In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00038-CV

PERRY D. REED AND PERRY D. REED & COMPANY, P.C., Appellants

V.

JAMES T. DAVIS, CPA, JAMES T. DAVIS, P.C., DAVIS GRIFFIN, LLP, Appellees

On Appeal from the County Court at Law No. 2
Gregg County, Texas
Trial Court No. 2015-946-CCL2

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

At a meeting called to identify and work through differences between two pediatric dentists who were in the process of ending and dividing their joint practice, James T. Davis, the accountant for Ronald N. Fadal, DDS, P.A., offered his tentative concern that Fadal's partner, Justin R. Horne, DDS, may have improperly received distributions of some $1.2 million more than Fadal, an apparent discrepancy that needed to be examined further. Davis' utterance resulted in a May 2015 lawsuit by Perry D. Reed and his professional corporation (collectively Reed) against Davis and two related entities (collectively Davis),[1] setting out claims of defamation, business disparagement, and tortious interference with prospective relations. Reed had been the accountant for the dental partnership, while Davis had been retained later by the attorneys for Fadal to help in the practice separation process.

In response to Reed's lawsuit, Davis filed a traditional and no-evidence motion for summary judgment as to all three of Reed's claims. Following a hearing on Davis' motion, the trial court granted summary judgment to Davis on each of Reed's claims on both traditional and no-evidence grounds. The no-evidence summary judgment was granted based on the trial court's ruling that there was no evidence of actual malice or damages, thus defeating all three of Reed's claims. The summary judgment was also rendered on traditional grounds on all three claims based on the trial court's ruling that qualified privilege and judicial privilege were established as a matter of law.

[1]Plaintiffs were Perry D. Reed, CPA, and Perry D. Reed & Company, P.C.; and defendants were James T. Davis, CPA, James T. Davis, P.C., and Davis Griffin, LLP.

On appeal, Reed complains of the trial court's (a) discovery rulings that upheld Davis' assertions of the work-product exemption, the attorney-client privilege, and the consulting expert privilege;[2] (b) traditional summary judgment sustaining Davis' affirmative defenses of judicial privilege and qualified privilege; (c) no-evidence summary judgment on Reed's defamation claim on the basis that Reed raised fact issues regarding evidence of damages; and (d) no-evidence summary judgment on Reed's business-disparagement and tortious-interference claims on the basis that Reed raised fact issues regarding actual malice and special damages.

We affirm the trial court's judgment, because (1) there was no abuse of discretion in denying discovery of Davis' Fadal file based on Davis' privilege assertions; (2) traditional summary judgment was proper on Reed's claims for defamation and business disparagement, because conclusive proof established Davis' defense of qualified privilege; and (3) no-evidence summary judgment was proper on Reed's claim for tortious interference with prospective business relations, because there was no evidence of damages.

History

In 2007, Fadal and Dr. Justin Horne, President of Justin R. Horne, DDS, P.A., entered into a partnership agreement forming a limited-liability partnership known as Pediatric Dental Associates, L.L.P. (PDA), with each of their respective professional associations (PAs) serving as general partners. PDA had locations in Longview and Marshall owned by Fadal-Horne Investment, LP, for which both Horne and Fadal served as limited partners and Pediatric Dental

[2]Reed also argues that, in the event this Court finds Davis did not meet his burden of proof, the trial court's error prevented him from obtaining crucial evidence essential to create fact issues on several elements on which he either assumed the burden of proof or for which the burden of proof was improperly assigned to him at the summary judgment stage.

Associates, L.L.P., served as general partner. Reed was hired as the accountant performing a full range of accounting services for PDA. Eventually, Fadal's wife, Dr. Jennifer Rogers (Jennifer) began working for or with PDA.

After practicing together for over six years, Horne and Fadal sought to dissolve the partnership. Reed drafted a memorandum of understanding (MOU) for the dissolution of the partnership.[3] Soon, conflicts arose between Fadal and Horne relating to the dissolution of the partnership. As a result, Fadal decided to terminate Reed as his accountant and to hire attorneys, Robert Foster and Jerry Hill, to represent him during the dissolution of the partnership. After Fadal retained Foster and Hill, Foster hired Davis as an accounting expert to assist in representing Fadal.

[3]The MOU stated:

> Justin R. Horne, DDS, PA and Ronald N. Fadal, DDS, PA want to dissolve their partnerships, Fadal-Horne Investments, LP and Pediatric Dental Associates, LLP.
>
> Dr. Fadal will keep the commercial buildings and equipment located in Longview . . . and . . . . Appraisals will be done for the real estate and equipment, and Dr. Fadal will pay Dr. Horne for ½ the [f]air [m]arket value. Dr. Fadal will set up a new limited partnership to transfer the buildings into, owned by a 2% general partner (an LLC management company to be formed by Dr. Fadal and his wife, Dr. Rogers) and 24.5% interest each owned by Dr. Fadal, Dr. Rogers, Alyssa Fadal, and Caroline Fadal.
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> Dr. Horne will take the building and equipment located in Marshall at [a certain address]. Upon dissolution of Fadal-Horne Investments, LP, the building will be moved into a new entity owned by Dr. Horne and Dr. Miner. This entity will be owned by a 2% general partner (an LLC management company to be formed by Drs. Horne and Miner), and 49.5% interest each by Dr. Horne and Dr. Miner.
>
> Dr. Fadal will keep the name, Pediatric Dental Associates, to use as his DBA, and hopes to add another doctor shortly after dissolution.
>
> Drs. Horne and Miner will set up a new LLP, possibly Horne & Miner Dental Associates, LLP, to operate their new practice under.
>
> All parties agree that the status quo of the present working structure will continue as is until a new building for Justin Horne and Joshua Miner is completed, expected time approximately one year from October 15, 2013.

During this time period, Reed resigned from serving Horne as a client. Horne then elected to use attorney Matthew Hill as his representative during the dissolution, as well as Rodney Overman as his accounting expert. The parties also hired a new accountant for partnership matters, Robert "Bob" Rogers.

After Davis was retained, he began to prepare an accounting of the PDA partnership, using information that had been given to him by Foster. After Davis discovered what he believed was an apparent disparity in the accounting favoring Horne,[4] the parties set up a meeting for May 27, 2014 (the meeting). The purpose of the meeting was to discuss the dissolution of the partnership and the issue of disparity and to determine what information would be needed to assist the parties

[4]In his sworn affidavit, Foster states,

> After Mr. Davis' initial review of the documents he had available to him and his calculations, he informed me that it was his opinion that there was a disparity in guaranteed payments between Dr. Fadal and Dr. Horne and that his preliminary opinion was that the disparity appeared to be in the range of approximately $1,200,000.00. Mr. Davis informed me that additional information was needed to confirm the amount of the disparity.

in resolving the issues.[5] Horne's lawyer, Matthew Hill, recalled Davis' statement during the meeting as follows:[6]

> [Davis] -- was the first person to speak at the meeting; and he said that Dr. Rogers was put under Fadal Pediatric -- Dr. Fadal's individual PA and not under the partnership Pediatric Dental Associates and, as a result of that -- and, obviously the disparity in distributions that we talked about, his -- Dr. Fadal was harmed to the tune of $1.2 million and that it was his opinion that Perry Reed showed favoritism towards one partner over the other in providing that advice, in doing that, and that he thought that it hurt Dr. Horne, as well, financially, because now he's going to have to make all this stuff up.[7]

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[5]Foster then goes on to explain,

> By the time of the May 27, 2014[,] meeting, I anticipated litigation, whether by civil suit or arbitration, between Dr. Fadal and Dr. Horne, and also possibly Perry Reed, if the disputes between Dr. Fadal and Dr. Horne were not resolved.
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> . . . .
>
> At the May 27, 2014[,] meeting were Dr. Ronald Fadal and Dr. Jennifer Rogers; their legal counsel, myself and Jerry Hill; Susan Vickery, the paralegal employed by my law firm and assisting me in my representation; James Davis, who I had retained as my consulting expert; Dr. Justin Horne; Matthew Hill, as Dr. Horne's legal counsel; Rodney Overman, the consulting accounting expert for Mr. Matthew Hill; and Robert [Bob] Rogers, an independent accountant who had been hired for the partnership, Pediatric Dental Associates. . . .
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> . . . .
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> The May 27, 2014[,] meeting was not open to the public and the information discussed at the meeting was not supposed to be disclosed to the public. It was a pre-litigation attempt to move the parties' disputes towards a resolution.
>
> . . . .
>
> I continued to represent Dr. Fadal after the May 27, 2014[,] meeting. After the May 27, 2014[,] meeting, I prepared a Petition under Texas Rule of Civil Procedure 202 to obtain additional information from Perry Reed and in order to investigate further potential claims Dr. Fadal might have against Perry Reed for the accounting services he provided.

[6]Davis had been asked to discuss the disparity that he, Overman, and Rogers had discovered.

[7]Ultimately, Fadal and Horne entered into a settlement agreement regarding this issue.

In his first amended original petition, Reed alleges, "Shortly after the meeting convened, Defendant James Davis represented to all present that Perry Reed's accounting advice and services had served to favor Dr. Horne over Dr. Fadal in the amount of $1,200,000." This statement, allegedly made by Davis, is the basis for Reed's claims of defamation,[8] business disparagement,[9] and tortious interference with prospective business relations.[10] Reed maintains that "these false

[8]In the first amended original petition, Reed alleges:

> 15. By the conduct set forth above and incorporated herein in [sic] by reference, Defendants published a statement or statements of fact to third persons, those statements referred to by Perry D. Reed and his business, Perry D. Reed & Company, P.C., such statement or statements were defamatory, false, and Defendants are strictly liable for publishing such statement or statements.
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> 16. Such statement or statements were slander per se because they operated to injure Perry D. Reed in his profession and occupation.
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> 17. Alternatively, such statement or statements were slander per quod and were defamatory by implication or innuendo.
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> 18. Plaintiff is entitled to general damages because such statements were defamatory per se and damage is presumed.
>
> 19. Alternatively, Plaintiff is entitled to special damages including loss of past and future income, loss of profits, loss of goodwill, and past and future mental anguish.
>
> 20. Plaintiff is entitled to exemplary damages because Defendants acted with malice.

[9]In the first amended original petition, Reed alleges:

> 21. By the conduct set forth above and incorporated herein by reference, Defendants published disparaging words about the Plaintiff's economic interests.
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> 22. Those words were false.
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> 23. Defendants published the words with malice and without privilege.
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> 24. The publication caused special damages to Plaintiff in the form of pecuniary loss to the Plaintiff's economic interest including lost profits and loss of goodwill.

[10]In the first amended original petition, Reed alleges:

> 25. Plaintiff maintained a continuing business relationship with Dr. Fadal, Dr. Horne, Dr. Miner[,] and other clients.

statements "had the effect of implying that Plaintiffs breached their fiduciary duty to Pediatric Dental Associates, LLP[,] and Dr. Fadal in order to benefit one partner over another." Reed also claims that he lost business as a result of Davis' statements. Davis filed a general denial and also maintained that judicial immunity and qualified immunity were applicable to the facts of this case.

Discovery issues soon ensued. In particular, Reed sought the discovery of Davis' file on Fadal relating to the dissolution of PDA. Davis objected to Reed's request on the grounds that the contents of Davis' file were protected by the work-product exemption, the attorney-client privilege, and the consulting-expert privilege. After reviewing Davis' privilege logs and conducting several *in camera* inspections, the trial court sustained many of Davis' privilege assertions; however, it also overruled some of Davis' assertions on the grounds of waiver and ordered the disclosure of information that was directly related to Davis' opinions at the May 27 meeting.

After the requisite discovery process was completed, Davis filed the motion for summary judgment. In addition to arguing that there was no factual evidence to support any of Reed's three claims, Davis also maintained that (a) his expressed opinions and beliefs as a retained expert were not actionable assertions of fact; (b) his preliminary opinions were true or substantially true and were made without malice or negligence; (c) qualified privilege was applicable to Reed's business

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26. By the conduct set forth above and incorporated herein by reference, Defendants intentionally interfered with those relationships by conduct that amounted to slander and business disparagement.

27. Such interference proximately caused injury to Perry D. Reed & Company, P.C. in the form of actual damages and loss including, but not limited to, loss of profits and loss of good will.

disparagement claim because the May 27 meeting was a closed-door meeting and only included parties and their representatives who had an interest in the topics discussed; (d) judicial privilege barred Reed's defamation action because Davis' statements were made in the context of a quasi-judicial forum and were absolutely privileged; and (e) Reed suffered no damages. The trial court granted both the no-evidence and traditional portions of the motion for summary judgment.[11]

[11]The trial court's order stated,

> The Court FINDS that the summary judgment evidence establishes the existence of judicial privilege;
>
> The Court further FINDS that the summary judgment evidence establishes the existence of qualified privilege;
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> The Court FINDS that there is no evidence Defendants' made any statement with actual malice, an element necessary to negate the existence of qualified privilege and to establish a claim for business disparagement, and thus GRANTS Defendants' No Evidence Motion for Summary Judgment as to the issue of actual malice.
>
> The Court FINDS that there is no evidence Plaintiffs suffered any actual damages as a result of any allegedly defamatory statement, and thus GRANTS Defendants' No Evidence Motion for Summary Judgment on the element of actual damages.
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> Actual damages is a necessary element of business disparagement and tortious interference. Further, in order to establish a claim of business disparagement, the plaintiff must establish that the complained of statements were made with actual malice and without privilege. Based on the Court's findings that there is no evidence of actual damage or actual malice, and the Court's finding that the alleged statements were protected by judicial and qualified privilege, the Court Orders that Defendants' Motion for Summary Judgment with respect to Plaintiffs' claims for business disparagement and tortious interference is GRANTED.
>
> Actual damages is a necessary element of defamation, except where the allegedly defamatory statements constitute defamation per se. Judicial Privilege and qualified privilege are affirmative defense [sic] to defamation and bar the plaintiffs [sic] recovery for allegedly defamatory statements which are privileged. Based on the Court's finding that the allegedly defamatory statements are protected by the judicial privilege and by a qualified privilege, and that there is no evidence of actual malice which would negate the qualified privilege, the Court ORDERS that Defendants' Motion for Summary Judgment with respect to Plaintiffs claims for defamation is GRANTED.
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> All other grounds asserted by Defendants' in support of their Motion for Traditional and No Evidence Motion for Summary Judgment are DENIED.

1. There Was No Abuse of Discretion in Denying Discovery of Davis' Fadal File Based on Davis' Privilege Assertions

During the course of the litigation, Reed served written discovery requests on Davis, seeking production of Davis' file relating to work performed on behalf of Fadal that related to the dissolution of PDA. Davis asserted the work-product exemption,[12] the attorney-client privilege,[13] and the consulting-expert privilege.[14]

In its December 25, 2015, letter to the parties, the trial court made the preliminary finding that "the files of Mr. Davis could potentially contain documents subject to both Work Product Privilege and Consulting Expert Privilege." In addition, the trial court found,

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[12]The work-product exemption protects documents prepared by attorneys or their agents that contain the attorney's mental processes, conclusions, or legal theories in anticipation of litigation. *Humphreys v. Caldwell*, 888 S.W.2d 469, 471 (Tex. 1994) (per curiam) (orig. proceeding). The work product exemption is broader than the attorney-client privilege because it includes all communications made in preparation of trial, including an attorney's interviews with not only a party, but also with nonparty witnesses. *In re Bexar Cnty. Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 186 (Tex. 2007) (orig. proceeding). "A party may reasonably anticipate suit being filed, and conduct an investigation to prepare for the expected litigation, before the plaintiff manifests an intent to sue." *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993). "It is not necessary that litigation be threatened or imminent, as long as the prospect of litigation is identifiable because of claims that have already arisen." *Id.* at 205. In reviewing whether litigation may be anticipated, the trial court must look at the totality of the circumstances to determine whether each prong is satisfied. *Id.* at 204.

[13]The attorney-client privilege protects confidential communications between a lawyer and a client or their respective representatives made for the purpose of facilitating the rendition of professional legal services to the client. TEX. R. EVID. 503(b). This privilege is not limited to communications made in anticipation of litigation; however, the privilege does not apply if the attorney is acting in a capacity other than that of an attorney. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337 (Tex. App.—Texarkana 1999, orig. proceeding) (citing *Clayton v. Canida*, 223 S.W.2d 264, 266 (Tex. Civ. App.—Texarkana 1949, no writ)). A representative of an attorney for purposes of the attorney-client privilege includes "one employed by the lawyer to assist the lawyer in the rendition of professional legal services." TEX. R. EVID. 503(a)(4).

[14]"The policy behind the consulting expert privilege is to encourage parties to seek expert advice in evaluating their case and to prevent a party from receiving undue benefit from an adversary's efforts and diligence." *Tom L. Scott, Inc. v. Mcllhany*, 798 S.W.2d 556, 559 (Tex. 1990) (orig. proceeding). The consulting-expert privilege allows the parties and their attorneys a range of protection and privacy in which to develop their case. *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex. 1997) (orig. proceeding). As the United States Supreme Court explained:

> Proper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy

> The services of Mr. Davis were engaged through the offices of Mr. Rob Foster, the attorney for Dr. Fadal. As an accountant retained by an attorney, the contents of the file of Mr. Davis would be subject to the Attorney-Client Privilege. [Tex. R. Evid.] 503(a)(4)(B). Again, the Court is finding the prospect of an arbitration to resolve the disputed issues sufficient to invoke this privilege. *Watson v. Kaminski*, 51 S.W.3d 825, 827 (Tex. App.—Houston [1st Dis.] 2001).

Next, the trial court explained that it had received Davis' file relating to the dissolution of PDA and that it would conduct an examination of the documents contained in the file to determine, among other things, whether the asserted privileges applied. Following an *in camera* inspection of the documents in conjunction with a review of Davis' privilege logs, the trial court sustained Davis' privilege assertions in regard to many of the documents contained in Davis' file on Fadal.

A party that seeks to exclude any matter from discovery on the basis of an exemption or immunity from discovery must specifically plead the particular exemption or immunity and produce evidence supporting such a claim. *Humphreys*, 888 S.W.2d at 470. The burden is on the party asserting a privilege from discovery to produce evidence concerning its applicability. *Id.* "To meet its burden, the party seeking to assert a privilege must make a prima facie showing of the applicability of the privilege and produce evidence to support the privilege." *In re USA Mgmt. Res., L.L.C.*, 387 S.W.3d 92, 96 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding). The

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> without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Hickman v. Taylor, 329 U.S. 495, 511 (1947). The mental opinions and impressions of a consulting expert whose opinions and impressions have not been reviewed by a testifying expert are privileged. TEX. R. CIV. P. 192.3(e). A consulting expert is an expert retained, consulted, or specially employed by a party in anticipation of litigation or in preparation of trial, but who has not been designated as a testifying witness. TEX. R. CIV. P. 192.7(d). An undertaking is performed "in anticipation of litigation" if (1) "the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation[,]" and (2) "the party invoking the privilege believes in good faith that there is a substantial chance that litigation will ensue." *Nat'l Tank Co.*, 851 S.W.2d at 204.

prima facie standard requires the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Tex. Tech Univ. Health Scis. Ctr. v. Apodaca*, 876 S.W.2d 402, 407 (Tex. App.—El Paso 1994, writ denied). The prima facie standard may be satisfied by filing an affidavit in support of the assertion of privilege. Moreover, prima facie evidence may be shown by the use of testimony or by producing the documents to the court for *in camera* inspection. *In re Exxon Mobil Corp*., 97 S.W.3d 353, 357 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

Reed maintains that Davis presented no witnesses during the hearing and relied on his own affidavit verifying the truth of his interrogatory answers to support his claims of privilege. As such, Reed contends that Davis failed to make a prima facie showing that any of the asserted privileges were applicable before the completion of the hearing, so Davis' claims of privilege were waived.

In support of Davis' assertions of privilege, he presented to the trial court a sworn answer to an interrogatory from Reed:[15]

> Davis Griffin, L.L.P.[,] was hired by Dr. Fadal's attorney, Rob Foster, on or about March 15, 2014, to serve as a consulting expert in regard to the dissolution of Pediatric Dental Associates and any disputes or anticipated litigation arising therefrom. Thereafter, on or about May 24, 2014, Dr. Fadal retained Davis Griffin, L.L.P.[,] to perform personal accounting services.

Reed contends this statement is conclusory and that it is only some evidence of the consulting-expert privilege and no evidence of the attorney-client privilege and work-product exemption.

[15]The interrogatory involved was interrogatory number three, which read, "Please identify the approximate date James Davis and/or James Davis, P.C.[,] was retained by Dr. Fadal or any of his attorneys, and the reason you were retained."

Reed also maintains that the trial court's ruling shielded the materials that informed Davis' opinions regarding the May 27 meeting. Reed claims the court's ruling was harmful because it prevented him from discovering materials and information that may have been relevant and admissible and may have permitted him to raise genuine issues of material fact on the elements of actual malice and ill will.

Davis responds that (a) Reed did not object at trial and has not argued on appeal against using the answer to interrogatory number three as evidence in support of Davis' claims of privilege,[16] (b) the facts contained in his answer to Reed's interrogatory are not conclusory, but instead warrant a rational inference that the documents contained in Davis' Fadal file included information protected by the asserted privileges, (c) his answer to Reed's interrogatory meets the required burden of proof; and (d) even if this Court finds Davis failed to produce prima facie evidence, the trial court was allowed to, and did, conduct an *in camera* inspection of the documents before issuing its order and found many of the documents in Davis' file to be privileged.

> (a) *Hearing*. Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence *may* be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an in camera review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.

[16]This Davis assertion is misguided. When Davis offered the answer to the interrogatory into evidence during the trial court's hearing on Davis' privilege assertions, Reed responded, "[W]e're going to object to that as not either being testimony at a hearing or affidavits provided seven days prior as required by the rule." We do not, however, find the trial court's ruling in the record.

TEX. R. CIV. P. 193.4(a) (emphasis added). In this case, the trial court made such a determination and set a hearing on the matter in November 2015.

During the hearing, after Davis offered his answer to interrogatory number three as prima facie evidence in support of his privilege assertions and Reed objected to his offer, the trial court stated, "Mr. Perry, provide Mr. Davis' file for an in camera inspection. I'm going to look at it in light of the report -- the privilege log[17] that is provided. And, I might have a follow-up question or two for Counsel once I get into it." Notably, Rule 193.4(a) states that a party seeking to avoid production of a document based on a privilege *may* resort to live testimony or affidavits in order to support an assertion of privilege. It does not state, however, that any other type of evidence, such as a sworn answer to an interrogatory, is unacceptable evidence for consideration by the trial court.

Moreover, following the hearing, the trial court sent a letter to the parties stating, "The Court has made a careful review of the Court's file, the Motion to Compel filed by Plaintiffs, together with the Responses filed on behalf of Defendants, and the arguments of counsel provided at the hearing on November 19, 2015, and sets forth its preliminary rulings." After stating its preliminary findings, the trial court closed its letter to the parties by stating,

> The Court received Mr. Davis' file relating to the dissolution of Pediatric Dental Associates LLP. The Court will conduct an examination to determine: 1) whether there are documents responsive to the disputed request; 2) whether an Attorney-Client Privilege Applies; 3) whether an Attorney Work Product Privilege applies; 4) whether a Consulting Expert Privilege applies; and, 5) whether the document relates to the alleged voluntary disclosure on the part of Mr. Davis.

[17]Davis' privilege log contained a brief description of each document at issue, the privilege or privileges asserted as to each of them, along with a corresponding Bates number.

Apparently, the trial court found that Davis' sworn answer to interrogatory number three, together with the court's file, Reed's motion to compel, and Davis' answers to Reed's interrogatories, warranted an *in camera* inspection of the documents before making a final ruling. The trial court was within its discretion to review the documents themselves. "Affidavits or live testimony may be sufficient proof; however, when the claim is based on attorney-client or attorney-work product, the documents themselves may constitute the only, and certainly the best, evidence substantiating the claim of privilege." *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 631 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (citing *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proceeding) (per curiam)). The fact that the trial court eventually sustained Davis' assertions of privilege relating to a number of the documents contained in his file necessarily means it found that Davis presented prima facie evidence of the privileges he asserted as to those documents. Under these circumstances, we do not find that the trial court abused its discretion when it determined that prima facie evidence of the asserted privileges existed, regardless of when it made its determination. We also find no waiver by Davis of his privilege assertions.[18]

This point of error is overruled.

[18]In his brief, Reed concludes his discussion of this issue by asking the Court "to find that Davis waived all asserted privileges and reverse and remand this matter to the trial court with instructions that the Court compel Davis to produce all responsive documents within his file and that Davis be subject to deposition again without the benefit of the waived privileges." In effect, Reed is asking us to overturn the trial court's ruling that certain documents in Davis' file were privileged without our having the benefit of reviewing the documents to determine whether we believe they are privileged or not. This we cannot do, and thus, we deny Reed's request.

2. Traditional Summary Judgment Was Proper on Reed's Claims for Defamation and Business Disparagement, Because Conclusive Proof Established Davis' Defense of Qualified Privilege

Based on Davis' statement during the May 27 meeting, Reed alleged claims of defamation, business disparagement, and tortious interference with prospective business relations. The trial court, faced with both a no-evidence and traditional motion for summary judgment, granted Davis' no-evidence motion for summary judgment as to the issue of malice relating to the claim of business disparagement and his no-evidence summary judgment motion as to the issue of damages as they relate to a claim of defamation. It also granted Davis' traditional motion for summary judgment with respect to all three of Reed's claims against Davis finding that either qualified privilege or judicial privilege protected Davis' statement.

The grant of a trial court's summary judgment is subject to de novo review on appeal. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In making the required review, we deem as true all evidence which is favorable to the nonmovant, we indulge every reasonable inference to be drawn from the evidence to favor the nonmovant, and we resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

A no-evidence summary judgment is essentially a pretrial directed verdict. Therefore, we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002). We must determine whether the claimant produced any evidence of probative force to raise a fact issue on the material questions presented. *See id.*; *Woodruff v. Wright*, 51 S.W.3d

727, 734 (Tex. App.—Texarkana 2001, pet. denied). The plaintiff will defeat a defendant's no-evidence summary judgment motion if plaintiff presented more than a scintilla of probative evidence on each element of its claim. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Rhine v. Priority One Ins. Co*., 411 S.W.3d 651, 657 (Tex. App.—Texarkana 2013, no pet.).

To be entitled to traditional summary judgment, a movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Once the movant produces evidence entitling it to summary judgment, the burden shifts to the nonmovant to present evidence raising a genuine issue of material fact. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). A defendant who conclusively negates a single essential element of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508–09 (Tex. 2010).

Our analysis leads us to conclude that, as a matter of law, (a) only interested persons were at the meeting and (b) Davis acted without malice.

(a) Only Interested Persons Were at the Meeting

In its letter order, the trial court found as follows:

> [T]hat the alleged defamatory statement was made by an accountant retained by an attorney, representing one of [t]wo (2) dentists seeking to address issues relating to the dental practice. The Court finds that the participants to the meeting all had interests sufficiently affected by the communication, and therefore the qualified [privilege] attached. As a result thereof, this Court is granting Defendants' Traditional Motion for Summary Judgment that a qualified privilege attached as to the alleged defamatory statement.

Reed contends the trial court erred when it granted summary judgment to Davis based on qualified privilege. The common law "qualified privilege" has been described as follows: "Qualified privileges against defamation exist at common law when a communication is made in good faith and the author, the recipient or a third person, or one of their family members, has an interest that is sufficiently affected by the communication." *Cain v. Hearst Corp.*, 878 S.W.2d 577, 582 (Tex. 1994). Qualified privilege is a conditional privilege and will be defeated if it is abused. *Hurlburt v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1988). That is, the statement must be made in good faith and without malice.[19] *Zarate v. Cortinas*, 553 S.W.2d 652, 655 (Tex. Civ. App.—Corpus Christi 1997, no writ). When publication of an allegedly defamatory statement is made under circumstances creating a qualified privilege, the plaintiff has the burden to prove malice. *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 335 (Tex. App.—Dallas 1986, no writ). When a defendant moves for summary judgment, however, the defendant assumes the burden of proving the absence of malice. *Martin*, 860 S.W.2d at 199. In making a determination as to whether a statement is subject to a qualified privilege, courts must consider the "occasion" of the communication by examining the totality of the circumstances including the communication itself, its communicator, its recipient, and the relief sought. *Clark v. Jenkins*, 248 S.W.3d 418 (Tex. App.—Amarillo 2008, pet. denied). The question of whether a qualified privilege exists is a question of law which is to be decided by the trial court. *Mayfield v. Gleichart*, 484 S.W.2d 619 (Tex. Civ. App.—Tyler 1972, no writ).

[19]In order to establish actual malice, "one must show that the declarant knew the statements were false or that the declarant acted with reckless disregard of whether they were false." *Martin v. Sw. Elec. Power Co.*, 860 S.W.2d 197, 199 (Tex. App.—Texarkana 1993, no writ).

Reed maintains that Davis failed to present competent summary judgment evidence to show that all of the meeting's attendees were sufficiently interested in the statement made by Davis at the May 27 meeting. Reed contends he presented sufficient evidence that Dr. Jennifer Rogers, Fadal's wife, and Robert "Bob" Rogers, CPA, were not sufficiently interested in the contents of Davis' statements during the May 27 meeting. In support of his assertion, Reed provided the affidavit of Leonard Acker, who is a licensed Certified Professional Accountant.[20] Acker's affidavits reads:

> I have been made aware in reviewing the various affidavits of those present at the meeting that they all purport to have had an interest in the topics discussed at the meeting. Although none of them elaborate as to why they had an interest in the topics, it is questionable from an accounting perspective that either Mr. Bob Rogers or Dr. Jennifer Rogers had any interest in the statements attributed to Mr. Davis at that meeting. Bob Rogers was apparently employed as an independent CPA to generate the tax returns for PDA for 2013. His role apparently expanded beyond that point, but as of the time of that meeting, any statements regarding the accounting favoring one dentist over another in the amount of $1.2 million reflected back in time and would have no apparent impact from an accounting perspective on generating tax returns of PDA in 2013. As for Dr. Jennifer Rogers, she had no partnership interest in PDA, Fadal, PA, or Horne, PA, and she would have no interest in the statements attributed to Mr. Davis from an accounting perspective because any failure of accounting advice or services to PDA or Fadal, PA[,] did not have an affect on her and only would have affected the one or both of the dentist's PAs or PDA

[20]In his affidavit, Acker states,

> I have been engaged as an expert by Plaintiffs to evaluate the rationale from an accounting perspective, if any, employed by James Davis and that relate to statements he made about the accounting advice and services provided by Plaintiffs to Dr. Fadal and Dr. Horne. Dr. Fadal and Dr. Horne maintained equal partnership interests in Pediatric Dental Associates, LLP ("PDA") through their respective professional associations. . . . I have also been engaged to calculate the lost net profits suffered by Plaintiffs in the loss of certain former clients as it may relate to Mr. Davis'[] statements.

In support of Davis' position, Davis provides affidavits from many of the participants of the May 27 meeting, including Robert "Bob" Roger's affidavit. Rogers averred, "All persons present at the meeting had an interest in the topics discussed during the meeting or represented those who had such interest."[21] Rogers also stated,

> I was later engaged to prepare, among other things, Pediatric Dental Associates 2013 tax returns. On April 3, 2014, I met with James Davis and Rodney Overman in Mr. Davis' office to discuss capital accounts and guaranteed payments for Pediatric Dental Associates. During that meeting, Mr. Davis walked Mr. Overman and myself through the treatment of the capital accounts, specifically with respect to how guaranteed payments to Dr. Ronald Fadal were negatively impacted by disbursements made to Dr. Fadal's P.A. for purpose of compensating Dr. Jennifer Rogers. During that meeting, I remember Mr. Davis writing his calculations for the resulting disparity in guaranteed payments between Dr. Horne and Dr. Fadal on a white board in his office.
>
> . . . .
>
> One of the reasons for the May 27, 2014[,] meeting was to discuss the disparity between Dr. Horne and Dr. Fadal's guaranteed payments as a result of how Dr. Fadal's guaranteed payments had been calculated to include disbursements made by Pediatric Dental Associates for Dr. Rogers' compensation. I was aware of this issue before the May 27, 2014[,] meeting, given the fact that Mr. Davis[] had discussed the issue and his calculations for the amount of the disparity based on the records available to him at the time in the meeting held at his office with Rodney Overman and myself on April 3, 2014.

Although Ackers avers that Rogers and Fadal's wife, Jennifer Rogers, had no interest in the May 27 meeting, and "that it is *questionable* from an accounting perspective that either Mr. Bob Rogers or Dr. Jennifer Rogers had any interest in the statements attributed to Mr. Davis at that meeting[,]" Akers' statements are his opinions and do not amount to facts as to who had, or did

[21]With the exception of Acker's affidavit, the remaining affiants made the same or similar statements.

not have, an interest in the subject of the meeting. Consequently, Acker's statements contained in Ackers' affidavit do not create a factual dispute as to the issue of qualified privilege.

In addition, when Horne's counsel, Mathew Hill, was asked during his deposition whether the May 27 meeting was a public meeting, Hill responded, "Absolutely not. I mean, you know, these are -- these two respected physicians and it -- it's not something that you want to put on public display." He went on to state, "The only person that would *potentially* even fall outside of that is Bob Rogers, who's just kind of there trying to help both of these guys out, get their necessary tax stuff done while they're trying to resolve their disputes." Hill was then asked if Rogers was there by agreement of all of the parties, and he responded, "That is correct."

Although Hill stated that Rogers was potentially a disinterested party, he clarified his comment by explaining why Rogers was attending the meeting and then explained that he was there with the permission of all of the parties. Again, Hill's statement does not create a fact issue as to the matter before us.

On the other hand, Robert "Bob" Rogers stated in his affidavit that he had been hired to perform accounting services for PDA and had already been involved in the April 3 meeting, which was a meeting to discuss the issues that were to be presented in the May 27 meeting. That is, Rogers had been involved directly with the parties or their representatives in order to prepare for the upcoming meeting. In addition, Jennifer Rogers had at least two reasons to be interested and affected by the topic at issue as she was Fadal's wife and, as she stated in her affidavit, "I am generally aware that during James Davis' review, *he discovered discrepancies relating to my compensation* and how that compensation was credited against Ronald Fadal's share of the general

distributions to the partners of Pediatric Dental Associates, LLP, in an amount totaling approximately $1,200,000.00." Thus, it was her compensation and the manner in which it had been accounted for that were the focal points of the meeting.

There is no doubt that the May 27 meeting was a closed meeting, not a meeting open to the public. Further, the evidence shows that all of the attendees present during the meeting had an interest, either directly or in a representative capacity, in the issues that were being discussed during the meeting and, thus, were affected by the subject of the meeting, including Davis' communication.

(b) Davis Acted Without Malice

Next, Reed contends the trial court's finding of qualified privilege was error because the record contains no evidence of Davis' subjective state of mind that would conclusively prove he either did not know his statement was false or that he did not make the statement with reckless disregard for the truth.[22] Reed maintains there is no evidence showing that Davis exercised good faith when he made the statements and, therefore, that summary judgment in Davis' favor was error. We disagree.

A qualified privilege is lost when a communication is motivated by malice. *Pioneer Concrete of Tex., Inc. v. Allen*, 858 S.W.2d 47, 49 (Tex. App.—Houston [14th Dist.] 1993, writ denied). The Texas Supreme Court has explained the standard:

[22]Reed contends the trial court improperly placed the burden of proof on him, requiring him to prove that Davis' statement was made with malice. In its letter order to the parties, the trial court stated, "If a defendant establishes a privilege, the burden shifts to the plaintiff to prove that the defendant made the statements with actual malice." As we have already stated, when a defendant moves for summary judgment, the defendant assumes the burden of proving the absence of malice. *See Martin*, 860 S.W.2d at 199. Therefore, we must determine whether *Davis* produced sufficient evidence to negate the element of actual malice, thus preserving his qualified privilege.

> [T]he actual malice standard requires that a defendant have, subjectively, significant doubt about the truth of his statements at the time they are made. To disprove actual malice, a defendant may certainly testify about his own thinking and the reasons for his actions, and may be able to negate actual malice conclusively. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 574 (Tex. 1998). But his testimony that he believed what he said is not conclusive, irrespective of all other evidence. The evidence must be viewed in its entirety. The defendant's state of mind can—indeed, must usually—be proved by circumstantial evidence. A lack of care or an injurious motive in making a statement is not alone proof of actual malice, but care and motives are factors to be considered. An understandable misinterpretation of ambiguous facts does not show actual malice, but inherently improbable assertions and statements made on information that is obviously dubious may show actual malice. A failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is. Imagining that something may be true is not the same as belief.

Bentley v. Bunton, 94 S.W.3d 561, 596 (2002).

There is no evidence that Davis made "inherently improbable assertions and statements" based on information that has been shown to be "obviously dubious." In his affidavit, Foster stated,

> I approached James Davis to obtain the assistance of his expertise as an accountant. I retained Davis as a consulting expert in connection with my representation of Dr. Fadal. Dr. Fadal also retained Jerry Hill as his additional legal counsel to assist in the dissolution of Pediatric Dental Associates. Likewise, Dr. Horne had retained Matthew Hill as his attorney, and Mr. Matthew Hill retained Rodney Overman as his consulting expert.
>
> After Mr. Davis' initial review of the documents he had available to him and his calculations,[23] he informed me that it was his opinion that there was a disparity in guaranteed payments between Dr. Fadal and Dr. Horne and that his preliminary opinion was that the disparity appeared to be in the range of approximately $1,200,000.00. Mr. Davis informed me that additional information was needed to confirm the amount of the disparity.

Jerry Hill, who was also Fadal's counsel, stated in his affidavit,

[23]Davis was given various materials for review, including the books and records of PDA.

> Mr. Davis was asked to discuss his opinions based on his review of the records available at the time. Mr. Davis discussed the information that he had to date, and stated his initial opinion that, based on the available records provided to him, his calculations revealed an approximate $1,200.000.00 disparity in the distribution of guaranteed payments. Mr. Davis explicitly stated that there were additional documents, records, and information that could affect his calculations and that he needed those additional documents, records, and information in order to finalize his opinion regarding the nature and amount of the disparity in guaranteed payment distributions between Dr. Fadal and Dr. Horne. During the meeting, Mr. Davis did not accuse Perry Reed of favoring any party, of committing professional malpractice, of being negligent, of breaching his fiduciary obligation, or of any other wrongful or improper conduct.

Robert "Bob" Rogers stated in his affidavit, "The May 27, 2014[,] meeting began with the attorneys for Dr. Horne and Dr. Fadal beginning the conversation. Mr. Davis was later asked to discuss his opinions based on his review of the accounting books and records available to him at that time."

Mathew Hill's own statement, which has not been supplemented by any other evidence, was that Davis said,

> Dr. Fadal was harmed to the tune of $1.2 million and that it was his opinion that Perry Reed showed favoritism towards one partner over the other in providing advice, in doing that, and that he thought that it hurt Dr. Horne, as well, financially, because now he's going to have to make all this stuff up.[24]

During his deposition, Hill was asked, "You-guys were working in a contested dispute trying to get it resolved, trying to get the bottom of the issues, and you were relying on the investigations and the opinions of trained professionals to provide you with information and

[24]The remaining affiants either deny or do not aver that Davis made the statement "Reed showed favoritism towards one partner . . . ." In fact, the wording contained in Reed's first amended petition is less forceful than Hill's assertion: "Shortly after the meeting convened, Defendant Davis represented to all present that Perry Reed's accounting advice and services had served to favor Dr. Horne over Dr. Fadal in the amount of $1,200,000." Regardless, there is no issue as to whether Davis initially estimated that there was a $1,200,000.00 difference.

opinions to help you do that, correct?" Hill answered, "Correct. We thought that if we could get the parties together with their representatives and kind of throw out onto the table what everybody was thinking, we might be able to resolve our differences without getting any deeper or even having mediation."

When looking at the evidence in its entirety, Davis was acting in a manner that was consistent with "kind of throw[ing] out onto the table what everybody was thinking." The evidence demonstrates that Davis interpreted the documents that he had at his disposal at the time and drew a conclusion based on that information. Further, the evidence presented by Davis establishes he was not aware that his statements were false or that he acted with reckless disregard to whether they were false. To the contrary, the evidence shows nothing more than that Davis had a subjective, good-faith belief in his calculations at the time and that he admittedly needed additional information before making a final determination. Because Davis demonstrated the applicability of qualified privilege to the circumstances of this case,[25] Reed's claims of defamation and business disparagement do not survive Davis' summary judgment motion.[26]

[25]Because we find that qualified privilege is applicable to Davis' statement, we find it unnecessary to address the issue of judicial privilege.

[26]Although qualified privilege may be applicable in relation to a plaintiff's claim for business disparagement, defamation, and tortious interference with existing contract, it is not available for a claim of tortious interference with prospective business relations. The Texas Supreme Court stated:

> In reaching this conclusion[,] we treat interference with prospective business relations differently than tortious interference with contract. It makes sense to require a defendant who induces a breach of contract to show some justification or privilege for depriving another of benefits to which the agreement entitled him. But when two parties are competing for interests to which neither is entitled, then neither can be said to be more justified or privileged in this pursuit. If the conduct of each is lawful, neither should be heard to complain that mere unfairness is actionable. Justification and privilege are not useful concepts in assessing interference with prospective relations, as they are in assessing interference with an existing contract.

The trial court did not err when it granted summary judgment in favor of Davis as to his assertion of qualified privilege.[27] We overrule this point of error.

3. No-Evidence Summary Judgment Was Proper on Reed's Claim for Tortious Interference with Prospective Business Relations, Because There Was No Evidence of Damages

Reed also contends the trial court erred by granting Davis' no-evidence summary judgment as to Reed's claim of tortious interference with prospective business relations.

> To establish . . . tortious interference with prospective business relationships, a plaintiff must show that (a) there was a reasonable probability that the parties would have entered into a business relationship; (b) the defendant committed an independently tortious or unlawful act that prevented the relationship from occurring; (c) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; and (d) the plaintiff suffered actual harm or damages as a result of the defendant's interference.

Richardson-Eagle, Inc. v. William M. Mercer, Inc., 213 S.W.3d 469, 475 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Finding in favor of Davis as to the element of damages, the trial court stated,

> The only summary judgment evidence as to damages was the loss of the Horaneys[28] as an accounting client. However, the Court finds there to be no evidence of any causal link between the loss of the Horaneys as an accounting client and any alleged defamatory statements on the part of Defendant, Davis.

Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 727 (Tex. 2001).

[27]Because we find that qualified privilege shielded Davis as to Reed's defamation and business disparagement claims, we need not address Reed's remaining assertions regarding either of these causes of action.

[28]Ronald Horaney and his mother, Betty Horaney, had been Reed's clients.

In his response to Davis' summary judgment motion, Reed points to "reasonably inferable" statements that were made, which related to the alleged loss of the Horaneys' business. During his deposition, Reed stated,

> And then when [Ronald] came in to pick up his tax work and the corporate tax returns that were prepared and ready to be sent off, then -- and it might have been September 14th. I don't remember, but, anyway, the -- it was close to the filing deadline.
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> . . . .
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> And that's when he told me. He said Betty was upset about the way you treated Ron Fadal or what --

When asked if that was the only explanation Ronald gave him, Reed responded, "[T]hat's it." Reed's recitation of Ronald's statement that "Betty was upset" can be connected only by speculation to Davis' statement as the reason the Horaneys discontinued their business relationship with him. In fact, Ronald avers in his sworn affidavit,

> I am related to Dr. Ron Fadal and am close friends with him and his wife. As a result, I have known for some time about the dispute between Ronald Fadal and Justin Horne relating to the dissolution of their business relationship and was aware that Ronald Fadal was dissatisfied with the accounting services provided by Perry Reed in connection with that business relationship. Neither that knowledge nor anything Ronald Fadal may have said to me about his situation was the reason for my decision to terminate the services of Perry Reed and his company.

In addition, Betty states in her affidavit that she was aware of the situation between Horne and Fadal. She continues by stating,

> For some period in the past, my son and I used the accounting services of Perry Reed and his company, individually and for our business. *For a number of reasons related solely to how our business was handled* by Perry Reed, we made the decision to change accountants and terminate our business relationship with Perry Reed.

In Fadal's affidavit, he avers that Davis' statement had no impact on his decision to cease using Reed's accounting services, stating, "I had made the decision to cease using Perry Reed's accounting services before James Davis being hired by Robert Foster and before having had any conversation with James Davis because I perceived Perry Reed had a conflict of interest." "[M]y decision to terminate Mr. Reed's accounting services had already been made and the fact that I ultimately did terminate Mr. Reed's accounting services was not influenced by any comments or statements made to me by James Davis."

Although Reed claims in his amended petition that Davis' alleged interfering statement adversely affected his business relationship with "Dr. Fadal, Dr. Horne, Dr. Miner and other clients," there is no evidence to support his allegation. For this reason, we find the trial court did not err when it granted Davis' motion for summary judgment as it related to damages stemming from Reed's claim of tortious interference with prospective business relations.

We overrule this point of error.

We affirm the judgment of the trial court.

Josh R. Morriss, III
Chief Justice

Date Submitted: November 28, 2016
Date Decided: March 24, 2017