



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-16-00565-CV

Ana Sophia **SPENCER** and William Alex Spencer,  
Appellant

v.

Jennifer **OVERPECK**,  
Appellee

From the 408th Judicial District Court, Bexar County, Texas  
Trial Court No. 2016-CI-03779  
Honorable Solomon Casseb, III, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice  
Rebeca C. Martinez, Justice  
Patricia O. Alvarez, Justice

Delivered and Filed: March 15, 2017

**AFFIRMED IN PART; REVERSED IN PART**

Ana Sophia Spencer and William Alex Spencer appeal the trial court's order denying their motion to dismiss filed pursuant to the Texas Citizens Participation Act also known as the anti-SLAPP statute. The Spencers assert the trial court erred in denying their motion with regard to Overpeck's claims for intentional infliction of emotional distress, tortious interference with contract, abuse of process, and wrongful injunction because Overpeck failed to establish by clear

and specific evidence a prima facie case for each element of those claims.<sup>1</sup> The Spencers further assert the trial court erred in denying their motion with regard to Overpeck's defamation claim because the Spencers established each essential element of a valid defense to that claim by a preponderance of the evidence. We reverse the trial court's order with regard to Overpeck's claims for tortious interference with contract, abuse of process and wrongful injunction, and we render judgment dismissing those claims. We affirm the remainder of the trial court's order.

### BACKGROUND

Because both the trial court and this court are required to consider the pleadings and evidence in the light most favorable to Overpeck, the following summarizes facts from Overpeck's pleadings. *See Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 892 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Serafine v. Blunt*, 466 S.W.3d 352, 369 n.28 (Tex. App.—Austin 2015, no pet.); *see also Rio Grande H2O Guardian v. Robert Muller Family P'ship Ltd.*, No. 04-13-00441-CV, 2014 WL 309776, at \*3 (Tex. App.—San Antonio Jan. 29, 2014, no pet.) (mem. op.) (noting “[u]nlike other types of cases where pleadings are not considered evidence, section 27.006 . . . expressly provides” that “we may consider the pleadings as evidence”).

Overpeck is a kindergarten teacher employed at an elementary school and had been employed as a teacher for six years. Overpeck met Ana Spencer at the beginning of the 2015-2016 school year (the first day of school was August 24, 2015). One of the Spencers' twin daughters, O.S., was in Overpeck's class. The other twin, S.S., was in the other kindergarten teacher's class. Ana Spencer frequently visited Overpeck's classroom after hours to talk, and the two women became friends. Overpeck and Ana Spencer shared information on personal issues with each other.

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<sup>1</sup> The Spencers also refer to a business disparagement claim; however, Overpeck dropped that claim in amending her pleadings.

Both twins had behavior issues, and Ana Spencer warned Overpeck that S.S. would throw hysterical tantrums, requiring her to be “redirected” to calm down. Both twins had trouble concentrating and completing their work. Both struggled academically and were not achieving normal milestones as the school year progressed. The Spencers were made aware of these issues.

Shortly after the school year began, S.S. was unintentionally left in the class during the lunch break by the other kindergarten teacher. On September 4, 2015, Ana Spencer complained about the incident. On September 16, 2015, S.S. did not eat her lunch which upset Ana Spencer and resulted in her demanding that S.S. be transferred to Overpeck’s classroom. S.S. was transferred on September 22, 2015. On the first day S.S. was transferred to Overpeck’s classroom, she threw a tantrum and was uncontrollable. Overpeck notified Ana Spencer, who came to the school. Upon seeing S.S. in the care of her previous teacher while Overpeck was attempting to calm the rest of her class, Ana Spencer became enraged and began screaming at the other teacher in front of the children. The school principal pulled Ana Spencer aside to calm her down.

In their pleadings in the underlying cause, the Spencers alleged they contacted the vice-principal the day after S.S. was transferred to Overpeck’s classroom to complain they were uncomfortable with Overpeck due to her inappropriate affections and taking pictures of their children on her cell phone.<sup>2</sup> At the beginning of the school year, the Spencers had consented to the taking of photographs, and Overpeck took pictures of all of the children in her class.

On September 25, 2015, the Spencers joined Overpeck, her husband, and her two sons for a run/walk and invited the Overpecks to their home. Throughout September and October, the Spencers and the Overpecks socialized several times at each other’s homes. During those occasions, the Spencers observed Overpeck hugging the twins and their two-year-old sister and

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<sup>2</sup> In their reply brief, the Spencers contend the reference to a meeting on September 23, 2015 was an error and was meant to refer to the meeting that occurred on October 26, 2015.

allowing them to sit on her lap. The Spencers never gave any indication they were alarmed by these interactions.

On October 26, 2015, the Spencers alleged they had a meeting with the school's principal, vice-principal, and a school district administrator complaining about Overpeck's inappropriate interactions with their children. The Spencers also again complained about the other kindergarten teacher.

On October 29, 2015, S.S. had a tantrum near the end of the school day when it was time for the twins to get on the bus to go to after-school daycare. Overpeck attempted to redirect S.S. and placed S.S. on her lap on the bus for a brief time in an effort to calm her.

On November 30, 2015, Alex Spencer phoned the assistant principal and told her Overpeck had told his daughter "kids don't say no to the teacher."<sup>3</sup> Alex Spencer claimed Overpeck was being overly affectionate and allowing the children to sit on her lap. Ana Spencer emailed Overpeck and informed her she was not comfortable with her allowing her daughter to sit on her lap, telling the students she loved them, and telling them not to say "no" to their teacher. The school administrators discussed these allegations with Overpeck and found no basis for concern or discipline.

In January of 2016, O.S. and S.S. fell behind in their school work because they were absent from school for several days. The Spencers expressed frustration to Overpeck about her requesting that the twins finish make-up work, and the Spencers emailed the administration complaining about the homework load. The Spencers also were upset that the twins received an "N" for conduct on their report cards, indicating they needed improvement.

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<sup>3</sup> Overpeck states in her affidavit that this statement was taken out of context. When S.S. refused to complete her school work, Overpeck told S.S. she should not tell a teacher "no" when she is asked to do her assigned work.

On February 3, 2016, Ana Spencer sent an email to the principal and vice principal requesting a meeting to discuss Overpeck's lack of honesty, professionalism, and poor communication. The email did not suggest any inappropriate affection or physical interactions between Overpeck and the twins.

On February 9, 2016, the Spencers had a meeting with the principal, vice principal, and the school district administrator. Overpeck attached an exhibit to her pleading listing fifty-five defamatory statements she alleged the Spencers made at the meeting, including statements relating to Overpeck's children and husband. The record contains affidavits from the principal and vice principal confirming many of the alleged statements were made. Following that meeting, a teacher's aide was present in Overpeck's classroom at all times.

On February 12, 2016, the Spencers alleged Overpeck sexually abused O.S. in the school restroom which caused O.S. to cut off a piece of her hair.<sup>4</sup> On February 14, 2016, one of the Spencers called the school district's "Safeline" to make a report, and on February 15, 2016, the Spencers made a report to the school district's police department. Around the same time, the Spencers also contacted the Bexar County Sheriff's office and the Texas Department of Family and Protective Services.

On February 23, 2016, the school placed Overpeck on paid administrative leave while the school investigated the Spencers' allegations. On March 3, 2016, the Spencers sued Overpeck seeking to permanently enjoin her from being within 1,000 feet of O.S. and S.S., and on March 4,

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<sup>4</sup> In her affidavit, Overpeck stated she opened the bathroom door and handed O.S. a chair and books to use while waiting on the school nurse to bring her dry clothes after she had a bathroom accident. The aide assigned to Overpeck's classroom stated in her affidavit that Overpeck never went inside the bathroom with O.S. The Spencers relied on O.S. allegedly reporting she was alone in the restroom with Overpeck, and the school district's notes that the aide reported Overpeck went inside the restroom to check on O.S.

2016, the Spencers obtained an ex parte temporary restraining order prohibiting Overpeck from being within 1,000 feet of their children. Overpeck subsequently agreed to a temporary injunction.

On March 28, 2016, the Department ruled out any abuse or neglect by Overpeck. That same day, Overpeck filed her counterclaims against the Spencers, including claims for intentional infliction of emotional distress, tortious interference with contract, abuse of process, wrongful injunction, and defamation. On April 10, 2016, the trial court dissolved the temporary injunction, finding it was void, and Overpeck returned to work.

On May 5, 2016, the Spencers filed the motion to dismiss Overpeck's counterclaims, and on June 1, 2016, the Spencers non-suited their claims against Overpeck. After a hearing on the motion to dismiss, the trial court realigned the parties, designating Overpeck as the plaintiff, and denied the Spencers' motion to dismiss. The Spencers appeal.

#### **THE TEXAS CITIZENS PARTICIPATION ACT AND STANDARD OF REVIEW**

“[T]he Texas Citizens Participation Act or TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern.” *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). “The Act provides a special procedure for the expedited dismissal of such suits.” *Id.*

When a defendant files a motion to dismiss under the TCPA, the defendant-movant has the initial burden to show by a preponderance of the evidence that the plaintiff's claim is based on, relates to, or is response to the defendant-movant's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West 2015); *In re Lipsky*, 460 S.W.3d at 586-87. “If the movant is able to demonstrate that the plaintiff's claim implicates one of these rights, the [next] step shifts the burden to the plaintiff to ‘establish [ ] by clear and specific evidence a prima facie case for each essential element of the claim in question.’” *In re Lipsky*, 460 S.W.3d at 587 (quoting TEX. CIV. PRAC. & REM. CODE ANN.

§ 27.005(c)). Finally, if the plaintiff meets its burden to establish a prima facie case, the trial court must still dismiss the claim if the defendant-movant “establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d).

In determining whether the plaintiff’s claim should be dismissed, the court is to consider the pleadings and any supporting and opposing affidavits. *Id.* at 27.006(a). As previously noted, both the trial court and this court are required to consider the pleadings and evidence in the light most favorable to Overpeck. *See Schlumberger Ltd.*, 472 S.W.3d at 892; *Serafine*, 466 S.W.3d at 369 n.28; *see also Rio Grande H2O Guardian*, 2014 WL 309776, at \*3 (noting “[u]nlike other causes of action where pleadings are not considered evidence, section 27.006 . . . expressly provides” that “we may consider pleadings as evidence in this case”).

The TCPA does not define the phrase “clear and specific evidence” which is the standard the plaintiff must meet in establishing a prima facie case for each essential element of the plaintiff’s claims. *See In re Lipsky*, 460 S.W.3d at 590. The Texas Supreme Court, however, has held the standard requires more than mere notice pleadings but does not impose an elevated evidentiary standard or categorically reject circumstantial evidence. *Id.* at 590-91. “Instead, a plaintiff must provide enough detail to show the factual basis for its claim.” *Id.* at 591. “In a defamation case that implicates the TCPA, pleadings and evidence that establishes 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.” *Id.*

**CLAIMS BASED ON EXERCISE OF RIGHT OF FREE SPEECH,  
RIGHT TO PETITION, OR RIGHT OF ASSOCIATION**

The Spencers assert they met their burden to establish Overpeck’s claims are based on their exercise of the right of free speech because all of their communications were made in connection

with a matter of public concern. Citing *Bilbrey v. Williams*, No. 02-13-00332-CV, 2015 WL 1120921, at \*9 (Tex. App.—Fort Worth 2015, no pet.) (mem. op.), the Spencers contend matters involving the well-being and safety of children are matters of public concern. Although Overpeck questions whether the Spencers’ initial meeting with school administrators regarding their children involved a matter of public concern, Overpeck agrees the Spencers’ reports to law enforcement and their filing of their petition seeking injunctive relief implicate their right to petition. We hold the Spencers have satisfied their initial burden to show Overpeck’s claims related to or were in response to the Spencers’ right of free speech, right to petition, or right of association. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b).

#### **PRIMA FACE CASE**

Because the Spencers met their initial burden, the burden shifted to Overpeck to establish by clear and specific evidence a prima facie case for each essential element of her claims.

##### **A. Intentional Infliction of Emotional Distress**

To recover damages for intentional infliction of emotional distress, a plaintiff must establish that: (1) the defendant acted intentionally or recklessly; (2) the defendant’s conduct was extreme and outrageous; (3) the defendant’s actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Kroger Tex. Ltd. P’ship v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006); *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004).

In their brief, the Spencers’ only argument with regard to Overpeck’s intentional infliction of emotional distress claim is that the claim is a “gap-filler” claim which “has no application where other avenues of remedy exist for the conduct about which complaint is made.” We hold the Spencer’s “gap-filler” argument is premature in this context.

The Texas Supreme Court has recognized the “gap-filler” argument does not mean a plaintiff could not establish a prima facie case; only that the claim would otherwise be precluded



in view of duplicate remedies offered by other claims. *See Hoffmann–La Roche Inc.*, 144 S.W.3d at 447-48. Under section 27.005(c), Overpeck’s only burden was to establish a prima facie case for each element of her claim by clear and specific evidence. *See TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c)*. Because the Spencers do not raise any argument in their brief asserting Overpeck failed to establish a prima facie case for each of the above-referenced elements of her intentional infliction of emotional distress claim, we hold the trial court did not err in denying the Spencers’ motion to dismiss as to this claim.

B. Tortious Interference with Contract

The elements of tortious interference with an existing contract are: (1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff’s 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).

The Spencers first argue Overpeck did not establish a prima face case of this claim because they were exercising their own legal right to address their concerns with appropriate authorities. As Overpeck correctly notes, however, whether a defendant’s conduct is justified is an affirmative defense that the Spencers were required to plead and prove. *Id.* at 77-78; *ACS Inv’rs, Inc. v. McLaughlin*, 943 S.W.2d 426, 431 (Tex. 1997). The Spencers’ motion to dismiss recognized this burden asserting Overpeck’s claim was subject to a valid defense because their conduct constituted “an exercise of legal rights taken in good faith.” *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 80 (noting “justification defense can be based on the exercise of either (1) one’s own legal rights or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken”). In their first amended answer, however, the Spencers did not assert the defense of legal justification. Instead, they only asserted defenses to Overpeck’s defamation claim, including privilege, absence of malice, immunity, and estoppel. Because the Spencers did not plead the

defense of justification, the trial court would not have erred in denying the motion to dismiss Overpeck's tortious interference with contract claim based on this argument.

The Spencers also argue Overpeck did not establish a prima facie case for her claim because "merely inducing a contract obligor to do what it has a right to do [under the subject contract] is not actionable interference." *ACS Inv'rs, Inc.*, 943 S.W.2d at 430. Because the school district's suspension of Overpeck with pay was within the school district's contractual rights, the Spencers argue Overpeck cannot establish the elements of this claim.

Most courts hold that to prevail on a claim for tortious interference with contract, the plaintiff must show the interference induced an actual breach of the contract. *See id*; *Serafine*, 466 S.W.3d at 362; *All Am. Tel., Inc. v. USLD Commc'ns, Inc.*, 291 S.W.3d 518, 532 (Tex. App.—Fort Worth 2009, pet. denied). In this case, Overpeck did not establish that the school district breached its contract with her.

Although the courts generally require a showing that the contract was breached, one court has stated the contract need not have been breached so long as the plaintiff incurred damages. *Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, 05-13-00506-CV, 2015 WL 6750047, at \*24 (Tex. App.—Dallas Nov. 4, 2015, no pet.) (mem. op.). The damages recoverable for tortious interference with contract are limited to the same measure of damages for breach of the contract interfered with, *i.e.*, to put the plaintiff in the same economic position he would have been in if the contract had been performed. *See Am. Nat'l Petroleum Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990); *Fitness Evolution, L.P.*, 2015 WL 6750047, at \*24. Because Overpeck was placed on leave with pay, she has not established any damages under this measure of damages. Therefore, because Overpeck did not present clear and specific evidence in support of this element of her tortious interference with a contract claim, the trial court erred in denying the motion to dismiss as to Overpeck's claim for tortious interference with contract.

### C. Abuse of Process

Abuse of process requires proof that: (1) the defendant made an illegal, improper, perverted use of the process; (2) the defendant had an ulterior motive or purpose in exercising such illegal, perverted, or improper use of process; and (3) the plaintiff sustained damage from the irregularity. *Alsheikh v. Dyab*, No. 07-08-00162-CV, 2010 WL 1380978, at \*2 (Tex. App.—Amarillo Apr. 7, 2010, no pet.) (mem. op.); *Detenbeck v. Koester*, 886 S.W.2d 477, 480 (Tex. App.—Houston [1st Dist.] 1994, no writ). “The focus is on the use of the process once it is properly obtained, not on the motive for originally obtaining the process.” *Davis v. W.*, 433 S.W.3d 101, 110 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). “When the process is used for the purpose for which it is intended, even though accompanied by an ulterior motive, no abuse of process occurs.” *Whitehead v. Mackenzie*, No. 02-09-00383-CV, 2011 WL 2755349, at \*5 (Tex. App.—Fort Worth July 14, 2011, pet. denied) (mem. op.); *see also Baubles & Beads v. Louis Vuitton, S.A.*, 766 S.W.2d 377, 378–79 (Tex. App.—Texarkana 1989, no writ). A claim based on the filing and maintaining of a lawsuit and the obtaining of a temporary restraining order cannot constitute abuse of process, because abuse of process refers to the improper use of the process after it has been issued. *Alsheikh*, 2010 WL 1380978, at \*2; *Michels v. Zeifman*, No. 03-08-00287-CV, 2009 WL 349167, at \*6 (Tex. App.—Austin Feb. 12, 2009, pet. denied) (mem. op.).

In this case, Overpeck’s claim focuses on the Spencers’ filing of the lawsuit and their obtaining the temporary restraining order. In her brief, Overpeck focuses on the Spencers’ use of false statements in their petition. Even if the Spencers’ lawsuit was based on false statements and allegations, however, Overpeck has not shown how the temporary restraining order, once it was obtained, was improperly used. Therefore, she did not establish a prima facie case for her abuse of process claim, and the trial court erred in denying the Spencers’ motion to dismiss with regard to that claim.

D. Wrongful Injunction

“There are two separate causes of action for wrongful injunction: (1) on a bond ordinarily filed to obtain the injunction and (2) malicious prosecution.” *Castaño v. San Felipe Agr., Mfg., & Irr. Co.*, No. 04-01-00822-CV, 2003 WL 288276, at \*4 (Tex. App.—San Antonio Feb. 12, 2003, no pet.) (mem. op.). “To prevail on an injunction bond, the claimant must prove the temporary restraining order or temporary injunction was issued or perpetuated when it should not have been and that it was later dissolved.” *Id.* “A claimant need not prove that the temporary restraining order or temporary injunction was obtained maliciously or without probable cause.” *Id.* “Instead, such elements must be proven in a claim for malicious prosecution.” *Id.* “In a cause of action for malicious prosecution, the claimant must prove that the injunction suit was prosecuted maliciously and without probable cause and was terminated in his favor.” *Id.* “Under either cause of action, the claimant must prove that the issuance of the injunction caused him damages.” *Id.*

In her brief, Overpeck refers to the elements of a wrongful injunction on a bond. The Spencers contend Overpeck failed to establish a prima facie case on this claim because she agreed to the temporary injunction. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 686 (Tex. 1990) (noting plaintiff cannot recover damages for a claim of wrongful injunction “for having been prohibited from doing something which he agreed not to do, even if the agreement was unenforceable”). Apparently acknowledging this procedural problem, Overpeck refers to the period of time during which the temporary restraining order was in place prior to the agreed temporary injunction. The temporary restraining order, however, was not dissolved. *See Castaño*, 2003 WL 288276, at \*4 (providing claimant must prove temporary restraining order was later dissolved to prevail on an injunction bond). Instead, it was replaced by the agreed temporary injunction. Therefore, we hold the trial court erred in denying the Spencers’ motion to dismiss with regard to Overpeck’s claim for wrongful injunction.

**ESTABLISHMENT OF A VALID DEFENSE TO DEFAMATION CLAIM**

The Spencers do not contend on appeal that Overpeck failed to establish a prima facie case as to the elements of her defamation claim. Instead, the Spencers contend the trial court erred in denying their motion to dismiss Overpeck's defamation claim because they established each essential element of a valid defense to the defamation claim by a preponderance of the evidence. *See* TEX. CIV. PRAC. & REM CODE ANN. § 27.005(d).

The Spencers rely on two defenses: (1) immunity under section 261.106 of the Texas Family Code; and (2) common law qualified privilege for statements made without actual malice. Overpeck responds the Spencers did not assert immunity as a defense in their motion to dismiss and the Spencers did not prove by a preponderance of the evidence the absence of actual malice as to each alleged defamatory statement.

A. Immunity Under Section 261.106

Section 261.106 of the Texas Family Code entitled "Immunities" provides as follows:

(a) A person acting in good faith who reports or assists in the investigation of a report of alleged child abuse or neglect or who testifies or otherwise participates in a judicial proceeding arising from a report, petition, or investigation of alleged child abuse or neglect is immune from civil or criminal liability that might otherwise be incurred or imposed.

TEX. FAM. CODE ANN. § 261.106(a) (West 2014).

A motion to dismiss under the TCPA must be filed no later than the 60th day after the date of service of the legal action. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b). The Spencers timely filed their motion to dismiss, but in their motion, the Spencers alleged the following as one of their valid defenses:

(c) The conduct of the Spencers complained of in the Counter-Claim constitute an exercise of legal rights taken in good faith.

As Overpeck notes in her brief, this defense makes no reference to immunity. It was not until the Spencers filed their first amended answer, beyond the 60-day deadline for filing a motion to dismiss, that the Spencers alleged immunity as follows:

3. Further, Defendants would show that their alleged acts and conduct were such that they are immune from civil liability and that they were at all times acting in good faith.

Because the amended answer was filed after the 60th day after the date of service of the legal action, the Spencers cannot rely on the allegations in their amended answer to supplement the grounds asserted in their motion to dismiss.

Having reviewed the motion to dismiss, we hold the defense alleged in the motion was an assertion of a justification defense relating to Overpeck's claim for tortious interference with contract. Such a justification defense "can be based on the exercise of either (1) one's own legal rights, or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken." *Prudential Ins. Co. of Am.*, 29 S.W.3d at 80. Therefore, the Spencers did not assert an immunity defense in their motion to dismiss, and we need not further address that defense on appeal.

#### B. Qualified Privilege

The Spencers next contend they met their burden to establish the defense of qualified privilege. Under this defense, the Spencers were required to establish by a preponderance of the evidence that they did not make the statements with actual malice, defined as knowledge of its falsity or with reckless disregard for the truth. *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 171 (Tex. 2003). Reckless disregard focuses on the defendant's state of mind, and the plaintiff must establish the defendant entertained serious doubts about the truth of his statements or had a high degree of awareness that the statements were probably false. *Id.* As the Texas Supreme Court has explained:

To summarize, the 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. 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 motive 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 (Tex. 2002).

In her brief, Overpeck contends the Spencers' affidavits fail to satisfy their burden. We agree. Both affidavits state the Spencers "had no reason to doubt the truth or accuracy of the *incidents* described above." (emphasis added). However, neither affidavit references all of the statements Overpeck lists in the exhibit to her petition as being defamatory. Therefore, because the Spencers did not present evidence establishing by a preponderance of the evidence that all of the statements Overpeck alleged they made were truthful or made without any serious doubt as to the truth of those statements, the Spencers did not satisfy their burden with regard to their qualified privilege defense.<sup>5</sup>

Because the Spencers failed to satisfy their burden with regard to their defenses to Overpeck's defamation claim, the trial court did not err in denying the Spencers' motion to dismiss with regard to Overpeck's defamation claim.<sup>6</sup>

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<sup>5</sup> In her post-submission letter brief, Overpeck raises a question regarding the actual malice standard she is required to prove given that her lawsuit is against a private party. We need not resolve this question because we hold the Spencers have failed to meet their burden even under the heightened actual malice standard set forth in *Bentley*, 94 S.W.3d at 596.

<sup>6</sup> Although Overpeck challenges the constitutionality of section 27.005(d) in her brief, Overpeck's attorney stated during oral argument that this court would not need to address Overpeck's constitutional arguments if the court determined that the Spencers did not satisfy their burden under section 27.005(d). We agree. Therefore, because we

**CONCLUSION**

Because Overpeck failed to satisfy her burden to establish a prima facie case with regard to her claims for tortious interference with contract, abuse of process, and wrongful injunction, we reverse the trial court's order as to those claims and render judgment dismissing those claims. The remainder of the trial court's order is affirmed. The cause is remanded to the trial court for further proceedings consistent with this opinion.

Sandee Bryan Marion, Chief Justice

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hold the Spencers did not satisfy their burden under section 27.005(d), we do not address Overpeck's constitutional challenge.