ACCEPTED
01-15-00617-CV
FIRST COURT OF APPEALS
HOUSTON, TEXAS
10/31/2016 3:57:06 PM
CHRISTOPHER PRINE
CLERK

No. 01-15-00617-CV
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IN THE COURT OF APPEALS
FIRST COURT OF APPEALS DISTRICT
HOUSTON, TEXAS
***

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
10/31/2016 3:57:06 PM
CHRISTOPHER A. PRINE
Clerk

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 BOB DEUELL'S OPPOSED MOTION FOR REHEARING AND MOTION FOR EN BANC RECONSIDERATION

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ATTORNEYS FOR APPELLANT
BOB DEUELL

SIGNED on this the 31st day of October, 2016.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT
BOB DEUELL

MAY IT PLEASE THE COURT:

NOW COMES APPELLANT, Bob Deuell, and files this Appellant's Motion for Rehearing and En Banc Reconsideration in accordance with the Texas Rules of Appellate Procedure ("TRAP").

INTRODUCTION

By this motion for rehearing and reconsideration en banc filed under Texas Rules of Appellate Procedure 49.1 and 49.7, Appellant Bob Deuell, (hereinafter, "Appellant" and/or "Deuell"), asks this Court to reconsider its decision to affirm the trial court's denial of Appellant's motion to dismiss pursuant to Tex. Civ. Prac. & Rem. Code § 27.003 against Appellee Texas Right to Life Committee, Inc. (hereinafter, "Appellee" and/or "TRLC") and also allow Appellant to file a supplement to his brief.

Rehearing and reconsideration en banc are appropriate in this case because the Court's ruling mistakenly concludes that the Appellee met the burden of proof in establishing a prima facie case of tortious interference with a contract on all elements and that the Appellant failed to establish as a matter of law that he was entitled to the affirmative defense of judicial privilege.

STATEMENT OF REHEARING POINTS

Appellant requests rehearing and reconsideration of the Court's ruling based on the following:

A. The Court incorrectly reviewed the pleadings and evidence in a light favorable to the nonmovant because it failed to consider all of movants' evidence and therefore incorrectly surmises that Appellee established a prima facie case in that the evidence does not support a determination that Appellee met the burden for each element of the offense of tortious interference with a contract as required by the application of the Texas Citizens Participation Act which is to be construed liberally to effectuate its purpose and intent fully. Tex. Civ. Prac. & Rem. Code Ann. §27.011(b).

B. The Court incorrectly found that Appellant failed to establish the affirmative defense of judicial privilege in that Texas Courts have applied the privilege beyond the context of libel or slander claims.

ARGUMENTS & AUTHORITIES

A. The Court incorrectly reviewed the pleadings and evidence in a light favorable to the nonmovant because it failed to consider all of movants' evidence and therefore incorrectly surmises that Appellee established a prima facie case in that the evidence does not support a determination that Appellee met the burden for each element of the offense of tortious interference with a contract as required by the application of the Texas Citizens Participation Act which is to be construed liberally to effectuate its purpose and intent fully. Tex. Civ. Prac. & Rem. Code Ann. §27.011(b).

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 § 27 .005(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).

(1) The element of an existing contract subject to interference.

On page eight of the opinion, the Court opines that the affidavit of James J. Graham, the Executive Director of TRLC, averred that they entered into two contracts for radio advertising. However, all of Appellee's pleadings, in state and federal court, original and amended, assert that TRLC hired a third party to purchase this air time. The pleadings all state:

> On May 9, 2014, Texas Right to Life hired a third party to purchase air time for their radio ad on radio stations that would reach the general public to inform the public on the issue concerning Defendant's voting record."

[C.R. at 6, 83, 114, 194 and 276].

This directly conflicts with the testimony of Graham contained in his affidavit:

> On or about May 7, 2014, Texas Right to Life Committee, Inc. entered into a contract with Cumulus Media Dallas-Ft. Worth to secure airtime for their radio advertisements.
>
> On or about May 8, 2014, Texas Right to Life Committee, Inc. entered into a contract with Salem Communications to secure airtime for their radio advertisements.

Affidavit of James J. Graham [C.R. at 95-96].

During the hearing on the Motion to Dismiss, Appellee did not rectify this conflict. TRLC did not offer any explanation or clarification as to why there were three difference dates and different parties involved. If Appellee actually performed as the pleadings stated, they would not even have standing to bring this suit. This is a fairly significant contradiction impacting a critical element in establishing tortious interference with a contract. *Serafine v. Blunt*, 466 S.W.3d 352, 361 (Tex.App. – Austin 2015, no pet.)

Moreover, the few sentences of Graham'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)(finding that the express terms of the contract in question showed that it was not subject to tortious interference allegations, and therefore the defendant could not have interfered as a matter of law.) *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.

The Appellee's own pleadings offered rebuttal evidence regarding who the contracting parties were and even the alleged contract dates. *See In re Lipsky*, 460 S.W.3d 579 (Tex.2015). This Court quoted the Supreme Court as holding 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. *Lipsky* at 591, *citing Simonds v. Stanolind Oil & Gas Co.*, 136 S.W.2d 207, 209 (Tex.1940). Appellee's own evidence contradicted and rebutted itself. This cannot be held to meet 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).

In reviewing the pleadings and supporting affidavit it is clear that the Appellee had conflicting information to prove up at the hearing and they failed to do so. The pleadings allege that the Appellee did not have a contract with Cumulus or Salem. The affidavit alleges they did. The pleadings allege the Appellant entered into a contract with a third party on May 9, 2014, to have them purchase the airtime for their ads. The affidavit claims the Appellant entered into two contracts on two different dates prior to the date in the pleadings. Appellee did not produce clear and

specific evidence of the existence of a contract subject to interference. *Tex. Civ. Prac. & Rem. Code* §27.005(c).

Therefore, when reviewing all of the evidence submitted in pleadings and supporting and opposing affidavits, there is equally conflicting information such that this Court could not dismissively discount one portion of Appellee's evidence in favor of another without any discussion in its opinion. The Court erred in finding Appellee met their burden on this element of tortious interference with a contract.

(2) The element of a willful and intentional act of interference with the contract.

On page twelve, the Court decides that this element is met by TRLC with clear and specific evidence of a willful and intentional act of interference – the letters relating to anticipated litigation. But without knowing the specifics of the contracts in question, it is hard to know whether or not the letters sent by Appellant's counsel interfered with any obligatory provisions of the alleged contracts.

The Affidavit only refers to a hearsay statement:

> On or about May 14, 2014, Texas Right to Life Committee, Inc., received notice from Cumulus Media and Salem Communications 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.

[C.R. at 96].

This allegation is not only hearsay, but it is not clear and specific about what individual from either Cumulus Media or Salem Communications sent the notice. It

is not clear and specific about what the form of the notice was. It is not clear and specific about what individual employee or agent of Texas Right to Life Committee, Inc. received the notice. It is not specific as to the contents of the notice. It is not even specific as to the nature of the alleged tortious act. The *Affidavit of James J. Graham* does not provide the clear and specific evidence necessary to prove that Appellant committed a willful and intentional act of interference with any specific contract and it does not provide the clear and specific evidence required to avoid dismissal. *See Serafine*, 466 S.W.3d at 362. *Tex. Civ. Prac. & Rem Code§* 27.005(c).

Moreover, the affidavit stated that the phone calls TRLC received in regards to the communication from Appellant was that "legal threats" had been received regarding the ads. This lends more credibility to Appellant's affirmative defense argument of judicial privilege, discussed in more detail below. This Court erred in finding prime facie evidence of this element of the offense as well.

(3) The elements of proximity of the intentional act or interference causing actual damages or loss.

On page fifteen, the Court determined that the evidence in the affidavit of Graham showing that the ads were going to be suspended for an unidentified amount of time somehow amounts to an interference significant enough to cause actual damage. Appellee offered no evidence as to what monetary damage was suffered as a result of the ads not being on the air for two days. Graham's affidavit merely recites alleged contract prices but does not provide evidence to support Appellee's

actual damages claim. Appellee wholly fails to identify in any of his pleadings, state and federal, original and amended, any specific amount of actual damages or loss. At one point, Appellee states that the amount is "immeasurable." [C.R. 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 Appellee's claim. Moreover, Appellee plead that they were entitled to full restitution of all profit realized by Appellant in this matter. Again, Appellee did not provide any evidence of what this profit was or what the full restitution amount is that would likely be sought. Appellant was not successful in his run for reelection and therefore has not unjustly profited from the complained of actions. Appellant merely desired that the radio ads not present false information. Once the false information was removed, Appellant no longer asserted a good faith right to take legal action against Salem or Cumulus, as is arguably allowed under §315 of the Communications Act. *See* 47 U.S.C. §315(2002). *See and compare Houston Post Co. v. U.S.,* 79 F.Supp199 (S.D.Tex1948) and *KENS-TV, Inc. v. Farias*, 2007 WL 2253502.

Given that the letter went out to Cumulus and Salem on May 14, 2014, and that within hours both companies had decided to suspend airing of the ad and had contacted TRLC, there would appear to be some legitimacy to the content of the legal concerns expressed by Appellant. So much so, that immediate action was taken

to compromise and produce a new radio ad, arguably with modified statements of facts, which was being aired within 48 hours.

In their opening paragraph for actual damages, Appellee alleges that at the least 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 the Affidavit of James J. Graham, nor included in the pleadings. Based on the evidence presented by Appellant, the first radio ad only cost $450. Appellee did not offer any evidence of the cost to produce the second radio ad and place it back with Cumulus or Salem. The alleged contract prices are not relevant as evidence of actual damages either since there is no way to deduce from them the amount to place the second ad or the actual cost of lost airtime. Appellee 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.
>
> [R.R. I at 9].

The trial court erroneously advised Appellee that they did not have to offer evidence of damages for the hearing when it was clear the Appellee knew they did in order to meet their burden. As was discussed during the hearing, Appellant had no legal issues with the new radio ad and did not threaten further legal action. Further substantiating Appellant's claim for its affirmative defense of judicial privilege, *discussed ante*. The affidavit only states the cost for the new additional airtime contract with a new company, not the amount of loss for the two days under the original contracts. Without knowing what different terms and conditions were created in an alleged agreement by TRLC with a whole new communications group, there is not enough evidence to establish actual damages or loss.

The Appellee failed to identify specifics - other than start date and approximate cost - to show that the subsequent agreement with a different communications company was required in order to offset their "loss" of comparable airtime. There is no evidence to substantiate that this was necessary or mitigating. The second radio ad was already running on other media networks, Salem and Cumulus.

Appellee did not provide any evidence to show that the new contract achieved the level of market penetration that they desired from the original contracts with Cumulus and Salem, as set forth in their pleadings. There is not clear and specific evidence to meet the Appellee's burden on this element. Appellee failed to establish

a prima facie case for this element of the offense of tortious interference with a contract.

B. The Court incorrectly found that Appellee failed to establish the affirmative defense of judicial privilege in that the letters to the radio stations asserting potential litigation were the only evidence of an alleged act of interference, and therefore proved, by a preponderance of the evidence, the privilege.

On page 21 of the Court's opinion, the court concludes that TRLC's tortious interference claim is not protected by the absolute judicial privilege because they do not seek to recover reputational or defamation-type damages. This Court decided that Appellee was only seeking only direct and consequential contract damages. However, as is evident from the pleadings, TRLC's damages claims are very vague and non-specific as to what harm or loss or damage has truly been suffered, as *discussed supra.* Appellant would argue that this Court could not have decided the merits of this claim based solely on the type of damages sought as that has yet to be determined or proved up.

Even if the Appellee could establish, by clear and specific evidence, every element of its tortious interference claim (and it cannot do so), the Court must dismiss Appellee's lawsuit if Appellant establishes, by a preponderance of the evidence, each essential element of a valid defense to Appellee's tortious interference claim. *Tex. Civ. Prac.* & *Rem. Code* §27.005(d).

The Texas Supreme Court described the judicial privilege in this manner: "Any communication, oral or written, uttered or published in the due course of a judicial proceeding is absolutely privileged and cannot constitute the basis of a civil action in damages for slander or libel. The falsity of the statement or the malice of the utterer is immaterial, and the rule of nonliability prevails even though the statement was not relevant, pertinent and material to the issues involved in the case." *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942). The Court later expanded the scope of the privilege beyond slander and libel. *See Bird v. W.C.W.*, 868 S.W.2d 767, 771-72 (Tex. 1994) (extending the absolute privilege to pre-trial proceedings and statements defeating the plaintiffs' negligence claim where plaintiffs' damages were basically defamation damages).

"Although most cases addressing the judicial communications privilege involve claims of libel or slander, Texas courts have consistently applied the privilege to claims arising out of communications made in the course of judicial proceedings, regardless of the label placed on the claim." *Laub v. Pesikoff*, 979 S.W.2d 686, 690 (Tex. App. - Houston [1st Dist.] 1998 pet. denied). The judicial immunity recognized in *Bird* is not limited only to claims styled as defamation claims, but instead extends to "claims arising out of communications made in the course of judicial proceedings, regardless of the label placed on the claim." *Crain v.*

Unauthorized Practice of Law Comm., l 1S.W.3d 328, 335 (Tex. App.-Houston [1st Dist.] 1999, pet. denied).

In *Crain v. Smith*, 22 S.W.3d 58, 62-63 (Tex.App. – Corpus Christi 2000, no pet.), the court detailed Texas case law regarding the application of judicial privilege over the years. It has expanded from a purely "judicial" privilege in actual courtroom proceedings, *Runge v. Franklin*, 10 S.W. 721 (Tex.1889), to situations such as is being considered in this case, *City of Brady v. Bennie*, 735 S.W.2d 275, 279 (Tex.App. Eastland 1987, no writ). *See also Russell v. Clark*, 620 S.W.2d 865, (Tex.Civ.App. – Dallas 1981, writ ref'd n.r.e.); *Thomas v. Bracey*, 940 S.W.2d 340 (Tex.App. San Antonio 1997, no writ); *James v. Brown*, 637 S.W.2d 914 (Tex.1982)

It is well established under Texas law that letters written by attorneys in anticipation of litigation are absolutely privileged. *See Russell v. Clark*, 620 S.W.2d 865, 869 (Tex. App. - Dallas 1981, writ ref'd n.r.e.) "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications **preliminary to a proposed judicial proceeding,** or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." *Id.* (emphasis added); *see also Watson v. Kaminski*, 51 S.W.3d 825, 827-28 (Tex. App.- Houston [1st Dist] 2001, no pet)(holding that an attorney's letter alleging that a prisoner was trying to extort money from appellants and that he was likely to be sued if he attempted to do so

came within the judicial privilege even though no litigation was pending.); *Krishnan v. Law Offices of Preston Henrichson, P.C.*, 83 S.W.3d 295, 301-03 (Tex. App.-Corpus Christi 2002, pet. denied)(finding that an attorney's letters sent to a doctor to give notice of a negligence claim [under 4590i] and to request records, even though suit was never actually filed, were made in contemplation of judicial proceeding and were therefore privileged); *Crain v. Smith*, 22 S.W.3d at 62-63.

Even if the potential litigants later decide not to file suit, "[t]here is no requirement that a person actually get sued for the privilege to apply; only that the statements are related to a contemplated judicial proceeding." *Krishnan*, 83 S.W.3d at 302-03.

> Whether a lawyer's out-of-court statement is related to a proposed or existing judicial proceeding is a question of law to be determined by the court. When deciding the issue, "the court must consider the entire communication in its context, and must extend the privilege to any statement that bears some relation to an existing or proposed judicial proceeding." All doubt should be resolved in favor of the relevancy of the statement.

Dallas Ind. Sch. Dist. v. Finlan, 27 S.W.3d 220, 239 (Tex. App.-Dallas 2000, pet. denied)(quoting *Russell.); see also Daystar Residential, Inc. v. Collmer*, 176 S.W.3d 24, 28 (Tex. App.- Houston [1st Dist.] 2004, writ denied)(finding that statements made by a lawyer to a newspaper in contemplation of and preliminary to filing suit were absolutely privileged).

The absolute judicial privilege has been applied to tortious interference claims. *See Griffin v. Rowden,* 702 S.W.2d 692, 695 (Tex. App.-Dallas 1985, writ ref d n.r.e)(holding that the filing of a *lis pendens* was absolutely privileged in an action for tortious interference with contract.); *Crain v. Unauthorized Practice of Law Committee,* 11 S.W.3d 328, 335 (Tex. App.-Houston [1st Dist.], 1999 pet denied)(concluding that prior testimony by a witness was subject to the affirmative defense of absolute immunity to a claim of tortious interference). *City of Brady v. Bennie*, 275 S.W.2d at 279, *citing Sakowitz, Inc. v. Steck*, 669 S.W.2d 105 (Tex.1984), overruled in part by *Sterner v. Marathon Oil, Co.*, 767 S.W.2d 686, 688 (Tex.1989)(overruling that portion of *Sakowitz* putting burden of proof with respect to justification on plaintiff).

The federal courts as well have discussed the absolute privilege defense to tortious interference cases in Texas. *See and compare Wardlaw v. Inland Container Corp.,* 76 F.3d 1372, 1377-80 (5th Cir.1996); *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir.1991). Following the Supreme Court's holding in Sakowitz, the courts have held that once a plaintiff makes out a prima facie case of tortious interference, a defendant can avoid liability by establishing some type of privilege or justification for its actions, such as the exercise of its own rights or its good-faith assertion of rights it believes it has, even if that belief is mistaken. *U.S. Enercorp, Ltd v. SDC Montana Bakken Exploration, LLC,* 966 F. Supp.2d 690 (W.D.

Tex.2013). *See also Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77-78 (Tex.2000); *Baty v. Protech Ins. Agency*, 63 S.W.3d 841 (Tex.App.2001).

Appellant made a good faith assertion of its legal right to challenge a third-party campaign ad as being defamatory. *See Oxenford, David, Broadcast Law Blog: What's a Broadcaster to Do When a Candidate Complains About the Truth of an Attack Ad? – Dealing with Ads from Non-Candidate, Third-Party Organizations*, October 7, 2014, available at http://www.broadcastlawblog.com/2014/10/articles/whats-a-broadcaster-to-do-when-a-candidate-complains-about-the-truth-of-an-attack-ad/, (last visited on September 15, 2016); and *Oxenford, David, Broadcast Law Blog: Ted Cruz Demands Takedown of PAC Ad attacking His Voting Record – Issues that Broadcast Stations Need to Consider When Threatened by Candidate Wanting an Ad Pulled*, February 17, 2016, available at http://www.broadcastlawblog.com/2016/02/articles/ted-cruz-Demands-Takedown-of-pac-ad-attacking-his-voting-record-issues-that-broadcast-stations-need-to-consider-when-threatened-by-candidate-wanting-an-ad-pulled/, (last visited on September 15, 2016). *Also, see Oxenford, David, Broadcast Law Blog: Demands to Pull Political Attack Ads – What is a Station to Do?* October 26, 2016, available at http://www.broadcastlawblog.com/2016/10/articles/demands-to-pull-political-attack-ads-what-is-a-station-to-do/, (last visited on October 31, 2016); and

Oxenford, David, Broadcast Law Blog: Three Last Minute Political Issues for Consideration by Broadcasters, October 27, 2016, available at http://www.broadcastlawblog.com/2016/10/articles/three-last-minute-political-issues-for-consideration-by-broadcasters/, (last visited on October 31, 2016). Oxenford writes that Section 315 of the Communications Act only protects candidate ads, not third party ads under the "no censorship" provision. *See* 47 U.S.C. §315 (2015). Ads by third party groups – PACs, labor unions, advocacy groups, etc… - can be censored based on their content. If the contents might violate someone else's rights, the station can refuse to run the ad or demand changes to the content of the ad since the station can be held liable for the third-party ad content. Once the station is put on notice of the potential falsity of a third-party ad, the station has a duty to investigate its truth. This is usually done by asking the sponsor for material to back up its claims. Depending on the claims, the station may want to pull the ads while the investigation is ongoing. *See and compare, Houston Post Co. v. U.S.*, 79 F.Supp199 (S.D.Tex.1948) and *KENS-TV, Inc. v. Farias*, 2007 WL 2253502.

The communications complained of as being interfering are demand letters sent to radio stations. Each of these letters was sent by Scott Tschirhart, an attorney representing Senator Deuell. Each of these letters specifically warn of anticipated litigation. These letters request if the recipient will accept service of process or

whether suit must be served on their registered agent. These letters contain notices of litigation hold and preservation demands, including:

> **LITIGATION HOLD & PRESERVATION DEMAND**
>
> You are hereby on notice and should have reason to believe that litigation may result from the claims described above ... pursuant to state and federal law, you are now under a legal duty to preserve all evidence, whether printed or electronic that might become relevant in this matter ...
>
> [C.R. at 27-64].

Finally, these letters include admonitions for the recipients to contact their legal counsel immediately. [C.R. at 27-64].

Since the communications complained of are clearly demand letters sent from an attorney in anticipation of litigation, "'the court must consider the entire communication in its context, and must extend the privilege to any statement that bears some relation to an existing or proposed judicial proceeding.' All doubt should be resolved in favor of the relevancy of the statement." *Dallas Ind. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 239 (Tex. App.-Dallas 2000, pet. denied).

Appellee has offered no controverting evidence, and in its Response to Appellant's Motion to Dismiss, Appellee failed to address the judicial privilege defense in any way. [C.R. at 90]. *Tex. Civ. Prac. & Rem. Code* §27.006(a). Appellant has established, by a preponderance of the evidence, each essential

element of a valid defense of judicial privilege to Appellee's tortious interference claim. *Tex. Civ. Prac.* & *Rem. Code* §27.005(d).

CONCLUSION

The trial court should have granted Appellant's Motion to Dismiss and dismissed Appellee's lawsuit. This Court should have reversed the trial court's opinion and affirmed Appellant's Motion to Dismiss. Accordingly, Appellant asks this court to reconsider its holding in this matter and substitute its opinion with one that reverses the trial court's order and enters an order granting the Appellant's Motion to Dismiss. Alternatively, this Court should reconsider its holding in this matter and grant additional oral argument.

The Court should also award attorneys' fees and costs to Appellant 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 Appellant.

PRAYER

WHEREFORE PREMISES CONSIDERED, Appellant BOB DEUELL prays that this Court rehear and reconsider en banc its decision to affirm the trial court's decision and, after oral arguments, hold that Appellant's Motion to Dismiss should be granted and that the Appellee's suit should be dismissed. 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.

SIGNED on this the 31st day of October, 2016.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT
BOB DEUELL

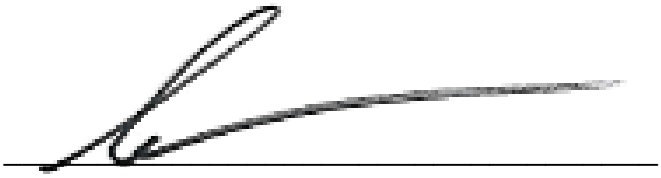
CERTIFICATE OF CONFERENCE

Pursuant to Rule 10.1(a)(5) of the Rules of Appellate Procedure, the undersigned certifies that attempts to confer with counsel for Appellees Texas Right to Life Committee, Inc. was made on September 29, 2016, about the merits of this motion but were opposed, therefore, Appellant is filing this motion as opposed.

_____
SCOTT M. TSCHIRHART

CERTIFICATE OF COMPLIANCE

In compliance with Tex. R. App. P. 9.4(i)(3), this is to certify that the Appellants' Motion for Rehearing and En Banc Reconsideration contains four thousand five hundred and seventy-seven (4,577) words, which does not include the caption, signature, proof of service, certificate of conference, and certificate of compliance.



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 Tex. R. App. P. and Tex. R. Civ. P. and/or via electronic notification on this the 31st day of October, 2016:

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