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DEFAMATION: ENVIRONMENTAL ALLEGATIONS AGAINST FRACKING COMPANIES ARE DEFAMATORY PER SE IN TEXAS

*Jessica Schauwecker**

STEVEN Lipsky, a homeowner in Weatherford, Texas, sued Range Resources Corporation (Range), an oil and gas exploration and production company that had used hydraulic fracturing (fracking) to drill two gas wells beneath the Lipsky home, for gross negligence and nuisance upon discovering that he could light his well water on fire.¹ Despite the Texas Railroad Commission's determination that the gas in the Lipsky well had leaked from the shallower Strawn formation, rather than from the Barnett Shale formation, which lies more than a mile below the well and into which the Range wells were drilled,² Lipsky continued to assert Range's fault in the matter, even after the Environmental Protection Agency (EPA) inexplicably withdrew its administrative order against Range.³ Meanwhile, Range moved to dismiss Lipsky's claims and filed counterclaims against the homeowner for defamation, business disparagement, and civil conspiracy.⁴

The trial court granted Range's motion to dismiss and denied Lipsky's motion to dismiss the counterclaims under the Texas Citizens Participation Act (TCPA), an act that "protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern."⁵ On appeal, the Fort Worth Court of Appeals dismissed Range's civil conspiracy claim but upheld the claims against Lipsky for business disparagement and defamation, finding that Range had satisfied the "clear and specific evidence standard" to establish a prima facie case under the TCPA.⁶ Both Range and Lipsky sought mandamus relief in the Texas Su-

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1. *In re Lipsky*, 460 S.W.3d 579, 584-85 (Tex. 2015).
2. *Id.* at 595.
3. *Id.* at 585-86.
4. *Id.* at 585.
5. *Id.* at 585-86.
6. *Id.* at 590-91.

preme Court,⁷ which subsequently dismissed Range's business disparagement claim for failure to establish economic loss by clear and specific evidence.⁸ However, despite Range's failure to provide more than conclusory statements of special damages, the court upheld the defamation claim as defamation per se.⁹

Because defamation per se, without proof of special damages, yields only nominal damages to a successful plaintiff, the public generally viewed the Texas Supreme Court's decision as a victory for Lipsky and a strike against powerful oil and gas companies who would seek to suppress free expression on matters of public concern, such as fracking.¹⁰ Similarly, the legal community focused primarily on the court's interpretation of the "clear and specific evidence" standard under the TCPA and its resolution of the previous split on the issue among Texas courts of appeals.¹¹ The potential implications of the court's holding on Range's defamation per se claim have been either overlooked or ignored.¹² While defamation per se generally renders only nominal damages that, when viewed in isolation, may have little impact on the defendant's financial wellbeing, the viability of such suits by plaintiff corporations against individuals and the accompanying court and attorney costs may prove sufficient to stanch free speech regarding certain matters of public concern such as environmental harm, thereby directly negating the intended safeguards provided by the TCPA.¹³ Thus, while the Texas Supreme Court's interpretation of the TCPA and dismissal of Range's business disparagement claim may have indeed provided an immediate victory for Steven Lipsky, it may be that the court's new, broader application of defamation per se will stifle under-supported allegations against fracking operations and so prove an ultimate victory for the oil and gas industry.¹⁴

In Texas, the category of defamation per se pertaining to statements that "adversely reflect on a person's fitness to conduct his or her business or trade"¹⁵ has been traditionally limited in reach, including only those statements that have a negative effect on some aspect peculiar to the person's business or trade.¹⁶ For example, describing a person as a "liar" or "crook" is not defamatory per se, regardless of the person's occupation, as such labels are not harmful in any specific business or trade, but rather

7. *Id.* at 586.

8. *Id.* at 593.

9. *Id.* at 595-96.

10. See, e.g., LakeSuperior, *Lipsky Family Wins a Victory on Range Resources SLAPP Law Suit at Texas Supreme Court*, DAILY KOS (Apr. 27, 2015, 9:38 AM), <http://www.dailykos.com/story/2015/04/27/1380639/-Lipsky-Family-Wins-a-Victory-Against-Range-Resources-SLAPP-Law-Suit-at-Texas-Supreme-Court> [<http://perma.cc/54XT-M6KD>].

11. See Laura Lee Prather & J. Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH. L. REV. 725, 749 (2015).

12. See LakeSuperior, *supra* note 10.

13. See *Lipsky*, 460 S.W.3d at 593.

14. See *id.*

15. *Lipsky*, 460 S.W.3d at 596.

16. See *id.*

reflect negatively upon the person's character in general.¹⁷ Similarly, alleging that a merchant failed to pay a debt¹⁸ or accusing a physician of untruthfulness¹⁹ does not injure the person in his or her specific profession and so is not defamatory without proof of special damages. On the other hand, alleging that a physician experimented with an illegal drug on his patients without their consent is defamatory per se, as such a statement directly injures the physician in his profession.²⁰

The Texas Supreme Court's finding of defamation per se in *Lipsky* falls beyond the narrow bounds drawn in prior case law.²¹ In contrast to the court's lengthy discussion of the standard of proof under the TCPA, the *Lipsky* court dealt with the issue of defamation per se in a single paragraph.²² The court simply stated that, because "[e]nvironmental responsibility is an attribute particularly important to those in the energy industry—no more so than natural gas producers . . . who employ horizontal drilling and hydraulic fracturing in their business," Lipsky's allegation that Range's fracking contaminated his well water reflected adversely on Range's fitness to produce natural gas.²³ Yet, despite its quick disposal of the issue, the court's holding regarding Range's defamation counterclaim was not mere dicta. The finding of defamation per se was essential to the outcome of the proceeding, as it alone prevented complete dismissal of Range's claims against Lipsky.²⁴ Thus, the court's declaration that environmental accusations against fracking companies are defamatory per se will bear precedential weight for future Texas decisions.

Of course, there is no dispute that environmental responsibility is an important aspect of oil and gas exploration and production. But surely not only natural gas producers' businesses would be damaged by allegations of environmental harm. Electricity generation, coal mining, agriculture, and numerous other industries have generated public attention due to possible adverse environmental impact.²⁵ Even groundwater contamination is not a problem specific to fracking.²⁶ Certainly well water pollu-

17. See *Moore v. Waldrop*, 166 S.W.3d 380, 384–85 (Tex. App.—Waco 2005, no pet.); *Arant v. Jaffe*, 436 S.W.2d 169, 176 (Tex. Civ. App.—Dallas 1968, no writ); *Billington v. Hous. Fire & Cas. Ins. Co.*, 226 S.W.2d 494, 496 (Tex. Civ. App.—Fort Worth 1950, no writ).

18. *World Car Nissan v. Abe's Paint & Body, Inc.*, No. 04-12-00457-CV, 2013 WL 3963700, at *5 (Tex. App.—San Antonio July 31, 2013, pet. denied) (mem. op.).

19. *Hancock v. Variyam*, 400 S.W.3d 59, 66 (Tex. 2013).

20. *Post-Newsweek Stations, Hous., Inc. v. Dugi*, No. 13-10-00366-CV, 2011 WL 2463057, at *10 (Tex. App.—Corpus Christi June 16, 2011, pet. dism'd) (mem. op.).

21. See *Billington*, 226 S.W.2d at 496.

22. See *In re Lipsky*, 460 S.W.3d 579, 596 (Tex. 2015).

23. *Id.*

24. See *id.*

25. See *World's Top 10 Toxic Pollution Problems*, CONSERVE ENERGY FUTURE, <http://www.conserve-energy-future.com/top-10-worst-toxic-pollution-problems.php> [<http://perma.cc/WR9Y-V6X4>].

26. See U.S. Dep't of the Interior, *Contaminants Found in Groundwater*, U.S. GEOLOGICAL SURVEY, <http://water.usgs.gov/edu/groundwater-contaminants.html> [<http://perma.cc/UK7C-P8RA>]. Industries including ceramics, plastics, and synthetic fibers manufactur-

tion would not tie as specifically to fracking as illegal drug experimentation on patients would to the work of a physician.²⁷

Furthermore, although false allegations of groundwater contamination would likely result in public disapproval of Range and its fracking operations, Range does not sell or deal directly in business with the public at large.²⁸ As an exploration, production, and transportation company, Range primarily drills, produces, and transports crude oil, natural gas, and natural gas liquids to processing plants and intermediary markets, which then resell the finished products to vendors and consumers as fuel and other commodities.²⁹ Thus, while Lipsky's accusations might have some minor effect on Range's relationship with public investors,³⁰ any damage to Range's public reputation would be unlikely to directly affect the company's profits or detrimentally to impact its contracts with downstream purchasers, who are more likely to recognize the falsity of the accusation and unlikely to end their relationship with Range due to one instance of environmental contamination. Similarly, Lipsky's communication with the Environmental Protection Agency (EPA) was not likely to cause significant harm to Range's business if the accusations proved false, as the EPA was required to, and did, conduct an independent study before assuming fault.³¹

Not only does the court's holding in *Lipsky* broaden the scope of statements considered to adversely affect a person in his or her business, but it may also place accusations of environmental harm more definitively within that category of defamation per se than does prior Texas case law.³² In *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, Waste Management, a waste-removal and landfill-services company, sent a written "Action Alert" to environmental and community leaders in Austin, Texas, alleging that Texas Disposal, a competitor company, was environmentally unsound in its operations and that Texas Disposal's landfill contract with the City of San Antonio would therefore lead to environmental problems.³³ Despite the evident tendency of these statements to adversely affect Texas Disposal in its business as a landfill services provider, especially given the station of the recipients of the Action Alert and Waste Management's express intent to upset the contract

ing, municipal waste disposal, steel processing, and farming utilize harmful chemicals that may pollute groundwater by leaching through soil. *See id.*

27. *See Post-Newsweek Stations, Hous., Inc. v. Dugi*, No. 13-10-00366-CV, 2011 WL 2463057, at *10 (Tex. App.—Corpus Christi June 16, 2011, pet. dismissed) (mem. op.).

28. *See Operations*, RANGE RESOURCES, <http://www.rangeresources.com/operations> [<http://perma.cc/9U7K-JBDM>].

29. *See Strategy*, RANGE RESOURCES, <http://www.rangeresources.com/company/strategy> [<http://perma.cc/EYC2-39X6>].

30. *See Investors*, RANGE RESOURCES, <http://ir.rangeresources.com/phoenix.zhtml?c=101196&p=irol-irhome> [<http://perma.cc/H9LP-HKRB>].

31. *See In re Lipsky*, 460 S.W.3d 579, 585 (Tex. 2015).

32. *See Waste Mgmt. of Tex. v. Tex. Disposal Sys. Landfill, Inc.*, No. 03-10-00826-CV, 2012 WL 1810215, at *1 (Tex. App.—Austin May 18, 2012, pet. granted) (mem. op.), *rev'd on other grounds*, 434 S.W.3d 142 (Tex. 2014).

33. *Id.*

between San Antonio and Texas Disposal and thus eliminate Texas Disposal as a competitor, the court did not immediately declare the Action Alert defamatory per se.³⁴ Instead, the court ruled that the question of defamation per se should be submitted to the jury, as there were “underlying fact issues regarding whether Waste Management’s Action Alert was defamatory per se—i.e., whether the meaning and effect of the words in the Action Alert tended to affect Texas Disposal injuriously in its business.”³⁵ Surely if such direct statements regarding a landfill company’s environmental integrity, explicitly intended to deprive the company of contracted business and directed to the attention of persons with particular interest and power to influence decision-making, required a jury to determine whether or not the statement adversely reflected on the company’s fitness to conduct business, then Lipsky’s allegation of a single instance of groundwater pollution by Range merits some hesitation as to whether defamation per se should apply.³⁶

Even if the *Lipsky* decision has not significantly expanded the category of defamation per se involving statements adversely reflecting upon a person in his or her business or trade, allegations against natural gas producers of causing environmental harm through fracking should not be held defamatory without proof of special damages on account of the sheer number of potential claims to which such holding could give rise. The environmental effects of fracking are subjects of hot debate throughout the United States.³⁷ Fracking has been blamed not only for groundwater contamination, but also for causing air pollution, health defects, and even earthquakes.³⁸ Texas nonprofit and political groups have banded against proposed and current fracking operations, organizing and conducting protests and garnering media attention.³⁹ In November 2015,

34. *Id.* Waste Management’s direction of the Action Alert to environmental and community leaders may bear some factual similarity to Lipsky’s communication with the EPA regarding the well water contamination. *See id.*; *Lipsky*, 460 S.W.3d at 585. However, unlike environmental activists, who might presume blame and take immediate action upon notice of an environmental threat, the EPA, as a government agency, was required to, and did in fact, investigate the source of contamination before taking action against Range. *See Lipsky*, 460 S.W.3d at 585. Furthermore, Lipsky’s primary motivation in reporting the contamination to the EPA was to remedy the environmental harm through either injunction or damages, whereas Waste Management’s express aim in defaming Texas Disposal was to disparage Texas Disposal’s business reputation and eliminate the company as a competitor. *See id.*; *Waste Mgmt.*, 2012 WL 1810215, at *1.

35. *Waste Mgmt.*, 2012 WL 1810215, at *1.

36. *See id.*; *Lipsky*, 460 S.W.3d at 585.

37. *See, e.g., Coalition Members*, AMERICANS AGAINST FRACKING, [http://www.americansagainstfracking.org/about-the-coalition/members/#National Organizations](http://www.americansagainstfracking.org/about-the-coalition/members/#National%20Organizations) [<http://perma.cc/PK2J-7VXJ>].

38. *See* William L. Ellsworth, *Injection-Induced Earthquakes*, 341 SCIENCE 1225942, at *1 (2013), <http://www.sciencemag.org/content/341/6142/1225942> [<http://perma.cc/2S8E-HHXY>]; Joe Hoffman, *Potential Health and Environmental Effects of Hydrofracking in the Williston Basin, Montana*, NAGT GEOLOGY AND HUMAN HEALTH (2012), http://serc.carleton.edu/NAGTWorkshops/health/case_studies/hydrofracking_w.html [<http://perma.cc/6ZRP-9GM4>].

39. *See, e.g.,* NORTH CENTRAL TEXAS COMMUNITIES ALLIANCE, <http://www.nctca.net> [<http://perma.cc/6K86-3VZD>]; FRACDALLAS, <http://fracdallas.org> [<http://perma.cc/KZN8-4Q9E>]; *see also* Luke Metzger, *Fracking on UT Lands Pollutes Air and Water*, ENVIRON-

Denton community activists were successful in persuading the city council to pass a temporary ban on fracking operations.⁴⁰

In jurisdictions outside of Texas, homeowners and community organizations have filed lawsuits seeking damages and injunctions against companies conducting fracking operations.⁴¹ Plaintiffs have filed claims of nuisance and trespass, alleging that fracking has contaminated both groundwater and air,⁴² as well as claims of negligence and nondisclosure of material facts regarding the chemicals contained in fracking fluid and their potential to cause harmful environmental and health effects.⁴³ The decisions in such suits have varied, with some courts declining to grant monetary or injunctive relief when the claimed harm remains conclusory and unproven,⁴⁴ while other courts have willingly sustained verdicts against defendant natural gas producers.⁴⁵ The prevalence of public and media debate over the purported harms of fracking has had some impact on the outcomes of these legal disputes, especially in jury trials.⁴⁶ For example, in *Hiser v. XTO Energy, Inc.*, a case arising from an Arkansas homeowner's allegations that XTO's natural gas drilling had caused damaging vibrations on his property, the Eighth Circuit sustained a jury verdict against XTO, despite the jurors' discussion of "extra-record evidence" and preconceived notions that earthquakes could be caused by fracking.⁴⁷

While Texas courts have not yet been inundated by claims of environmental damage from fracking, possibly because of the state's economic interest in the oil and gas industry and vast shale reserves that can only be accessed by fracking, it is merely a matter of time before expanding natural gas production spawns more lawsuits by homeowners and activists.⁴⁸ However, the Texas Supreme Court's holding in *Lipsky* may deter potential plaintiffs from seeking to recover damages for nuisance or trespass, or even from reporting negative effects of fracking to the media or EPA.⁴⁹ It

MENT TEXAS (Sep. 8, 2015), <http://environmenttexas.org/news/txe/report-fracking-ut-lands-pollutes-air-and-water> [<http://perma.cc/9CQ8-RZHV>].

40. See Max B. Baker, *Denton City Council Repeals Fracking Ban*, THE STAR-TELEGRAM, June 16, 2015, <http://www.star-telegram.com/news/business/barnett-shale/article24627469.html> [<http://perma.cc/479V-F6RB>]; see also *10 Reasons to Ban Fracking in Denton, FRACK FREE DENTON*, <http://frackfreedenton.com/ten-reasons-to-ban-fracking-in-denton> [<http://perma.cc/DJL6-E4GX>].

41. *Hiser v. XTO Energy, Inc.*, 768 F.3d 773, 775 (8th Cir. 2014); see, e.g., *Dine Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209 JB/SCY, 2015 WL 4997207, at *1 (D.N.M. Aug. 14, 2015) (slip copy).

42. See *Tucker v. Sw. Energy Co.*, Nos. 1:11-CV-44-DPM, 1:11-CV-45-DPM, 2012 WL 528253, at *1 (E.D. Ark. Feb. 17, 2012).

43. See *Mangan v. Landmark 4 LLC*, No. 1:12 CV 613, 2013 WL 950560, at *1 (N.D. Ohio Mar. 11, 2013).

44. See *Tucker*, 2012 WL 528253, at * 1.

45. See *Hiser*, 768 F.3d at 773.

46. See *id.*

47. See *id.* at 775.

48. See Rhiannon Meyers, *Texas' Oil and Gas Industry Expands to Near-Record Levels*, FUEL FIX (July 24, 2014), <http://fuelix.com/blog/2014/07/24/texas-oil-and-gas-industry-expands-to-record-levels> [<http://perma.cc/5J26-DHYQ>].

49. See *In re Lipsky*, 460 S.W.3d 579, 596 (Tex. 2015).

is true, of course, as those who declared victory for Lipsky after the Texas Supreme Court's decision so aptly observed, that a finding of defamation per se, with no proof of economic harm, can yield at most an award of nominal damages, which are unlikely to set a defendant back more than a few dollars.⁵⁰ But in addition to nominal damages, the defendant against a claim of defamation per se by a corporate plaintiff incurs attorney's fees and court costs and also risks much larger special damages if the company is able to prove economic harm.⁵¹ Thus, homeowners and nonprofit organizations may choose to refrain from allegations against fracking companies, even upon clear evidence of adverse environmental effects, under the looming threat of a defamation counterclaim and its associated costs.⁵² Surely this deterrent counteracts the protection of public interest speech intended under the Texas Citizens Participation Act and the Act's construal by the court in *Lipsky*.⁵³

Frivolous lawsuits are a burden on Texas courts both temporally and financially.⁵⁴ Meritless claims waste the time and money of both the judiciary and litigants and further burden the state's already-congested courts.⁵⁵ On the other hand, legitimate suits should not be barred by overwhelming costs and hurdles, and prohibitions on speech related to public interest—speech that is protected under the First Amendment—should not be imposed lightly.⁵⁶ The Texas Supreme Court's holding in *Lipsky* constitutes an unprecedented expansion of a traditionally narrow category of defamation per se.⁵⁷ Given the continuing growth of instate drilling for natural gas, discouraging good faith allegations of environmental harm, even when such allegations ultimately prove false, may stanch public debate over the risks and benefits of fracking. Accusations of pollution by oil and gas companies are all too commonplace amidst today's swell of environmentalism.⁵⁸ Even if such statements do tend adversely to reflect on a natural gas producer's fitness to conduct business, companies should be required to produce evidence of special damages before such statements become actionable.⁵⁹ False accusations of environmental harm, especially within the context of fracking, should not be sheltered under the blanket of defamation per se.

50. *See id.* at 596 (“As defamation per se, damages to its reputation are presumed, although the presumption alone will support only an award of nominal damages.”).

51. *See generally* Kelly Davis, *Levying Attorney Fees Against Citizen Groups: Towards the Ends of Justice?*, 39 TEX. ENVTL. L.J. 39, 39 (2008).

52. *See generally id.*

53. *See Lipsky*, 460 S.W.3d at 590-91.

54. *See* Chris Colby, *There's a New Sheriff in Town: The Texas Vexatious Litigants Statute and Its Application to Frivolous and Harassing Litigation*, 31 TEX. TECH L. REV. 1291, 1292 (2000).

55. *See id.*

56. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

57. *See Lipsky*, 460 S.W.3d at 596.

58. *See, e.g.*, FRACDALLAS, <http://fracdallas.org> [<http://perma.cc/AV4M-VLEZ>].

59. *See Lipsky*, 460 S.W.3d at 593.

