlbut* and *Clemens* as its guide, applied the law from *Hurlbut* but likened Shell's facts and circumstances to those in *Clemens*.⁶² Where Gulf was not the target of the Assistant Attorney General's investigation at all times, evidence established that Shell Oil was the clear target of the DOJ during the DOJ's entire involvement much like McNamee was a constant target throughout the investigation.⁶³ The court found even more distinguishable the fact that Gulf completely cut off all communications whereas Shell did

⁴⁹ *Hurlbut*, 749 S.W.2d at 764.

⁵⁰ *Id.* at 763.

⁵¹ *Gulf Atlantic*, 696 S.W.2d at 100.

⁵² *Hurlbut*, 749 S.W.2d at 767–68.

⁵³ *Id.* at 768.

⁵⁴ *Shell Oil Co.*, 2015 WL 2328678, at *6.

⁵⁵ *Clemens v. McNamee*, 608 F.Supp.2d 811, 824–25 (S.D. Tex. 2009).

⁵⁶ *Id.* at 825.

⁵⁷ *Id.* at 824.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 825.

⁶² *Shell Oil Co.*, 2015 WL 2328678, at *7.

⁶³ *Id.* at 7–8.

not.⁶⁴ The constant communication between Shell and the DOJ was clear evidence that Shell was a continuous target for the DOJ. In addition, when viewing the severity of the penalties levied against Shell, it was apparent that Shell was compelled to undertake its investigation, much like McNamee was compelled to make statements in *Clemens*.⁶⁵ The court explained the manner of FCPA enforcement was steadily becoming more coercive as time progressed between the DOJ's first contact with Shell Oil and the furnishing of the report.⁶⁶ This heightened the compelled nature of the report.⁶⁷ The court supported the coercive nature of the DOJ using an article from this very journal, *The Texas Journal of Business Law*, which revealed many companies choose to cooperate to obtain any chance at leniency from the government's harsh penalties.⁶⁸ The looming shadow of the DOJ was to Shell as the federal marshals, threats, and the special commission were to McNamee in *Clemens*.⁶⁹ Not only was the threat of coercion present, the threat of harsher penalties and fines was a direct cause of Shell's creation of the report.⁷⁰

In conclusion, the court held that the summary judgement evidence was conclusive to establish that when Shell furnished the report, Shell was the target of a DOJ investigation.⁷¹ Furthermore, the evidence also established Shell acted under the influence of eminent prosecution.⁷² These circumstances resulted in the court classifying the report as absolutely privileged.⁷³ The court, therefore, reversed the judgement of the court of appeals and reinstated that of the trial court.⁷⁴

⁶⁴ *Id.* at 8.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ See Joel Androphy & Ashley Gangour, *The Intersection of the Dodd-Frank Act and the Foreign Corrupt Practices Act: What All Practitioners, Whistleblowers, Defendants, and Corporations Need to Know*, 45 *Tex. J. Bus. L.* 129, 138 (2013).

⁶⁹ *See Shell Oil Co.*, 2015 WL 2328678, at *8.

⁷⁰ *See id.* at *2.

⁷¹ *Id.* at *8.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*