Opinion issued September 15, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00617-CV

BOB DEUELL, Appellant

V.

TEXAS RIGHT TO LIFE COMMITTEE, INC., Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2014-32179

O P I N I O N

In this interlocutory appeal, State Senator Bob Deuell challenges the trial court's denial of his motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA). Texas Right to Life Committee, Inc. (TRLC) sued Deuell for tortious interference with contract after Deuell's lawyers sent cease-and-desist letters to two

radio stations that had been airing TRLC's political advertisements concerning Deuell and the stations stopped airing the ads. Deuell argued that the lawsuit should be dismissed under the TCPA because the letters were an exercise of his free speech rights. The trial court denied the motion. We affirm.

Background

In March 2014, Deuell was a candidate in the Republican primary for re-election as State Senator for Senate District 2, and he faced two challengers. None of the candidates received the necessary votes to win the March primary election. As a result, Deuell and one of the challengers, Bob Hall, faced each other in a run-off election on May 27, 2014.

During the Eighty-Third Session of the Texas Legislature in 2013, Deuell had authored Senate Bill 303, which related to advance directives. TRLC, an advocacy political action committee, opposed SB 303. On May 6, 2014, during the run-off election season, TRLC entered into a contract to secure the production of a radio advertisement criticizing Deuell for his authorship of SB 303 and urging voters to vote for Hall. TRLC secured airtime with two radio stations run by Cumulus Media Dallas-Fort Worth and Salem Communications, which began airing the advertisement. In relevant part, the advertisement said:

> Before you trust Bob Deuell to protect life, please listen carefully. If your loved one is in the hospital, you may be shocked to learn that a faceless hospital panel can deny life-sustaining care . . . . Bob Deuell sponsored a bill to give even more power to these hospital panels over

> life and death for our ailing family members. Bob Deuell turned his back on life and on disabled patients.

On May 14, 2014, Deuell's lawyers sent cease-and-desist letters to Cumulus and Salem, urging that they cease airing the advertisement. In relevant part, the letters, which were essentially identical, stated:

> We represent the Honorable Texas State Senator Bob Deuell, and we have become aware of defamatory advertisements published in certain media outlets which were airing and re-airing a non-use campaign ad by Texas Right to Life PAC (not a candidate ad).
>
> These false and defamatory statements completely and totally misrepresent Senator (and Medical Doctor) Deuell's position on Patient Protection and End of Life Legislation and completely and totally misrepresent Senate Bill 303. Specific FALSE content of this ad includes the following:
>
> Defamation: - "Bob Deuell sponsored a bill to give even more power to these hospital panels over life and death for our ailing family members. Bob Deuell turned his back on life and on disabled patients."
>
> . . . .
>
> If your station has been running this ad, you are hereby put on notice of the false and defamatory statements contained therein. Any further publication of this ad will shift your conduct from reckless disregard to intentional and actual malice. . . . .
>
> **THEREFORE, WE RESPECTFULLY DEMAND THAT YOU IMMEDIATELY CEASE AND DESIST FROM INTENTIONALLY DEFAMING TEXAS STATE SENATOR BOB DEUELL BY REPUBLISHING THESE FASLE [SIC] AND DEFAMATORY STATEMENTS BY RE-AIRING THE ADVERTISEMENT, AS OUTLINED.**
>
> **LITIGATION HOLD & PRESERVATION DEMAND**

> You are hereby on notice and should have reason to believe that litigation may result from the claims described above. . . . .

(Emphasis in original.) That same day, Cumulus and Salem notified TRLC "that agents of Mr. Deuell had contacted them and that they were suspending the airing of [TRLC's] commercials based upon the legal threats made by Mr. Deuell." TRLC paid to produce a new advertisement that Cumulus and Salem agreed to air, and also contracted with CBS Radio Texas for additional airtime to compensate for the lost advertising time.

TRLC sued Deuell for tortious interference with contract and sought damages for the expenses it incurred to produce the new advertisement and to buy additional airtime with CBS Radio Texas. Deuell moved to dismiss the suit pursuant to the TCPA, arguing that the cease-and-desist letters were an exercise of his right to free speech, and that the suit was precluded by the affirmative defenses of judicial privilege and illegal contract. TRLC responded that the TCPA did not apply, and that even if it did, it satisfied its evidentiary burden to establish a prima facie case of tortious interference with contract. After a hearing, the trial court denied the motion.

Discussion

In his first issue, Deuell contends that the trial court erred in denying his motion to dismiss because he showed that TRLC's tortious interference suit was related to his exercise of his right of free speech, and TRLC failed to establish by

clear and specific evidence a prima facie case for each essential element of its tortious interference claim.

A. Standard of Review and Applicable Law

To obtain dismissal under the TCPA, a defendant must show "by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech; the right to petition; or the right of association." TEX. CIV. PRAC. & REM. CODE § 27.005(b). In deciding whether to grant a motion under the TCPA and dismiss the lawsuit, the statute instructs a trial court to "consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006.

If the movant meets its burden to show that a claim is covered by the TCPA, to avoid dismissal of that claim, a plaintiff must establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). In *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015), the Texas Supreme Court clarified how this evidentiary standard should be applied. It wrote: "[M]ere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not suffice." *Id.* at 590–91. "Instead, a plaintiff must provide enough detail to show the factual basis for its claim." *Id.* at 591. The Supreme Court noted that "[i]n contrast to 'clear and specific evidence,' a 'prima facie case' has a traditional legal meaning." *Id.* at 590. "It refers to evidence sufficient as a matter

of law to establish a given fact if it is not rebutted or contradicted." *Id.* (citing *Simonds v. Stanolind Oil & Gas Co.*, 136 S.W.2d 207, 209 (Tex. 1940)). "It is the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *Id.* (citing *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (per curiam)); *see Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (term "prima facie case" in the TCPA "implies a minimal factual burden," the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true"). Thus, for example, "[i]n a defamation case that implicates the TCPA, pleadings and evidence that establish[] the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *Lipsky*, 460 S.W.3d at 591.

If the nonmovant establishes a prima facie case, the burden shifts back to the movant. In order to obtain dismissal, the movant must establish by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim. TEX. CIV. PRAC. & REM. CODE § 27.005(d).

We review de novo a trial court's ruling on a motion to dismiss under the TCPA. *Better Bus. Bur. of Metro. Houston, Inc. v. John Moore Servs., Inc*., 441 S.W.3d 345, 353 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). In conducting

this review, we review the pleadings and evidence in a light favorable to the nonmovant. *Crazy Hotel*, 416 S.W.3d at 80–81.

B. Did TRLC establish a prima facie case?

In his first issue, Deuell argues that the trial court erred in denying his motion to dismiss because TRLC's suit is related to Deuell's exercise of his free speech rights and TRLC failed to adduce clear and specific evidence to support each element of its claim. TRLC argues that Deuell did not show that the suit is related to Deuell's exercise of his free speech rights, and, even if he did, TRLC satisfied its evidentiary burden to establish a prima facie case. For purposes of this interlocutory appeal, we will assume without deciding that the suit relates to Deuell's exercise of his right of free speech, because we agree with TRLC that it established a prima facie case of its claim for tortious interference.

The essential elements of a tortious interference with contract claim are: (1) the existence of a contract subject to interference, (2) the occurrence of an act of interference that was willful and intentional, (3) that the act was a proximate cause of the plaintiff's damage, and (4) that actual damage or loss occurred. *Holloway v. Skinner*, 898 S.W.2d 793, 795–96 (Tex. 1995). Accordingly, we evaluate the pleadings and evidence adduced in connection with the motion to dismiss to determine whether TRLC established a prima facie case for each element of its tortious interference claim by clear and specific evidence.

1. Existence of contract subject to interference

TRLC adduced clear and specific evidence establishing a prima facie case of the first element of its tortious interference claim: the existence of the two contracts with which it alleges Deuell interfered. In an affidavit accompanying its response to Deuell's motion to dismiss, James J. Graham, the Executive Director of TRLC, averred that "[o]n or about May 7, 2014, [TRLC] entered into a contract with Cumulus Media Dallas-Fort Worth to secure airtime for [its] radio advertisements." Graham averred that TRLC paid approximately $17,935 pursuant to that contract. Graham further averred that "[o]n or about May 8, 2014, [TRLC] entered into a contract with Salem Communications to secure airtime for [its] radio advertisements." Graham averred that TRLC paid approximately $22,015 pursuant to that contract. Graham further averred that Cumulus and Salem performed under the contracts—they ran the advertisements that were the subject of the contracts—until they each received cease-and-desist letters from Deuell on May 14.

Deuell contends that TRLC failed to satisfy its burden because it did not attach the contracts themselves and because Graham's affidavit is conclusory and includes insufficient detail regarding the contracts' terms. But Graham did not merely make a conclusory statement that the two contracts existed. *Cf. Lipsky*, 460 S.W.3d at 592–93 (TCPA affidavit is conclusory when it fails to provide underlying facts). Instead, Graham's affidavit stated the two dates on which each of the contracts was

made, identified the parties to each of the contracts, identified the consideration TRLC paid Cumulus and Salem in exchange for their agreement to air the TRLC advertisement, and averred that Cumulus and Salem performed by actually airing the advertisement until May 14, the date Deuell sent the cease-and-desist letters. This is evidence sufficient to support a rational inference that the contracts existed, and this evidence was not rebutted or contradicted. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c); *Lipsky*, 460 S.W.3d at 590 (prima facie case requires only minimum quantum of evidence necessary to support rational inference that allegation of fact is true); *Crazy Hotel*, 416 S.W.3d at 80 (same); *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (valid contract includes offer, acceptance, meeting of the minds, each party's consent to terms, and execution and delivery, which can be shown by evidence that parties treated contract as effective); *see also Martin v. Bravenec*, No. 04-14-00483-CV, 2015 WL 2255139, at *7 (Tex. App.—San Antonio, May 13, 2015, pet. denied) (affirming denial of TCPA motion to dismiss tortious interference claim and holding that Bravenec met burden to establish existence of contract subject to interference where pleadings alleged the existence of "a contract to sell" real property and Bravenec "identified the name of the prospective purchaser at the hearing").

Our dissenting colleague asserts that Graham's affidavit "does not establish the existence of a contract" because Graham did not present sufficient detail regarding the contracts' terms. But the cases on which the dissent relies do not support reversal. In *Better Business Bureau of Metropolitan Houston*, our court concluded that John Moore had not met its burden to adduce clear and specific evidence of the existence of a contract where John Moore merely alleged that the Bureau had interfered with John Moore's customer contracts but "did not present evidence regarding the terms" of any of the contracts it alleged existed between John Moore and any of the individuals registering complaints on the Bureau's website. 441 S.W.3d at 361. Similarly, in *Serafine v. Blunt*, 466 S.W.3d 352 (Tex. App.—Austin 2015, no pet.), the Austin court noted that the Blunts' evidence "indicate[d] a possible contract" but concluded that the evidence was too vague and conclusory to support a prima facie case of their tortious interference claim because the Blunts neither attached a document memorializing their contract nor offered detail about the contract's terms. *Id.* at 361. This case is different because TRLC identified the counterparties to the contracts—Cumulus and Salem—and adduced specific evidence of the existence and material terms of the agreements: it agreed on May 7 and 8 to pay them $17,935 and $22,015, respectively, in exchange for airtime for TRLC's advertisement in advance of the May 27 run-off, and Cumulus and Salem performed by running the advertisement until May 14, when they received Deuell's

cease-and-desist letter. *See Prime Prods., Inc.*, 97 S.W.3d at 636 (existence of contract may be shown by evidence that parties treated contract as effective).

Deuell also contends that, by failing to attach the contracts to its response, TRLC fell short of its burden to demonstrate that the contracts are subject to interference. *See Holloway*, 898 S.W.2d at 795–96 (noting first element of tortious interference claim is existence of a contract subject to interference). Along the same lines, our dissenting colleague asserts that Cumulus and Salem were obliged to reserve for themselves the right to reject TRLC's advertisements. He reasons that if Cumulus and Salem had a right to suspend the advertisement, Deuell could not be liable for interference because "inducing a contract obligor to do what it has a right to do is not an actionable interference." *ACS Invs., Inc. v. McLaughlin*, 943 S.W.2d 426, 431 (Tex. 1997).

We note, however, that TRLC did not bear the burden to disprove the existence of Deuell's potential defenses. Rather, it was Deuell who bore the burden to prove a defense to TRLC's tortious interference claim. TEX. CIV. PRAC. & REM. CODE § 27.005(d) (moving party bears burden to establish by preponderance of evidence each essential element of a defense to nonmovant's claim). And, although the TCPA permits discovery relevant to a section 27.003 motion, *see* TEX. CIV. PRAC. & REM. CODE § 27.006(b), Deuell did not adduce evidence that any cancellation or other terms of the contracts provided that Cumulus and Salem's

suspension of the advertisement would not amount to a breach. The contracts may contain such a provision, but no evidence of such a provision is before us and, accordingly, the potential existence of such a provision should not be the basis for today's decision.[1]

In sum, we conclude that TRLC met its burden to establish, by clear and specific evidence, the existence of contracts subject to interference between TRLC and Cumulus and Salem for the purchase of airtime for TRLC's radio advertisement concerning Deuell. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c); *see also Lipsky*, 460 S.W.3d at 590 (prima facie case requires only minimum quantum of evidence necessary to support rational inference that allegation of fact is true); *Crazy Hotel*, 416 S.W.3d at 80 (same); *Bravenec*, 2015 WL 2255139, at *7 (burden satisfied where pleadings alleged the existence of "a contract to sell" real property and Bravenec "identified the name of the prospective purchaser at the hearing").

2. Willful and intentional act of interference

TRLC also adduced clear and specific evidence establishing a prima facie case of the second element of its tortious interference claim: a willful and intentional act

[1] We express no opinion about the merits of a defense based on a cancellation or other contract provision. We likewise express no opinion about the merits of the defense of justification. *See Prudential Ins. Co. of Am. v. Fin. Rev. Servs., Inc.*, 29 S.W.3d 74, 80 (Tex. 2000) (justification is an affirmative defense to tortious interference with contract; justification defense can be based on exercise of either one's own legal rights or a good-faith claim to a colorable legal right). Rather, we address only the two defenses Deuell raised—judicial privilege and illegality—below.

of interference. Graham averred that Cumulus and Salem both notified TRLC "that agents of Mr. Deuell had contacted them and that they were suspending the airing of our commercials based upon the legal threats made by Mr. Deuell." Deuell attached copies of the letters sent to Cumulus and Salem, which showed that Deuell threatened to sue Cumulus and Salem unless they stopped airing the ads.

Deuell contends that this evidence does not satisfy TRLC's burden because it is not sufficiently clear and specific. In particular, Deuell complains that Graham's affidavit does not specify which individuals at Cumulus and Salem notified TRLC, how they notified TRLC that the advertisements would be suspended, who at TRLC received the notice, or what the exact content of the notice was. But the failure of TRLC to adduce more detailed evidence does not negate the evidence—adduced by Deuell—showing that Deuell's lawyers contacted Cumulus and Salem and urged them to stop airing the advertisements. The May 14th letters demanded that Cumulus and Salem stop airing the advertisements, and Graham averred that Cumulus and Salem did in fact stop running the advertisements on May 14th. This is clear and specific evidence of a willful and intentional act of interference. *Lipsky*, 460 S.W.3d at 590 (prima facie case requires only minimum quantum of evidence necessary to support rational inference that allegation of fact is true); *see also Browning–Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993) (evidence showing defendant knowingly induced or intended contract obligor to stop

performing under contract establishes actionable willful and intentional act of interference).

Deuell also complains that Graham's averments regarding interference constitute hearsay. But Deuell failed to preserve this complaint because he did not obtain a ruling on this objection from the trial court. *See Wilson v. Gen. Motors Acceptance Corp.*, 897 S.W.2d 818, 821–22 (Tex. App.—Houston [1st Dist.] 1994, no writ) (hearsay in affidavit is defect in form); *Vice v. Kasprzak*, 318 S.W.3d 1, 11 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (objection to defect in form is waived if no ruling secured). Additionally, the TCPA expressly contemplates consideration of affidavits. *See* TEX. CIV. PRAC. & REM. CODE § 27.006 ("In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.").

Thus, considering all the evidence in a light favorable to TRLC as the nonmovant, TRLC met its burden to establish a prima facie case of a willful and intentional act of interference by clear and specific evidence. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c); *see also Lipsky*, 460 S.W.3d at 590 (prima facie case requires only minimum quantum of evidence necessary to support rational inference that allegation of fact is true); *Crazy Hotel*, 416 S.W.3d at 80 (same).

3. Interfering act proximately caused plaintiff's actual damage or loss

Finally, TRLC adduced clear and specific evidence establishing a prima facie case of the third and fourth elements of its tortious interference claim—that the interfering act proximately caused TRLC actual damage or loss. Graham averred that after TRLC learned that Cumulus and Salem were no longer running its advertisements based upon the letters from Deuell's lawyers, TRLC "contacted our legal counsel who immediately contacted Cumulus . . . and Salem . . . in an attempt to resume our radio advertisements airing." Graham goes on to aver that Cumulus and Salem "were informed by counsel for [TRLC] that we considered the efforts of Mr. Deuell to be tortious interference with our existing contract and a violation of our right to engage in political speech." However, when Cumulus and Salem did not resume airing the advertisements, TRLC "agreed to produce a new radio advertisement and replace the original radio advertisement suspended due to the threats of Mr. Deuell." Graham further averred:

> Recognizing that Mr. Deuell's interference had disrupted the timing and effectiveness of the radio advertisements originally contemplated by [TRLC], the organization recognized that it needed to take remedial measures to make up for the lost advertising time so it contracted with CBS Radio Texas for additional airtime in the Dallas/Ft Worth media market for the new radio advertisement. [TRLC] paid approximately $15,037 for the placement and airing of the new radio advertisements with CBS Radio Texas.

Thus, TRLC met its burden to adduce a prima facie case by clear and specific evidence that Deuell's act caused it actual damage or loss, in the form of costs to

produce a new radio advertisement and to procure additional airtime to make up for time the original advertisement had been suspended.

Deuell and our dissenting colleague assert that TRLC was required to adduce more specific evidence about its damages, such as the number of instances in which the original advertisements were scheduled to but did not air, the content of the replacement advertisements, the number of times CBS Radio Texas aired the advertisements, and whether the advertisements were targeted at the same audience or time spots as the Cumulus and Salem advertisements. But the TCPA does not impose such a requirement. While this evidence could be necessary or at least useful at an eventual trial on the merits, a TCPA nonmovant is not required to adduce all of the evidence that they would, or could, need at trial. *Lipsky*, 460 S.W.3d at 590–91 (pleadings and evidence showing factual basis for claim is sufficient to meet TCPA burden). Under the TCPA, TRLC only had to adduce evidence supporting a rational inference as to the existence of damages, not their amount or constitutent parts. *Id.* at 590 (TCPA nonmovant only required to adduce evidence to support rational inference that allegation of fact is true). When we consider the evidence described above in a light favorable to the nonmovant TRLC, as we are required to do, that evidence, which was not rebutted or contradicted, is sufficient to support a rational inference that the advertisements were discontinued as a result of Deuell's communications and that TRLC incurred specific costs to replace the contracted-for

advertising services. *See id.* (evidence may be direct or circumstantial and need only show factual basis for claim); *Crazy Hotel*, 416 S.W.3d at 80–81 (prima facie case requires only minimum quantum of evidence necessary to support rational inference that allegation of fact is true). We therefore conclude that TRLC met its burden to adduce clear and specific evidence that the allegedly interfering act caused it actual damage or loss.

In summary, we hold that TRLC proved, by clear and specific evidence, a prima facie case supporting its tortious interference with contract claim.

We overrule Deuell's first issue.

C. Did Deuell establish the affirmative defense of judicial privilege?

In his second issue, Deuell contends that even if TRLC met its burden to prove a prima face case, the trial court erred by failing to grant his motion to dismiss because he established the affirmative defense of judicial privilege by a preponderance of the evidence. Specifically, Deuell argued that Deuell's lawyers' letters to Cumulus and Salem were subject to the absolute judicial privilege, because they were made in contemplation of a judicial proceeding.

1. Applicable law

The judicial privilege applies to bar claims that are based on communications related to a judicial proceeding that seek defamation-type damages in name or in substance, i.e., damages for reputational harm. Communications made in the course

of a judicial proceeding are absolutely privileged and will not serve as the basis of a civil action for libel, slander, or business disparagement, regardless of the negligence or malice with which they are made. *See James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982); *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942). This privilege extends to any statements made by the judges, jurors, counsel, parties, or witnesses and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits, and any pleadings or other papers in the case. *James*, 637 S.W.2d at 916–917.

Judicial privilege also extends to statements made in contemplation of and preliminary to judicial proceedings. *See Watson v. Kaminski*, 51 S.W.3d 825, 827 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *see also Thomas v. Bracey*, 940 S.W.2d 340, 342–43 (Tex. App.—San Antonio 1997, no writ); *Russell v. Clark*, 620 S.W.2d 865, 869 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). To trigger the privilege, "there must be a relationship between the correspondence and the proposed or existing judicial proceeding, which decision is made by considering the entire communication in context, resolving all doubts in favor of its relevancy." *Crain v. Smith*, 22 S.W.3d 58, 62 (Tex. App.—Corpus Christi 2000, no pet.); *see also Krishnan v. Law Offices of Preston Henrichson, P.C.*, 83 S.W.3d 295, 302–03 (Tex. App.—Corpus Christi 2002, pet. denied) (no requirement that actual lawsuit

be filed in order for judicial privilege to apply; only that statements are related to a contemplated judicial proceeding).

However, the judicial privilege does not apply to every type of claim. Originally, the judicial privilege provided protection only from defamation claims, including slander and libel. *See Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex. 1994).[2] In *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994), the Texas Supreme Court held that the privilege should apply in cases in which a party seeks damages that flow from alleged reputational harm, regardless of the type of claim alleged. *Id.* at 772. The *Bird* Court extended the privilege to a claim for negligent misdiagnosis, noting that the damages being sought were "basically defamation damages." *Id.*

In *Bird*, a father brought a negligent misdiagnosis claim against a psychologist who had erroneously concluded, and averred in a family court proceeding, that the father had sexually abused his son. *Id.* The father sought damages for emotional harm and financial damage. *Id.* The Texas Supreme Court concluded that "the essence of the father's claim is that it was [the psychologist's] *communication* of her diagnosis that caused him emotional harm and related financial damages." *Id.* at 768–69 (emphasis in original). Because the psychologist's communications were

---

[2] Judicial privilege was also extended to actions based upon the filing of a lis pendens. *See Griffin v. Rowden*, 702 S.W.2d 692, 695 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (judicial privilege applied to tortious interference suit based upon filing of lis pendens). There is no lis pendens at issue in this case.

made during the course of a judicial proceeding and the father's damages flowed from reputational harm caused by those communications, the Supreme Court held that the judicial privilege applied, and rendered judgment in favor of the psychologist. *Id.* at 772.

Following *Bird*, courts have applied the privilege to claims other than libel, slander, and defamation, including tortious interference. But they have done so only "when the essence of a claim is damages that flow from communications made in the course of a judicial proceeding" and the plaintiff seeks reputational damages. *See Laub v. Pesikoff*, 979 S.W.2d 686, 691 (Tex. App.—Houston [1st Dist.] 1998, writ denied) (applying privilege to husband's claims against wife's psychotherapists who offered affidavits in divorce proceeding regarding wife's mental state; finding that claims for tortious interference with contract, civil conspiracy, and intentional infliction of emotional distress in addition to libel and slander were barred by judicial privilege because "the essence of each of these claims is that [husband] suffered injury as a result of the *communication* of allegedly false statements during a judicial proceeding" and husband claimed damages were essentially defamation damages) (emphasis in original); *see Crain v. Unauthorized Practice of Law Comm. of Supreme Court of Tex.*, 11 S.W.3d 328, 335 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (applying *Laub*; judicial privilege applied to plaintiff's tortious interference with contract claim against chair of UPLC subcommittee because claim

sought defamation damages under different label). Whether a claim is subject to judicial privilege is a question of law. *See Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex. App.—San Antonio 1997, no pet.).

2. Analysis

We conclude that TRLC's tortious interference claim is not protected by the absolute judicial privilege, because TRLC does not seek to recover reputational or defamation-type damages.[3] To the contrary, TRLC seeks direct and consequential contract damages that allegedly flowed from Deuell's sending cease-and-desist letters to Cumulus and Salem.

Deuell asserts that the judicial privilege forecloses TRLC's suit, arguing that judicial privilege categorically applies to tortious interference claims that are based upon letters sent by a lawyer threatening litigation. But no Texas court has extended the judicial privilege this far, and *Bird* made clear that the purpose of the privilege is to foreclose claims for reputational damages, regardless of the label the claim is given. *See Bird*, 868 S.W.2d at 772.

---

[3] Deuell argues that TRLC's failure to address judicial privilege and illegal contract in response to his motion to dismiss means that he established these defenses by a preponderance of the evidence and that TRLC has waived any argument regarding these defenses on appeal. But it was Deuell, the movant, who bore the burden to establish each essential element of a valid affirmative defense by a preponderance of the evidence. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(d). This holds true regardless of TRLC's response. *See id.*

The cases on which Deuell relies do not support his argument. For example, in *Laub v. Pesikoff*, 979 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), Laub sued his wife's treating psychotherapists for libel, slander, intentional infliction of emotional distress, conspiracy, and tortious interference after they averred in summary-judgment affidavits that Laub physically abused his wife. *Id.* at 688–89. The trial court granted summary judgment on the ground that Laub's suit was barred by the judicial privilege. *Id.* at 689. On appeal, this Court affirmed, reasoning that the judicial privilege applied because the essence of Laub's claims was that he suffered injury as a result of the communication of allegedly false statements during a judicial proceeding and Laub sought damages for reputational injury. *Id.* at 691–92.

Similarly, in *Crain*, Crain, a non-lawyer, operated a debt collection business in which he filed lien affidavits. 11 S.W.3d at 331. The Unauthorized Practice of Law Committee (UPLC) investigated, and Lehmann, the chairman of the Houston subcommittee of the UPLC, testified against Crain. *Id*. at 335. Crain sued Lehmann, asserting that Lehmann's testimony constituted tortious interference with Crain's business. *Id*. at 331–32. Implicit in Crain's claims was that Lehmann's testimony harmed Crain's reputation. *See id.* In light of the fact that Crain sought to recover for reputational injury, this court affirmed the summary judgment in the UPLC's favor based on the judicial privilege.

Finally, in *Crain v. Smith*, 22 S.W.3d 58 (Tex. App.—Corpus Christi 2000, no pet.), Smith, a lawyer, sent Crain a letter on behalf of Smith's client, advising Crain of her discovery that Crain had been charged with unauthorized practice of law and demanding payment for her client's damages resulting from the filing of a lien. *Id.* at 59. Crain sued Smith for libel, slander, and tortious interference with contract to recover for the alleged harm to his reputation. *Id.* Smith obtained a summary judgment on the basis that her letter was subject to judicial privilege, and the Corpus Christi Court of Appeals affirmed. *Id.* at 63.

These authorities demonstrate, consistent with *Bird*, that the judicial privilege may apply to various claims, regardless of the label they are given, but only if the damages sought are essentially defamation or reputational damages. *See Crain*, 11 S.W.3d at 335 & n.1; *Laub*, 979 S.W.2d at 691–92.[4] Here, the live pleadings and evidence reflect that TRLC does not seek defamation or reputational damages, and we thus conclude that the judicial privilege does not apply to TRLC's tortious

[4] Deuell also relies upon *Griffin v. Rowden*, 702 S.W.2d 692 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), in which the court of appeals held that judicial privilege applied to a tortious interference claim that was based upon the filing of a lis pendens. *Id.* at 695. *Griffin* is inapposite here because there is no lis pendens at issue. *See id.* at 694; *see also Prappas v. Meyerland Cmty. Improvement Ass'n*, 795 S.W.2d 794, 796 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (recognizing that *Griffin* turned specifically on consideration of lis pendens).

interference claim. Accordingly, we hold that the trial court did not err in concluding that Deuell should not prevail based upon that defense.

We overrule Deuell's second issue.

D. Did Deuell establish the affirmative defense of illegality?

In his third issue, Deuell contends that even if TRLC met its burden to prove a prima face case of tortious interference, the trial court erred by failing to grant his motion to dismiss because he established the affirmative defense of illegality by a preponderance of the evidence. Deuell argues that TRLC's advertisements violated section 255.001 of the Texas Election Code, and therefore, the contracts to air the advertisements were illegal. Accordingly, Deuell argues that TRLC cannot maintain its suit because a defendant cannot be held liable for tortiously interfering with an illegal contract. *See GNG Gas Sys., Inc. v. Dean*, 921 S.W.2d 421, 427 (Tex. App.—Amarillo 1996, writ denied) (if performance of contract will result in violation of Constitution, statute, or ordinance, contract is illegal); *Flynn Bros. v. First Med. Assocs.*, 715 S.W.2d 782, 785 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (when party sues based upon illegal contract, courts do not entertain suit); *see also Lewis v. Davis*, 199 S.W.2d 146, 148–49 (Tex. 1947) (contract to do thing which cannot be performed without violation of law is void).

Section 255.001 of the Election Code was enacted in 1987 and required certain disclosures be made regarding, among other things, the identity of the person

paying for political advertisements. In 2003, the Court of Criminal Appeals held that section 255.001 violated the First Amendment of the United States Constitution. *See Doe v. State*, 112 S.W.3d 532, 534 (Tex. Crim. App. 2003). Deuell acknowledged at oral argument that section 255.001 is not a basis for reversal. We therefore conclude that Deuell did not establish the affirmative defense of illegality. *See id.* Accordingly, we hold that the trial court did not err in concluding that Deuell should not prevail based upon the affirmative defense of illegal contract.[5]

We overrule Deuell's third issue.

Conclusion

We affirm the trial court's order. We dismiss as moot Deuell's motion for leave to file a supplement to his appellant's brief.

Rebeca Huddle
Justice

Panel consists of Justices Jennings, Bland, and Huddle.

Jennings, J., dissenting.

---

[5] TRLC argues that Deuell waived his affirmative defenses by failing to include them in his answer. Because we have determined that Deuell did not carry his burden on either of the defenses he raised on appeal, we do not reach the question of whether Deuell was required to plead the affirmative defenses in order to prevail on his TCPA motion to dismiss.

Opinion issued September 15, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00617-CV

BOB DEUELL, Appellant

V.

TEXAS RIGHT TO LIFE COMMITTEE, INC., Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2014-32179

DISSENTING OPINION

> [A] calculated falsehood, inserted into the midst of a heated political campaign, can unalterably distort the process of self-determination. For the use of a known lie . . . is at once at odds with the premises of democratic government and the orderly manner in which economic, social, and political change is to be effected. Half-truths strung

> misleadingly together are no less destructive of democracy than an outright lie.[1]

Because the majority errs in concluding that appellee, Texas Right to Life Committee, Inc. ("TRLC"), established by clear and specific evidence a prima facie case for each essential element of its claims of tortious interference with contract against appellant, former state Senator Bob Deuell, I respectfully dissent.

In the May 4, 2014 Texas Republican Primary election, Deuell, a sitting Texas State Senator, sought re-election. Days later, with Deuell facing a challenger in the May 27, 2014 run-off election, TRLC produced a radio advertisement about Deuell's sponsorship in 2013 of Senate Bill 303, "relating to advance directives and health care and treatment decisions."[2] The script of the advertisement reads as follows:

> Before you trust Bob Deuell to protect life, please listen carefully. If your loved one is in the hospital, you may be shocked to learn that a faceless hospital panel can deny life-sustaining care[—]giving you only 10 days to find another facility for your mother, dad, or young child even if the patient is conscious. Your civil liberties and your right to life should not go away once you are in the hospital. This actually happens to families across Texas, and Bob Deuel[l] sponsored a bill to give even more power to these hospital panels over life and death for our ailing family members. Bob Deuell turned his back on life and on disabled patients. Don't trust him to protect you if you are sick. . . .

---

1 *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 137 (Tex. 2000) (Baker, J., joined by Enoch, J., and Hankinson, J., concurring in part and dissenting in part) (internal quotations omitted).

2 TEX. S.B. 303, 83rd Leg., R.S. (2013).

And TRLC contracted with Cumulus Media Dallas–Fort Worth ("Cumulus") and Salem Communications ("Salem") to broadcast its advertisement on their radio stations.

Subsequently, Deuell sent a series of cease-and-desist letters to the radio stations, complaining that TRLC's advertisement was false and defamatory.[3] He

[3] Senate Bill 303 actually proposed to ***extend*** *from ten days to fourteen days* the time to transfer a patient to an alternative health care provider. *Compare* TEX. HEALTH & SAFETY CODE ANN. § 166.046(e) (Vernon 2010 & Supp. 2016) (physician and health care facility "not obligated to provide life-sustaining treatment after the 10th day" after ethics committee's written decision regarding withdrawal of life-sustaining treatment), *with* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. S.B. 303, 83rd Leg., R.S. (2013) (physician and health care facility "not obligated to provide life-sustaining treatment after the 14th day"). Senate Bill 303 also proposed to ***extend*** *from 48 hours to 7 days* the family notification period in advance of an ethics committee meeting regarding a decision to withhold or withdraw life-sustaining treatment. *Compare* TEX. HEALTH & SAFETY CODE ANN. § 166.046(b) (patient or family must be "informed" of review process "not less than 48 hours before" meeting), *with* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. S.B. 303, 83rd Leg., R.S. (2013) (committee "required," "not later than the seventh calendar day before" meeting regarding decision to withhold or withdraw life-sustaining treatment, to provide patient or "surrogate" (family member or clergy) with "written description" of review process and "notice" of "entitle[ment]" to second opinion and to "attend and participate in" meeting). Senate Bill 303 also increased a health care provider's duty to inform a patient's family prior to withholding or withdrawing life-sustaining treatment. *Compare* TEX. HEALTH & SAFETY CODE ANN. § 166.039(b) (Vernon 2010 & Supp. 2015) (authorizing "attending physician and one person," including a patient's spouse, adult child, parent, or relative, "if available," to make decision to "withhold or withdraw life-sustaining treatment"), *with* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. S.B. 303, 83rd Leg., R.S. (2013) ("[r]equiring" attending physician and health care facility to make "reasonably diligent effort to contact" family or clergy). Further, Senate Bill 303 increased the accountability of health care providers. *See* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. S.B. 303, 83rd Leg., R.S. (2013) (requiring facilities to report number of cases in which ending life-sustaining treatment considered and their disposition).

attached to his letters a statement by the Texas Catholic Conference. In their statement, the Catholic Bishops of Texas endorsed Senate Bill 303 as follows, in pertinent part:

> Texas Catholic Bishops joined a coalition of the state's largest pro-life organizations, healthcare providers, and religious denominations to endorse legislation introduced by state Senator Robert Deuell . . . to improve the state's handling of end-of-life care in a way that balances the protections of human life and a medical provider's conscience (SB 303).
>
> Senate Bill 303 would reform the Texas Advance Directives Act of 1999 . . . to improve the statute's clarity and consistency about many ethical decisions amid the complexity of end-of-life care. For instance, the current statute contains definitions that could be interpreted to allow for the premature withdrawal of care for patients who may have irreversible, but non-terminal, conditions; fails to ensure that all patients are provided with basic nutrition and hydration; and falls short in ensuring the clearest and most compassionate communication between medical professionals and patient families when disagreements arise.
>
> The reforms set forth by Sen. Deuell's bill address those shortcomings by empowering families and surrogates, [and] protecting physicians and other providers . . . . Senate Bill 303 also earned the endorsement of the Texas Medical Association, Texas Hospital Association, Catholic Health Association – Texas, Texas Alliance for Life, and the Baptist General Convention of Texas.

Texas Catholic Conference, *Texas Bishops Endorse SB 303 [t]o Improve End-[o]f-Life Care* (Jan. 31, 2013), http://www.txcatholic.org/news/300-bishops-applaud-advance-directives-reform-bill (attached as an appendix to this opinion).

After the Cumulus and Salem radio stations suspended the airing of TRLC's advertisements, TRLC purchased a new advertisement to air on the stations, and it contracted for airtime with CBS Radio Texas ("CBS"). And after Deuell was defeated in the run-off election, TRLC filed the instant suit against him, alleging

that he had tortiously interfered with its contracts with Cumulus and Salem. Deuell moved to dismiss the suit under the Texas Citizens Participation Act (the "TCPA").[4] And the trial court denied his motion.

In his first issue, Deuell argues that the trial court erred in denying his motion to dismiss TRLC's lawsuit because his communications to Cumulus and Salem related to his exercise of free speech and TRLC failed to establish a prima facie case for its claims of tortious interference with contract.

The purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (Vernon 2015). It "protects citizens from retaliatory lawsuits that seek to intimidate or silence them" from exercising their First Amendment freedoms and provides a procedure for the "expedited dismissal of such suits." *In re Lipsky*, 460 S.W.3d 579, 584, 586 (Tex. 2015); *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (Vernon 2015). It is intended to identify and summarily dispose of lawsuits "designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *In re Lipsky*, 460 S.W.3d at 589. And it is to be "construed liberally to effectuate its purpose and intent fully." TEX. CIV. PRAC. & REM. CODE ANN. § 27.011(b).

---

[4] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (Vernon 2015).

A defendant who believes that a lawsuit is based on his valid exercise of First Amendment rights may move for expedited dismissal of the suit. *In re Lipsky*, 460 S.W.3d at 586. The defendant must first show "by a preponderance of the evidence" the applicability of the TCPA, that is, that the plaintiff's claim is "based on, relates to or is in response to the [defendant's] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association." *Id.* at 586–87 (internal citations omitted); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). The first step of the inquiry is a legal question that we review de novo. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

If the initial showing is made, the burden then shifts to the plaintiff to establish by "clear and specific evidence" a prima facie case for each essential element of its claim. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c); *Lipsky*, 460 S.W.3d at 587–88; *Newspaper Holdings, Inc.*, 416 S.W.3d at 80. "The words 'clear and specific' in the context of this statute have been interpreted respectively to mean, for the former, 'unambiguous,' 'sure,' or 'free from doubt' and, for the latter, 'explicit' or 'relating to a particular named thing.'" *Lipsky*, 460 S.W.3d at 590 (quoting BLACK'S LAW DICTIONARY 268, 1434 (8th ed. 2004)); *see KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. App.—Houston 1st [Dist.]

2013, pet. denied). In contrast, a "prima facie case" has a "traditional legal meaning." *Lipsky*, 460 S.W.3d at 590. "It refers to evidence *sufficient as a matter of law to establish a given fact* if it is not rebutted." *Id.* (emphasis added). Thus, "pleadings that might suffice in a case that does not implicate the TCPA may not be sufficient to satisfy the TCPA's 'clear and specific evidence' requirement." *Id.* at 590–91 ("Mere notice pleading . . . will not suffice."). "[A] plaintiff must provide enough detail to show the factual basis for its claim." *Id.* at 591.

In determining whether a legal action should be dismissed, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a). We review the pleadings and evidence in a light favorable to the plaintiff. *Newspaper Holdings, Inc.*, 416 S.W.3d at 80–81. If the defendant's constitutional rights are implicated and the plaintiff has not met the required showing of a prima facie case, the trial court must dismiss the plaintiff's claim. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005.

Here, Deuell asserted in his motion to dismiss that TRLC's lawsuit against him is based on his exercise of the right of free speech. *See Lipsky*, 460 S.W.3d at 586–87. The TCPA defines the "[e]xercise of the right of free speech" as "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). A "communication" includes the "making

or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id*. § 27.001(1). A "matter of public concern" includes an issue related to: "(A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." *Id*. § 27.001(7).

The record shows that TRLC's claims are based on Deuell's statements, which were contained in letters he wrote to the radio stations running TRLC's advertisement, complaining that it had misrepresented the purpose and effect of legislation he had sponsored as a senator for the State of Texas. The complained-of statements constitute "communications," as defined in the statute. *See id*. § 27.001(1). Further, the statements regard a "matter of public concern," as defined, because they concern issues related to the government and a public official, i.e., Deuell's comment on political advertisements relating to him, as a senator, during an election, concerning legislation that he sponsored in the Texas Senate. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7).

Because Deuell established that the TCPA applies to TRLC's claims against him, the burden then shifted to TRLC to establish by "clear and specific evidence" a prima facie case for each essential element of its claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c); *Lipsky*, 460 S.W.3d at 586–87; *Newspaper*

Holdings, Inc., 416 S.W.3d at 80. The elements of TRLC's claims for tortious interference with contract are (1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract by Deuell, (3) that proximately caused TRLC injury, and (4) "caused actual damages or loss." *Prudential Ins. Co. of Am. v. Fin. Review Servs. Inc.*, 29 S.W.3d 74, 77 (Tex. 2000).

TRLC asserts that it had contracts with Cumulus and Salem for the broadcasting of its advertisement leading up to the May 27, 2014 run-off election. Deuell interfered with TRLC's contracts by threatening litigation against the radio stations if they did not suspend the broadcasting of its advertisement. His letters resulted in the two radio stations suspending TRLC's advertisement and caused it to lose two days of airtime. And TRLC was forced to purchase a new advertisement and contract for airtime with CBS.

As evidentiary support, TRLC presented the affidavit of its executive director, James J. Graham. In his affidavit, Graham testified that on May 6, 2014, TRLC contracted with Malone Media Design ("Malone") to produce a radio advertisement for the Dallas and Fort Worth media markets concerning Deuell's "voting record" for $450. On May 7, 2014, TRLC entered into a contract with Cumulus for the placement and airing of the radio advertisement for "approximately $17,935." And on May 8, 2014, TRLC entered into a contract

with Salem for the placement and airing of the radio advertisement for "approximately $22,015."

According to Graham, Cumulus and Salem, on May 14, 2014, notified TRLC that they had received "legal threats" from Deuell based on TRLC's advertisement and they were suspending its airing. "As a compromise to resume airing [of TRLC's] radio advertisement, given the concerns of [Cumulus] and [Salem], [TRLC] agreed to produce a new radio advertisement and replace the original radio advertisement. . . ." TRLC returned to Malone and "had another radio advertisement produced and delivered" to Cumulus and Salem. And, as a "remedial measure[]," TRLC also "contracted with [CBS]" to purchase "additional airtime in the Dallas/F[ort] Worth media market for the new radio advertisement" for "approximately $15,037."

Graham's testimony, standing alone, does not establish the existence of a contract. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 77; *see also Serafine v. Blunt*, 466 S.W.3d 352, 361 (Tex. App.—Austin 2015, no pet.). In *Serafine*, the Blunts alleged that Serafine tortiously interfered with their contract with a drainage and foundation company to install a pump-and-drain system on their property. 466 S.W.3d at 361. Seraphine threatened the company's employees while they worked, and she threatened the company with litigation, resulting in its decision "not to continue the contracted-for work" and causing the Blunts to have to "pay

more for the work." *Id.* Pursuant to the TCPA, Serafine moved to dismiss the Blunts' claim against her. *Id*. Mr. Blunt, in his affidavit in response to Serafine's motion, testified that he had "hired [the company] to professionally install a pump and drain system." *Id.* At a hearing, he explained that he had hired it "to resolve a drainage problem that was causing water to gather under his house." *Id.* And it was "going to install French drains around the property and against the border of his house that would tie into a sump pump that would pump the water out to a pop-out valve so it would flow down into the street." *Id.* The Austin Court of Appeals held that the Blunts had "failed to establish a prima facie case for [the contract] element of their claim" because "Mr. Blunt did not provide *detail about the specific terms* of the contract or attach to his affidavit any contract or other document memorializing any agreement between the Blunts and the drainage company about the scope of work to be done." *Id.* at 361–62 (emphasis added).

This Court recently reached the same conclusion in a case with similar facts. *See Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc*., 441 S.W.3d 345, 361 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). In *John Moore*, we held that the nonmovant had "failed to establish by clear and specific evidence the essential element of the existence of a contract" because it did not present evidence regarding "*the terms*" of any of its contracts with its customers or

the Better Business Bureau chapters. *Id.* (emphasis added). Rather, the nonmovant merely asserted that contracts existed.[5] *Id.*

Here, Graham, in his testimony, presented even less detail about the terms of TRLC's contracts with Cumulus and Salem than did Blunt in his affidavit in *Seraphine*. *See* 466 S.W.3d at 361–62. Graham's testimony does not constitute "clear and specific evidence" of "the terms" of any contract. *See id.* at 361; *John Moore Servs., Inc.*, 441 S.W.3d at 361; *see also All Am. Tel., Inc. v. USLD Commc'ns, Inc.*, 291 S.W.3d 518, 532 (Tex. App.—Fort Worth 2009, pet. denied) (general statement contracts existed insufficient to maintain tortious-interference-with-contract claim where affidavit provided no "detail as to specific terms" of contracts and no contract attached "to serve as an exemplar"). Thus, TRLC did not establish a prima facie case for the existence of a contract. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 77; *see also Lipsky*, 460 S.W.3d at 590–91 (plaintiff "must provide enough detail to show the factual basis of its claim" and present "evidence

---

[5] In support of its holding, the majority relies, in part, on *Martin v. Bravenec*, No. 04-14-00483-CV, 2015 WL 2255139, at *7 (Tex. App.—San Antonio May 13, 2015, pet. denied). In *Martin*, the San Antonio appellate court's entire analysis "[w]ith regard to the existence of a contract," is as follows: "[T]he pleadings alleged the appellees have a contract to sell the Property, and Bravenec identified the name of the prospective purchaser at the hearing." *Id.* As discussed, this Court has previously held that merely alleging that a contract exists is insufficient to establish "by clear and specific evidence the essential element of the existence of a contract." *See Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 361 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Further, identifying a "prospective purchaser" alone does not establish "the terms" of a contract. *See id.*

sufficient as a matter of law to establish a given fact if it is not rebutted" (emphasis added)).

Graham's testimony also does not establish that Deuell committed a willful and intentional act of interference with any contract. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 77. A willful and intentional interference requires evidence that the defendant "knowingly induced" a contracting party to breach its obligations. *Serafine*, 466 S.W.3d at 362; *see also John Paul Mitchell Sys. v. Randalls Food Mkts.*, 17 S.W.3d at 721, 730 (Tex. App.—Austin 2000, pet. denied). Graham's conclusory testimony about the existence of a contract is insufficient to establish a breach of any of specific contract provision. *See All Am. Tel., Inc.*, 291 S.W.3d at 532. Further, TRLC was required to provide "clear and specific evidence" that "some *obligatory* provision" of the contract was breached. *Id.* (emphasis added).

"Inducing a contract obligor to do what it has a right to do is not an actionable interference." *ACS Inv'rs, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). A licensed[6] radio broadcasting station is, with the very narrow

---

[6] The Communications Act of 1934 (the "Act") "forbids any person from operating a broadcast station without first obtaining a license" from the Federal Communications Commission. *United States v. Midwest Video Corp.*, 406 U.S. 649, 679, 92 S. Ct. 1860, 1876 (1972) (Douglas, J., joined by Stewart, J., Powell, J., and Rehnquist, J., dissenting) (citing 47 U.S.C. § 301). The Act extends "to all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States." *Id.* (citing 47 U.S.C. § 152(a)).

exception of advertising by political candidates,[7] "obliged to reserve to [itself] the final decision" as to the content it will air. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 205, 63 S. Ct. 997, 1004 (1943) ("[A] licensee has the duty of determining what [content] shall be broadcast over [its] station's facilities."); *see also McIntire v. Wm. Penn Broad. Co. of Pa.*, 151 F.2d 597, 601 (3d Cir. 1945) ("[A] radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones.").

Moreover, a licensed radio station "must operate in the public interest." *United States v. Midwest Video Corp*., 406 U.S. 649, 679, 92 S. Ct. 1860, 1876 (1972) (Douglas, J., joined by Stewart, J., Powell, J., and Rehnquist, J., dissenting) (citing 47 U.S.C. §§ 308–09); *see also Nat. Broad. Co.*, 319 U.S. at 205, 63 S. Ct.

---

[7] If a licensee permits "any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." 47 U.S.C. § 315(a), (b)(2)(D) ("A candidate meets the requirements of this subparagraph if, in the case of a radio broadcast, the broadcast includes a personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast."); *see also KENS-TV, Inc. v. Farias*, No. 04-07-00170-CV, 2007 WL 2253502, at *3 (Tex. App.—San Antonio Aug. 8, 2007, pet. denied) (mem. op.) (discussing "use" advertisements under section 315(a)). A licensee has "no power of censorship over the material broadcast" in a "use" advertisement. 47 U.S.C. § 315(a). And because the broadcaster cannot censor the candidate's materials, it is immune from state libel claims. *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc*., 360 U.S. 525, 528, 535, 79 S. Ct. 1302, 1305, 1308 (1959); *see also Carlisle v. Philip Morris, Inc*., 805 S.W.2d 498, 516 (Tex. App.—Austin 1991, writ denied). However, because third-party groups, like TRLC, are not "legally qualified candidate[s]," they are not subject to the "no censorship" provisions of section 315(a), and radio stations can be held liable for the content of their advertising.

at 1004 ("It is the station, not the network, which is licensed to serve the public interest."). The Federal Communications Commission ("FCC"), "in determining whether a licensee's operation has served the public interest, considers whether [it] has complied with state and local regulations governing advertising." *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 445, 83 S. Ct. 1759, 1771 (1963). And the National Association of Broadcasters "unmistakably enjoins each member to refuse the facilities of his station to an advertiser where he has good reason to doubt the integrity of the advertiser, the truth of the advertising representations, or the compliance of the advertiser with the spirit and purpose of all applicable legal requirements." *Id.* at 446, 83 S. Ct. at 1771.

Thus, for a radio station to execute an agreement to "broadcast all advertisements tendered to [it], without qualification" would constitute an "illegal" contract because a licensee "cannot lawfully delegate [its] duty or transfer the control of [its] station" to another. *Nat'l Broad. Co.*, 319 U.S. at 205, 63 S. Ct. at 1004; *Traweek v. Radio Brady, Inc.*, 441 S.W.2d 240, 242 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.); *see also* 47 U.S.C. § 310(d) (prohibiting transfer of licensing or control except by application to FCC). Notably, a contract that is illegal or contrary to public policy cannot serve as the basis for a claim of tortious interference with contract. *Wa. Square Fin., LLC v. RSL Funding, LLC*, 418 S.W.3d 761, 771 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

Here, because TRLC did not present any of the details about the terms of its contracts with Cumulus and Salem, it did not present "clear and specific evidence" that an "*obligatory* provision" of the contracts was breached.[8] *See All Am. Tel*., 291 S.W.3d at 532 (emphasis added).

Further, Graham's testimony does not present clear and specific evidence establishing a prima facie case that Deuell's actions "caused actual damages or loss." *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 77. Graham, in his affidavit, asserts only the price paid for each contract and that some portion of each was not performed. Further, Graham, in his affidavit, does not present any of the details of TRLC's new contract with CBS, i.e., when it was executed, when the "remedial" advertisements began airing, how many spots were aired, or when they stopped.

At the hearing on Deuell's motion to dismiss, the following exchange took place between the trial court and counsel for TRLC:

---

[8] The majority asserts that "TRLC did not bear the burden to disprove the existence of Deuell's potential defenses." The Texas Supreme Court has rejected similar reasoning in another case involving a claim for tortious interference with contract. *See ACS Inv'rs v. McLaughlin*, 943 S.W.2d 426, 431 (Tex. 1997). There, McLaughlin similarly asserted that ACS's argument that its action was authorized under the contract and was therefore not subject to interference constituted an attempt to raise a defense. *Id.* The court explained that establishing the existence of a *contract subject to interference* constituted an essential element of McLaughlin's prima facie case. *Id.* And the existence of a defense was "not an issue." *Id.* The court concluded that because the evidence revealed that the agreement was not subject to the tortious interference allegation, ACS did not interfere as a matter of law and need not prove a defense to avoid liability. *Id.* ("The focus in evaluating a tortious interference claim begins, and in this case remains, on *whether the contract is subject to the alleged interference*.") (emphasis added)).

THE COURT:	You were off the air for two days?
TRLC:	We were off the air for two days.
THE COURT:	How are you going to—this is just a curiosity here. How are you going to prove damages for the two days?
TRLC:	I can do it right now. I can prove them almost to the penny, and I can—I can put on a witness who we're prepared to do.
THE COURT:	That's not part of this Motion. As I said, that was a curiosity on my part.

As an element of its prima facie case, however, TRLC was required to present evidence of its damages. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 77. And TRLC presented no such evidence at the hearing.

Again, a "prima facie case" "refers to evidence *sufficient as a matter of law to establish a given fact* if it is not rebutted." *Lipsky*, 460 S.W.3d at 590 (emphasis added). "[B]aseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA." *Id.* at 592. TRLC was required to "provide enough detail to show the factual basis of its claim[s]." *Id.* at 591; *see, e.g.*, *Tex. Campaign for the Env't v. Partners Dewatering Int'l, LLC*, 485 S.W.3d 184, 199–200 (Tex. App.—Corpus Christi 2016, no pet.) (affidavit testimony set out damages model, considerations upon which damages were based, and included costs up to time of contract cancellation).

Graham's testimony shows that TRLC did not merely pay Malone to produce a new commercial for Cumulus and Salem pursuant to the "compromise" that TRLC struck "to resume airing [of its] radio advertisement[]." Rather, TRLC signed a new contract with CBS, the terms of which it did not present to the trial court. And, according to Graham, TRLC paid just $450 to Malone to produce the original advertisement and $17,935 and $22,015 to Cumulus and Salem, respectively, to broadcast it over the total contract period. Nevertheless, TRLC asserts that it was forced to spend over $15,000 to cure the lost airtime, which Graham does not quantify in his affidavit, but TRLC's counsel explained at the hearing constituted only a two-day period. "[O]pinions must be based on demonstrable facts and a *reasoned basis*." *In re Lipsky*, 460 S.W.3d at 593 (emphasis added).

In sum, TRLC presented *no evidence* to establish any of the elements of its claims against Deuell for tortious interference with contract. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 77. Deuell established that the TCPA applies to the claims against him, and TRLC did not present clear and specific evidence establishing a prima facie case of each of the elements of its tortious-interference claims. Accordingly, I would reverse the trial court's order and render judgment dismissing TRLC's claims against Deuell.

Terry Jennings
Justice

Panel consists of Justices Jennings, Bland, and Huddle.

Jennings, J., dissenting.

TEXAS CATHOLIC CONFERENCE
THE PUBLIC POLICY VOICE OF THE CATHOLIC BISHOPS OF TEXAS

Texas Bishops Endorse SB 303 To Improve End-Of-Life Care

January 31, 2013

Texas' Catholic Bishops joined a coalition of the state's largest pro-life organizations, healthcare providers, and religious denominations to endorse legislation introduced by state Senator Robert Deuell (R-Greenville) to improve the state's handling of end-of-life care in a way that balances the protections of human life and a medical provider's conscience (SB 303)

Senate Bill 303 would reform the Texas Advance Directives Act of 1999 (TADA), to improve the statute's clarity and consistency about many ethical decisions amid the complexity of end-of-life care. For instance, the current statute contains definitions that could be interpreted to allow for the premature withdrawal of care for patients who may have irreversible, but non-terminal, conditions; fails to ensure that all patients are provided with basic nutrition and hydration; and falls short in ensuring the clearest and most compassionate communication between medical professionals and patient families when disagreements arise.

The reforms set forth by Sen. Deuell's bill address those shortcomings by empowering families and surrogates, protecting physicians and other providers from having to provide morally unethical treatment, and avoiding the continuing threats of frivolous lawsuits. Senate Bill 303 also earned the endorsement of the Texas Medical Association, Texas Hospital Association, Catholic Health Association-Texas, Texas Alliance for Life, and the Baptist General Convention of Texas.

Reforming the Advance Directive Act has been a top priority for the Texas Catholic Conference in the 83rd Texas Legislature, as the Catholic Church strongly believes that respect for life is lifelong – from conception to natural death.

"The bishops of Texas have long sought to reform end-of-life care laws in a way that promotes and protects the life of individuals in the natural process of dying. We believe that in end-of-life decisions, any legislation should prioritize the patient, while also recognizing the emotional and ethical concerns of patients, families, and health care providers, to provide the most compassionate care possible," said Daniel Cardinal DiNardo, of the Diocese of Galveston-Houston.

"Respect and care for the life and personal dignity of the dying patient should be the goals of every individual and institution involved in the process. We are pleased that Senator Deuell's bill accomplishes these goals by explicitly excluding any form of euthanasia and rejecting an abusive extension of the death process," Cardinal said.

The reforms suggested in Senator Deuell's address a number of principles, including:

- Improving notification and appeal processes for families or surrogates when a Do-Not-Resuscitate Order is used;
- Ensuring that artificially administered nutrition and hydration cannot be withdrawn from a patient, unless continuing to provide that treatment would harm the patient;
- Ensuring the process is applied only to patients for whom life-sustaining treatment would be medically inappropriate and ineffective, and are difficult for the patient to endure;
- Respecting the conscience of physicians and other health care providers so the law does not require them to provide unethical treatment;
- Extending the notification time to a family or surrogate from 48 hours to seven days in advance of an ethics committee meeting;
- Extending the time to find an alternative willing provider from 10 to 14 days;
- Providing the family or surrogate with a patient liaison to help guide them through the process;
- Providing the family or surrogate with a free copy of the patient's medical record;
- Inviting the family or surrogate to attend the ethics committee meeting at which future care for their loved one will be

EXHIBIT A

discussed; and,

• Creating reporting requirements for hospitals or hospital systems that have one or more ethics committee meetings on the process outlined in the bill.

S S S-1 1
2

Pope Names Cardinal DiNardo To New Council For The Economy

Senate Bill Affirms Parental Choice In Child Care Bill

Heritage Edition Of The St. John's Bible Visits Houston

Child Protective Services Introduces CHILD Program to Amarillo Diocese

Phone: (512) 339-9882 • Fax: (512) 339-8670
Physical Address: 1600 North Congress Avenue, Suite B, Austin TX 78701
Mailing Address: P.O. Box 13285, Austin, TX 78711

The Texas Catholic Conference is the association of the Roman Catholic Bishops of Texas. We accredit the state's Catholic Schools, maintain records that reflect the work of the Church in Texas, and represent the Bishops in the public policy sphere.

TCC HOME BISHOPS MARRIAGE FORMS SITE MAP CONTACT PRIVACY USCCB VATICAN

EXHIBIT A