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REPORTER'S RECORD

VOLUME 1 OF 1 VOLUMES

TRIAL COURT CAUSE NO. 1-16-0894

MCC AND ASSOCIATES, INC.,	*	IN THE DISTRICT COURT
A TEXAS CORPORATION;	*	
MEGAN MCANALLY, AN	*	
INDIVIDUAL, SHANNON	*	
MCANALLY, AN INDIVIDUAL,	*	
JOHN MCANALLY, AN	*	
INDIVIDUAL; AND NICHOLAS	*	
RYAN NARRAMORE, AN	*	
INDIVIDUAL,	*	
Plaintiffs	*	
VS.	*	ROCKWALL COUNTY, TEXAS
	*	
THOMAS RYAN DANIEL, DDS,	*	
AN INDIVIDUAL,	*	
Defendant	*	382ND JUDICIAL DISTRICT

MOTION TO DISMISS

On the 1st day of February, 2017, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Brett Hall, Judge presiding, held in Rockwall, Rockwall County, Texas:

Proceedings reported by machine shorthand.

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1 P R O C E E D I N G S

2 THE COURT: This is Cause Number
3 1-16-0894. It's MCC and Associates, Inc., a Texas
4 Corporation, and others, plaintiffs, versus Thomas
5 Ryan Daniel, D.D.S.

6 You just need the ELMO, document cam?

7 MR. BELL: Yes, Your Honor, we have a
8 PowerPoint, however, to make it show up.

9 THE COURT: Is it to the computer?

10 MR. BELL: Yes, laptop.

11 (Discussion off the record.)

12 THE COURT: All right. Counsel, you
13 can proceed.

14 MR. BELL: Thank you, Your Honor.

15 May it please the Court. My name is
16 James Bell. I represent Dr. Ryan Daniel. He's a
17 dentist. He's an accomplished dentist here in the
18 D/FW Metroplex.

19 This case is a defamation case brought
20 by the plaintiffs. And throughout the plaintiffs'
21 presentation, you're going to hear things that my
22 client may or may not have said, but -- that are vile,
23 that are distasteful, it wouldn't be something -- a
24 kind of person you would want to be around, perhaps I
25 wouldn't want to be around or anybody in this

1 courtroom would want to be around.

2 The issue is, is whether or not his
3 speech is protected by the First Amendment.

4 Now, as you know, under the -- you
5 know, after 2011, the passage of the Texas Citizen's
6 Participation Act, for the most part, the legislation,
7 rightly or wrongfully, did away with -- with
8 defamation and slander and libel and these sorts of
9 claims. And they've enacted this Citizen's
10 Participation Act.

11 And just -- I want to give you a little
12 bit of history and color in this case, Your Honor.
13 The plaintiffs filed this action in Your Honor's court
14 after they had filed a -- let me back up.

15 The plaintiff corporation entered into
16 an agreement with my client to build his dental
17 practice. My client, and you'll see a video here in a
18 minute, they're at odds with respect to the quality of
19 the building and deceptive trade practices, et cetera,
20 et cetera. That's what kind of culminated.

21 Notwithstanding the fact that one of the owners of the
22 corporation had dated my client for four years, so it
23 adds a personal dynamic. If that makes sense, okay?

24 Now, the plaintiffs filed this case in
25 Your Honor's court after they had filed an M&M lien up

1 in Denton County -- not in Rockwall County, but in
2 Denton County -- and filed a lawsuit to foreclose --
3 to foreclose on \$54,000, foreclose on my client's real
4 estate and his dental practice that he had spent the
5 last 10, 15 years building.

6 May I approach, Your Honor?

7 THE COURT: And that suit was filed in
8 Denton?

9 MR. BELL: Yes, Your Honor. And that's
10 going to be --

11 THE COURT: Is it still pending?

12 MR. BELL: Yes, Your Honor. And that's
13 going to be -- we're going to come back to that in a
14 moment.

15 I'm going to -- that's part of the
16 record. Are you good on that?

17 May I approach?

18 THE COURT: Yes, sir.

19 MR. O'DENS: Your Honor, for the
20 record, I have no objection with the Court taking
21 judicial notice of the M&M case that was filed in
22 Denton County.

23 MR. BELL: May I approach?

24 THE COURT: All right. Sure, you can
25 approach.

1 MR. BELL: Your Honor, here is the M&M
2 lien which is marked as Defendant's Exhibit 1.

3 THE COURT: Are you wanting to
4 introduce that?

5 MR. BELL: Yes, Your Honor.

6 THE COURT: Okay. Any objection?

7 MR. O'DENS: I am going to object, Your
8 Honor. While the Court can take judicial notice of
9 it, under the Anti-SLAPP Statute, the only evidence
10 heard in a motion to dismiss are the pleadings that
11 are on file, the affidavits or opposing affidavits
12 that have been submitted. No other evidence. This is
13 not an evidentiary hearing, and I would object to
14 anything being introduced, recognizing that the Court
15 can take judicial notice of the case pending in Denton
16 County.

17 THE COURT: All right. It is what the
18 Statute says, is it not, as far as exhibits?

19 MR. BELL: Yes, Your Honor, but I do
20 have a response.

21 THE COURT: Go ahead.

22 MR. BELL: He attached that to the back
23 of his response to my Motion to Dismiss in Your
24 Honor's court.

25 THE COURT: Then it's part of your

1 pleadings?

2 MR. O'DENS: It's part of the
3 pleadings.

4 THE COURT: Okay. Well, I'll take
5 notice of all the pleadings in this case without --
6 without actually admitting that as a separate exhibit.

7 MR. BELL: Then that's fine. I just
8 want to mark it for identification for purposes of an
9 appellate record, that -- that's really the main
10 reason.

11 And I can show you what's been marked
12 as Defendant's Exhibit 2, Your Honor. We don't have
13 to -- this is the lawsuit that was filed -- I don't
14 know if you want to take a look at it -- filed
15 September 1st, 2016.

16 And may I be excused back to -- should
17 I go back to the table?

18 THE COURT: Sure.

19 So you're not asking for admission on
20 the record, you just want me to have these for
21 identification purposes?

22 MR. BELL: Yes, Your Honor, yes.

23 THE COURT: All right. Go ahead.

24 MR. BELL: And take judicial notice of
25 it.

1 THE COURT: I'll take judicial -- if
2 these are on file in this case as exhibits or
3 pleadings or otherwise, I'll take judicial notice of
4 everything that's in this file.

5 MR. BELL: They are, Your Honor.

6 THE COURT: Okay. Thank you.

7 MR. BELL: May I continue, Judge?

8 THE COURT: Sure.

9 MR. BELL: Thank you.

10 Now, so, you have an M&M lien, which is
11 filed in the county records in Denton, and you have a
12 lawsuit to foreclose and a breach of contract lawsuit
13 filed in Denton County. That case is still pending,
14 and it was a prior filed case to the case filed in
15 your court. And we're going to talk about abatement
16 and judicial privilege here in a second.

17 Now, notwithstanding having said that,
18 it was only after these lawsuits and M&Ms had been
19 filed that Dr. Daniel began to blog about the
20 defendant's (sic) and the defendant (sic) owners and
21 what they had done.

22 Now, the TCPA was enacted to prevent
23 these kind of retaliatory lawsuits and to allow a
24 channel for which folks can speak freely without the
25 fear of retribution and lawsuits, such as the ones

1 filed by the plaintiffs, to try and shelf free speech.

2 THE COURT: Let me ask you a question;
3 you're probably going to cover this. Are any of the
4 things being complained about things that were said
5 during the course of the judicial action in the Denton
6 County lawsuit?

7 MR. BELL: Yes, Your Honor. I'm going
8 to get to it.

9 THE COURT: That's a separate issue, I
10 suppose?

11 All right. Go ahead.

12 MR. BELL: Well, it's part of -- it
13 is --

14 THE COURT: Well, I mean, it has to be
15 viewed differently than other statements.

16 MR. BELL: That's correct. That's
17 correct. And I think that, in and of itself, as a
18 matter of law and as a matter of fact allows Your
19 Honor to grant this motion, period, without -- but
20 I'll get to it.

21 Go ahead. Thank you.

22 Now, I just want to give you a brief
23 kind of view of the construction which --

24 MR. O'DENS: And Your Honor, I'm going
25 to object. Counsel is now playing video, attempting

1 to introduce evidence for the Court's consideration --

2 MR. BELL: It's not --

3 MR. O'DENS: Let me finish with my
4 objection.

5 -- the Court's consideration on a
6 motion to dismiss under the Anti-SLAPP Statute.

7 THE COURT: Y'all approach the Bench
8 for just a minute. Let me get a clarification from
9 both of you.

10 (Sidebar conference, off the record.)

11 THE COURT: All right. Back on the
12 record.

13 Counsel, you have an objection you want
14 to make for the record?

15 MR. O'DENS: I do, Your Honor.

16 I object to the Court's consideration
17 of any material, including videos or photographs,
18 being tendered by the defendant in this case as not
19 being included within the evidence to be considered by
20 the Court under 27.006 of the Civil Practices and
21 Remedies Code.

22 THE COURT: Response?

23 MR. BELL: Yes, Your Honor, I'm not
24 offering it into evidence. I'm offering it for
25 purposes of giving the Court background information on

1 what this case is about. It's in the pleadings.

2 The -- the -- in the very affidavit and
3 the pleading submitted by the defendant (sic), they
4 talk about the M&M lien, the lawsuit, and the alleged
5 faulty construction. So, if anything, they've opened
6 the door on this very issue. And I'm happy -- if you
7 look in their affidavit, they talk all about it,
8 Judge.

9 THE COURT: All right. Well, I'm not
10 going to conclude that they've opened the door on
11 anything, but I'll let you present it as a
12 demonstrative aid, just as background information for
13 the Court to put the motion and the response in
14 context.

15 You can proceed.

16 MR. BELL: Thank you, Your Honor.

17 So, Judge, this was the predicate acts
18 which led to my client's alleged defamatory
19 statements. And you can see some of the construction
20 here. And I've fast forwarded the video, but you get
21 kind of a little bit of a color of -- not for
22 consideration of this motion -- but color behind what
23 was going on in the mind of my client when he's paying
24 close to a million dollars for this kind of shoddy
25 construction.

1 You can go -- let's go to the next
2 slide.

3 Now, you're going to hear Mr. O'Dens,
4 Your Honor, talk about how Mr. Daniel -- Dr. Daniel
5 was -- went outside the bounds of any kind of decency
6 in write -- in blogging, in blogging on the Internet
7 about the defendants (sic).

8 And Your Honor, I have a case out of
9 the Fifth District Court of Appeals -- unfortunately,
10 I was part of this case -- this is *Young V Krantz*.

11 May I approach, Your Honor?

12 THE COURT: You may.

13 MR. BELL: For purposes of
14 identification, I marked it as Defendant's Exhibit 4.

15 It is a case, believe it or not, almost
16 directly on point. In that case, the Fifth District
17 Court of Appeals -- the lower court, I think Judge
18 Hoffman, denied the anti-SLAPP motion, went up to the
19 Court of Appeals, Court of Appeals reversed and
20 rendered judgment.

21 In that case, a lawyer and her client
22 had made alleged false and disparaging and defamatory
23 statements about a contractor on Angie's List.
24 Angie's List is a -- kind of an online blogger, public
25 review, you get to make comments, website.

1 In that case, the Court of Appeals
2 said -- this is a matter of public concern, so
3 therefore the burden shifts to the plaintiff to show a
4 prima facie case of each and every single element of
5 their claims in that case, which is completely
6 analogous -- completely analogous to the case at bar.
7 In that case, the Dallas Court of Appeals reversed and
8 rendered.

9 Now -- you can go ahead and go to the
10 next slide.

11 Now, in this slide, Judge, I've given
12 you kind of the standard. Court must grant a motion
13 to dismiss under the Anti-SLAPP Statute, the TCPA if
14 it's in response to a party's exercise of their right
15 of free speech. Once I've done that, the burden --
16 and I'm going to show you how I've done that -- the
17 burden then shifts to the plaintiffs to prove to you,
18 Your Honor, clear and specific evidence of a prima
19 facie case for each and every single element of their
20 claim.

21 Now, Texas Supreme Court has held in a
22 defamation case, the claimant's pleadings and evidence
23 must establish the facts of when, where, and what was
24 said, the defamatory nature of the statements, and how
25 they damaged the plaintiff in order to avoid

1 dismissal.

2 Now, I'm going to mark Defendant's
3 Exhibit 5 just for purposes of identification.

4 May I approach, Your Honor?

5 THE COURT: You may.

6 MR. BELL: This is the plaintiff's
7 response to our Motion to Dismiss, and the plaintiff
8 asked that the Court only consider the Plaintiffs'
9 First Amended Original Petition and my client's
10 original answer and affirmative defenses, is what he
11 asked for.

12 May I be excused back, Your Honor?

13 And if the Court will look in the
14 Plaintiffs' First Amended Petition, which the Court
15 can take judicial notice of, and it's part of the
16 anti -- this TCPA record -- may I approach, Judge?

17 THE COURT: You may.

18 MR. BELL: This is -- you'll note --
19 this is the Plaintiffs' First Amended Original
20 Petition, Your Honor.

21 You will note that nowhere in -- I
22 spent hours, it will probably take you a lot less, but
23 I think after having read the Plaintiffs' First
24 Amended Original Petition, you'll note that there are
25 no facts of when, where, or what was said, and the

1 defamatory nature of the exact statements. None of
2 that exists. None of that exists in the very pleading
3 that the plaintiffs asked you -- one of the two very
4 pleadings only that the plaintiffs asked the Court to
5 consider in denying the Motion to Dismiss.

6 You can go to the next slide.

7 May I proceed, Your Honor?

8 And I'm going to go back to, just for
9 purposes of the record, what the burden is. The
10 initial threshold burden is the defendant must show
11 that the statements or alleged statements are a matter
12 of public concern. And once the defendant, who's made
13 the alleged defamatory statements, has met that
14 threshold burden or step, the burden -- it's a
15 two-step analysis. The burden then shifts to the
16 plaintiffs to come forward with clear and specific
17 evidence above prima facie case of each and every
18 single element.

19 Now, the Courts have held that a good,
20 a product, a service in the marketplace is a matter
21 of public concern. *Young V Krantz*, that was the case
22 that I gave you where -- very analogous, you had a
23 contractor committed wrongful acts, deceptive acts,
24 cheated the folks; there was an Angie's List review,
25 which is very, very similar to the case at bar, if not

1 almost completely analogous, in which the Court of
2 Appeals granted the anti-SLAPP motion.

3 It is clear that -- that dealing with a
4 construction company that's filed an M&M lien, filed a
5 lawsuit, and then you start a website and a blog to
6 talk about their wrongful acts is a matter of public
7 concern.

8 Now, I want to talk a little bit about
9 absolute privilege and judicial privilege. You'll
10 note, Your Honor, I gave you, I believe, Exhibit 2,
11 which the Court can take judicial notice of.
12 Exhibit 2 is the plaintiffs' original petition in
13 Denton County, Texas, filed, I believe, on or about
14 August 2nd, 2016. There's an orange highlighter in
15 the right-hand corner. Is that the pleading you have
16 in front of you, Judge?

17 THE COURT: Yeah.

18 MR. BELL: And that was a lawsuit filed
19 prior to -- my understanding, filed prior to the
20 launching of website and blogs and the campaign
21 against the plaintiffs.

22 Now, the Court is well aware -- TCPA or
23 no TCPA, the Court is well aware that any statement
24 made during the course of a judicial proceeding is
25 absolutely privileged.

1 So, we have a judicial proceeding
2 pending when these remarks are being made. As a
3 matter of law, the plaintiffs are barred -- barred,
4 100 percent, unequivocally, undisputedly barred --
5 from bringing a defamation claim.

6 THE COURT: You're saying any
7 statement, just because there's a judicial proceeding
8 pending, it doesn't have to be within that proceeding?

9 MR. BELL: That's an interesting
10 question.

11 Go to the next slide.

12 It has to be -- here's the law: The
13 defamatory statement need not be relevant to the
14 proceeding to be absolutely privileged. And a court
15 should resolve all doubts in favor of finding the
16 statement has some relation to the proceeding.

17 And so, to answer your question, Your
18 Honor -- I'll mark this as 7 -- answer your question,
19 Your Honor, I don't believe it's absolute that any and
20 all statements, if somebody goes off the reservation,
21 are protected.

22 If -- may I approach, Your Honor?

23 THE COURT: But you don't think it's
24 limited to what was said in a court proceeding or in a
25 deposition or something like that?

1 MR. BELL: Oh, absolutely not.

2 Absolutely not.

3 THE COURT: Okay.

4 MR. BELL: It's not limited to that.

5 This is out of your response.

6 May I approach, Judge?

7 THE COURT: Yes, sir.

8 MR. BELL: And Defendant's Exhibit 7,
9 which is part of the response and part of the
10 pleadings on file -- and just because it's my only
11 copy, if I may read just a little bit before I hand it
12 to you, Judge, for the record.

13 THE COURT: Okay.

14 MR. BELL: In paragraph 8 of the
15 plaintiff's response it says, as set forth in the
16 plaintiff's pleading, it cannot be lost that the
17 animosity exhibited by Daniel is an outgrowth of a
18 business dispute between the parties. In
19 December 2015, Daniel engaged MCC and Associates to
20 construct a dental office. The individual plaintiffs
21 are all employed by MCC and Associates. Certain
22 disputes arose between the parties regarding the
23 construction of the dental office which were
24 exacerbated by Daniel's outrageous and offensive
25 communications with the plaintiffs. The parties'

1 business relationship was eventually terminated.

2 Paragraph 9: Following termination of
3 the parties' business relationship and after a barrage
4 of email and text communications from Daniel to
5 plaintiffs, Daniel began posting comments on various
6 social media sites.

7 May I approach, Judge? This is
8 Defendant's Exhibit -- or Exhibit 7. It's part of the
9 plaintiffs' response.

10 I believe Defendant's Exhibit 7
11 resolves any issues with respect to -- you can go back
12 to the preceding slide -- that the plaintiffs all but
13 judicially admit -- pretty much judicially admit that
14 all of the statements arise from, relate to the
15 business relationship and were during the course of or
16 in anticipation of a judicial proceeding.

17 And you're also going to find there's
18 going to be no evidence in the record that any of
19 these statements fall outside the course of any
20 judicial proceeding.

21 This is a little bit separate from the
22 original TCPA motion, but it's very important that
23 it -- the Court be made aware that there is this --
24 that the Court wasn't aware that there was this
25 separate case in Denton County where all of the issues

1 could be resolved.

2 And in preparation for Your Honor's
3 hearing last night -- may I approach?

4 THE COURT: Yes, sir.

5 MR. BELL: You have a copy of that?

6 MR. O'DENS: Yeah.

7 MR. BELL: Mr. -- Dr. Daniel filed a
8 plea in abatement -- not that I don't want to be in
9 your court, Your Honor -- but a plea in abatement,
10 perhaps abating these proceedings, pending the outcome
11 of the litigation in Denton County.

12 Now --

13 THE COURT: Are you moving for that
14 today?

15 MR. BELL: I -- the answer is yes. If
16 you'll just hear me very briefly. I know -- I think
17 the off-the-cuff argument would be, hey, you filed it
18 last night, there's no notice, we're not here -- and I
19 can understand Mr. O'Dens' argument, and I think
20 that's more than fair.

21 THE COURT: My question was, if you
22 were moving for that today, and if this case was
23 abated pending what is going on in Denton County, what
24 effect does that have on timelines, if any, on this
25 part of the statute, on your Motion to Dismiss? Does

1 it stop those?

2 MR. BELL: I think it stops it right in
3 its tracks, is my understanding.

4 And the reason why I bring it up,
5 Judge, is not because Mr. O'Dens doesn't have notice
6 and maybe he should have filed a notice of related
7 case with Your Honor, but the Texas law is very clear
8 that if the Court is made aware of circumstances
9 justifying abatement, it may order abatement on its
10 own motion.

11 And that case is *Wheeler V Employers*
12 *Mutual Liability Insurance Company*, 609 S.W.2d 826.
13 Here you have a --

14 MR. O'DENS: Judge Hall, let me, for
15 the record --

16 THE COURT: Let me ask a question. How
17 does abatement of this defamation suit improve by
18 completing the suit in Denton County, which I guess is
19 based on the construction and the issues related to
20 them?

21 MR. BELL: What should happen is, all
22 of it should be for purposes of judicial economy and
23 the witnesses and time and your court staff in having
24 to set things. All of this can be heard in Denton
25 County, where it should be heard, because, as you'll

1 note, on Defendant's Exhibit 7, the plaintiffs make no
2 bones about the fact that this case arises out of,
3 relates to -- and all occurrences relate to the
4 contract between MCC and my client.

5 THE COURT: Well, that would take a
6 motion to transfer and to consolidate, right?

7 That's not what I have today. You're
8 not asking me to transfer the case, and I couldn't
9 consolidate it anyway because it's not in my court.

10 I mean, the transfer's not what I'm
11 looking at today, right?

12 MR. BELL: Correct, Your Honor.

13 THE COURT: Okay.

14 MR. BELL: Possible abatement to where
15 we can bring these -- here's -- you run the risk, just
16 from -- I'm getting a little bit off topic, but we run
17 the risk of different judgments on different issues if
18 this gets litigated in Denton County where we have
19 different results and you have the same parties, the
20 same issues, the same occurrences, the same
21 transactions.

22 THE COURT: All right. Counsel, you
23 want to respond about the abatement issue?

24 MR. O'DENS: I do, Your Honor.

25 Let me respond, first of all, the plea

1 in abatement was filed last night. We have not been
2 provided notice of any hearing on that, certainly not
3 three days.

4 Let me note for the Court also, the
5 Motion to Dismiss was filed in September of last year.
6 The Denton County lawsuit was filed in September of
7 2016. Dr. Daniel had plenty of time, if he wanted to
8 argue about an abatement, to present that issue.

9 So I'm not responding to the motion
10 because I object to the Court's consideration, but I
11 do want to address counsel's comment. They are not
12 the same parties and they are not the same claims.
13 The plaintiff in the Denton County case is MCC and
14 Associates. The defendant is TRD Enterprises, LLC,
15 which was the entity that was contracted for to build
16 the building. It's filed in Denton County because the
17 real property is in Denton County and venue is
18 mandatory in Denton County. It does not include Dr.
19 Daniel as a party. It does not include any of the
20 individual plaintiffs as parties. And the only claims
21 in the Denton County case are breach of contract and
22 foreclosure of the M&M lien. This case involves
23 defamation. It is separate and apart.

24 THE COURT: All right. Having said
25 that, you filed the Motion for Abatement, if you want

1 to have a hearing on that, you can give him the proper
2 notice and set it and we'll do that.

3 MR. BELL: Yes, Your Honor. Yes, Your
4 Honor.

5 May I proceed?

6 THE COURT: Yes, sir.

7 MR. BELL: Okay. Going back to Your
8 Honor's question, the law is clear. Statements may
9 not serve as the basis of an action for defamation
10 regardless of their falsity or any malice which the
11 statements were made and published. The privilege
12 applies even to statements made to parties who are not
13 involved in the judicial proceedings -- meaning, some
14 of these owners of MCC -- if the statements bear some
15 relation to the proceedings. And it goes on to state:
16 Texas Supreme Court law is clear, statements relating
17 to proposed litigation are absolutely privileged.

18 You can go to the next one.

19 Now, Your Honor, I'd ask that the Court
20 dismiss any and all claims from the individual
21 plaintiffs in this case. The Court -- in accordance
22 with what I gave you was, Mr. O'Dens said, consider
23 the First Amended Petition -- even though he's filed a
24 Second Amended, he said, consider the First Amended
25 Petition and my -- and Dr. Daniel's answer.

1 You'll note, under 27.006, what we
2 talked about, you've got to consider the affidavits in
3 the pleadings. In the pleadings that Mr. -- that the
4 plaintiffs would like you to consider, doesn't have
5 the defamatory statements; they lose as a matter of
6 law there.

7 Now --

8 THE COURT: Let me just cover that
9 right now. Does the Second Amended Petition attempt
10 to cure that argument?

11 MR. O'DENS: As far as detailing every
12 defamatory statement, no, it does not.

13 THE COURT: All right. So does it
14 matter that -- I mean, that I'm restricted to the
15 First Amended Petition?

16 MR. O'DENS: It does not. With respect
17 to the defamation claim, it has no relevance
18 whatsoever.

19 THE COURT: I just want to be clear
20 that wasn't going to be an issue.

21 Okay. Go ahead.

22 MR. BELL: Thank you, Your Honor.

23 And as you know, we talked about it,
24 the Court can consider affidavits. When you take the
25 First Amended Petition, you don't have what is

1 necessary in order to show a clear and specific claim
2 with resp -- there's no specificity with respect to
3 the defamation claim.

4 Now, in terms of affidavits, Your
5 Honor, the only affidavit before you is an affidavit
6 by Shannon McAnally, who is the corporate
7 representative -- the corporate representative for
8 MCC, the corporate plaintiff in this case. You don't
9 have affidavits from -- from Megan McAnally, John
10 McAnally, Shannon McAnally in her individual capacity,
11 or Nicholas Ryan Narramore, is my understanding.

12 As a result, Judge, I don't think the
13 Court has -- the Court can obviously -- I'm not
14 telling the Court how it should rule, but because
15 there lacks an evidentiary basis for any of these
16 alleged defamatory statements or libel or invasion of
17 privacy, because there's no affidavits from some of
18 the key plaintiffs in this case, their claims for
19 defamation, invasion of privacy, libel, and I think
20 they -- they even just yesterday added -- or three
21 days ago added an IIED -- intentional infliction of
22 emotional distress claim. No affidavit whatsoever.
23 No particularized injury, nothing in the pleading,
24 nothing about it.

25 I ask that the Court, at a minimum,

1 dismiss the individuals' claims as a matter of law and
2 as a matter of fact because there's nothing in the
3 evidentiary record to support it to show clear and
4 specific evidence of any kind of defamation, libel,
5 invasion of privacy, or intentional infliction of
6 emotional distress.

7 THE COURT: And again, you're saying
8 they have that burden because it shifted to them after
9 you've demonstrated that the subject matter's of
10 public concern?

11 MR. BELL: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. BELL: You know, we can talk about
14 the quasi judicial privilege; I think I've pretty much
15 covered it with judicial privilege.

16 THE COURT: What you're showing me here
17 on the screen, is that part of your --

18 MR. BELL: Yes, Your Honor.

19 THE COURT: -- responses, in the file,
20 this actual presentation?

21 MR. BELL: Yes, Your Honor.

22 THE COURT: Okay. Thank you.

23 MR. BELL: And there's a qualified
24 privilege. You know, we talked a little bit about
25 judicial privilege and how it's absolute. In this

1 circumstance, I'm talking about a qualified privilege.

2 A qualified privilege exists when there
3 are communications between folks that have a common
4 interest or a common business interest. You know,
5 employers want to make reports of misconduct about
6 their employees, et cetera.

7 A qualified privilege applies -- and
8 this is the Supreme Court -- to a communication made
9 when the author, the recipient, or a third person or
10 one of their family members has an interest that is
11 sufficiently affected by the communications.

12 It goes on to say that a qualified
13 privilege protects otherwise defamatory communications
14 made between persons who are in a business
15 relationship. There is no dispute, the plaintiffs
16 have judicially admitted that the plaintiffs and the
17 defendant are in a business relationship. Not only
18 are they in a business relationship, you'll see from
19 the defendant's pleadings, at one point there was a
20 personal four-year relationship between Megan McAnally
21 and Dr. Daniel.

22 You can go on to the next one.

23 So, just to shore that up, I think the
24 judicial privilege and the quasi privilege bar the
25 plaintiffs' claims as a matter of law, as well.

1 Now, there's been -- my client has made
2 reports to the FBI, to the IRS, to the police about
3 alleged misconduct on the part of -- rightly or
4 wrongfully, I would have told him not to do it, but it
5 is what it is -- but these reports, in and of
6 themselves, or blogging about them or talking about
7 them, how vile, how disgusting, how -- however you
8 want to couch it, it's nothing I would want my niece,
9 my nephew, my mother to see. Having said that, they
10 are nevertheless protected by the First Amendment. A
11 communication about a wrongful act to an official
12 enjoys a qualified privilege.

13 Now, here comes a different aspect of
14 the defendant's Motion to Dismiss under the TCPA.
15 The -- Dr. Daniel has lodged the defense of truth.
16 Truth of a published statement is an absolute complete
17 defense to a defamation claim.

18 Now, generally accepted Texas
19 jurisprudence principles is, if you bring up truth as
20 defense, you bear the burden of it. In this
21 particular case, Your Honor, I would offer to the
22 Court and suggest to the Court that in this particular
23 circumstance, Dr. Daniel doesn't bear the burden on
24 truth as a defense.

25 Now --

1 THE COURT: You mean under the statute
2 or under the defamation cause of action?

3 MR. BELL: Under the statute. Here's
4 why -- and defamation cause of action.

5 It's my understanding, based on my
6 research of the law, the plaintiffs bear the burden,
7 not the defendant. And here it is, Judge -- there's
8 some Supreme Court cases here -- although truth is
9 generally referred to as a defense, in a defamation
10 suit regarding a matter of public concern -- those are
11 the magic words -- in a defamation suit regarding a
12 matter of public concern, the plaintiff bears the
13 burden of showing falsity.

14 And that's *KBMT V Toledo*, and that's a
15 Supreme Court case, Texas Supreme Court, 1257, it's
16 also *Neely V Wilson*, 418 S.W.3d 52 at 62, at note 12;
17 that's a Texas 2000 -- Supreme Court 2013 case.
18 There's *McIlvain V Jacobs*, 794 S.W.2d 14. And there's
19 a Dallas case, *Rogers V The Dallas Morning News*, 889
20 S.W.2d 467.

21 In these circumstances and in these
22 cases, what would otherwise be considered the
23 defendant's burden to show that truth is an
24 affirmative defense, in this particular case, it is
25 the plaintiffs' burden to show the false -- the

1 alleged falsity of any statements of -- of the
2 defendant because it is a matter -- undisputedly, a
3 matter involving public concern.

4 THE COURT: So if the construction --
5 proper construction of the facility is a matter of
6 public concern, that opens up the -- any side to say
7 anything about any person involved, no matter how
8 unrelated it is to the construction? I mean, that's
9 the key. You said it shifts the burden, it has to be
10 a matter of public concern. Doesn't it have to do
11 with what the statement is about?

12 Can they say anything as long as it
13 somehow relates back to the construction issue?
14 That's my question.

15 MR. BELL: If it involves a matter of
16 public concern. And those words are taken straight
17 out of the statute.

18 THE COURT: Okay. And given that, the
19 construction of the facility, if we agree that
20 involves a matter of public concern, you're telling me
21 that opens up either side of the lawsuit to say
22 anything about any person involved, no matter how
23 personal or how unrelated it is to the construction?

24 MR. BELL: I think you're right. I --

25 THE COURT: I don't know if I'm right

1 or not, I just ask the question.

2 MR. BELL: I think -- the question, as
3 posed, the answer would be no. I --

4 THE COURT: Right.

5 MR. BELL: But I think -- the issue
6 of -- of the building is not the matter of public
7 concern.

8 THE COURT: And tell me what it is.

9 MR. BELL: I think it's the ability to
10 post something about somebody that leases goods,
11 markets materials, being able to publish about
12 somebody that can build a building --

13 THE COURT: Right.

14 MR. BELL: -- in the marketplace.

15 THE COURT: But doesn't it have to be
16 related to the construction?

17 MR. BELL: Yes.

18 THE COURT: Can it be any subject
19 matter?

20 MR. BELL: No, I think it has to relate
21 or somehow be tied to the construction.

22 THE COURT: Okay.

23 MR. BELL: Go ahead.

24 Now, Your Honor, when Mr. O'Dens
25 presents his argument, I'd like -- I think the Court

1 will find -- although the only evidence that should be
2 considered is the First Amended and my answer, the
3 only -- any statements, if any, that Mr. O'Dens brings
4 up is -- relate to matters of opinion, not fact. And
5 opinions obviously are not actionable.

6 THE COURT: Well, I assume what he's
7 going to bring up are -- I haven't looked at this so I
8 don't know exactly what these statements are, but I
9 assume they're in his affidavits or his pleadings?

10 MR. O'DENS: They are, Your Honor.

11 THE COURT: And that's required?

12 MR. O'DENS: Absolutely.

13 THE COURT: Okay. And you're saying
14 some of that shouldn't necessarily be taken as fact;
15 it's opinion, is that your --

16 MR. BELL: That's right, number one.

17 And I have a motion -- objections and
18 motion to strike because I think a lot of what he said
19 is based on hearsay, but we'll address that when we
20 get there.

21 Go ahead.

22 Judge, I think by now I've belabored
23 the point about what the rule is.

24 Is there any more slides? There isn't?
25 Oh, that's the *Krantz* case, which is analogous. Can

1 you go next? A few more.

2 Okay. Go ahead. Keep going. Keep
3 going. Go ahead. Go ahead. You can go to the next
4 one, sorry. You can go to the next one. Go to the
5 next one. Go ahead. Go ahead. Go ahead. Next one.

6 So, Judge, the only two questions is,
7 what is the clear and specific evidence -- and I'll
8 leave you with this: What is the clear and specific
9 evidence, which is a heightened evidentiary standard,
10 of the plaintiffs' claims against Dr. Daniel.

11 I believe, based on the plaintiffs
12 boxing themselves into two pleadings, what the Court
13 should consider -- that's what they've asked the Court
14 to consider -- that they've got absolutely zero
15 evidence, and they failed to establish by clear and
16 specific evidence a prima fascia case against -- for
17 each and every essential element of the claim against
18 Dr. Daniel.

19 And -- yeah, that's fine. Go ahead.

20 Thank you, Your Honor. Thank you very
21 much.

22 THE COURT: All right. Counsel.

23 MR. O'DENS: Yes, Judge Hall.

24 Let me begin, initially, by talking
25 about the Anti-SLAPP Statute and what we're here on.

1 Prior to last year --

2 I'd like you to keep that slide up, if
3 you would, please.

4 MR. BELL: Sure.

5 MR. O'DENS: Prior to last year, there
6 was a lot of confusion among the Courts of Appeal as
7 to what the Legislature intended.

8 THE COURT: Wait a minute.

9 MR. O'DENS: That's fine. That's the
10 slide.

11 THE COURT: Go ahead.

12 MR. O'DENS: Prior to last year, there
13 was a lot of confusion among the Courts of Appeal as
14 to what the legislature meant when they said a party
15 has to establish a prima fascia case by clear and
16 specific evidence.

17 Some Courts of Appeal said that wasn't
18 the evidentiary standard. That was higher than the
19 typical motion practice. Some Courts said it wasn't.
20 And you'll notice in the last slide, if plaintiffs
21 failed to establish by clear and specific evidence
22 satisfaction of an elevated evidentiary standard.
23 Well, that might have been the law, it's not anymore.

24 May I approach?

25 THE COURT: Yes, sir.

1 MR. O'DENS: Your Honor, in *Lipsky*, the
2 Texas Supreme Court specifically addressed this
3 problem under the Anti-SLAPP Statute.

4 Remember, a motion to dismiss under the
5 Anti-SLAPP Statute is supposed to be an expedited
6 summary proceeding, it's supposed to happen quickly,
7 subject to an interlocutory appeal, and it's supposed
8 to resolve cases that are designed to squash people's
9 First Amendment right, but not eliminate meritorious
10 claims for defamation.

11 And it is a summary proceeding without
12 the benefit of discovery. The Statute specifically
13 prohibits my clients from conducting any discovery
14 during the period, absent seeking relief from the
15 Court, and it's based solely upon the pleadings and
16 the evidence being submitted in response to the
17 motion.

18 And what the Supreme Court ruled in
19 *Lipsky* was very clear. The Anti-SLAPP Statute does
20 not impose an elevated evidentiary standard. The
21 Court specifically held that.

22 It went on to say that in a prima
23 fascia case, in order to defeat a motion to dismiss
24 under the Anti-SLAPP Statute, all that's required is
25 the minimum quantum of evidence necessary to support a

1 rational inference that the allegation of fact is
2 true. The Court also noticed that the Court is to
3 consider the pleadings. And notice pleading is
4 sufficient in order to defeat a motion to dismiss
5 under the Anti-SLAPP Statute.

6 So all of the standards that Mr. James
7 just talked about -- the elevated standard, you have
8 to have all this evidence -- the Texas Supreme Court
9 has ruled last year is not a requirement.

10 Let's also be clear that no matter how
11 you cloak the First Amendment, the First Amendment
12 does not protect defamation. Regardless of what the
13 First Amendment provides, if you defame someone, you
14 can be held responsible for it. And while it's true
15 that the burden is higher involving public officials,
16 when it involves individuals, they only need to
17 establish negligence.

18 Now, at the early stage of this case,
19 what we have in the record is very clear. Dr. Daniel
20 has made outlandish, outrageous, and offensive
21 publicized statements that are the outgrowth of the
22 failed business deal.

23 What we are talking about, Your Honor,
24 is that Dr. Daniel -- and this is the evidence that's
25 been submitted to the Court; in fact, the posting is

1 attached to the Motion to Dismiss -- Dr. Daniel
2 created a website to go out and to publicly expose MCC
3 and my clients to public hatred and ridicule. It's a
4 published statement on the Internet.

5 Clearly, the first element is going to
6 be met. He did so by posting this website through
7 social media sites and emails that he engaged in.

8 Now, defamation is not measured by a
9 single statement; it's measured by the context of all
10 of the statements. And in fact, statements that are
11 not necessarily defamatory in and of themselves, when
12 viewed in the entire context, can result in
13 defamation. To make it clear, Your Honor, at this
14 point, we're not arguing defamation other than per se.

15 Now, the elements for defamation are:
16 One, publication of a false statement; number two,
17 it's defamatory concerning a plaintiff; number three,
18 there is a requisite degree of fault involved; and
19 number four, there are damages.

20 There are two forms of libel. All of
21 these are written, defamation generically. Under the
22 statutory provision for libel per se: If you injure a
23 person's reputation; if you impeach a person's
24 honesty, integrity, virtue or reputation, that is
25 liable per se.

1 Under the common law, if you injure a
2 person's -- in their occupation, you accuse them of a
3 crime, or of sexual misconduct, that is defamation per
4 se.

5 Words which cause a charge of
6 dishonesty or fraud are libel per se. That was *The*
7 *State Medical Association versus The Committee For*
8 *Chiropractic Care* from the Galveston Court of Appeals
9 in 1951, and at the end, I'll provide the Court with
10 all the authority.

11 You can take that down now. Thank you.

12 I also have two cases for the Court to
13 consider -- one involving Anti-SLAPP Statute out of
14 the Dallas Court of Appeals -- that talk about these
15 very specific issues, in which they say that, if you
16 injure someone in their occupation, then you can be
17 held responsible for defamation per se, but you look
18 at everything in context. And again, I'll provide
19 those cases to the Court to consider.

20 So what do we have? Dr. Daniel created
21 this website where he went to complain about the
22 quality of work, supposedly, involving my clients.

23 Number one, he published it. He
24 concedes that. In his Motion to Dismiss on page 2,
25 paragraph 5, he says, I created this website. In

1 fact, he attaches it to his Motion to Dismiss, because
2 he says, all of that is protected by the First
3 Amendment.

4 Second, the statements are false. Now,
5 I disagree with Mr. James, again -- and I'm sorry,
6 Your Honor, I do not have the case this afternoon,
7 I'll be happy to supplement it with the Court. There
8 is a split among the Court of Appeals on whether or
9 not in a defamation per se case whether the plaintiff
10 is required to establish the falsity of the
11 statements. Some of the Courts of Appeals have said
12 no, because it's defamatory per se, you don't have to
13 establish the falsity of it, it's presumed. If you
14 accuse someone of a crime, if you accuse someone of
15 sexual misconduct, you don't have to come out and say
16 that's false. Some Courts have said, yes, you still
17 have to meet that burden.

18 The last time the Dallas Court of
19 Appeals addressed this issue, it doesn't decide the
20 issue. In a footnote, the Court said we don't have to
21 decide it because there's an affidavit on file that
22 says the statements are false so we don't have to meet
23 that burden.

24 In this case, Ms. McAnally's affidavit,
25 at page 6 of her affidavit, paragraph 12, she

1 testifies that the statements on the website are
2 false. So we've met that requirement as it is.

3 The fact that truth is a defense, that
4 burden belongs to Dr. Daniel. We're not required to
5 prove that the statements are true or not true.
6 That's the defense.

7 And note, Dr. Daniel's offered not one
8 shred of evidence other than giving the Court his
9 website that he posted. Doesn't offer a shred of
10 evidence that anything he says on his website is true.
11 It's not an issue in the anti-SLAPP motion because
12 that burden remains with Dr. Daniel.

13 So were the statements about the
14 plaintiffs? Again, Dr. Daniel concedes that. He
15 recognizes his website addresses MCC and all the
16 individual plaintiffs in the case; that's at page 2,
17 paragraph 5. And it's undisputed. It's also
18 undisputed that his avowed intent is to do everything
19 he can to destroy MCC and the plaintiffs.

20 Your Honor, attached to our response,
21 Exhibit A3, is an email Dr. Daniel sent to John
22 McAnally, copy to Shannon McAnally. I'm going to read
23 a portion of this, Your Honor. And again, I apologize
24 up front for the language being used.

25 Dr. Daniel says: I will spend my

1 entire life suing you and Ryan Narramore until you are
2 both bankrupt. I will do anything I can to throw you,
3 your wife, and your daughters in prison for
4 disadvantaged business fraud, material overcharging,
5 product substitutions, general fraud, deceptive trade
6 practices, false advertising, and wire fraud --

7 By the way, Your Honor, there
8 aren't any counterclaims pending in this case, nor are
9 there any counterclaims pending in the Denton County
10 case.

11 -- all of which are felonies. The FBI
12 and the IRS and the U.S. Department of Transportation
13 is already investigating you. The public already
14 knows of your deceptive, and I will push my rights and
15 will never stop until you are no longer in business.
16 If I get an opportunity to press charges on any of you
17 pieces of human shit, I will in a heartbeat, and then
18 visit you in prison. I will donate every dime I make
19 off your ignorant, slimy company to charity for kids
20 who cut themselves, for kids of absent fathers who rip
21 off people for a living, or kids of parents who are
22 pieces of shit. If those don't exist, I will just
23 burn my winnings in the street with a sign that reads,
24 MCC is a sham and John McAnally is a pussy.

25 It gets worse after that, Your Honor,

1 and it's attached.

2 His avowed statements are to do
3 everything he can. So what has been published?

4 MR. BELL: What was defamatory about
5 that?

6 THE COURT: I'll let you respond after
7 he's finished.

8 MR. BELL: Thanks, Your Honor.

9 MR. O'DENS: Your Honor, in our
10 response we have set forth specific references to Dr.
11 Daniel's website. Those references are contained on
12 pages 10 through 13 of the response, in paragraphs 23
13 to 24, and page 15 of the response of paragraph 28.

14 What we did, Your Honor, was to
15 reproduce Dr. Daniel's website as it existed. It's
16 hard, because of the color, to read. We then created
17 a white version of that, and so there are specific
18 references that the Court can look at for the
19 accusations.

20 What does Dr. Daniel say? With respect
21 to the plaintiffs, he accuses them of criminal
22 activity. He specifically accuses them of engaging in
23 fraud and wire fraud.

24 Moreover, he accuses the plaintiffs of
25 sexual misconduct. For example, he accuses Ms.

1 McAnally of cheating on every man she's ever known,
2 for being sexually potentially permissive at the age
3 of 12; it is beyond the pale, Your Honor, and they're
4 all set out in the response.

5 He goes forward to accuse MCC of
6 professional misconduct, lying to its clients. In
7 fact, at one point, he accuses MCC of stealing from
8 its clients. There are accusations -- and they're all
9 set forth in the response, Your Honor -- from his
10 website, and nothing more. Accusations of drug use,
11 tax evasion, racism, bigotry, nepotism. He calls the
12 plaintiffs arrogant, stupid, liars, and manipulators.

13 Now, I am the first to acknowledge to
14 the Court that not every one of those statements is
15 defamatory in and of itself. But what the Dallas
16 Court of Appeals has made clear is, is that in the
17 context of the entirety of the communication, there
18 can be words that are used that are not defamatory,
19 but in context, become defamatory.

20 It is clear that Dr. Daniel is intent
21 on destroying the business of MCC. That is defamation
22 and libel per se, both statutorily and at common law.

23 What's ironic is, Dr. Daniel professes
24 in his Motion to Dismiss that all he was doing was
25 commenting on the quality of MCC's workmanship and

1 their professionalism. Calling someone a liar,
2 calling them a tax cheat, calling them sexually
3 permissive, those are not the communications that
4 relate to addressing an issue of, quote, unquote,
5 public concern about the quality of their work. It
6 rings all too hollow, and Dr. Daniel offers no
7 evidence to support any of his outrageous allegations.

8 So then the question becomes, what's
9 the next element? We have to show some degree of
10 fault on behalf of Dr. Daniel. We've done that.
11 Exhibit A3 clearly demonstrates his avowed intent to
12 do anything he can in order to destroy this business
13 because he's upset. In fact, in that exhibit, he goes
14 on to say that not only does he want to sue them
15 through the courts, he says, I want social justice
16 over MCC and Associates, McAnally Construction
17 Company.

18 MR. BELL: Do you have an extra copy of
19 that?

20 MR. O'DENS: It's attached to the
21 response. I'm done with it, you can have my
22 highlighted copy.

23 MR. BELL: Sorry, Your Honor.

24 THE COURT: Are you finished?

25 MR. O'DENS: I'm not, Your Honor, I

1 have a few more points.

2 Now, this is where it gets interesting,
3 Your Honor. And finally, we get to damages, and we
4 don't have to prove anything on damages, because if
5 it's defamatory per se, damages are presumed. *Lipsky*
6 even goes there because that's the same thing in that
7 case.

8 So what do we have? He accuses all of
9 the plaintiffs being under investigation for fraud;
10 that's defamatory per se. He says that they're under
11 investigation by the Department of Justice, the FBI,
12 the Department of Transportation, the Texas Department
13 of Transportation, and the IRS; that's included in his
14 website.

15 And you heard Mr. James say, well, he's
16 reported them. We don't know that. We have no idea.
17 He hasn't offered any evidence that he's made such
18 reports. That's the whole point of an anti-SLAPP
19 motion, is that you only have to cross the threshold
20 of a prima facie case.

21 He's accused Shannon McAnally of sexual
22 misconduct, cheating on boyfriends, transmitting
23 sexually transmitted diseases, drug use, and money
24 laundering. He's accused Megan McAnally of sexual
25 misconduct. He's accused John McAnally of stealing

1 from his clients, and he's accused Ryan Narramore of
2 drug use, for which he could be prosecuted, and felony
3 fraud and wire fraud. All of these are beyond the
4 pale. The First Amendment does not protect someone's
5 right to defame someone. It never has.

6 Let me address a couple of points
7 raised by Mr. James. He talks about the Denton County
8 case. The only reason the Denton County case is
9 pending is because that's where the property is and
10 the M&M lien has to be there.

11 Second of all, this idea that simply
12 because a lawsuit is pending, you get to go out into
13 the public and say anything you want and it's
14 protected by judicial privilege? That doesn't work.
15 The only protection is for statements made in
16 pleadings and for testimony in court. So what I say
17 in this court is protected, but if I walk outside this
18 court and I disparage this Court, I'm subject to the
19 laws of defamation.

20 THE COURT: So y'all have a pretty wide
21 disagreement on that issue; in other words, that's
22 what I asked earlier, it has to be made in court or in
23 deposition or in a pleading --

24 MR. O'DENS: Correct.

25 THE COURT: -- in the actual judicial

1 proceeding; you think that's true?

2 MR. O'DENS: That is absolutely true,
3 Your Honor.

4 THE COURT: You think if it's related
5 to it, even if it's made outside of that framework,
6 that it still can be protected?

7 MR. BELL: Of course. Otherwise, every
8 lawyer in the state of Texas or across the United
9 States would never, never send a demand letter, never
10 send a cease and desist letter. So --

11 THE COURT: Well, those are not
12 generally defamatory letters, are they?

13 MR. BELL: They can be, if you're
14 accusing somebody of misconduct and you're telling
15 them to stop. There's no -- of course, the judicial
16 privilege does not relate to anything that happens in
17 the courtroom. If there is a case on file -- just
18 like the newspaper, Your Honor, if the newspaper
19 publishes a pleading in this court and publishes it
20 outside the court, is that judicial? Of course it is.
21 Of course it's privileged.

22 So it doesn't -- it is not constrained
23 by these Courts. And I'm happy to brief that issue
24 for the Court.

25 THE COURT: It's privileged because

1 it's quoting something that happened within the
2 judicial proceeding.

3 MR. O'DENS: Correct.

4 MR. BELL: But anything relating to or
5 rising out. And I showed --

6 THE COURT: I'll look at the case you
7 gave me. I think you gave me several.

8 MR. BELL: Okay. And I'm happy to
9 write a quick letter brief, Your Honor, if that's what
10 you'd like.

11 THE COURT: It depends.

12 I mean, go ahead and finish yours, and
13 then I'll let you respond.

14 MR. BELL: Yes, Your Honor.

15 MR. O'DENS: The privilege has never
16 extended to anything else either than an official
17 proceeding, it never has.

18 The fact that there's a lawsuit pending
19 does not allow the parties to go out and say whatever
20 they want. It allows them the ability to come into
21 court, to make statements before the Court, to testify
22 in court, without the fear of being sued for
23 defamation.

24 Because that's where we're supposed to
25 resolve these disputes. We're supposed to resolve

1 them in a court of law. We're not supposed to resolve
2 these disputes on the Internet, by creating websites
3 about an entity, and then accusing them of all sorts
4 of things that would injure them in their business,
5 injure them in their occupation, and besmirch their
6 reputation. That's what defamation is designed to
7 protect.

8 I also want to make clear, because
9 Mr. James says this is all in the context of a
10 business relationship. That business relationship
11 terminated. Dr. Daniel fired MCC. There is no
12 business relationship. And that's at page 4,
13 paragraph 19 of the First Amended Petition. So there
14 is no business relationship to attach. And
15 regardless, it does -- even if you have a business
16 relationship, it doesn't give you the right to go out
17 and accuse somebody, in public, of committing a crime,
18 of sexual impropriety, or disparage them for their
19 honesty, their integrity, or in their occupation.

20 At this stage of the game, it is only
21 necessary that a prima facie case of defamation be
22 established, and we've established every one of those
23 elements. This case needs to go forward. We need to
24 have the ability to conduct discovery and to have 12
25 citizens sitting in the box make a decision whether

1 Dr. Daniel defamed the plaintiffs.

2 THE COURT: Counsel.

3 MR. BELL: May it please the Court.

4 THE COURT: Sure.

5 MR. BELL: I just want to -- just so
6 that the record is clear. Does the plaintiffs rest?

7 THE COURT: I mean, you've -- you've
8 completed your response at this stage?

9 MR. O'DENS: I've completed my response
10 at this stage.

11 THE COURT: All right. I'll let you
12 respond to their response.

13 MR. BELL: Thank you, Your Honor. I'm
14 just trying to protect whatever record we have, is the
15 reason being.

16 I'm going to first start out with the
17 following. The Anti-SLAPP Statute applies to the
18 additional claims: The IIED claim, and the invasion
19 of privacy claim that was filed in the Second Amended
20 Petition. Before the Court, Your Honor, there is
21 absolutely zero, I mean goose egg evidence of any sort
22 of damages on IIED and -- intentional infliction of
23 emotional distress -- I'm sorry, intentional
24 infliction of emotional distress and invasion of
25 privacy. A goose egg of evidence.

1 The Courts are clear that claims like
2 IIED, invasion of privacy, tortious interference with
3 a contract, all fall within the purview of the Texas
4 Citizens Participation Act. Yet heard, Mr. O'Dens
5 addressed that issue.

6 THE COURT: Are those included in the
7 Second Amended Petition?

8 MR. O'DENS: They're new claims in the
9 Second.

10 THE COURT: They're new claims?

11 MR. O'DENS: Yes.

12 THE COURT: So this Motion to Dismiss
13 doesn't relate to those?

14 MR. BELL: I filed -- well, it does in
15 the sense that I filed -- I mean, it wouldn't -- I
16 filed a second -- a supplemental.

17 THE COURT: When?

18 MR. BELL: Last night, because it was
19 just filed on the 25th. I understand that -- I
20 understand why you would scratch your head, Judge.
21 Just hear me out just for one second.

22 THE COURT: I mean, it can go on and on
23 and on. I mean, I'm trying to figure out -- I want to
24 get it all resolved that -- I mean, I assume Mr.
25 O'Dens will agree with you that if he just filed that

1 Second Amended Petition, he may not have filed an
2 affidavit that presents any evidence regarding it, but
3 I think it's his assumption that it didn't apply to
4 this Motion.

5 MR. BELL: Yeah, but --

6 THE COURT: I don't know if it did or
7 didn't, but...

8 MR. BELL: It does apply. That's
9 what -- that's what the case law says.

10 So, basically stated differently, what
11 the -- what Mr. O'Dens would force me to do, okay, is
12 file another anti-SLAPP motion, we're going to get
13 another --

14 THE COURT: On those two causes of
15 action.

16 MR. BELL: That's right. And the law
17 is clear on that, the Courts want it heard in an
18 expedited fashion, he should have brought those
19 claims, they all arise out of and relate to the same
20 facts, Your Honor. There is no dispute about that.
21 And so, those -- those claims should be part of
22 this -- that's why I had to file a second supplement
23 to the Motion to Dismiss because it's being heard
24 today.

25 If the Court is telling me, hey, James,

1 I'm not hearing -- James, I'm not hearing it, you need
2 to file another Motion to Dismiss.

3 THE COURT: I don't know what the
4 statute requires, but it strikes me that, if you just
5 filed that last night, you may not have given them
6 notice and given him time to file any affidavits. And
7 your answer is going to be, well, he should have filed
8 all that before because he knew this was pending, he
9 shouldn't have filed a Second Amended Petition with no
10 affidavits.

11 MR. BELL: If you look at the two,
12 Judge --

13 THE COURT: So I don't want to get hung
14 up on that, but, I mean, are you asking me to dismiss
15 individual claims that were just filed?

16 Mr. O'Dens, how would you address that?

17 MR. O'DENS: Yes, Your Honor. First of
18 all, it was filed last night.

19 Second of all, I couldn't file it. We
20 had an agreement under a Rule 11 to abate everything
21 until January the 15th, so I was prohibited from
22 filing anything.

23 Moreover, I would also point out that
24 the intentional --

25 MR. BELL: He filed it -- I'm sorry for

1 interrupting.

2 THE COURT: Hold on, hold on.

3 MR. O'DENS: The intentional infliction
4 claim has nothing to do with public statements. If
5 you read the intentional infliction, it says that Dr.
6 Daniel has engaged in the systematic campaign of
7 written communication with plaintiffs that are
8 outrageous. That's where -- the intentional
9 infliction. It has nothing to do with what he's
10 posting on the Internet, has nothing else to do --

11 THE COURT: So that's not a defamation
12 claim?

13 MR. O'DENS: It's not a defa --

14 THE COURT: What about the invasion of
15 privacy?

16 MR. O'DENS: The invasion of privacy,
17 Your Honor -- and this is the most absurd thing in
18 this case. Despite everything Dr. Daniel has done, he
19 has fabricated the testimonial by Shannon McAnally on
20 his website where Shannon McAnally allegedly says,
21 he's the greatest dentist there is. Ms. McAnally
22 never authorized that. He doesn't have a First
23 Amendment right to speak for Ms. McAnally.

24 And it's an invasion of privacy to
25 misappropriate someone's name for your own benefit.

1 That has nothing to do with free speech. That has
2 nothing to do with the anti-SLAPP motion. It's an
3 independent claim for invasion of privacy.

4 THE COURT: Okay. Counsel.

5 MR. BELL: Yes, Your Honor. May I
6 approach the Bench?

7 THE COURT: Sure.

8 MR. BELL: Do you have the First
9 Amended Petition? I think I gave you my only copy,
10 Your Honor. I'm sorry, I didn't ask you if I can
11 approach.

12 THE COURT: That's okay.

13 MR. BELL: May I approach?

14 THE COURT: Sure.

15 MR. BELL: Thank you, Your Honor.
16 Thank you. May I be excused?

17 THE COURT: Yes, sir.

18 MR. BELL: So, Judge, the facts
19 relating to -- I think you'll note the facts relating
20 to the fact section between the Second Amended, if
21 you'll just take a look, and the First Amended, the
22 facts are almost identical that give rise to the
23 claims. And so, just for purposes of the record, I
24 want to make it clear, I'm asking the Court to dismiss
25 the intentional infliction of emotional distress claim

1 and the invasion of privacy claim. They fall within
2 the purview of the Texas Citizens Participation Act.

3 The Legislature and the Courts have
4 held that -- basically, what would happen is, if -- if
5 Mr. O'Dens was right, if you think about it, what he
6 would -- what he could do is file a defamation claim,
7 and then get up to a hearing after we've stayed
8 discovery for 60 days or 90 days, nonsuit it, file an
9 amended petition, add a claim for libel, stay
10 discovery for another 90 days, or whatever the case,
11 nonsuit it, add a claim for slander, so on and so
12 forth.

13 THE COURT: Those are all defamation
14 cases. I think what I understood him to say is that
15 these don't fall under defamation; invasion of privacy
16 and infliction of emotional distress is directly
17 related directly to a party.

18 Is that what you're arguing?

19 MR. O'DENS: Yes, Your Honor.

20 THE COURT: Okay.

21 MR. BELL: The problem -- may I?

22 THE COURT: Yes, sir, go ahead.

23 MR. BELL: The problem is, is the Texas
24 Citizens Participation Act specifically covers
25 claims -- if you look in -- for example, Judge, if

1 you -- the Yancey -- not Yancey case, Amy
2 Yancey was -- or Yancey was the lawyer in the Krantz
3 case out of Dallas. If you'll look at that case, Your
4 Honor, where it's very analogous. I mean, we're
5 talking with a construction and a review on the
6 Internet. In that case, the court dismissed the
7 intentional infliction of emotional distress claim and
8 the defamation claim.

9 And as far as the Second Amended
10 Petition, Judge -- may I approach just one more time,
11 Judge --

12 THE COURT: Yes, sir.

13 MR. BELL: -- and give you the First
14 Amended?

15 THE COURT: Yes, sir.

16 MR. BELL: Sorry, Your Honor. Because
17 if I'm wrong, I'm wrong. May I approach?

18 THE COURT: Yes.

19 MR. BELL: Okay. Paragraphs 9 and 10
20 are the same out of the First and the Second, Your
21 Honor. Paragraphs 14, 15, 16, 17 are all the same.
22 Eighteen is a little bit different, just more abusive,
23 but very, very similar, 95 percent similar. Nineteen
24 is almost the same. Twenty is the exact same.
25 Twenty-one is almost the exact same.

1 Okay. Your Honor, if you'll look,
2 okay, at Defendant's Exhibit 6, Your Honor -- and I
3 don't mean to crowd your space.

4 THE COURT: Which one is it?

5 MR. BELL: It's right here, Your Honor,
6 I'm sorry. That would be the First Amended Petition.

7 THE COURT: Uh-huh.

8 MR. BELL: And Mr. O'Dens said that
9 their new claims -- the new claims were added, the
10 IIED claim and the invasion of privacy claim. If
11 you'll look at these two petitions side by side, Your
12 Honor, I promise you you're going to find almost, I'd
13 say, 95 to 98 percent the exact same claims. In the
14 fact section, I'm going to say it's 99 percent the
15 exact same.

16 So, what I'm saying is, the very
17 facts -- and I don't think Mr. O'Dens will dispute
18 that -- the very facts that give rise to the
19 defamation claim are the very facts that give rise to
20 the IIED and the invasion of privacy. Therefore,
21 given the fact we filed a supplement to include his
22 recently amended petition, the intentional infliction
23 of emotional distress claim and the invasion of
24 privacy claim ought to be dismissed as a matter of
25 law. The -- no evidence in the record, none, no

1 evidence of damages, no -- no clear and specific
2 evidence of damages.

3 Now, there's no -- there's been no
4 evidence of any falsity with respect to any alleged
5 statements made by Dr. Daniel.

6 Now, unfortunately, there is a little
7 bit of a personal dispute. And I will give you a
8 little bit of color, it's not for evidentiary reasons,
9 but just a little bit of color for Your Honor. They
10 dated for four years. There are videos between the
11 two of them. They had engaged in different activities
12 in Las Vegas, and different things.

13 Ms. McAnally, believe it or not, Your
14 Honor -- this is going to change, I think, your
15 analysis when I know you go back into chambers and
16 you're reviewing all this to try to make sense of
17 it -- was formerly Miss Virginia, which makes her a
18 public figure. And, so -- and held herself out as
19 Miss Virginia, and where's the pageant, and so on.
20 But be that as it may, maybe it comes out later on in
21 a different part, and hopefully it doesn't and you
22 grant my motion -- my client's motion.

23 But based on the record before you, the
24 evidentiary record before Your Honor, I believe
25 that -- that the Court, in this particular

1 circumstance, even Mr. O'Dens' demonstrative about
2 what my client has said, is proof in and of itself
3 that there was nothing defamatory. It was opinion.
4 It was related to a business. There's qualified
5 privilege. There's judicial privilege. I'm happy to
6 brief that issue.

7 This case is a case like the Krantz
8 case out of Dallas whereby you have things posted on
9 the Internet, blogs, websites -- we don't know who all
10 posted what -- but in terms of -- terms of what the
11 law is, I respectfully request that the Court grant
12 this Motion to Dismiss, Your Honor, based on the
13 record before you.

14 THE COURT: All right. Anything else?

15 MR. O'DENS: No, for the record, Your
16 Honor, the anti-SLAPP motion didn't ever address the
17 Second Amended Petition, it only addressed the
18 defamation claim.

19 THE COURT: Okay. Question: This
20 Statute -- in other words, y'all have done no
21 discovery because the Statute --

22 MR. O'DENS: Prohibits it.

23 THE COURT: -- prohibits it, not unless
24 it's court ordered?

25 MR. O'DENS: Correct.

1 MR. BELL: Unless somebody files a
2 motion, shows good cause, and then you order it,
3 that's right.

4 THE COURT: Okay. And it's a -- it's a
5 summary statute in order to try to stop litigation at
6 an early stage; agreed?

7 MR. O'DENS: Correct.

8 THE COURT: It doesn't have anything to
9 do -- it's not a summary judgment, per se, it doesn't
10 foreclose anybody filing a summary judgment, correct?

11 MR. O'DENS: That's correct.

12 THE COURT: It's not related to Rule
13 91A, although it's similar?

14 MR. O'DENS: After *Lipsky*, it's pretty
15 close to it.

16 THE COURT: All right. Well, I guess
17 what I need to do, gentlemen, is read the cases that
18 you've given me, and read my notes, and try to put
19 together what you've argued here today. And if I have
20 any questions, I'll call you on a joint telephone
21 conference. If not, I'll just send you a ruling.

22 You think I have 30 days to do that?

23 MR. O'DENS: You have 30 days, Your
24 Honor.

25 MR. BELL: Yes, Your Honor.

1 MR. O'DENS: The Houston --

2 THE COURT: All right.

3 MR. O'DENS: -- Court of Appeals has
4 held that the 30 days is mandatory, and Dallas has
5 adopted it.

6 THE COURT: Okay.

7 MR. O'DENS: And here are two of the
8 Dallas cases I referenced.

9 THE COURT: All right.

10 MR. BELL: Thank you, Your Honor.

11 MR. O'DENS: Thank you, Your Honor.

12 (Proceedings concluded.)

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1 STATE OF TEXAS)

2 COUNTY OF ROCKWALL)

3 I, Linda A. Kaiser, Official Court
4 Reporter in and for the 382nd District Court of
5 Rockwall County, State of Texas, do hereby certify
6 that the above and foregoing contains a true and
7 correct transcription of all portions of evidence
8 and other proceedings requested in writing by
9 counsel for the parties to be included in this
10 volume of the Reporter's Record in the above-styled
11 and numbered cause, all of which occurred in open
12 court or in chambers and were reported by me.

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

17 I further certify that the total cost for
18 the preparation of this Reporter's Record is \$384.00
19 and was paid by the Defendant.

20

21 WITNESS MY OFFICIAL HAND on this, the 16th
22 day of February, 2017.

23

24

25 ___/s/ Linda A. Kaiser
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Expiration: 12/31/2017

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