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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. _____

IN THE SUPREME COURT OF TEXAS

BOB DEUELL
Petitioner,

v.

TEXAS RIGHT TO LIFE COMMITTEE, INC.
Respondent,

On Petition for Review from the
First Court of Appeals at Houston, Texas
No. 01-15-00617-CV

PETITION FOR REVIEW

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REFERENCES TO THE RECORD

Clerk's Record will be as:	CR at [Page #]
Reporter's Record will be as:	RR Vol. [#] at [Page #]
Appendix will be referenced as	App. [Letter]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATE OF THE CASE

Nature of the Case:

In March 2014, Petitioner Bob Deuell (hereinafter "Petitioner" and/or "Deuell") was a candidate in the Republican primary for re-election as State Senator for Senate District 2, and he drew two challengers. Deuell and challenger Hall were to face each other in the run-off election in May. During the previous Texas Legislature, Deuell had authored Senate Bill 303, which was related to advance directives. Respondent Texas Right to Life Committee, Inc. ("hereinafter "Respondent" and/or "TRTL"), an advocacy political action committee, opposed SB 303. 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. TRTL secured airtime with two radio stations run by Cumulus Media Dallas-Ft. Worth and Salem Communications, which began airing the advertisement.

Petitioner's lawyers sent cease-and-desist letters to Cumulus and Salem, urging that they cease airing the advertisement because it contained false and defamatory statements. That same day, Cumulus and Salem notified TRTL that attorneys for Deuell had contacted them and that they were suspending the airing of the advertisements based upon the legal threats made.

TRTL 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. (CR at 4-10). Deuell moved to dismiss the suit pursuant to the Texas Citizen's Participation Act (hereinafter "TCPA"), arguing that the cease-and-desist letters were an exercise of the right to free speech, and that the suit was precluded by the affirmative defenses of judicial privilege and illegal contract. (CR at 14-66). TRTL 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 a contract.

Trial Court: TRTL's lawsuit was filed on June 5, 2014. (CR at 4) However, Deuell was not served immediately. Petitioner filed a timely Original Answer on August 11, 2014. (CR at 11). Deuell's Motion to Dismiss was filed on September 5, 2014. (CR at 14) Defendant argued that the case must be dismissed pursuant to Chapter 27 of the Texas Civil Practice & Remedies Code because: 1) the complained of speech was on a matter of public concern and thus protected by Defendant's free speech rights under the First Amendment to the United States Constitution and Section 8, Article 1 of the Bill of Rights to the Texas Constitution (CR at 15-16); 2) the affirmative defense of Judicial Privilege applied (CR at 16-20); and 3) the affirmative defense of illegality applied. (CR at 20-21). Appellant timely set the Motion to Dismiss for hearing on September 26, 2014. (CR at 70). On September 24, 2014, two days prior to the hearing on Deuell's Motion to Dismiss, TRTL filed a First Amended Petition alleging a federal cause of action pursuant to 42 U.S.C. 1983. (CR at 80). Also on September 24, 2014, TRTL filed its Response to Deuell's Chapter 27 Motion to Dismiss. (CR at 90). Plaintiff only addressed Deuell's argument concerning Constitutionally protected freedom of speech and did not address the affirmative defenses.

On September 25, 2014, Deuell filed a Notice of Removal and removed the case to federal court. (CR at 99). In order to maintain Deuell's Motion to Dismiss, on October 15, 2014, Deuell filed Motions to Dismiss under Rule 12 and Chapter 27 of the Texas Civil Practice & Remedies Code in federal court (CR at 216). Before the Court could rule on Petitioner's Motions to Dismiss, Respondent filed its Second Amended Complaint, voluntarily dismissing its federal cause of action. (CR at 273) and filed its Motion to Remand. (CR at 281).

On December 23, 2014, the federal court remanded the case back to the trial court. (CR at 364). After remand, and without precedential guidance on Chapter 27 concerning the extension of time for a trial court to rule under these circumstances on January 7, 2015, the Petitioner filed a Notice of Interlocutory Appeal to this Honorable Court, (CR

at 367), under Case No. 01-15-00011-CV. Respondent filed Motion to Dismiss the Appeal for Want of Jurisdiction. On February 24, 2015, this Court issued a Memorandum Opinion granting TRTL's Motion to Dismiss because "*the trial court below has neither denied Beuell's (sic) section 27.003 motion to dismiss nor failed to rule on the motion within 30 days following the date of a hearing on the motion, the Texas Civil Practice and Remedies Code does not permit Beuell's (sic) attempted interlocutory appeal*."

Once this matter was remanded back to the trial court, Deuell immediately set his Motion to Dismiss for hearing for March 16, 2015. (CR at 376). However, TRTL argued that until the Court issued a Mandate, Deuell's motion could not be heard; therefore, the hearing was passed. On May 15, 2015, the Court issued the Mandate on this matter. On May 18, 2015, Petitioner's Motion to Dismiss was reset to June 19, 2015. (CR at 378). On June 19, 2015, Appellant's Motion to Dismiss was heard before the Hon. Robert K. Schaffer. (RR at 1-27).

Trial Court Disposition: On July 1, 2015, Judge Schaffer issued an Order denying Appellant's Motion to Dismiss. (CR at 380).

Court of Appeals This case was affirmed. *Deuell v. Texas Right to Life Committee, Inc*., 01-15-00617-CV, Court of Appeals of Texas, First District, September 15, 2016.

Panel consisted of Justices Jennings, Bland, and Huddle.[1]

Court of Appeals Disposition: The Court of Appeals' Opinion and Judgement are attached hereto as App. D. The First Court of Appeals assumed the TCPA had been properly plead and supported by Petitioner and then held TRTL met its burden of prima facie evidence on each and every element of the offense of tortious interference with a contract and affirmed the trial court's

[1] Justice Michael C. Massengale was on the original panel, but recused himself after Appellant filed Appellant's Opposed Motion to Recuse showing the relationship between Judge Massengale and TRTL. [App. C].

denial of Deuell's Motion to Dismiss. The Court entered its Judgment on September 15, 2016. On October 31, 2016, Deuell filed a Motion for Rehearing and Motion for En Banc Reconsideration. On December 29, 2016, the Court denied Deuell's motions. There are no motions pending before the Court of Appeals.

:

STATEMENT OF JURISDICTION

This Court has jurisdiction of this case under sections 22.001(a)(2); 22.001(a)(3); 22.001(a)(6); and 22.225(c) and (e) of the Texas Government Code as follows:

22.001(a)(2): The decision of the Court of Appeals in this case conflicts with, or the Justices disagree on the material question of law, in *Serafine v. Blunt*, 466 S.W.3d 352, 361 (Tex.App. – Austin 2015, no pet.), in that the Court of Appeals determined that similar evidence was insufficient to provide by clear and specific evidence a prima facie case of the existence of a contract subject to tortious interference.

22.001(a)(2): The decision of the Court of Appeals in this case conflicts with the Supreme Court's Opinion in *In re Lipsky*, 460 S.W.3d 579, 592-93 (Tex. 2015) in that the court misapplied the standard of "clear and specific" evidence of a prima facie case for each essential element of the claim in question.

22.001(a)(2): The decision of the Court of Appeals in this case conflicts with the Supreme Court's Opinion in *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994) in that the Court misconstrued the nature of the tortious interference claim in that the essence of the claim is damages that flow from communications made in the course of a judicial proceeding, where underlying "tort" flows from an alleged reputational harm, regardless of the type of claim alleged.

22.001(a)(2): The decision of the Court of Appeals in this case conflicts with, or the Justices disagree on the material question of law, in *Griffin v. Rowden*, 702 S.W.2d 692 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) in that the Court of Appeals determined that the Dallas Court of Appeals' holding that judicial privilege applied to a tortious interference claim is inapposite because *Griffin* turned on the filing of a lis pendens. A number of Texas courts have extended the judicial privilege beyond defamation claims.

22.001(a)(3) and 22.001(a)(6): This case involves construction of a statute, and involves a matter of high importance to the jurisprudence of the State.

22.225(c) and (e): The disagreement, inconsistency or conflict on a material point of law is such that it should be clarified to remove unnecessary uncertainty in the law and provide fairness to litigants.

ISSUES PRESENTED

1. The Court of Appeals erred when it concluded that TRTL proved a prima facie case for the element of a contract subject to interference when TRTL failed to produce clear and specific evidence of the specific provisions of the alleged contract.

2. The Court of Appeals erred when it concluded that TRTL proved a prima facie case for the element of a willful and intentional act of interference because TRTL presented no evidence that the contracts were breached.

3. The Court of Appeals erred when it concluded that TRTL proved a prima facie case for the element of actual damages or loss when TRTL failed to produce clear and specific evidence of actual damages or loss.

4. The Court of Appeals erred when it concluded that TRTL's tortious interference claim is not protected by the absolute judicial privilege when the underlying alleged tortious conduct is a communication made in the course of a judicial proceeding and is therefore absolutely privileged.

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW BOB DEUELL ("Deuell") and files this Petition for Review of the Court of Appeals' panel decision, which upheld the Trial Court's denial of Deuell's Motion to Dismiss raising the defense of the Texas Citizen's Participation Act, ("TCPA"), Tex. Civ. Prac. & Rem. Code Ann. §27.001-.011 (Vernon 2015).

STATEMENT OF FACTS

Pursuant to Tex. R. App. P. 53.2(g), the Petitioner notes that the factual summary in the Court of Appeals decisions is accurate, however, the Dissenting Opinion contains factual details that were omitted from the Court of Appeals' decision. (App. E).

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

In 2013, during the Eighty-Third Session of the Texas Legislature, Deuell had authored Senate Bill 303, which was related to advance directives. TRTL, an advocacy political action committee, opposed SB 303. On May 6, 2014, during the run-off election season, TRTL 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. TRTL secured airtime with two radio stations run by Cumulus Media Dallas-Ft. 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, Petitioner'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 disables 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 FALSE 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 TRTL that attorneys for Deuell had contacted them and that they were suspending the airing of the advertisements based upon the legal threats made. TRTL represents that it paid to produce a new advertisement that Cumulus and Salem agreed to air, and secured additional airtime with CBS Radio Texas to compensate for the lost advertising time. The ads were back on the air two days later.

TRTL 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. Deuell moved to dismiss the suit pursuant to the TCPA, arguing that the cease-and-desist letters were an exercise of the right to free speech, and that the suit was precluded by the affirmative defenses of judicial privilege and illegal contract. TRTL responded that 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 a contract. After a hearing, the trial court denied the motion. Deuell appealed the trial

court's denial of his Motion to Dismiss to the First Court of Appeals, Houston, Texas.

The First Court of Appeals heard oral arguments on the briefs on March 23, 2016. The First Court of Appeals assumed the TCPA had been properly plead and supported by Petitioner and then determined that Respondent had presented a prima facie case for each element of the offense of tortious interference with a contract, and that Petitioner had not sufficiently proved any affirmative defenses. The Court affirmed the trail court's denial of the Motion to Dismiss. The Petitioner filed a Motion for Reconsideration and En Banc Rehearing on October 31, 2016. This was denied by the First Court of Appeals on December 29, 2016.

SUMMARY OF THE ARGUMENT

The issues in this case are important to the jurisprudence of the proper application of the TCPA, Tex. Civ. Prac. & Rem. Code Ann §§27.001 – 27.011, in order 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 §27.002 (Vernon 2015). Further, communications by Texas attorneys, made on behalf of their clients should be absolutely privileged from tortious interference claims because the underlying tort must sound in libel, slander or business disparagement, each of which this Court has determined are protected by the judicial privilege.

ARGUMENT

In order to obtain a dismissal under Chapter 27 of the Texas Civil Practice & Remedies Code, a defendant must show "by a preponderance of 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 Ann. §27.005(b) (Vernon 2015). The purpose of the Act is to protect 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). It should be construed liberally to effectuate its purpose and intent fully. Tex. Civ. Prac. & Rem. Code Ann. §27.011(b). This determination is reviewed de novo as an application of law to the facts. *See Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Serv., Inc.*, 441 S.W.3d 345, 353 (Tex. App.-Houston [1st Dist] 2013, pet. denied).

The Court may not dismiss the action if the non-movant can establish, by clear and specific evidence, a prima facie case for each essential element of the claim in question. Tex. Civ. Prac. & Rem. Code §27.005(c). "Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes 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). "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." Tex. Civ. Prac. & Rem. Code §27.006(a).

In order to establish tortious interference with a contract, the Plaintiff must provide evidence of: (1) a contract subject to interference exists, (2) that the alleged act of interference was willful and intentional, (3) that the willful and intentional act proximately caused damage, and (4) that actual damage or loss occurred. *Prudential Ins. Co. of Am. V. Fin. Review Servs. Inc.*, 29 S.W.3d 74, 77 (Tex. 2000), *citing ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997).

(1) The Court of Appeals erred when it concluded that TRTL proved a prima facie case for the element of a contract subject to interference when TRTL failed to produce clear and specific evidence of the specific provisions of the alleged contract.

The Court erred in reasoning that TRTL presented by clear and specific evidence a prima facie case of the essential element of a contract subject to tortious interference. *See Affidavit of James J. Graham* (CR at 95-96).

In *Serafine v. Blunt*, 466 S.W.3d 352, 361 (Tex.App. – Austin 2015, no pet.), the Blunts sued Sarafine for tortious interference with their contract for drainage work at their property. *Id*. Sarafine moved to dismiss the suit based on the TCPA. *Id*. The Blunts presented affidavit, as well as testimony, evidence at the hearing of the existence of a contract. The Austin Court of Appeals held that the Blunts failed

to establish a prima facie case for the contract element of their claim reasoning that there was not sufficient detail about the specific terms of the contract nor was it attached to the affidavit or other document memorializing any agreement between the Blunts and the drainage company about the scope of the work to be done. *Id*. at 361-362. TRTL likewise offered insufficient details about specific terms about the alleged contracts.

Likewise, the few sentences of TRTL's affidavit alone should not be sufficient to be considered "clear and specific evidence" of actual contracts subject to interference. *See ACS Investors, Inc. v. McLaughlin,* 943 S.W.2d 426, 43l (Tex.1997). In *ACS Investors, Inc*., this Court found that the express terms of the contract in question showed that it was not subject to tortious interference allegations, and therefore, ACS Investors could not have interfered express terms as a matter of law. The severance of the contract by ACS Investors could not be a breach of the contract because ACS Investors had a right to do so under the agreement. *Id*. *See also Serafine v. Blunt,* 466 S.W.3d at 361 and *Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 441 S.W.3d at 361.

This Court has held that a "prima facie case" refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. *In re Lipsky*, 460 S.W.3d 579, 591 (Tex.2015), *citing Simonds v. Stanolind Oil & Gas Co*., 136 S.W.2d 207, 209 (Tex.1940). Respondent's pleadings and conclusory

affidavit were the only evidence submitted of a contract. Without the benefit of any actual wording from the contracts or having attached them as evidence, Respondent cannot be held to have met 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 curium); *see Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex.App.-Houston [1st Dist.] 2013, pet. denied).

Once the TCPA was asserted by Petitioner, the Respondent had the burden of proving up an existing contract subject to interference. "The focus in evaluating a tortious interference claim begins, and in this case remains, on whether the contract is subject to the alleged interference." *Id*. See *Juliette Fowler Homes*, 793 S.W.2d 660, 664 (Tex. 1990). Respondent did not produce clear and specific evidence of the existence of a contract subject to interference. Tex. Civ. Prac. & Rem. Code §27.005(c). The Court erred in finding Respondent met its burden on this element of tortious interference with a contract.

(2) The Court of Appeals erred when it concluded that TRTL proved a prima facie case for the element of a willful and intentional act of interference because TRTL presented no evidence that the contracts were breached.

The Court's decision that this element is met by TRTL with clear and specific evidence of a willful and intentional act of interference – the letters relating to anticipated litigation – is also in error because the record is silent as to what

constitutes a breach under the alleged contracts. Without knowing the specifics of the contracts in question, it is impossible to know whether or not the letters sent by Petitioner's counsel interfered with any obligatory provisions of the alleged contracts. Respondent did not allege any specific provision of the contracts that were breached by Cumulus or Salem. It may well have been within their prerogative, and not bound by contract, to choose what and when to run any ad. The affidavit states that the stations notified TRTL that they were suspending airing the advertisement. Something they had the apparent right to do. *See Nat'l Broad. Co. v. United States*, 319 U.S. 205, 63 S.Ct. 997, 1004 (1943) and *McIntire v. Wm. Penn Co. of Pa.*, 151 F.2d 597, 601 (3rd Cir. 1945).

TRTL's affidavit does not provide the clear and specific evidence necessary to prove that Deuell committed a willful and intentional act of interference that would cause Cumulus or Salem to breach a specific contract provision. *Prudential Ins. Co. of Am.*, 29 S.W.3d at 77. A willful and intentional interference requires evidence that the party knowingly induced a contracting party to breach its obligations. *See Serafine*, 466 S.W.3d at 362. Tex. Civ. Prac. & Rem Code §27.005(c). An obligation or obligatory provision of the contract must be in existence and be breached. *Id.*

In *All Am. Tel., Inc. v. USLD Commc'ns Inc.*, 291 S.W.3d 518, 532 (Tex.App. – Fort Worth 2009, pet. denied) the court reasoned that general statements, in the

summary judgment affidavit, were not specific enough to identify conduct that interfered with a specific contract provision. For a plaintiff to maintain a tortious interference claim, it must produce some evidence that the defendant knowingly induced one of the contracting parties to breach its obligations under a contract. *Id*. *See also John Paul Mitchell Sys. v. Randalls Food Mkts., Inc*., 17 S.W.3d 721, 730 (Tex.App.-Austin 2000, pet. denied); *Davis v. HydPro, Inc*., 839 S.W.2d 137, 139-40 (Tex.App.-Eastland 1992, writ denied); *Dunn v. Calahan*, No. 03-05-00426-CV, 2008 WL 5264886, at *3 (Tex.App.-Austin Dec. 17, 2008, *pet. denied*) (mem. op. on reh'g). To do so, the plaintiff must present evidence that some obligatory provision of a contract has been breached. *Id*. *See N.Y. Life Ins. Co. v. Miller*, 114 S.W.3d 114, 125 (Tex.App.-Austin 2003, no pet.); *Archives of Am., Inc. v. Archive Litig. Servs., Inc.*, 992 S.W.2d 665, 667-68 (Tex.App.-Texarkana 1999, pet. denied).

TRTL did not present by clear and specific evidence a prima facie case for this essential element because there is no evidence of an act that was willful or intentional to cause a party to breach a contractual obligation. This determination was error by the Court of Appeals.

(3) The Court of Appeals erred when it concluded that TRTL proved a prima facie case for the element of actual damages or loss when TRTL failed to produce evidence of actual damages suffered.

The Court's decision errs in deciding that the Respondent provided clear and specific evidence of actual damages or loss. The affidavit recites several amounts

that are alleged to have been paid for advertising costs during the election run-off. TRTL does not actually ever provide clear and specific evidence of actual damages from the alleged tortious interference. At one point, TRTL states that the amount is "immeasurable." (CR at 85).

These blanket statements for unidentified amounts of harm or loss do not meet the requirement of clear and specific evidence of each element of TRTL's claim. *Lipsky*, 460 S.W.3d at 590. As this court has stated, prima facie evidence refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted. *Id*.

In their opening paragraph for actual damages, TRTL alleges that they suffered actual damages for the cost of production and placement of the second radio ad and the loss of airtime for the original radio ad. The cost of the second radio ad was not provided in its affidavit nor included in the pleadings. Additionally, TRTL plead that they were entitled to full restitution of all profit realized by Deuell in this matter. Again, Respondent did not provide any evidence of what this profit was or what the full restitution amount is that would likely be sought. Deuell was not successful in his run for reelection and therefore has not unjustly profited from the complained of actions.

As argued previously, if Cumulus and Salem had a right to suspend the airing of an advertisement at their discretion, as is anticipated by law, then there is no

damages or loss to TRTL for any airtime. *See* 47 U.S.C. §315(2002). *See and compare Houston Post Co. v. U.S.*, 79 F.Supp. 199 (S.D.Tex 1948) and *KENS-TV, Inc. v. Farias*, 2007 WL 2253502. Based on the evidence presented by TRTL, the first radio ad only cost $450. Respondent did not offer any evidence of the cost to produce the second radio ad. TRTL had the burden to present this evidence at the hearing on the Motion to Dismiss and they failed to do so:

> THE COURT: You were off the air for two days?
>
> MR. NIXON: 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?
>
> MR. NIXON: 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.
>
> (RR I at 9).

The trial court erroneously advised TRTL that they did not have to offer evidence of damages for the hearing. It was clear TRTL knew they did in order to meet their burden and they did not make an offer of proof or bill of exceptions to preserve that evidence in the record. The affidavit states the costs for all airtime but it does not identify the amount of loss for the two days under the alleged original contracts. Without knowing what the alleged new agreement covered, there is not

enough clear and specific evidence to establish that the cost of the additional contract was an actual damage or loss caused by the alleged tortious interference.

TRTL failed to identify specifics to show that the subsequent agreement with a different communications company was a justified expense in order to offset their "loss" of comparable airtime or that it did in fact do just that. The modified radio ad was already running on the original two media networks, Salem and Cumulus. Baseless opinions do not create a fact question and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA. *Lipsky*, 460 S.W.3d at 592. *See also Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex.2013); *Compare Tex. Campaign for the Env't v. Partners Dewatering Int'l, L.L.C.*, 485 S.W.3d 184, 199-200 (Tex.App. – Corpus Christi 2016, no pet.) 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.

TRTL did not provide enough detail to show that the cost of the new contract was an actual damage or loss – i.e. achieved the level of market penetration that they desired from the original contracts with Cumulus and Salem, did not encompass more than the two days of airtime when Cumulus and Salem had suspended airing, etc…. There is not clear and specific evidence to meet the Respondent's burden on

this element. TRTL failed to establish a prima facie case for this element of the offense of tortious interference with a contract.

(4) The Court of Appeals erred when it concluded that TRTL's tortious interference claim is not protected by the absolute judicial privilege when the underlying alleged tortious conduct is a communication made in the course of a judicial proceeding and is therefore absolutely privileged.

The Court's decision errs in deciding that Petitioner's lawyer's demand letters are not absolutely privileged to defend against TRLT's tortious interference claim. The Court correctly noted:

> 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).

Deuell v. Texas Right to Life Committee, Inc., No. 01-15-00617-CV, 2016 WL 8223950 (Tex. App. Sept. 15, 2016). However, the Court erred in finding that TRTL's tortious interference claim is somehow disconnected from Appellant's privileged statement. The underlying tortious or wrongful willful conduct in this case sounds in defamation or business disparagement, and such statements are privileged against these claims. Since the alleged breach of contract is directly related to the letters, recasting what would be a defamation or business disparagement claim as a tortious interference claim is legal gamesmanship designed to circumvent the policy behind the privilege. *See Bird v. W.C.W.*, 868 S.W.2d 767, 771-72 (Tex. 1994).

The absolute judicial privilege is not restricted to libel and slander cases. *See Alejandro v. Bell,* 84 S.W.3d 383, 390 (Tex. App.—Corpus Christi 2002, no pet.)("Texas Courts have long recognized that an absolute privilege extends to judicial proceedings, i.e., any statement, oral or written, made in the due course of a judicial proceeding are absolutely privileged and cannot constitute the basis for a defamation action, **or any other civil action**.")(emphasis added); *Crain v. Smith,* 22 S.W.3d 58, 63 (Tex. App.—Corpus Christi, 2000, no pet)(attorney letter privileged against libel, slander and tortious interference); *Laub v. Pesikoff,* 979 S.W.2d 686, 691-92 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)(judicial privilege applied

to claims for libel, slander, intentional infliction of emotional distress, conspiracy, and tortious interference); *Hernandez v. Hayes*, 931 S.W.2d 648, 654 (Tex. App.—San Antonio 1996, writ denied)("The privilege would be lost if the appellant could merely drop the defamation causes of action and creatively replead a new cause of action."); *Griffin v. Rowden,* 702 S.W.2d 692, 695 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *see also, Hoschkins v. Fuchs,* ___S.W.3d ___, 2016 WL 7407794, (Tex. App. Fort Worth, December 22, 2016)("Communications subject to an absolute privilege cannot constitute the basis for a civil action."); *Prappas v. Meyerland Community Imp. Ass'n,* 795 S.W.2d 794, 799 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (filing of a lis pendens absolutely privileged against a declaratory judgment action); *County Investment, LP, v. Royal West Investment, LLC,* ___S.W.3d ____ 2016 WL 7323308 at *5 (Tex. App.—Houston [14th Dist.] December 15, 2016)(filing of a lis pendens absolutely privileged against claim for damages even if the filing was improper); *Manders v. Manders*, 897 F.Supp, 972, 978 (S.D. Tex. 1995)("Under Texas law, the filing of a lis pendens notice is a part of the judicial process and is absolutely privileged. Hence, as a matter of law, a lis pendens cannot form the basis for claims alleging slander of title and interference with business.").

"[T] the assertion of a legal right and acting to protect such right affords no foundation for a recovery of damages for tortious interference." *Garza v. Mitchell,*

607 S.W.2d 593, 600 (Tex. App.—Tyler 1980, no writ)(citing *Morris v. Jordan Financial Corp.*, 564 S.W.2d 180, 184 (Tex.Civ.App.-Tyler 1978, writ ref'd n. r. e.); *Terry v. Zachry*, 272 S.W.2d 157, 159 (Tex.Civ.App.-San Antonio 1954, writ ref'd n. r. e.); *Montgomery v. Phillips Petroleum Co*., 49 S.W.2d 967, 972 (Tex.Civ.App.-Amarillo 1932, writ ref'd); *Tidal Western Oil Corp. v. Shackelford*, 297 S.W. 279, 281 (Tex.Civ.App.-Fort Worth 1927, writ ref'd)). A pre-suit demand letter, such as the one in this case, is simply an assertion of a legal right and an action to protect that right. Such a letter is absolutely privileged and the Court should have reversed the trial court and dismissed TRTL's tortious interference claim.

PRAYER

Petitioner asks this Court to grant its Petition for Review, holding, as shown in the Arguments above, that the Court of Appeals erred when it overruled Deuell's Issues 1-3. Because the Court of Appeals erred as a matter of law, the Petitioner prays this Court reverse the decision of the Court of Appeals and render judgment of dismissal for want of jurisdiction in favor of Deuell. In the alternative, the Court should reverse the trial court's order and remand this cause to the trial court for further proceedings consistent with this opinion.

The Court should also award attorneys' fees and costs to Petitioner as set forth in Texas Civil Practice & Remedies Code §27.009 or remand the case back to the trial

court to make a determination of the proper measure of attorneys' fees and costs to be awarded to Deuell.

SIGNED this 13th day of February, 2017.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER
BOB DEUELL

CERTIFICATE OF COMPLIANCE

In compliance with Tex. R. App. P. 9.4(i)(3), I certify that this Petition for Review complies with the word count limitations set out in Tex. R. App. P. 9.4(i). It contains 4,377 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1). In making this Certificate of Compliance, I am relying on the word count provided by the software used to prepare the document. This is a computer-generated document created in Microsoft Word, using 14-point Times New Roman typeface for body and 12-point Times New Roman typeface for footnotes.

/s/SCOTT M. TSCHIRHART
GEORGE E. HYDE
SCOTT M. TSCHIRHART

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served upon the below named individuals as indicated, and according to the Texas Rules of Appellant Procedure and/or via electronic mail pursuant to the parties' written agreement that such service shall constitute personal service on the 13th day of February, 2017.

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NO. _____

IN THE SUPREME COURT OF TEXAS

BOB DEUELL
Petitioner,

v.

TEXAS RIGHT TO LIFE COMMITTEE, INC.
Respondent,

On Petition for Review from the
First Court of Appeals at Houston, Texas
No. 01-15-00617-CV

APPENDIX TO PETITION FOR REVIEW

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APPENDIX

APP. A: Reporter's Record [RR Vol. 1 at 1-35] from trial court hearing on Motion to Dismiss, dated June 19, 2015

APP. B: *Order* [CR at 380] denying Defendant's Motion to Dismiss issued by Judge Robert K. Schaffer on July 1, 2015

APP. C: *Appellant's Opposed Motion to Recuse* filed on March 3, 2016

APP. D: *Opinion* and *Judgement* issued on September 15, 2016 by the First Court of Appeals

APP. E: *Dissenting Opinion* issued on September 15, 2016 by Justice Terry Jennings

SIGNED this 13TH day of February, 2017.

Respectfully submitted,

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APP. A

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. 2014-32179

APPELLATE NO. 01-15-00617-CV

PLAINTIFF TEXAS RIGHT TO LIFE COMMITTEE	)	IN THE DISTRICT COURT
vs.	)	HARRIS COUNTY, TEXAS
BOB DEUELL	)	152ND JUDICIAL DISTRICT

MOTION TO DISMISS

On the 19th day of June, 2015, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable ROBERT K. SCHAFFER, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

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THE COURT: Cause in 2014-32179; *Plaintiff Texas Right to Life Committee vs. Bob Deuell,* D-E-U-E-L-L.

Y'all please announce your appearances so the court reporter knows who's speaking.

MR. NIXON: Joseph Nixon and Trey Trainor on behalf Texas Rights.

MR. TSCHIRHART: Scott Tschirhart on behalf of Senator Deuell.

THE COURT: Okay. Before we get started, I want to disclose to y'all that, after this case was removed to federal court, Mr. Nixon came in and he and I had a conversation about this case.

I don't know how long -- that was back in October.

MR. NIXON: We didn't talk about the case, but we talked.

THE COURT: We talked. And, frankly, I don't have a clue as we sit here today what we talked about. I do recall you said it's too bad. It was an interesting case.

MR. NIXON: Sum sort of our conversation, I said I don't want to talk about the case because you might see it again. So, we talked politics and other stuff.

THE COURT: We did talk about politics because our politics very rarely cross one another. But that's it. You need to know that.

MR. TSCHIRHART: Your Honor, I have confidence in the integrity of the Court. I have no problem with that.

THE COURT: That's fine. I just wanted you to know that that happened. And when Mr. Nixon came in, I told him, if it comes back, I was going to tell you. That's about all I remember about our discussions about that case.

MR. TSCHIRHART: I'm content, your Honor.

THE COURT: Okay. I just wanted to let you know.

I don't want to sound like I'm taking up for Mr. Nixon here, but can't he argue that you're doing to him and his client the same thing you're claiming his client is doing to you?

Aren't you trying to obstruct their right to free speech in the actions that you took in the discussed issues of the day?

MR. TSCHIRHART: I don't think so, your Honor. A sitting senator making a comment on a matter of public interest has always been protected by the First Amendment.

THE COURT: But you didn't just make a comment on public interest. You went and sent a letter to those two radio stations and saying they're not telling the truth and they're violating the law. You should not let them have their right to advertise on your station under these circumstances.

MR. TSCHIRHART: That's correct, your Honor.

THE COURT: Can't that be construed as you strategically trying to keep them from discussing issues of the day?

MR. TSCHIRHART: Well, there are a couple of issues with this noted, your Honor, that separate it out.

These are third-party ads. These aren't candidate ads, and

third-party ads are different from can't candidate ads because you can attack a third-party ad. It's subject to suit for various reasons as we set forth in our Motion.

If this was a candidate ad, there wouldn't be very much we could do about it at all. But because it's a third party coming in on behalf of a candidate, we have a right to complain about that.

When the ad doesn't say the correct disclosure language on it, which is required be the Texas Elections Code, we have a right to complain about that.

THE COURT: Is that the only complaint that you raised with regard to these ads?

MR. TSCHIRHART: No. We raised complaints that the ads were inaccurate because they were mischaracterizing Senator Deuell's position on this particular piece of legislation.

THE COURT: Isn't that done every day by third-party 529 groups, everybody involved in politics? Aren't there accusations that everyone is mischaracterizing the other side's political positions? And is that something that you want the Court and the government to come in and stop?

MR. TSCHIRHART: I think under certain circumstances we do. I mean, for example, on the Election Code issue where it doesn't have the disclosures on it we do want that --

THE COURT: That's different. I'm talking about the substances right now because that was the issue that you raised at that time.

MR. TSCHIRHART: That's correct.

THE COURT: Tell me this:

How is the Plaintiff trying to keep you from commenting on issues of the day such that this Anti Slap Statute applies to this case?

MR. TSCHIRHART: I think that there are a couple of ways. It's to show other people you don't want to oppose Texas Right to Life because we will sue you and make an example of you.

That's one reason. But the -- and I think that's main force of this lawsuit, your Honor. We want to shut you up because we don't want other people opposing our position. Because we're going to show that if you do, if you complain at all against us, we're going to sue you.

THE COURT: Doesn't that thought bring you under this particular statute an intimidating factor?

MR. NIXON: No. Totally upside down. We just would have would have run our ads. There is no basis to sue anybody until they contacted our contractee and told our contractee to stop performing.

Let's be clear on a couple of issues:

The May 14th, 2014 letters during the runoff between Senators Deuell and Paul were the ones that knocked us off the air. The subsequent letters did not knock us off the air.

THE COURT: The subsequent letters fixed the technical legal issues, correct?

MR. NIXON: Actually, no. The case of *Doe vs. State* -- in

Doe vs. State the very statute he's referring to, Section 255.001 of the Election Code, has been declared to be unconstitutional in 2003.

So, that particular statute and subsequent -- and, you know, the disclaimers continue to say "proudly paid for by Texas Right to Life."

THE COURT: What was the issue on the disclaimer?

MR. NIXON: That they were supposed to have said "this is a political ad paid for Texas Right for Life Committee."

THE COURT: Hold on. Hold on. You will get your chance to speak.

MR. NIXON: The Court of Criminal Appeals in 2003 said, look, we looked at the statute. It is unconstitutional in it's application and breadth. So, since 2003 Section 2555.001 of the Election Code has been unenforceable.

So, but we were back on the air two days after May 14th. So, May 16th we came back on the air because of the intervention of Mr. Trainor and the Texas Right to Life at issue bough and cut new ads is a remedial effort.

THE COURT: Okay. So, let me get see if I got this straight. They sued you because you interfered -- you tortiously interfered with their relationship between the organization and the radio stations?

MR. TSCHIRHART: I believe that's correct, your Honor.

THE COURT: And that was based on your letters to the radio stations that said they are violating the law. Stop it.

MR. TSCHIRHART: Right. That's correct, your Honor.

THE COURT: Okay. And, so, they fixed the technical, legal issue involved and went back on the air.

Did you -- and you sent no more letters complaining about the substance or the ads themselves?

MR. TSCHIRHART: That's correct, your Honor. Once those portions were corrected, no more letters went out. But there were a series of letters and those were attached to my Motion.

THE COURT: I saw the letters. I didn't read them all.

MR. NIXON: Well, the original letter only dealt with intellectual substance of the ad. There was no complaints regarding the disclaimer.

THE COURT: I thought there was something.

MR. NIXON: In the May 18th and May 19th letters, but the May 14th letter had no subsequent complaint. Okay. That wasn't -- the issue with regard to the Election Code is a strong one because we were on the air and even the same ad was able to be put up.

So, we didn't just change -- we didn't fix any legal technicalities because there wasn't any legal technicalities to fix. The letters themselves -- you know what happened is is Cumulus and Salem Broadcasting quit advertising during a crucial period of the runoff.

THE COURT: When was the runoff? It was at the end of May, right?

MR. NIXON: Right. Right. So, right before early voting

where we bought three weeks' worth of ads.

THE COURT: You were off the air for two days?

MR. NIXON: 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?

MR. NIXON: 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.

MR. NIXON: In short we had to cut -- we had to, you know, impact into the mindset. You know, there are technical terms by the media consultants about persuasive points. When you lose ground during a critical time you have to run faster in order to make it up. So, we had to produce new ads and involve more air time to make for the time that we were off the air.

THE COURT: Okay. All right. Let's go back to the --

MR. NIXON: So, in short, I mean, they wrote letters. The stations stopped broadcasting. We acted in a remedial fashion. We were back on the air because of our efforts.

Well, one of the remedial acts was hiring Mr. Trainor to get involved and talk to various stations and get back. Subsequent letters had no impact on -- or very little impact but we were back.

THE COURT: Okay. So, with regard to this Motion, you are seeking to dismiss this case because the Plaintiffs in essence is

trying to intimidate you from exercising your right to free speech?

MR. TSCHIRHART: That's correct, your Honor. Us and anybody else who might oppose them politically.

THE COURT: And that's because this is a strong political organization and if you oppose them we will sue you?

MR. TSCHIRHART: We will sue you. That's correct, your Honor.

THE COURT: And that's it, right?

MR. TSCHIRHART: That's the first part.

THE COURT: On the Motion to Dismiss, that's the first part.

MR. TSCHIRHART: That's correct.

THE COURT: Your position on that is?

MR. NIXON: We are upside down. That's not -- first of all, this has to be a legal action brought because of the Defendant's exercise of free speech. This is exactly the opposite.

This is an action in defense of our -- the Plaintiff's exercise of free speech. So, under Chapter 27.003 it doesn't even meet the original legal test.

The legal test is this has to be an action brought because of the exercise of free speech. The is an action brought because of their interference in our -- in our exercise of the right of free speech.

So, it doesn't even fit the definition of Chapter 27. This Motion is completely upside down. That's the first thing. The -- second -- the second issue really has to do with the fact that we

have established both in our Pleadings and our affidavits but we're prepared to put on evidence today to put a prima fascia case in our cause of action.

More importantly, I think will help you, I don't think that you have this Motion before you yet.

THE COURT: I was wondering the same thing.

MR. NIXON: Right.

THE COURT: When you start counting days --

MR. NIXON: You're out of days.

THE COURT: I was going to raise that issue in just a minute myself because the Court of Appeals issued its Judgment on February 24th.

MR. TSCHIRHART: That's correct, your Honor.

THE COURT: Now, there is absolutely no case law on how we count this because you removed it. I don't know if you sought to have your Motion hear in the federal Court or not.

MR. TSCHIRHART: We did indeed, Judge.

THE COURT: I think you did. The Judge there says not my job anymore because you're going back to Schaffer.

MR. TSCHIRHART: That's right.

THE COURT: And then you appeal that to the 1st Court of Appeals, and the 1st Court of Appeals says not my job to say anything because Schaffer didn't do anything.

MR. TSCHIRHART: That's correct. What we had was by the time we had gone up and come back down the time period had passed as

laid out in the statute.

So, we figured we probably had a dismissal because was there no -- a ruling on it there is no case law.

THE COURT: Okay. But what about -- I mean, case law on tolling in all different kinds of situations where there are time deadlines involved -- medical malpractice, you've got a two-year statute. You send a notice letter, it's tolled for 75 days.

I think a DTPA tolls limitation for 60 days when you send notice letters. You have a requirement here to do something in a certain time. It is tolled while you are outside of this courtroom. But when it comes back into the courtroom, don't you have a duty to act within the statute from the date its send back here?

MR. TSCHIRHART: And we did. Immediately after it came back as soon as we got the mandate, we requested this hearing. And this was the earliest hearing.

THE COURT: When did you get the Mandate? Because I'm looking at the Judgment being entered on February 24th.

MR. TSCHIRHART: Right. But the Mandate didn't come till much later, your Honor.

MR. NIXON: The Mandate, Judge, it came on May 15th.

THE COURT: Okay.

MR. NIXON: So, let's just if we count the date -- now, look, two issues:

What do we do with the days we're in federal court. Okay. So, let's just skip that and we talk about it later. But if you

count the days and he filed his Motion --

THE COURT: You've got one of these charts?

MR. TSCHIRHART: Yes, I do, your Honor.

MR. NIXON: I do. I do, your Honor. He filed the Motion timely. Okay. So, there is two. You have to file it within 60 days. We are not objecting to that. So, he filed his Motion to Dismiss on 9/15. Then he removed the case on 9/25. We had 20 days go by. The hearing was on 9/26. That's when you and I visited. Then it got remanded. Let's it just skip federal court, and I will talk about federal court in a little bit.

I don't think the statute tolls. I think the days keep ticking. There are Motions you may file in federal court to press the Motion from this case follow the case to federal court. The federal court has pendant jurisdiction. This is a subject of right under our statutes.

It can be pressed. You can file and emergency Motion. Those people over on the other side of Downtown know how to handle emergency Motions. They can do that. None of that was done.

THE COURT: He did ask --

MR. NIXON: He has filed a Motion. He never set it for hearing. He didn't ask for a hearing. This was never set for a hearing.

THE COURT: Did you set this? Did you request a hearing?

MR. TSCHIRHART: I did request a hearing, your Honor.

MR. NIXON: I have the entire document docket.

THE COURT: Okay.

MR. NIXON: Well, I don't believe a hearing request was filed, but we can look at that. But assuming -- okay. So, it comes -- you know, the Order to Remand the case was filed on December 23rd. This Court's Docket shows that it came back on the 30th of December.

Then the Plaintiff filed a Notice of what -- he thought he his time had run. If you remember what he just told you, he thought his time had run. So, he filed a Notice of Appeal with a Court of Appeals on the 7th of January.

So, we had eight days where the Court had jurisdiction again. So, it goes up to the Court of Appeals. The Court of Appeals says there's nothing to appeal here because you either appeal -- your appeal should have been to the Fifth Circuit because it was, you know, if it got overruled as a matter of law you have to go to the Fifth Circuit.

MR. TSCHIRHART: That is not what happened --

THE COURT: Hold on. Please don't interrupt. Okay.

MR. TSCHIRHART: Thank you.

THE COURT: You're going to get a chance to respond. Please don't interrupt.

MR. TSCHIRHART: Thank you, your Honor.

MR. NIXON: You have to either go there or -- you know, or you have -- there has to be some decision of the court from which to appeal. This Court has not ever made a decision.

So, it comes back. The Mandate comes back. And the reason -- the reason why it took -- there's a difference is because you have a 45-day opportunity to either file a Motion for Rehearing or Petition for Review in the Supreme Court.

So, that's why there is lag between the decision and the Mandate. So, when the Mandate comes back, the Plaintiff sets this case for hearing today.

Well, today is 60 -- if you add up all the days, it's 62 days. This Motion has been on file in this Court alone for six days. Now, no one asked the Plaintiff the set this case for hearing today. This Court can set a hearing on three day's notice at any time.

THE COURT: Doesn't the statute say something to the effect that it's within 60 days so long as -- but it can be longer if it's because of the Court's schedule.

MR. NIXON: If the Court -- but that hasn't happened here. If the Court says I can't hear it within 60 days, we're going to have to push it -- in a lot of counties and this is not one of them but a lot of counties have criminal week, they have Family Law and then they have --

THE COURT: But that doesn't work here.

MR. NIXON: That doesn't work here.

THE COURT: Okay. But hold on a second. Let me ask you a question:

If he calls on May 17th and says I need a hearing and the

earliest hearing he gets from the Clerk is the June 19th, can that not be construed as evidence that the Court couldn't work it in until then?

MR. NIXON: Yes. If he any of that happened. But, I mean, I don't know if any of that happened. There should be some record of that in the file, and there is no record of that in the file. All we got was a Notice of Hearing. We got an Email saying are you available these dates. We said that we were. We didn't ask for an extension. We said we are available the day you pick but --

THE COURT: The hearing went on what day?

MR. NIXON: I have a copy.

THE COURT: May 28th -- no, that's wrong.

MR. NIXON: I think that's right. I think it did get --

MR. TSCHIRHART: The notice of hearing was May 18th.

THE COURT: Right.

MR. NIXON: I have the Notice of Hearing here, and it was signed May 18th.

THE COURT: Got it.

MR. NIXON: So, if -- quite frankly, I mean, we didn't -- I mean, I started looking at this on Monday. How did these days -- and, now, I am not of the agreement that you don't count the days when the case is in federal court because -- I mean, it's before a Court of Competent Jurisdiction. And, you know -- I mean, but --

THE COURT: But didn't the federal court say in its Remand Order say that we're not ruling on this because it belongs in the

state district court?

MR. NIXON: No. They said we're not ruling on it because it is moot, which is what they usually say.

THE COURT: Isn't it moot because it's goes back to the state district court?

MR. NIXON: We don't know. We don't know because he didn't give a reason why it's moot. It's kind of like the Court of Appeals didn't give a reason either.

They just said that, you know, we can't find error with the 152nd because the 152nd never ruled on it, which isn't to say that they just didn't tell us. This should have been ruled on in federal court. But, I mean, here's the deal:

It's either he's out of -- I mean, the statute is very specific as to time deadlines. But, more importantly, just there is a latches argument here, too. Sitting on your right to is not our problem. We should not have to bear the burden of Mr. Deuell sitting on his rights.

I mean, he could have pushed it in federal court. He asked that the federal court consider the Motion, and the substance of the Motion goes there, the procedure goes there, too.

THE COURT: Did you plan on filing an Application for Writ of Mandamus in the Supreme Court of Texas?

MR. TSCHIRHART: At what time, your Honor?

THE COURT: After the 1st Court -- well, the only time you could have do it is after the 1st Court of Appeals ruled.

MR. TSCHIRHART: I did not because the 1st Court discussion or in the their decision made it pretty clear that what they are just not ruling on anything because they believe that we never had a hearing in state Court which was my original thought on this thing, too.

We needed a hearing in state court, which is why we are back here as quickly as we possibly could. Nobody's sitting on their rights. We wanted to get in here as quickly as we could. We set this hearing at the first available date that we could get.

THE COURT: When you called the Clerk to request a hearing, did you point out to my Clerk that that there might have been a time issue that you needed to deal with?

MR. TSCHIRHART: We told them we needed a hearing as soon as we could possibly get one, and this is the first day that we received.

THE COURT: What else object this issue? Anything else?

MR. TSCHIRHART: On the timing issue?

THE COURT: Yes.

MR. TSCHIRHART: No, your Honor. I don't think so.

THE COURT: Okay.

MR. TSCHIRHART: I think that we have done everything that we could to get this thing pushed along as quickly as we could.

THE COURT: Okay.

MR. TSCHIRHART: And I disagree with the characterization of the -- of the -- of the federal court's Order.

I think it's very clear why this was moot, and it's in the previous paragraph. Says it's moot because we're sending this back down.

THE COURT: Okay. I will take it under advisement. Take a look at the issues again, and I will give you my ruling.

MR. NIXON: Did you need more evidence from us?

THE COURT: No. No, thank you. I think I got it. All right. Thank y'all for coming in.

MR. NIXON: We have, if the Court chooses to consider, an Order simply saying that after calculating the days this Court had jurisdiction of this matter the Court of the opinion that the hearing was scheduled beyond the 60 days. The Court neither grants nor denies the Motion but rules that the matter is not proper before the Court timely.

THE COURT: Okay. You wanted to add something?

MR. TSCHIRHART: I wanted to know if the Court needs anymore discussion on the affirmative defenses issue?

THE COURT: Oh, I'm glad you brought that up. There were two affirmative defenses that you didn't even respond to?

MR. NIXON: Yes.

MR. TSCHIRHART: They were never responded to in the Responsive Pleading, your Honor. I think it's waived.

THE COURT: Well, hold on a minute. He brings up a good point on the judicial admission aspect of this. Why is that Affirmative Defense not dispositive of this?

MR. NIXON: We haven't sued him. The privilege goes to the lawyer. It doesn't go to the party. Think about it. Think about it --

THE COURT: No. No. No. I don't agree with that at all. I just had a case involving a party being sued and a party making the statements. A witness -- the judicial privilege goes to witnesses, lawyers in the case. It's not just limited to the lawyers. The parties can make statements as well. That's clearly in the case law.

MR. NIXON: Right. Okay. So, there is three reasons if why. I am prepared to respond.

THE COURT: Okay.

MR. NIXON: All right. First of all, the privilege really isn't applicable to this defense. The Court is required to look at the full context of any kind of statement.

This was -- this was a letter written to our contractee telling or contractee not to continue perform under the contract.

THE COURT: Or else you will get sued.

MR. NIXON: Or else you will get sued.

THE COURT: That's implicit in that.

MR. NIXON: Right.

THE COURT: From the lawyer?

MR. NIXON: Right. Now, because we disagree -- we disagree with the radio ads, you are going to get sued. That's from the lawyer. So, remember, the context and the restatement all has to do with the protection of the lawyer. But if the asserted -- the -- but

in the full context what -- if you -- if you apply this privilege to every letter saying stop or --

THE COURT: Or I will sue you.

MR. NIXON: -- or I will sue you, you've eliminated several torts in their entirety because then they always say, well, that's just privilege. You can't sue my client. The intent of my client was to interfere with your contract. There's no question about that here, right? The intent of the letter was to cause Cumulus and Salem Broadcasting to stop broadcasting our ads.

THE COURT: So, if every letter -- if ever lawyer letter sent tells someone to stop and do something -- stop from doing something was a judicial admission you just -- you wouldn't be able to sue?

MR. NIXON: I would never be able to sue for tortious interference. Ever. In fact, you might expand to it to all torts. I mean, just think about it -- so, if you -- so, is it -- so, first of all, the Texas Legislature -- this is really important. If you look at 73.055 of the Civil Practice and Remedies Code, the Legislature has changed the manner in which one might -- may sue for slander or defamation, which is only in the May 14th letters which was the cause of the interruption.

It is 73.550. If I am slandered or I think I am slandered, I have to write to the defamer and say I believe I'm slandered and give them an opportunity to correct, clarify or withdraw their statement. Before I maintain a cause of action, I have to give them

an opportunity and then they have a chance to respond before I can sue.

That is -- we have completely changed. And that was done in 2013. So, this letter written in 2014 said I don't like what they are saying about me, my client, you have to stop doing it, doesn't comport with 73.05.

So, the bottom line is is that this is a really not a letter written in contemplation of litigation because they're not invoking the appropriate process or statute to protect themselves in the defamation case.

So, the letter itself is outside the context whatever kind of judicial informers they may have. The other portion -- the other letters, of course, didn't take anybody off the radio station. May 18 and 19 letters regarding the Election Code didn't take anybody off the radio station.

But, more importantly, think about what you're doing in relation to the public policy at stake, what this is asserting that this is privilege done in relation to public policy.

If any time I am speaking any political speaker -- and this is an independent political. This is an independent expenditure -- by the way, it really doesn't matter whether it's a campaign or not. And I have -- I have bought -- contracted with a media outlet whether a newspaper, radio, television, Twitter, social media. Contracted with a media outlet for the publication of my ideas. And someone is allowed to threaten suit and cut off my ability to express

myself and say my actions are completely privileged because they're in contemplation of litigation. I'm immune not just from -- the whole action is immune. What have we done with the First Amendment?

THE COURT: Is there any case law out there that takes political speech or any -- that qualifies the judicial admission in anticipation of litigation out from -- I hear what you're saying.

MR. NIXON: Right. It turns on its head.

THE COURT: And I'm a big First Amendment person myself.

MR. NIXON: Right. Well, you think about what it does. There is no case that we have found, but I will say that the cases that are cited by the -- Mr. Deuell are not directly applicable.

They have gone -- their big case the -- the *Daystar* case was a case written by Sam Nuchia that just, you know, a lot of dicta. Most of the cases have to do with the situation where a prisoner pursuing somebody or, you know, and a lawyer turns it over to a disciplinary committee. They are -- and they have gone that way to protect everybody from those situations.

But the *Daystar* case, which is their best case, is mostly dicta. And Sam Nuchia just goes there this sort of overly-broad discussion. It's where they're getting their language from. But if you think about it, can a privilege -- can the assertion of a privilege that causes the threat of a lawsuit, that causes somebody to hamper another's constitutional rights whether speech or the right to vote or any other right, are you -- does that privilege -- and we know we haven't sued the lawyer. I mean, because he is clearly agent

in fact for his client and we understood and knew that. He did it on the instruction of his client.

I think that's been admitted and his client asked him and they intended effect of causing this to come off the air.

So, is that the public policy of the state? Public policy of the state is, of course, you want to judicial -- whatever we say in the courtroom or the confidence of court proceedings, if that makes sense.

Does that privilege supersede or cause or allow somebody the privilege of stopping First Amendment Rights? Because if -- because it that's the way we now have public policy in Texas. It is aided and benefited very often by lawyers because now our job is to anytime anybody wants to runs in any ad is to fire off letters to radio stations, TV stations, newspapers to cause them to pull those ads by threatening lawsuits if the only thing I have do is put on the end of the letter you to we might sue you.

THE COURT: He makes a good point, doesn't he?

MR. TSCHIRHART: I think as a public policy, that probably applies to a candidate running an ad.

THE COURT: Why does it matter?

MR. TSCHIRHART: Because a non-use ad has been treated differently by the SCC, and people can be held liable for a non-use ad being run and it's -- the test is different.

A non-use ad can be defamatory whereas a candidate's ad cannot. And, now, these are specifically identified as non-use adds.

Ads by third parties, not by candidates.

MR. NIXON: All state political ads are non-use ads.

MR. TSCHIRHART: If I thought there wasn't a cause of action, I wouldn't have written a letter saying I'm going to sue you. I was absolutely prepared to do so. We didn't anticipate our client being sued over this thing. But I think that the law in Texas is very clear.

That *Russell v. Clark* an attorney at law is absolutely privileged to publish defamatory matter concerning another and communication preliminary judicial proceeding or an institution of or during the course or as a part of.

I mean, it's very broad. I wrote these letters as a lawyer representing my client and I think the case law is very clear that that also applies to the tort of tortious interference. And I've cited two cases for the Court that deal with this specifically with the tortious interference.

MR. NIXON: Consider what he just said. The lawyer can write any kind of defamatory comments and it's absolutely privileged in a letter, but I can't buy an ad discussing the conduct of a public official.

THE COURT: Okay. Okay. I got it.

MR. NIXON: So, the other thing is, before you have to get too further along, there's a third reason and that is this privilege open to Discovery.

I mean, the cases all say you can conduct Discovery because

there is a three-part test. There has to be some relationship to the proceedings, there has to be a proceeding and it has to be in furtherance of the representation.

THE COURT: No. Wait. Wait. There's a three-part test for the judicial admission? It does not have to be a proceeding. It can be pre-litigation.

MR. NIXON: Right. And we agree with that.

THE COURT: Okay.

MR. NIXON: We want the Court to note that the ad in question went back on the air and stayed on the air with two more ads and there was never a lawsuit filed.

MR. TSCHIRHART: When the content of the ads changed, our cause of action evaporated. No more letters were sent.

THE COURT: Okay. All right.

MR. NIXON: Well, what we had there, Judge, I think that the evidence is going to -- frankly, he put on that because he's attached transcripts to his -- to his Motion which is helpful to us because those -- all three ads -- three ads ran after May 16th. All of them including the one in question that went right back.

THE COURT: Okay. Last word. Anything else?

MR. TSCHIRHART: Please note that there was no timely response to the Affirmative Defenses that were pled in this lawsuit.

THE COURT: I understand that. I made that comment when we first moved on to the Affirmative Defense discussion.

Okay. Thank y'all for coming in. I will get you my ruling

on this as soon as I can.

MR. NIXON: Thank you, Judge.

MR. TSCHIRHART: Thank you, your Honor.

(Hearing ended)

STATE OF TEXAS

COUNTY OF HARRIS

I, Cynthia Martinez Montalvo, Official Court Reporter in and for the 152nd District Court of Harris, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $260.00 and was paid by DENTON, NAVARRO, ROCHA, BERNAL, HYDE & ZECH, P.C.

/s/Cynthia Martinez Montalvo

Cynthia Martinez Montalvo, CSR
Texas CSR 6863
Official Court Reporter
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APP. B

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FILED
Chris Daniel
District Clerk
JUL 01 2015
Time:
Harris County, Texas
By
Deputy

CAUSE NO. 2014-32179

TEXAS RIGHT TO LIFE COMMITTEE, INC.	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
BOB DEUELL	§	152nd JUDICIAL DISTRICT

ORDER

On this date came on to be heard Defendants' Motion to Dismiss pursuant to Tex. Civ. Prac. Code §27.003, and this court, after considering the pleadings and arguments of counsel, finds that this motion should be denied.

Signed July 1, 2015.

Robert K. Schaffer
Presiding Judge

APP. C

No. 01-15-00617-CV

***

IN THE COURT OF APPEALS
FIRST COURT OF APPEALS DISTRICT
HOUSTON, TEXAS

***

BOB DEUELL,
Appellant,

v.

TEXAS RIGHT TO LIFE COMMITTEE, INC.,
Appellee

On Appeal from the 152nd Judicial District Court
Of Harris County, Texas
Trial Court Cause No. 2014-32179
Honorable Robert Schaffer, Presiding Judge

APPELLANT'S OPPOSED MOTION TO RECUSE

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Scott M. Tschirhart
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ATTORNEYS FOR APPELLANT

MAY IT PLEASE THE COURT:

NOW COMES APPELLANT, Bob Deuell (hereinafter "Appellant" and/or "Deuell") and files this motion to recuse pursuant to Rules 18a and 18b of the Texas Rules of Civil Procedure, Rule 16 of the Texas Rules of Appellate Procedure and Canons 1,2,3, and 4 of the Code of Judicial Conduct. Appellant respectfully seeks the recusal of the Honorable Justice Michael C. Massengale from the above-styled action.

A. Introduction

1. Appellant is Bob Deuell. Appellee is the Texas Right to Life Committee, Inc.

2. The parties have consulted and are not agreed to this motion.

3. This matter is currently set for oral arguments on March 23, 2016 at 1:30 p.m. before a panel consisting of Justice Jennings, Justice Huddle and Justice Massengale.

4. This Motion is brought after the vote count on the recent Republican Primary election so as not to make this matter an issue in the election.

5. This motion is based on information made known to Appellant during the week leading up to the Republican Primary election held on March 1, 2016, and is therefore timely pursuant to Rule 16.3 of the Texas Rules of Appellate Procedure.

6. The information made known to Appellant concerns Justice Massengale and his connections with Texas Right to Life Committee, Inc. which includes campaign contributions and social media contacts from related parties.

7. According to the 8 day out Campaign Finance Report filed by Massengale for Texas Supreme Court: Empower Texans contributed $25,000.00 on February 16, 2016; Elizabeth Graham contributed $1,000.00 on February 8, 2016 and Texas Right to Life contributed $5,000.00 on February 15, 2016. All of these contributors are closely related to Appellee.

8. According to the January 2016 Semi-annual Campaign Finance Report for Massengale for Texas Supreme Court: Marty Beirne (Beirne Maynard & Parsons contributed $1,000.00 on October 23, 2015 and Tim Dunn contributed $5,000.00 on December 14, 2015. These contributors are closely related to Appellee.

9. Justice Massengale's 2010 and 2011 Campaign Finance Reports show contributions from Beirne Maynard & Parsons and Empower Texans. These contributors are closely related to Appellee.

10. Justice Massengale's Twitter feed shows that he follows Joe Nixon, Trey Trainer, Michael Q. Sullivan, Empower Texans, Texas Right to Life and several of their employees on Twitter.

11. Appellant's motion is based on this evidence, discussed in greater detail below, that has caused and will cause Justice Massengale's impartiality in this case to be reasonably questioned.

B. Argument & Authorities

12. The due-process clauses of both the Texas and the United States Constitutions guarantee a party an impartial and disinterested tribunal in civil cases. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Metzger v. Sebeck*, 892 S.W. 2d 20, 37 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

13. The legal standard for motions to recuse is set out in Rule 18b of the Texas Rules of Civil Procedure, and particularly Rule 18b(1) and (2), which provide in part that "a judge must recuse himself in any proceeding in which: (1) the judge's impartiality might reasonably be questioned … [or] (2) the judge has a persona bias or prejudice concerning the subject matter or a party." Tex. R. Civ. P. 18b(1) and (2). "The grounds for recusal of an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure." Tex. R. App. P. 16.2.

14. The issue of whether a judge's "impartiality might reasonably be questioned," is not whether the judge is actually biased. As the United States Supreme Court ruled in a recusal case on which the basis of recusal was campaign contributions:

> One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. Almost every State—West Virginia included—has adopted the American Bar Association's objective standard: "A judge shall avoid impropriety and the appearance of impropriety." The ABA Model Code test for the appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Caperton v. Massey Coal, 556, U.S. 868, 888 (2009)(citations omitted).

15. Texas has also adopted an objective test for impropriety. See Tex. Code Jud. Conduct Canon 2 (entitled "Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities"); *see Rogers v. Bradley*, 909 S.W.2d 872, 874 (Tex. 1995)(stating the rule requiring judges to recuse themselves in any proceeding in which Rule 18b of the Texas Rules of Civil Procedure requires recusal "in any proceeding in which . . . [the judge's] impartiality might reasonably be questioned"). Expanding on Texas' objective standard, Justice Grammage's declaration of recusal in *Rogers* stated:

> The rule does not require that the judge must have engaged in any biased or prejudicial conduct. It does require the judge to recuse if "his impartiality might reasonably be questioned," regardless of the source or circumstances giving rise to the question of impartiality and even though the source and circumstances may be beyond the judge's volition or control.

Rogers, 909 S.W.2d at 874.

16. The Texas intermediate courts of appeals have applied the same objective standard:

> The standard for recusal is clear. When the party moving for recusal relies on bias to claim the trial judge should be recused, the party filing the motion to recuse must show that a reasonable person, with knowledge of the circumstances, would harbor doubts as to the impartiality of the trial judge, and that the bias is of such nature and extent that allowing the judge to serve would deny the movant's right to receive due process of law.

In re Commitment of Winkle, 434 S.W.3d 300, 311 (Tex. App.—Beaumont 2014, pet denied); *see also Humitech Dev. Corp. v. Perlman,* 424 S.W.3d 782, 797 (Tex. App.—Dallas, 2014, no pet)("The test for recusal under rule [18b(b)] is 'whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial.'")(quoting *Hansen v. J.P. Morgan Chase Bank, NA*, 346 S.W.3d 769, 776 (Tex. App.—Dallas 2011, not pet.)); *Duffey v. State*, 428 S.W.3d 319, 325 (Tex. App.—Texarkana 2014, no pet.)(same).

17. The attached evidence shows that Justice Massengale has been the recipient of campaign funds from parties closely related to Appellee. According to the 8 day out Campaign Finance Report filed by Massengale for Texas Supreme Court: Empower Texans contributed $25,000.00 on February 16, 2016; Elizabeth Graham contributed $1,000.00 on February 8, 2016 and Texas Right to Life contributed $5,000.00 on February 15, 2016. *See* **Exhibit A**. [unrelated matter omitted for brevity]. According to the January 2016 Semi-annual Campaign Finance Report for Massengale for Texas Supreme Court: Marty Beirne (Beirne Maynard & Parsons contributed $1,000.00 on October 23, 2015 and Tim Dunn contributed $5,000.00 on December 14, 2015. *See* **Exhibit B.** [unrelated matter omitted for brevity].

18. Justice Massengale has maintained an Internet presence. *See* **Exhibit C** (screenshot of Justice Massengale's website at www.michaelmassengale.com).

Appellee Texas Right to Life's logo is prominently displayed on the first page of the website. Additionally, Appellee's logo appears on the endorsement page of Justice Massengale's website. *See* **Exhibit D** (screenshot of the endorsement page at https://michaelmassengale.squarespace.com).

19. Justice Massengale has also maintained a Twitter account under the username "@mmassengale." Attached as **Exhibit E** are screenshots of tweets from Justice Massengale which include a supportive tweet to Michael Q. Sullivan, an acknowledgement of joining with Empower Texans, appearances of Justice Massengale at Texas Right to Life events, endorsements from Texas Right to Life, and Justice Massengale's announcements of endorsements from Empower Texans and Appellee Texas Right to Life. Additionally **Exhibit E** shows that Justice Massengale follows Trey Trainor and Joe Nixon who are both attorneys of record in this case. These Twitter postings show a close connection between Justice Massengale, Appellee Texas Right to Life, and closely related persons and entities. Additionally, **Exhibit F** shows tweets between Justice Massengale and counsel for Appellee, Trey Trainor and Joe Nixon.

20. In this case, the personal interest or bias of Justice Massengale will deprive Appellant of his due-process rights in violation of the Texas and United States Constitutions Rules 18a and 18b of the Texas Rules of Civil Procedure, Rule 16 of

the Texas Rules of Appellate Procedure and Canons 1,2,3, and 4 of the Code of Judicial Conduct.

21. The attached evidence shows that Justice Massengale's impartiality might reasonably be questioned. Tex. R. Civ. P. 18b(b)(1); *Williams v. Viswanathan*, 65 S.W.3d 685, 687 (Tex. App.—Amarillo 2001, order).

22. The attached evidence shows that Justice Massengale's has a personal bias or prejudice toward his campaign contributor and endorser Appellee Texas Right to Life. Tex. R. Civ. P. 18b(b)(2); *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-21 (1986). The relationship between Justice Massengale and Appellee and Appellee's affiliates is such that a reasonable person, with knowledge of the circumstances, would harbor doubts as to the impartiality of the trial judge, and that the bias is of such nature and extent that allowing the Justice Massengale to serve would deny the movant's right to receive due process of law.

23. Appellant attaches the Affidavit of Scott M. Tschirhart to this motion to establish facts that are not included in the appellate record, are not known to the Court in its official capacity, and are not within the personal knowledge of the attorney signing this motion. Tex. R. App. P. 10.2.

C. **PRAYER**

WHEREFORE PREMISES CONSIDERED, Appellant Bob Deuell respectfully requests that Justice Massengale voluntarily himself and that another

Justice be assigned to decide the case. In the alternative, if Justice Massengale will not voluntarily recuse himself, that the Court set a hearing on this Motion and that in connection with the hearing, permit the issuance of court process to allow the parties to fully discover the extent of contacts between Justice Massengale, Texas Right to Life, Inc., Michael Q Sullivan, Trey Trainor, Joe Nixon and related parties, including the issuance of court process to obtain records from Twitter. That following any such hearing, this motion be granted and Justice Massengale be ordered recused from any further participation in this matter and for such other and further relief to which Appellant may show himself to be entitled.

SIGNED on this the 3rd day of March, 2016.

Respectfully submitted

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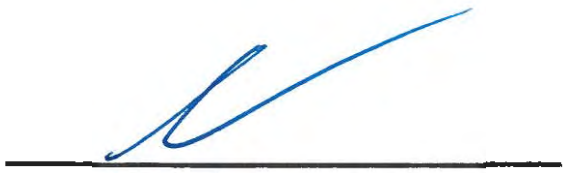
By: _____

George E. Hyde
State Bar No. 45006157
Scott M. Tschirhart
State Bar No. 24013655

ATTORNEYS FOR APPELLANT
BOB DEUELL

CERTIFICATE OF CONFERENCE

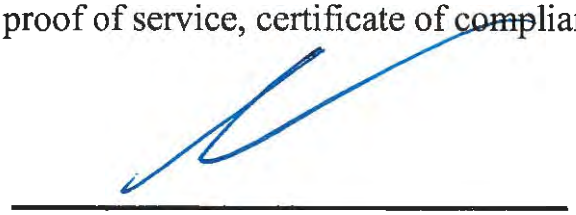
I hereby certified that on March 2, 2016, I conferred with attorney Nicholas Stepp, counsel for Appellee, about the merits of this motion and he was opposed to this motion.



Scott M. Tschirhart

CERTIFICATE OF COMPLIANCE

In compliance with Tex. R. App. P. 9.4(i)(3), this is to certify that this motion contains 1,723 words, which does not include the caption, signature, certificate of conference, proof of service, certificate of compliance, affidavit and exhibits.



George E. Hyde
Scott M. Tschirhart

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served upon the below named individuals as indicated, and according to the Texas Rules of Civil Procedure and/or via electronic notification on this the 3rd day of March, 2016:

N. Terry Adams, Jr.
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Houston, Texas 77056

via electronic notification
tadams@bmpllp.com

Joseph M. Nixon
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James E. "Trey" Trainor, III
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Nicholas D. Stepp
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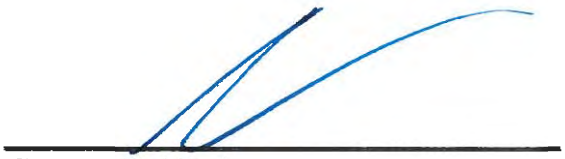
nstepp@bmpllp.com



George E. Hyde
Scott M. Tschirhart

No. 01-15-00617-CV

***

IN THE COURT OF APPEALS
FIRST COURT OF APPEALS DISTRICT
HOUSTON, TEXAS

***

BOB DEUELL,
Appellant,

v.

TEXAS RIGHT TO LIFE COMMITTEE, INC.,
Appellee

On Appeal from the 152nd Judicial District Court
Of Harris County, Texas
Trial Court Cause No. 2014-32179
Honorable Robert Schaffer, Presiding Judge

AFFIDAVIT OF SCOTT M. TSCHIRHART

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, a Notary Public, on this day personally appeared **Scott M. Tschirhart**, and being by me duly sworn on his oath deposed and said:

> My name is Scott M. Tschirhart. I am over the age of eighteen, have never been convicted of a felony or crime of moral turpitude, and am fully competent in all respects to make this affidavit. I am an attorney licensed to practice law in the State of Texas, each of the four Federal Districts in Texas and the Court of Appeals for the Fifth Circuit.
>
> I am familiar with facts stated herein because I serve as the lead attorney representing Appellant Bob Deuell in this action. This motion is accompanied by exhibits which are true and correct copies of the following items of which I have personal knowledge:

Exhibit A: 8 day out Campaign Finance Report filed by Justice Massengale;
Exhibit B: January 2016 Semi-annual Campaign Finance Report for Justice Massengale;
Exhibit C: Screenshot of Justice Massengale's website;
Exhibit D: Screenshot of the Endorsement page on Justice Massengale's website;
Exhibit E: Screenshots of tweets from Justice Massengale to Michael Q. Sullivan; and
Exhibit F: Screenshots of tweets between Justice Massengale and Trey Trainor and Joe Nixon, counsel for Appellee.

Further, affiant sayeth not.

Scott M. Tschirhart

SUBSCRIBED AND SWORN TO BEFORE ME by the said Scott M. Tschirhart on this 3rd of March, 2016, to certify which witness my hand and official seal.

NOTARY PUBLIC, STATE OF TEXAS

(Affix Notary Seal Above)

JUDICIAL SPECIFIC-PURPOSE COMMITTEE CAMPAIGN FINANCE REPORT

FORM JSPAC
COVER SHEET PG 1

The JSPAC Instruction Guide explains how to complete this form.

1 Filer ID (Ethics Commission Filers): 00080068

2 Total pages filed: 65

3 COMMITTEE NAME: Massengale for Texas Supreme Court

OFFICE USE ONLY

Date Received: ELECTRONICALLY FILED 02/22/2016

Date Hand-delivered or Date Postmarked

Receipt # | Amount

Date Processed

Date Imaged

4 COMMITTEE ADDRESS
☐ Change of Address
ADDRESS / PO BOX; APT / SUITE #; CITY; STATE; ZIP CODE
3733-1 Westheimer #652
Houston, TX 77027

5 CAMPAIGN TREASURER NAME
MS / MRS / MR: Mr.
FIRST: George
MI:
NICKNAME:
LAST: Fibbe
SUFFIX:

6 CAMPAIGN TREASURER STREET ADDRESS (Residence or Business)
STREET ADDRESS (NO PO BOX PLEASE); APT / SUITE #; CITY; STATE; ZIP CODE
3733-1 Westheimer #652
Houston, TX 77027

7 CAMPAIGN TREASURER MAILING ADDRESS
☐ Change of Address
STREET OR PO BOX; APT / SUITE #; CITY; STATE; ZIP CODE
3733-1 Westheimer #652
Houston, TX 77027

8 CAMPAIGN TREASURER PHONE
AREA CODE PHONE NUMBER EXTENSION
(281) 380-0479

9 REPORT TYPE
☐ January 15
☐ July 15
☐ 30th day before election
☒ 8th day before election
☐ Runoff
☐ Exceeded $500 Limit
☐ Dissolution (Attach JSPAC-DR)
☐ 10th day after campaign treasurer termination

10 PERIOD COVERED
Month Day Year: 01/22/2016 THROUGH Month Day Year: 02/20/2016

11 ELECTION
ELECTION DATE: Month Day Year: 03/01/2016
ELECTION TYPE
☒ Primary ☐ Runoff ☐ Other
☐ General ☐ Special

GO TO PAGE 2

Exhibit A

JUDICIAL SPECIFIC - PURPOSE COMMITTEE REPORT: PURPOSE & TOTALS

FORM JSPAC
COVER SHEET PG 2

12 COMMITTEE NAME	13 Filer ID (Ethics Commission Filers)
Massengale for Texas Supreme Court	00080068

14 COMMITTEE PURPOSE

(Attach lists on plain paper to complete this report if necessary.)

- [X] SUPPORT (Candidate)
- [ ] OPPOSE (Candidate)
- [ ] ASSIST (Officeholder)

- [X] Candidate
- [ ] Officeholder

CANDIDATE / OFFICEHOLDER NAME
Michael Massengale

OFFICE SOUGHT (candidate) / OFFICE HELD (officeholder)
Supreme Court Justice

15 CONTRIBUTION TOTALS	1. TOTAL POLITICAL CONTRIBUTIONS OF $50 OR LESS (OTHER THAN PLEDGES, LOANS, OR GUARANTEES OF LOANS), UNLESS ITEMIZED	$ $0.00
	2. **TOTAL POLITICAL CONTRIBUTIONS** (OTHER THAN PLEDGES, LOANS, OR GUARANTEES OF LOANS)	$ $153,550.00
EXPENDITURE TOTALS	3. TOTAL POLITICAL EXPENDITURES OF $100 OR LESS, UNLESS ITEMIZED	$ $0.00
	4. **TOTAL POLITICAL EXPENDITURES**	$ $482,782.85
CONTRIBUTION BALANCE	5. TOTAL POLITICAL CONTRIBUTIONS MAINTAINED AS OF THE LAST DAY OF THE REPORTING PERIOD	$ $39,209.10
OUTSTANDING LOAN TOTALS	6. TOTAL PRINCIPAL AMOUNT OF ALL OUTSTANDING LOANS AS OF THE LAST DAY OF THE REPORTING PERIOD	$ $100,000.00

16 AFFIDAVIT

I swear, or affirm, under penalty of perjury, that the accompanying report is true and correct and includes all information required to be reported by me under Title 15, Election Code.

Mr. George Fibbe
Signature of Campaign Treasurer

AFFIX NOTARY STAMP / SEAL ABOVE

Sworn to and subscribed before me, by the said _____, this the _____ day of _____, 20_____, to certify which, witness my hand and seal of office.

Signature of officer administering oath | Printed name of officer administering oath | Title of officer administering oath

Exhibit A

SUBTOTALS - JSPAC

FORM JSPAC
COVER SHEET PG 3

17 COMMITTEE NAME	18 Filer ID (Ethics Commission Filers)
Massengale for Texas Supreme Court	00080068

19 SCHEDULE SUBTOTALS NAME OF SCHEDULE			SUBTOTAL AMOUNT
1.	[X]	SCHEDULE A(J)1: MONETARY POLITICAL CONTRIBUTIONS (JUDICIAL)	$ 151,400.00
2.	[X]	SCHEDULE A2: NON-MONETARY (IN-KIND) POLITICAL CONTRIBUTIONS	$ 2,150.00
3.	[X]	SCHEDULE B(J): PLEDGED CONTRIBUTIONS (JUDICIAL)	$ 0.00
4.	[X]	SCHEDULE E(J): LOANS (JUDICIAL)	$ 0.00
5.	[X]	SCHEDULE F1: POLITICAL EXPENDITURES FROM POLITICAL CONTRIBUTIONS	$ 482,013.44
6.	[X]	SCHEDULE F2: UNPAID INCURRED OBLIGATIONS	$ 769.41
7.	[ ]	SCHEDULE F3: PURCHASE OF INVESTMENTS FROM POLITICAL CONTRIBUTIONS	$
8.	[X]	SCHEDULE F4: EXPENDITURES MADE BY CREDIT CARD	$ 0.00
9.	[ ]	SCHEDULE H: PAYMENT FROM POLITICAL CONTRIBUTIONS TO A BUSINESS OF C/OH	$
10.	[ ]	SCHEDULE I: NON-POLITICAL EXPENDITURES FROM POLITICAL CONTRIBUTIONS	$
11.	[ ]	SCHEDULE K: INTEREST, CREDITS, GAINS, REFUNDS, AND CONTRIBUTIONS RETURNED TO FILER	$

MONETARY POLITICAL CONTRIBUTIONS

SCHEDULE A(J)1

The Instruction Guide explains how to complete this form.

1 Total pages Schedule A(J)1: Sch: 12/43 Rpt: 15/65

2 FILER NAME: Massengale for Texas Supreme Court

3 Filer ID (Ethics Commission Filers): 00080068

4 Date	5 Full name of contributor / 6 Contributor address; City; State; Zip Code	7 Amount of Contribution ($)
01/28/2016	Doornbos, Billy Nederland, TX 77627	$50.00

8 Contributor's Principal Occupation: Administrator

9 Contributor's Job Title: Administrator

10 Contributor's employer/law firm: C. Doornbos Inc.

11 Law firm of contributor's spouse (if any):

12 If contributor is a child, law firm of parent(s) (if any):

Date	Full name of contributor / Contributor address; City; State; Zip Code	Amount of Contribution ($)
02/16/2016	Empower Texans PAC Austin, TX 78720	$25,000.00

Contributor's Principal Occupation:

Contributor's Job Title:

Contributor's employer/law firm:

Law firm of contributor's spouse (if any):

If contributor is a child, law firm of parent(s) (if any):

Date	Full name of contributor / Contributor address; City; State; Zip Code	Amount of Contribution ($)
02/12/2016	Fields, Rebecca Sugar Land, TX 77479	$300.00

Contributor's Principal Occupation: Investor

Contributor's Job Title: Owner

Contributor's employer/law firm: Imperial Home Buyers LLC

Law firm of contributor's spouse (if any):

If contributor is a child, law firm of parent(s) (if any):

MONETARY POLITICAL CONTRIBUTIONS

SCHEDULE A(J)1

The Instruction Guide explains how to complete this form.

1 Total pages Schedule A(J)1: Sch: 16/43 Rpt: 19/65

2 FILER NAME: Massengale for Texas Supreme Court

3 Filer ID (Ethics Commission Filers): 00080068

4 Date	5 Full name of contributor ☐ out-of-state PAC (ID#:_____)	7 Amount of Contribution ($)
02/08/2016	Graham, Elizabeth	$1,000.00
	6 Contributor address; City; State; Zip Code: Houston, TX 77036	

8 Contributor's Principal Occupation	9 Contributor's Job Title
Non-Profit	Director
10 Contributor's employer/law firm	**11** Law firm of contributor's spouse (if any)
TX RTL	

12 If contributor is a child, law firm of parent(s) (if any)

Date	Full name of contributor ☐ out-of-state PAC (ID#:_____)	Amount of Contribution ($)
02/11/2016	Groves, Lee	$5,000.00
	Contributor address; City; State; Zip Code: Farmers Branch, TX 75234	

Contributor's Principal Occupation	Contributor's Job Title
Business Owner	President
Contributor's employer/law firm	Law firm of contributor's spouse (if any)
Groves Electrical Service	

If contributor is a child, law firm of parent(s) (if any)

Date	Full name of contributor ☐ out-of-state PAC (ID#:_____)	Amount of Contribution ($)
02/12/2016	Gustafson, James	$200.00
	Contributor address; City; State; Zip Code: Houston, TX 77024	

Contributor's Principal Occupation	Contributor's Job Title
Real Estate	Realtor
Contributor's employer/law firm	Law firm of contributor's spouse (if any)
The Gustafson Group	

If contributor is a child, law firm of parent(s) (if any)

MONETARY POLITICAL CONTRIBUTIONS

SCHEDULE A(J)1

The Instruction Guide explains how to complete this form.

1 Total pages Schedule A(J)1: Sch: 39/43 Rpt: 42/65

2 FILER NAME: Massengale for Texas Supreme Court

3 Filer ID (Ethics Commission Filers): 00080068

4 Date	5 Full name of contributor ☐ out-of-state PAC (ID#:_____)	7 Amount of Contribution ($)
01/28/2016	Taylor, Catherine	$1,000.00
	6 Contributor address; City; State; Zip Code: Dallas, TX 75225	

8 Contributor's Principal Occupation	9 Contributor's Job Title
Investments	Investor
10 Contributor's employer/law firm: Self Employed	**11** Law firm of contributor's spouse (if any)

12 If contributor is a child, law firm of parent(s) (if any)

Date	Full name of contributor ☐ out-of-state PAC (ID#:_____)	Amount of Contribution ($)
01/28/2016	Texas Home School Coalition PAC	$5,000.00
	Contributor address; City; State; Zip Code: Lubbock, TX 79493	

Contributor's Principal Occupation	Contributor's Job Title
Contributor's employer/law firm	Law firm of contributor's spouse (if any)

If contributor is a child, law firm of parent(s) (if any)

Date	Full name of contributor ☐ out-of-state PAC (ID#:_____)	Amount of Contribution ($)
02/15/2016	Texas Right to Life PAC	$5,000.00
	Contributor address; City; State; Zip Code: Houston, TX 77036	

Contributor's Principal Occupation	Contributor's Job Title
Contributor's employer/law firm	Law firm of contributor's spouse (if any)

If contributor is a child, law firm of parent(s) (if any)

CORRECTION/AMENDMENT AFFIDAVIT FOR POLITICAL COMMITTEE

FORM JSCOR-PAC

1 Filer ID (Ethics Commission Filers) 00080068	2 Total pages filed: 138	OFFICE USE ONLY	
3 COMMITTEE NAME	Massengale for Texas Supreme Court	Date Received: ELECTRONICALLY FILED 02/08/2016	
4 TREASURER NAME	Fibbe, George (Mr.)	Date Hand-delivered or Date Postmarked	
5 ORIGINAL REPORT TYPE	[X] January 15 [ ] July 15 [ ] 30th day before election [ ] 8th day before election [ ] Runoff [ ] 10th day after campaign treasurer resignation [ ] Dissolution report [ ] Other (specify)	Receipt # / Amount	
6 ORIGINAL PERIOD COVERED	Month Day Year: 07/01/2015 THROUGH Month Day Year: 12/31/2015	Date Processed / Date Imaged	

7 EXPLANATION OF CORRECTION

An invoice submitted as back-up for the in-kind contribution was relied upon in the preparation of the report originally filed. The invoice did not reflect the name of the actual contributor, a law firm, and instead reflected the name of an individual who works for the law firm. This clerical error was not discovered before the eighth day after filing the original report. This error did not cause a violation of the Judicial Campaign Fairness Act - including the related contributions limits for law firms and person affiliated with law firm set out therein. This report was amended at the most immediate time after discovery of the issue. Other than updating the name of the contributor for the 10/7/2015 in-kind contribution, no other changes have been made to the report. In the event the Commission assesses a late-filing penalty, we respectfully request the Commission waiver or reduce the fine before final disposition.

8 AFFIDAVIT

I swear, or affirm, under penalty of perjury, that this corrected report is true and correct.

Check the box next to any and all applicable statements:

[X] **Semiannual reports:** I swear or affirm, that the original report was made in good faith and without an intent to mislead or to misrepresent the information contained in the report.

[X] **Other reports:** I swear, or affirm, that I am filing this corrected report not later than the 14th business day after the date I learned that the report as originally filed is inaccurate or incomplete. I swear, or affirm, that any error or omission in the report as originally filed was made in good faith.

Mr. George Fibbe

Signature of Campaign Treasurer

AFFIX NOTARY STAMP / SEAL ABOVE

Sworn to and subscribed before me, by the said _____, this the _____ day of _____, 20_____, to certify which, witness my hand and seal of office.

Signature of officer administering oath | Printed name of officer administering oath | Title of officer administering oath

Remember To Attach Any Part Of The Campaign Finance Report Form Needed To Report And Explain Corrections

JUDICIAL SPECIFIC-PURPOSE COMMITTEE CAMPAIGN FINANCE REPORT

FORM JSPAC
COVER SHEET PG 1

The JSPAC Instruction Guide explains how to complete this form.

1 Filer ID (Ethics Commission Filers): 00080068

2 Total pages filed: 138

3 COMMITTEE NAME: Massengale for Texas Supreme Court

OFFICE USE ONLY

Date Received: ELECTRONICALLY FILED 02/08/2016

Date Hand-delivered or Date Postmarked

Receipt # | Amount

Date Processed

Date Imaged

4 COMMITTEE ADDRESS
☐ Change of Address
ADDRESS / PO BOX; APT / SUITE #; CITY; STATE; ZIP CODE
3733-1 Westheimer #652
Houston, TX 77027

5 CAMPAIGN TREASURER NAME
MS / MRS / MR: Mr.
FIRST: George
MI:
NICKNAME:
LAST: Fibbe
SUFFIX:

6 CAMPAIGN TREASURER STREET ADDRESS (Residence or Business)
STREET ADDRESS (NO PO BOX PLEASE); APT / SUITE #; CITY; STATE; ZIP CODE
3733-1 Westheimer #652
Houston, TX 77027

7 CAMPAIGN TREASURER MAILING ADDRESS
☐ Change of Address
STREET OR PO BOX; APT / SUITE #; CITY; STATE; ZIP CODE
3733-1 Westheimer #652
Houston, TX 77027

8 CAMPAIGN TREASURER PHONE
AREA CODE PHONE NUMBER EXTENSION
(281) 380-0479

9 REPORT TYPE
☒ January 15
☐ July 15
☐ 30th day before election
☐ 8th day before election
☐ Runoff
☐ Exceeded $500 Limit
☐ Dissolution (Attach JSPAC-DR)
☐ 10th day after campaign treasurer termination

10 PERIOD COVERED
Month Day Year: 07/01/2015 THROUGH Month Day Year: 12/31/2015

11 ELECTION
ELECTION DATE: Month Day Year: 03/01/2016
ELECTION TYPE
☒ Primary ☐ Runoff ☐ Other
☐ General ☐ Special

GO TO PAGE 2

Exhibit B

JUDICIAL SPECIFIC - PURPOSE COMMITTEE REPORT: PURPOSE & TOTALS

FORM JSPAC
COVER SHEET PG 2

12 COMMITTEE NAME	13 Filer ID (Ethics Commission Filers)
Massengale for Texas Supreme Court	00080068

14 COMMITTEE PURPOSE

(Attach lists on plain paper to complete this report if necessary.)

- [X] SUPPORT (Candidate)
- [ ] OPPOSE (Candidate)
- [ ] ASSIST (Officeholder)

- [X] Candidate
- [ ] Officeholder

CANDIDATE / OFFICEHOLDER NAME
Michael Massengale

OFFICE SOUGHT (candidate) / OFFICE HELD (officeholder)
Supreme Court Justice

15 CONTRIBUTION TOTALS	1. TOTAL POLITICAL CONTRIBUTIONS OF $50 OR LESS (OTHER THAN PLEDGES, LOANS, OR GUARANTEES OF LOANS), UNLESS ITEMIZED	$ $0.00
	2. **TOTAL POLITICAL CONTRIBUTIONS** (OTHER THAN PLEDGES, LOANS, OR GUARANTEES OF LOANS)	$ $353,471.36
EXPENDITURE TOTALS	3. TOTAL POLITICAL EXPENDITURES OF $100 OR LESS, UNLESS ITEMIZED	$ $0.00
	4. **TOTAL POLITICAL EXPENDITURES**	$ $61,596.30
CONTRIBUTION BALANCE	5. TOTAL POLITICAL CONTRIBUTIONS MAINTAINED AS OF THE LAST DAY OF THE REPORTING PERIOD	$ $377,639.84
OUTSTANDING LOAN TOTALS	6. TOTAL PRINCIPAL AMOUNT OF ALL OUTSTANDING LOANS AS OF THE LAST DAY OF THE REPORTING PERIOD	$ $0.00

16 AFFIDAVIT

I swear, or affirm, under penalty of perjury, that the accompanying report is true and correct and includes all information required to be reported by me under Title 15, Election Code.

Mr. George Fibbe
Signature of Campaign Treasurer

AFFIX NOTARY STAMP / SEAL ABOVE

Sworn to and subscribed before me, by the said _____, this the _____ day of _____, 20_____, to certify which, witness my hand and seal of office.

Signature of officer administering oath | Printed name of officer administering oath | Title of officer administering oath

Exhibit B

SUBTOTALS - JSPAC

FORM JSPAC
COVER SHEET PG 3

17 COMMITTEE NAME	18 Filer ID (Ethics Commission Filers)
Massengale for Texas Supreme Court	00080068

19 SCHEDULE SUBTOTALS NAME OF SCHEDULE		SUBTOTAL AMOUNT
1. [X]	SCHEDULE A(J)1: MONETARY POLITICAL CONTRIBUTIONS (JUDICIAL)	$ 345,295.97
2. [X]	SCHEDULE A2: NON-MONETARY (IN-KIND) POLITICAL CONTRIBUTIONS	$ 8,175.39
3. [ ]	SCHEDULE B(J): PLEDGED CONTRIBUTIONS (JUDICIAL)	$
4. [X]	SCHEDULE E(J): LOANS (JUDICIAL)	$ 100,000.00
5. [X]	SCHEDULE F1: POLITICAL EXPENDITURES FROM POLITICAL CONTRIBUTIONS	$ 58,988.80
6. [X]	SCHEDULE F2: UNPAID INCURRED OBLIGATIONS	$ 2,607.50
7. [ ]	SCHEDULE F3: PURCHASE OF INVESTMENTS FROM POLITICAL CONTRIBUTIONS	$
8. [ ]	SCHEDULE F4: EXPENDITURES MADE BY CREDIT CARD	$
9. [ ]	SCHEDULE H: PAYMENT FROM POLITICAL CONTRIBUTIONS TO A BUSINESS OF C/OH	$
10. [ ]	SCHEDULE I: NON-POLITICAL EXPENDITURES FROM POLITICAL CONTRIBUTIONS	$
11. [X]	SCHEDULE K: INTEREST, CREDITS, GAINS, REFUNDS, AND CONTRIBUTIONS RETURNED TO FILER	$ 1,050.00

Exhibit B

MONETARY POLITICAL CONTRIBUTIONS

SCHEDULE A(J)1

The Instruction Guide explains how to complete this form.

1 Total pages Schedule A(J)1: Sch: 7/106 Rpt: 11/138

2 FILER NAME: Massengale for Texas Supreme Court

3 Filer ID (Ethics Commission Filers): 00080068

4 Date	5 Full name of contributor / out-of-state PAC (ID#:)	7 Amount of Contribution ($)
12/29/2015	Beecherl, Robert	$1,000.00
	6 Contributor address; City; State; Zip Code: Midland, TX 79702	

8 Contributor's Principal Occupation	9 Contributor's Job Title
Investments	Investor
10 Contributor's employer/law firm: Self Employed	**11** Law firm of contributor's spouse (if any)

12 If contributor is a child, law firm of parent(s) (if any)

Date	Full name of contributor / out-of-state PAC (ID#:)	Amount of Contribution ($)
10/23/2015	Beirne, Marty	$1,000.00
	Contributor address; City; State; Zip Code: Houston, TX 77056	

Contributor's Principal Occupation	Contributor's Job Title
Attorney	Founding Partner
Contributor's employer/law firm: Beirne Maynard and Parsons LLP	Law firm of contributor's spouse (if any)

If contributor is a child, law firm of parent(s) (if any)

Date	Full name of contributor / out-of-state PAC (ID#:)	Amount of Contribution ($)
09/13/2015	Bennett, Judith	$250.00
	Contributor address; City; State; Zip Code: Beaumont, TX 77706	

Contributor's Principal Occupation	Contributor's Job Title
School Counselor - Retired	Retired
Contributor's employer/law firm: Monsignor Kelly Catholic High School	Law firm of contributor's spouse (if any)

If contributor is a child, law firm of parent(s) (if any)

MONETARY POLITICAL CONTRIBUTIONS

SCHEDULE A(J)1

The Instruction Guide explains how to complete this form.

1 Total pages Schedule A(J)1: Sch: 23/106 Rpt: 27/138

2 FILER NAME: Massengale for Texas Supreme Court

3 Filer ID (Ethics Commission Filers): 00080068

4 Date	5 Full name of contributor ☐ out-of-state PAC (ID#:_____)	7 Amount of Contribution ($)
10/28/2015	DuPont, Cedric	$2,000.00
	6 Contributor address; City; State; Zip Code: Austin, TX 78759	

8 Contributor's Principal Occupation	9 Contributor's Job Title
Anesthesiologist	Physician
10 Contributor's employer/law firm	**11** Law firm of contributor's spouse (if any)
Austin Anesthesiology Group	

12 If contributor is a child, law firm of parent(s) (if any)

Date	Full name of contributor ☐ out-of-state PAC (ID#:_____)	Amount of Contribution ($)
10/20/2015	Duncan, John	$500.00
	Contributor address; City; State; Zip Code: Dallas, TX 75225	

Contributor's Principal Occupation	Contributor's Job Title
Information Requested Using Best Efforts	Information Requested Using Best Efforts
Contributor's employer/law firm	Law firm of contributor's spouse (if any)
Information Requested Using Best Efforts	

If contributor is a child, law firm of parent(s) (if any)

Date	Full name of contributor ☐ out-of-state PAC (ID#:_____)	Amount of Contribution ($)
12/14/2015	Dunn, Tim	$5,000.00
	Contributor address; City; State; Zip Code: Midland, TX 79701	

Contributor's Principal Occupation	Contributor's Job Title
Oil and Gas	CEO
Contributor's employer/law firm	Law firm of contributor's spouse (if any)
CrownQuest	

If contributor is a child, law firm of parent(s) (if any)

MICHAEL MASSENGALE
for TEXAS SUPREME COURT

JUSTICE MICHAEL MASSENGALE: A CONSTITUTIONAL CONSERVATIVE

Justice Michael Massengale currently sits on the First Court of Appeals. He is the only candidate in this race board-certified in civil appellate law. Before joining the court, he was a partner in the trial department at Baker Botts L.L.P. where he specialized in commercial litigation. He is a former Harris County Republican Party precinct chairman, and he served for four years as president of the Houston Lawyers Chapter of the Federalist Society, the nation's preeminent association of conservative lawyers. His wife, Lindsey Harris Massengale, is a Beaumont native and a board-certified ophthalmologist specializing in diseases of the vitreous and retina. Together they live and attend church in Houston, TX.

ENDORSEMENTS

TEXANS *for* LAWSUIT REFORM

TLR

POLITICAL ACTION COMMITTEE
TEXAS RIGHT TO LIFE

Exhibit C

TEXANS FOR FISCAL RESPONSIBILITY

TEXAS ASSOCIATION OF BUSINESS

TEXPAC
Political Arm of the Texas Medical Assn.

THE TEXAS CONSERVATIVE VIEW

TEXAS PATRIOTS PAC
TEA PARTY

MONTGOMERY COUNTY
MC Tea Party
TEA PARTY

KINGWOOD TEA PARTY

Exhibit C

VIEW ALL ENDORSEMENTS HERE (HTTPS://MICHAELMASSENGALE.SQUARESPACE.COM)

ABOUT MICHAEL MASSENGALE

Michael Massengale was appointed to the First Court of Appeals by Governor Rick Perry on June 15, 2009. He was elected in 2010 and re-elected to a full term in 2012.

Justice Massengale is board certified in civil appellate law by the Texas Board of Legal Specialization. Before joining the court, he was a partner in the trial department at Baker Botts L.L.P. where he specialized in commercial litigation involving corporate mergers and acquisitions, fraudulent transfers, securities fraud, and antitrust. He has also tried a number of personal injury and property damage lawsuits to jury verdicts.

He graduated with honors from The University of Texas School of Law. He earned the Outstanding Editor Award from the Texas Law Review, having published his student note, served as Book Review Editor, and edited the ninth edition of Texas Rules of Form. After law school, he clerked for Judge Harold R. DeMoss, Jr. of the United States Court of Appeals for the Fifth Circuit. He is a graduate of Dartmouth College and an Eagle Scout.

Among other civic and professional activities, Justice Massengale serves as a commissioner on the Permanent Judicial Commission For Children, Youth & Families where he chairs the Training Committee and oversees the Commission's judicial and attorney training programs. He also curates a blog on the history of the Texas Constitution, at www.texconst.wordpress.com. His wife, Lindsey, is a board-certified ophthalmologist specializing in diseases of the vitreous and retina.

BE PART OF OUR FUTURE!

Exhibit C

CONTACT

Michael Massengale Campaign.

Your Name *

Your Email *

Your Phone *

Your Message *

SEND MESSAGE

Exhibit C

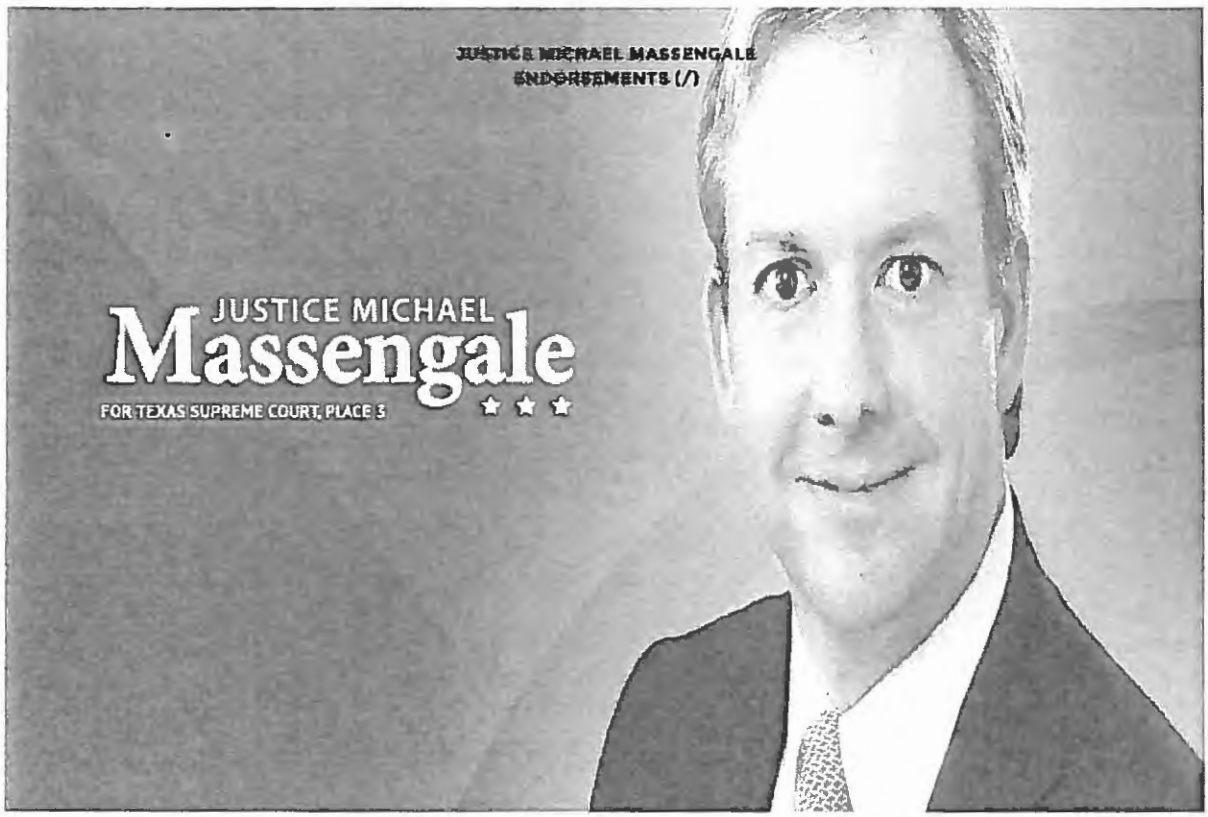
(https://www.facebook.com/pages/Just
Michael-
Massengale/214383198190?
fref=ts)

(https://twitter.com/mmassengale)

Political ad paid by Justice Michael Massengale Campaign, in compliance with the voluntary limits of the Judicial Campaign Fairness Act.

MAIL CONTRIBUTIONS: If you would like to make a contribution by mail, please make checks out to 'Massengale for Texas Supreme Court' and send them to Massengale for Texas Supreme Court, c/o Michelle Lupton -- 16238 RR 620N, Suite F255, Austin, TX 78717

Exhibit C



ENDORSEMENTS

TEXANS FOR FISCAL RESPONSIBILITY

TEXANS *for* LAWSUIT REFORM
TLR
POLITICAL ACTION COMMITTEE

TEXAS RIGHT TO LIFE

TEXPAC

TEXAS ASSOCIATION OF BUSINESS

TEXAS HOME SCHOOL COALITION

KINGWOOD TEA PARTY

MONTGOMERY COUNTY
MC Tea Party
TEA PARTY

TEXAS PATRIOTS PAC
TEA PARTY

CONSERVATIVE VIEW

DFW™

YOUNG CONSERVATIVES OF TEXAS

Exhibit D

Conservative Voters

STATEWIDE CONSERVATIVE LEADERS:

Rick Perry - *Former Governor of Texas*

Cathie Adams - *President - Texas Eagle Forum & Former Texas GOP Chairman**

George Strake - *Former Texas Secretary of State & Former Texas GOP Chairman**

Kelly Shackelford - *President & CEO - Liberty Institute**

David Barton - *President – W*

Exhibit D

Michael Massengale [illegible] Jun 2015

.@MQSullivan "You never take flak unless you're over the target." @EmpowerTexans #CLG15

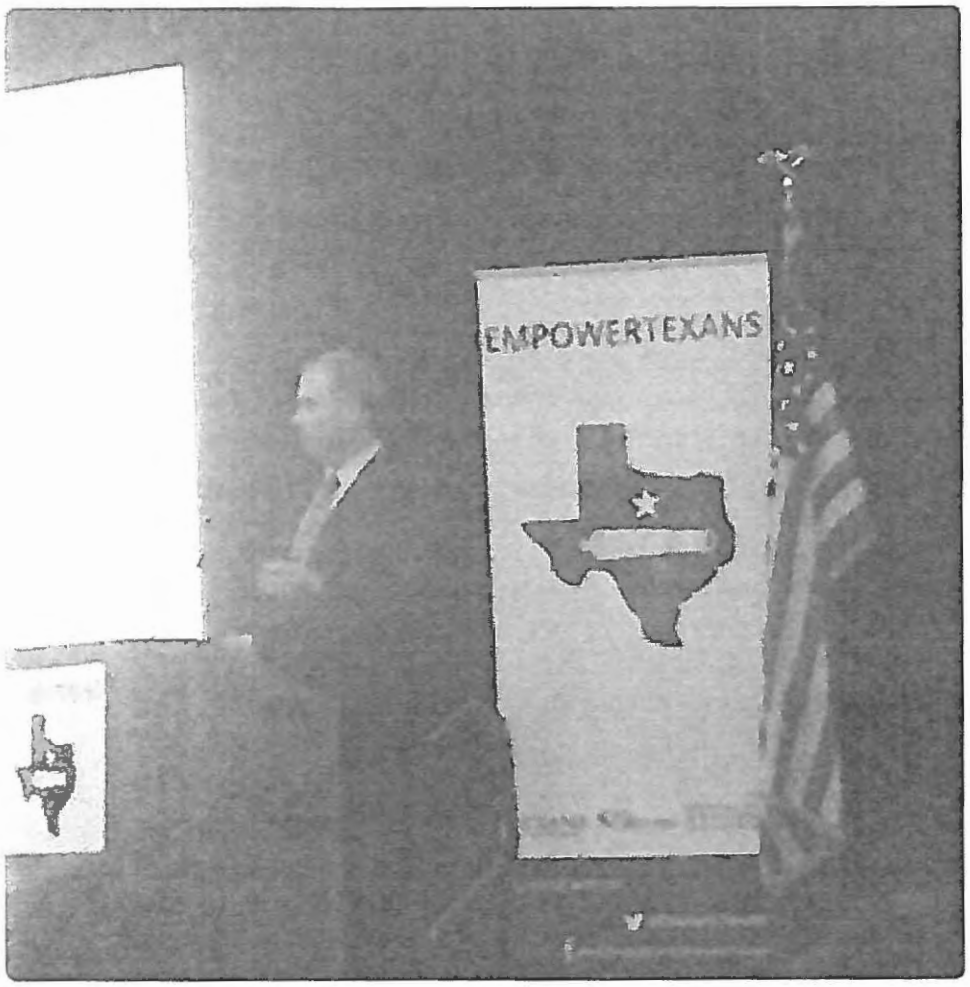


Exhibit E

Michael Massengale

Thrilled to join great conservative leaders at #CLG15 @EmpowerTexans @kwteaparty @KWTP @txelectionlaw @PrattonTexas

Exhibit E

Jordan Berry jordanberry · 3 Oct 2015

Bill_Zedler and Justice MMassengale at TXRightToLife gala in Houston. #COL2015

Texas Right to Life TXRightToLife · 2h

Justice @mmassengale is the conservative choice for SCOTX, Place 3. Learn more: txr.tl/iY8 #LifeFirst

"Voters in Texas have repeatedly shown their preference to have conservative judges at the court.
We know Texans want judges who will be faithful to the laws that are enacted by our legislature, the people we elect and send to Austin."
-Michael Massengale

TexasRightToLifePAC.com #LifeFirst
Pol. ad paid for by Texas Right to Life PAC

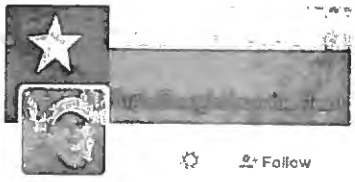
Exhibit E

Tweets Tweets & replies Photos & videos

Michael Massengale
Honored to have the endorsement of EmpowerTexans in this race!
Do you want to elect a constitutional conservative? Join them 3/1!
txlege

Michael Massengale
Did you hear that TXRightToLife has endorsed me for scotx? Join them and VoteMassengale on Tuesday! txlege

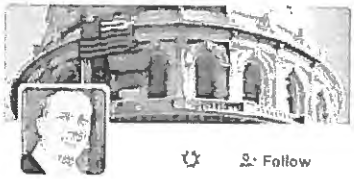
Exhibit E



Follow

Colonel
@laurakittrell

Woodlands Township Director, Blogger, Networker, Christian. Lived in France = socialism sucks! #GoNavy #GigEm #TXCHI.



Follow

Chip Roy
@chiproytx

1st Asst AG Tx, @KenPaxtonTx. Frmr: Chief Staff @TedCruz, Adviser@ @GovernorPerry & @JohnCornyn. SAUSA. @UVA & @UTexasLaw....

Empower Texans
@EmpowerTexans

Official Twitter Account for Emp Texans / Texans for Fiscal Respo Promoting liberty and fiscal resp in the Lone Star State.

Follow

Joe Nixon
@JMNLawyer

Former member of the Texas House of Representatives (12 years). Served as Chairman of the House Committee on Civil Practices.

Follow

TLR
@lawsuitreform

Texans for Lawsuit Reform is a volunteer-led organization working to maintain a fair and balanced civil justice system.

Statesman Courts
@AustinCourts

A look at local justice from inside outside the courtroom - Official feed for courts coverage from th American Statesman.

Exhibit E

1.

1. **Trey Trainor**

Just voted early for

Exhibit F

This is to certify that

James E. Trainor

(Name of Voter)

Election Precinct No. 236 of Hays County

has voted in the primary election of the Republican

Party Date

*Election Judge ~~County Clerk~~

*Cross Out One

Exhibit F

2.  **Trey Trainor** txelectionlaw 5 Dec 2015

Great to see candidate, justice at

3.

1.  **Michael Massengale** @mmassengale 5 Dec 2015

Thrilled to join great conservative leaders at

Exhibit F

Retweeted 1 like

4. In reply to Trey Trainor

Jordan Berry @jordandberry 4 Dec 2015

it was simple, I just answered the door after the FedEx guy knocked.

Exhibit F

5 In reply to Jordan Berry


Trey Trainor @txelectionlaw 4 Dec 2015

what's a guy gotta do to get one of those?


6. **Trey Trainor** @txelectionlaw 16 Nov 2015

Join here in Austin tomorrow

Exhibit F

7.

1. **Trey Trainor** @txelectionlaw 23 Oct 2015

MT Justice will be a strong Pro-Life voice in TX Supreme Court!

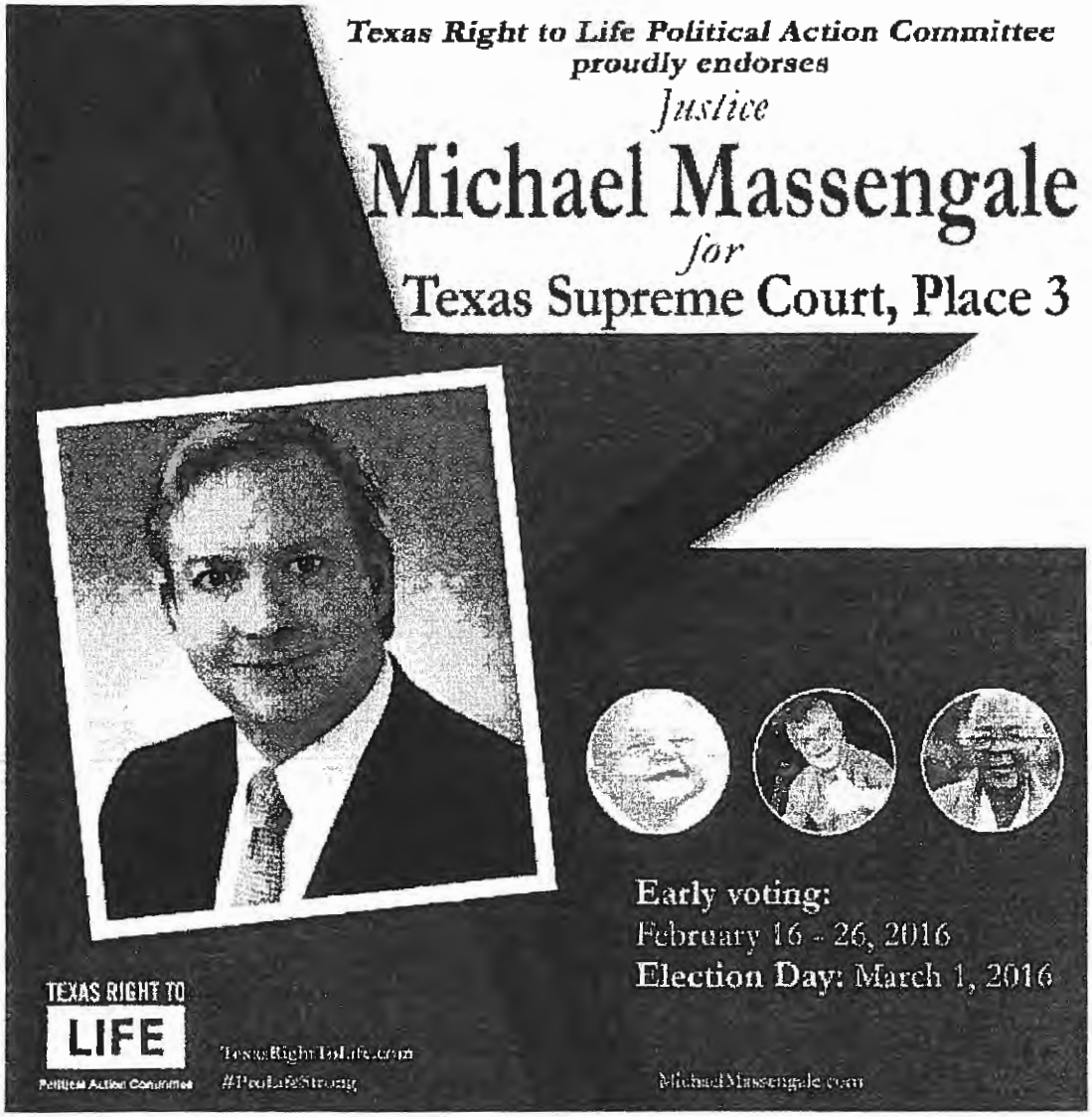


Exhibit F

8.  **Trey Trainor** @txelectionlaw 10 Sep 2015

Great to see at Luncheon today.

User Actions

Follow

 **Trey Trainor** txelectionlaw

Attacks on Massengale Assume Ignorance of Voters | Empower Texans℠ empowertexans.com/election/attac … via @empowertexans txlege SCOTX

- LIKE1

Exhibit F

8:01 AM - 28 Feb 2016

Troy Tanner Retweeted

Texas Values Action @TxValuesAction Feb 25

We proudly endorse : mmassengale for Texas Supreme Court Justice, Place 3!
txvaluesaction.org/texas-values-a. . ... #txlege

Exhibit F

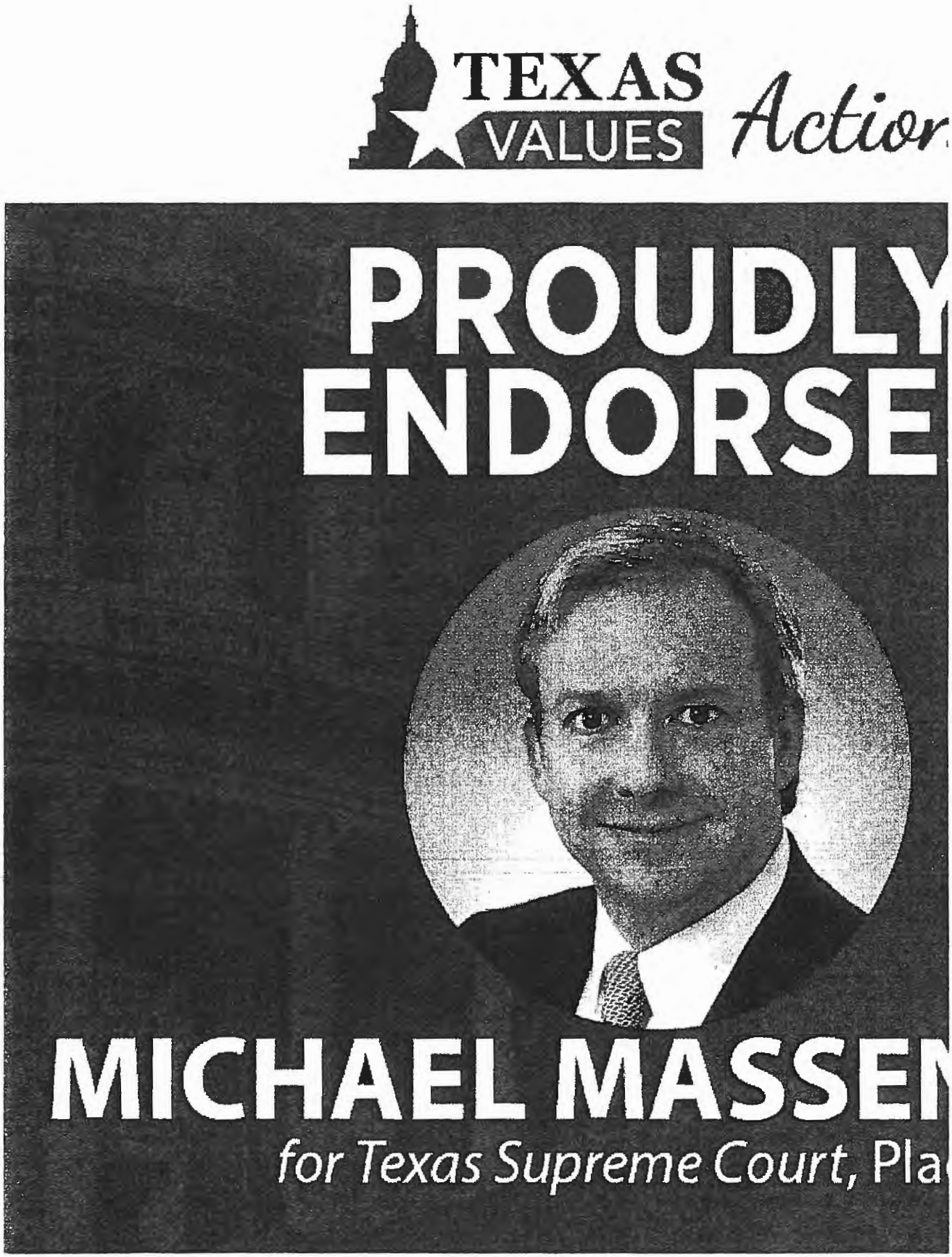

TEXAS
VALUES
Actior
PROUDLY
ENDORSE
MICHAEL MASSEN
for Texas Supreme Court, Pla

Exhibit F

Troy Trainor Retweeted

Michael Massengale @mmassengale · 3h

Thank you @TXRightToLife, @EmpowerTexans, @thsc, @timthsc, @TxValuesAction, and @JonathanSaenzTX for your endorsements! #SCOTX #FF

Exhibit F

1 In reply to Michael Massengale

Colonel Alaa Abdallah Feb 26

You earned it. Thank you!!

2. 

Michael Massengale mmassengale Feb 26

Thank you , , , , and for your endorsements!

Exhibit F

APP. D

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

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[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.

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[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.

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[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.

JUDGMENT

Court of Appeals

First District of Texas

NO. 01-15-00617-CV

BOB DEUELL, Appellant

V.

TEXAS RIGHT TO LIFE COMMITTEE, INC., Appellee

Appeal from the 152nd District Court of Harris County. (Tr. Ct. No. 2014-32179).

This case is an appeal from the order signed by the trial court on July 1, 2015. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that the trial court's order contains no reversible error. Accordingly, the Court **affirms** the trial court's order.

The Court **orders** that this decision be certified below for observance.

Judgment rendered September 15, 2016.

Panel consists of Justices Jennings, Bland, and Huddle. Opinion delivered by Justice Huddle. Justice Jennings, dissenting.

APP. E

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. . . .

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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).

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[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

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[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

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[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.

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[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:

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[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

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- Payday Lending
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- Many Head to the Capitol in Support of Life
- World War II Veteran Works on the Home Front to Promote Religious Vocations
- Folklife Mass: 'One Faith – Many Cultures'

News

- TCC- DACA Project
- Texas Catholic Conference Seeks Federal Extension Of Children's Health Insurance Program
- The Perils Of Payday And Auto Title Lending

Texas Voice
In this issue.

USCCB Migration Committe Traveled To U.S. -Mexican Border

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

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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

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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.

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