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NO. 471-03472-2022

HENRY MISHKOFF,	§	**IN THE DISTRICT COURT**
PLAINTIFF,	§	
	§	
V.	§	
	§	**471ST JUDICIAL DISTRICT**
T. CHASE GARRETT,	§	
SCHEEF & STONE, LLP, AND	§	
SONIA BRYANT,	§	
DEFENDANTS.	§	**COLLIN COUNTY, TEXAS**

PLAINTIFF'S RESPONSE TO DEFENDANTS' AMENDED MOTION TO DISMISS PURSUANT TO THE TEXAS CITIZENS PARTICIPATION ACT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Henry Mishkoff now files this Response to Defendants' Amended Motion to Dismiss Pursuant to Chapter 27 of the Texas Civil Practice and Remedies Code (the "Texas Citizens Participation Act," or the "TCPA"), and in support thereof, would respectfully show the Court as follows.

I. INTRODUCTION

In their motion to dismiss Plaintiff's Libel Complaint pursuant to the provisions of the TCPA (the "Motion to Dismiss"), Defendants raise three primary issues.

(1) Defendants claim that Plaintiff violated Defendants' "Fundamental Right to Petition," as safeguarded by the TCPA.

(2) Defendants claim that their accusation that Plaintiff is a sex offender is "absolutely privileged" because it was made in a judicial proceeding.

(3) Defendants claim that the doctrine of Attorney Immunity shields the lawyers among them from any potential liability that they might otherwise incur as a result of their contention that Plaintiff is a sex offender, because that doctrine protects them from repercussions for "actions taken in connection with representing a client in litigation."

In this Response, Plaintiff will show that Defendants' claim that Plaintiff's Libel Petition violated the provisions of the TCPA is totally without merit. Plaintiff will also show that Defendants' contention that they are protected by the Judicial Proceedings Privilege and Attorney Immunity is nothing more than a cynical attempt to shield themselves from having to face the consequences of their defamation by hiding behind the protections offered by those doctrines, thereby threatening to cheapen the values of those critically important societal protections.

II. THE RIGHT TO PETITION

Chapter 27 of the Texas Civil Practice and Remedies Code (the "Texas Citizens Participation Act," or the "TCPA"), says, in part, that a party may file a motion to dismiss a legal action if that legal action is based on the party's exercise of its right to petition. *See* TEX. CIV. PRAC. & REM. CODE § 27.003(a). The TCPA defines the "exercise of the right to petition" as including, among other things, a communication in a judicial proceeding. *Id.* at § 27.001(4)(A)(i).

In this lawsuit, Plaintiff is suing Defendants for making the defamatory statement that Plaintiff exposed himself. ("He [Mishkoff] simply seems to enjoy exposing himself to her [Defendant Bryant's] security cameras.") The defamatory statement appeared in a Counterclaim that Defendants filed in a property easement lawsuit that Plaintiff had previously filed against Defendant Bryant.[1] Because Defendants made the defamatory statement as part of a communication in a judicial proceeding, Defendants claim that Plaintiff's defamation lawsuit violates their right to petition. Defendants filed a motion to dismiss Plaintiff's lawsuit under the provisions of the TCPA.

However, the TCPA provides that the Court may ***not*** dismiss Plaintiff's defamation lawsuit if Plaintiff "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* at § 27.005(c).

A. There is, by clear and specific evidence, a prima facie case that Defendants' accusation is defamatory.

There is only one claim in question, which is that Defendants defamed Plaintiff by saying that he exposed himself. Therefore, the Court cannot dismiss Plaintiff's libel lawsuit if Plaintiff establishes, by clear and specific evidence, a

[1] *See* 471-01040-2022; *Henry Mishkoff v. Sonia Bryant,* pending in the 471st District Court, Collin County, Texas.

prima facie case that Defendants' accusation that Plaintiff exposed himself was defamatory.

The defamatory statement was, in its entirety: "He [Mishkoff] simply seems to enjoy exposing himself to her [Defendant Bryant's] security cameras."[2]

The *Merriam-Webster Dictionary* defines "expose oneself" as "to show one's sexual organs in public." MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/expose%20oneself. Other dictionaries offer substantially the same definition with only minor differences in wording. But one fact is clear: On its face, every reasonable person knows what it means when someone is accused of "exposing himself."

According to TEX. CIV. PRAC. & REM. CODE § 73.001 ("Elements of Libel"), "A libel is a defamation expressed in written or other graphic form that … tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation …" TEX. CIV. PRAC. & REM. CODE § 73.001.

The Oxford *Lexico* dictionary defines the Latin phrase "prima facie" (literally "at first sight") as "based on the first impression" and "accepted as correct until proved otherwise." LEXICO, https://www.lexico.com/en/definition/prima_facie.

[2] *See* Counterclaim at ¶ 9.

According to Texas law, indecent exposure is classified as a sexual offense. *See* TEX. PEN. CODE § 21.08.

Defendants have accused Plaintiff of committing a sexual offense. This would, in a massive understatement, tend to injure Plaintiff's reputation. So, on "first impression," Defendants have clearly defamed Plaintiff by accusing him of committing a sexual offense. And Defendants have not even *attempted* to prove that the first impression of the defamatory nature of their statement is incorrect. Therefore, there is clear and specific prima facie evidence that Defendants have defamed Plaintiff.

B. Without question, Defendants published a statement that, on its face, satisfied all of the elements of defamation as required by Texas law.

According to the Texas Supreme Court, the four elements of a prima facie case for defamation are:

> (1) the defendant published a false statement;
> (2) that defamed the plaintiff;
> (3) with the requisite degree of fault regarding the truth of the statement (negligence if the plaintiff is a private individual); and
> (4) damages, unless the statement constitutes defamation per se.

Bedford v. Spassoff, 520 S.W.3d 901, 904 (Tex. 2017).

Applying the four elements of a prima facie case for defamation as established in *Bedford* to the defamatory statement in this case:

(1) The statement was published. (In fact, Plaintiff became aware of it when he downloaded it from the World Wide Web, where it is, by definition, available to everyone in the entire world.)

(2) The statement was defamatory toward Plaintiff. (Falsely accusing someone of committing a sexual offense is a textbook example of a defamatory statement.)

(3) Accusing Plaintiff of exposing himself was, at the very least, negligent, which is the requisite degree of fault in regard to a private individual, such as Plaintiff.

(4) Plaintiff alleges defamation per se, so evidence of damages is not required.

The only remaining element of libel is that Plaintiff must present, by clear and specific evidence, a prima facie case that Defendants' accusation that Plaintiff exposed himself was false. If Plaintiff provides such evidence, the Court must ***not*** grant Defendants' Motion to Dismiss.

Defendants say that Plaintiff must provide *verifiable* evidence that their claim that Plaintiff enjoys exposing himself is false: "[S]tatements that are not verifiable as false cannot form the basis of a defamation claim." *Neely v. Wilson*, 418 S.W.3d 52, 62 (Tex. 2014).[3]

[3] *See* Motion to Dismiss at 10.

Defendants provide no explanation of what they mean by "verifiable." Of course, Plaintiff cannot provide ***direct*** evidence that he has ***not*** exposed himself. It is *impossible* to prove a negative. Plaintiff would have to produce a video recording of every moment in his entire life in order to prove by direct evidence that he has never exposed himself in public, which is obviously not possible.

However, if Defendants possessed evidence that Plaintiff ***had*** exposed himself, they could easily produce such evidence, and this case would be closed. The only inference that can be drawn from Defendants' failure to produce such evidence is that it does not exist. This is clear and specific prima facie evidence that Defendants recognize that their published, defamatory statement, in reference to Plaintiff, is false.

C. Defendants refuse to acknowledge what they actually said. Instead, they vigorously defend statements other than the defamation they published.

The clearest and most specific prima facie evidence that Defendants' statement is defamatory – and that Defendants ***know*** that their statement is defamatory – is that nowhere in their Motion to Dismiss do they claim that accusing Plaintiff of exposing himself is ***not*** defamatory. Instead, they alternately claim (a) that they did not actually say that Plaintiff exposes himself; or (b) that they said that Plaintiff exposes himself but that they did not mean it; or (c) that when they said that Plaintiff exposes himself they were merely expressing an opinion.

Again, the defamatory statement, in its entirety, was: "He [Mishkoff] simply seems to enjoy exposing himself to her [Defendant Bryant's] security cameras."[4]

But Defendants repeatedly claim that this is not what they actually said. For example: "The allegation in the Counterclaim is that Mr. Mishkoff not only trespassed on Ms. Bryant's real property, but seemed to do so while evincing conspicuousness."[5] "The only allegation in the Counterclaim was that Mr. Mishkoff trespassed onto Ms. Bryant's real property and made sure he was in full display of her security cameras when doing so."[6] "The statement in Paragraph 9 of the Counterclaim bears 'some relation' to the trespass proceeding because it alleges that Mr. Mishkoff appears to enjoy being caught by Ms. Bryant's security cameras during his unauthorized presence on her real property."[7]

Defendants display an alarming inability to acknowledge that they accused Plaintiff of exposing himself. Instead, they claim that they accused Plaintiff of "evincing conspicuousness." Or that they accused him of making sure that "he was in full display of her security cameras." Or that they accused him of enjoying "being caught by Ms. Bryant's security cameras." By refusing to confront the truth of what they actually said, Defendants are providing clear and specific evidence prima facie evidence that they know that they have defamed Plaintiff.

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[4] *See* Counterclaim at ¶ 9.
[5] *See* Motion to Dismiss at 2.
[6] *See Id.* at 3.
[7] *See Id.* at 16.

D. Defendants' defamation cannot be mitigated even by a liberal interpretation.

Trying to construe Defendants' misquotes liberally (as per a TCPA requirement), is it possible that Defendants are not misquoting themselves, but are merely paraphrasing themselves?

Not only is there no evidence of this, but any attempt to characterize Defendants' misquotes as paraphrases does not hold up.

"Evincing conspicuousness" is not a paraphrase of "exposing himself."

"Making sure that he was in full display" is not a paraphrase of "exposing himself."

"Being caught by Ms. Bryant's security cameras" is not a paraphrase of "exposing himself."

Trying to construe Defendants' misquotes even more liberally, is it possible that Defendants are ***not*** trying to tell the Court what they actually ***said***, but instead are trying to tell the Court what they actually ***meant***?

If so, Plaintiff would like to point out that what Defendants ***meant*** is not an issue in this case; the issue is what Defendants actually ***said***. Not being clairvoyant, Plaintiff cannot say with any certainty what Defendants meant, only what they said. And people who read the defamatory statement in the future will not have any idea of what Defendants meant; they will know only what Defendants actually said.

However, if the Court decides that what Defendants ***meant*** is a legitimate issue in this case, the determination of meaning would be a task for the jury, and is certainly not the province of the TCPA.

E. The Texas Supreme Court has clarified the meaning of "clear and specific evidence" and "a prima facie case."

Defendants have repeatedly used the phrases "clear and specific evidence" and "a prima facie case" as if the meaning of those phrases is obvious to everyone and needs no further explanation. Defendants seem to be arguing that those phrases imply that, unless Plaintiff can determine the truth of a statement merely by glancing at it – if, for example, Plaintiff has to "resort" to inferences or circumstantial evidence – then Plaintiff cannot say that the statement is clearly true on its face.

The Supreme Court of the State of Texas disagrees.

In re Lipsky is the only case in which the Texas Supreme Court has considered the meaning of the phrases "clear and specific evidence" and "a prima facie case" as they appear in the TCPA. Their ruling in *Lipsky* stands as the definitive ruling on the meanings and implications of those phrases in the Act.

First, the Court points out that the definition and applicability of "clear and specific evidence" is not something that can be taken for granted: "Clear and specific evidence is not a recognized evidentiary standard." *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). "… neither the Act [the TCPA] nor the common law provides a definition for 'clear and specific evidence.'" *Id.* at 590.

Then, the Court acknowledges the essential nature of circumstantial evidence to defeat a motion for a directed verdict – and, specifically, to defeat a motion to dismiss under the TCPA:

> All evidentiary standards, including clear and convincing evidence, recognize the relevance of circumstantial evidence. In fact, we have acknowledged that the determination of certain facts in particular cases may exclusively depend on such evidence. *See, e.g.,Bentley,*94 S.W.3d at 596 (noting, in a defamation case, that claims involving an element of a defendant's state of mind "must usually [ ] be proved by circumstantial evidence"). Circumstantial evidence may be used to prove one's case-in-chief or to defeat a motion for directed verdict, and so it would be odd to deny its use here to defeat a preliminary motion to dismiss under the TCPA. That the statute should create a greater obstacle for the plaintiff to get into the courthouse than to win its case seems nonsensical. *See Carreras v. Marroquin,*339 S.W.3d 68, 73 (Tex.2011) (noting that we "interpret statutes to avoid an absurd result").

Id. at 589.

> Though the TCPA initially demands more information about the underlying claim, the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence. In short, it does not impose a higher burden of proof than that required of the plaintiff at trial. We accordingly disapprove those cases that interpret the TCPA to require direct evidence of each essential element of the underlying claim to avoid dismissal.

Id. at 591.

Finally, the Court reminds us of the purpose of the TCPA and the elements that are required to defeat a motion to dismiss: "The TCPA's purpose is to identify

and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *Id*. at 589. "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.* at 591.

Applying the standards demanded by the Texas Supreme Court, it is apparent that Plaintiff has carried his burden to present clear and specific evidence of a prima facie case for every essential element of his claim for defamation. Therefore, the Court must not grant Defendants' Motion to Dismiss Plaintiff's lawsuit on grounds related to the TCPA.

III. FACT VS. OPINION

Defendants claim that their statement that identifies Plaintiff as a sex offender is an opinion, rather than a fact. An opinion, they seem to be maintaining (although only in passing), is an act of free speech (protected by the TCPA), and it cannot be considered to be defamatory.

Specifically, Defendants maintain that Plaintiff will be unable to disprove their contention that the defamatory statement is just an opinion: "Plaintiff will be unable to prove that the statement in Paragraph 9 of the Counterclaim is anything

other than the author's opinion that Mr. Mishkoff enjoys being caught on Ms. Bryant's security cameras."[8]

This is confusing. Perhaps Defendants are claiming that they said that Plaintiff enjoys *being caught on* Ms. Bryant's security cameras, even though they actually said that Plaintiff enjoys *exposing himself to* Ms. Bryant's security cameras. Are they claiming that "being caught" has the same meaning as "exposing himself"? And that the two phrases are so obviously synonymous that Defendants need not offer any evidence to support their claim? And that Plaintiff somehow has the burden of proving that something that bears no relation to what Defendants actually said is a statement of fact, rather than an opinion?

Or perhaps Defendants are claiming that when they said that Plaintiff enjoys "exposing himself" they actually ***meant*** that he enjoys "being caught." If so, Defendants have moved the issue from one of law to one of fact. Whether Defendants meant something completely different from what they actually said is an issue that Plaintiff looks forward to presenting to a jury.

A. Facts are facts. Opinions are opinions. Claiming that a fact is an opinion does not actually turn it into an opinion.

Although the fine points of Defendants' argument are unclear, Defendants may be suggesting that adding the words "seems to enjoy" to the defamatory claim

[8] *See* Motion to Dismiss at 10.

that Plaintiff was exposing himself somehow transforms it from a statement of fact to an opinion. In other words, Defendants appear to be arguing that accusing someone of "exposing himself" would be a statement of fact, but accusing someone of seeming "to enjoy exposing himself" is nothing more than an opinion.

Specifically, Defendants claim: "[S]tatements that cannot be verified, as well as statements that cannot be understood to convey a verifiable fact, are opinions." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 639 (Tex. 2018).[9]

This leads Defendants to the astonishing conclusion that "a reasonable person could only interpret such statement as an opinion."[10]

Defendants can reach this conclusion only by pretending that Plaintiff is claiming that the words "seems" and "enjoy" are defamatory, ignoring the obvious fact that what's defamatory is Defendants' claim about what Plaintiff seems to enjoy: exposing himself.

Following Defendants' logic, it would be impossible to defame anyone ever again. All anyone would have to do is precede an otherwise defamatory statement with the words "seems to enjoy" – and according to Defendants' peculiar logic, the statement is suddenly no longer defamatory, it's just an opinion.

[9] *See* Motion to Dismiss at 10.
[10] See *Id.*

B. Attempting to transform defamatory facts into protected opinions is an exercise in futility.

For example, if anyone were to level these three unfounded charges at random strangers, that person might be accused of defamation:

1) "He abuses little girls!"

2) "She's a serial killer!"

3) "They worked with Al-Qaeda to attack the Pentagon!"

But according to Defendants, this quick modification changes those three statements from defamation to opinion:

1) "He seems to enjoy abusing little girls!"

2) "She seems to enjoy being a serial killer!"

3) "They seemed to enjoy working with Al-Qaeda to attack the Pentagon!"

The defamatory elements of those three statements are the unfounded accusations of being a pedophile, being a murderer, and being a terrorist. Tacking the phrase "seems to enjoy" in front of those defamatory accusations doesn't somehow defuse the defamation and render it harmless.

It is especially telling that the defamatory statement appeared in the Counterclaim as Paragraph 9 in a section that Defendants labeled as their "Statement of Facts." But now, conveniently, Defendants maintain that one of the paragraphs in their Statement of Facts was not intended to be a fact after all – that it was so

obviously an opinion that no reasonable person could believe it was intended to be a statement of fact, in spite of it appearing in a section entitled "Statement of Facts." Plaintiff believes that this is nothing more than a transparent attempt to evade responsibility for a statement of fact by attempting to reclassify it as an opinion, well after it was explicitly published as a statement of fact.

(Plaintiff would like to point out that the inclusion of the word "enjoy" in the defamatory statement actually makes it a more serious accusation, rather than helping to turn a statement of fact into an opinion, as the Texas Penal Code lists "gratification" as one of the elements of the sexual offense of indecent exposure. *See* TEX. PEN. CODE § 21.08(a).)

If Defendants believe that their accusation that Plaintiff "seems to enjoy exposing himself" is a protected opinion rather than an actionable defamation, they should make that argument in front of a jury. This is not an issue that bears any relevance to the TCPA, and there is no question of law here for the Court to decide.

IV. THE JUDICIAL PROCEEDINGS PRIVILEGE

Defendants interpret the Judicial Proceedings Privilege (aka "The Litigation Privilege") to suggest that they are free to defame anyone they choose as long as they confine their defamatory statements to the contents of a judicial proceeding.

Defendants first claim that their privilege to defame in a judicial proceeding is absolute: "The privilege is an 'absolute privilege that covers any

statement made by the judge, jurors, counsel, parties or witnesses, and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits and any of the pleadings or other papers in the case.'" *Landry's, Inc. v. Animal Legal Def. Fund*, 631 S.W.3d at 46.[11]

Then, Defendants concede that the Judicial Proceedings Privilege has an important limitation, in that it protects defamatory statements made in the course of a judicial proceeding only insofar as those defamatory statements bear some relation to the proceedings: "[T]he statement must only bear 'some relation to the proceeding.'" *Russell v. Clark*, 620 S.W.2d 865, 869 (Tex.Civ.App.—Dallas 1981, writ ref'd n.r.e.).[12]

(Curiously, Defendants insist that Plaintiff misspoke when he claimed that the standard is *relevance*; they say that the standard is actually that the statement must *bear some relation to* the proceedings. *The Free Dictionary* confirms that Plaintiff's and Defendants' characterizations are synonymous, leaving Plaintiff puzzled about the point that Defendants are trying to make: "*Bear a relation/relationship to*: To have an association with or *relevance* to" (emphasis added). THE FREE DICTIONARY, https://www.thefreedictionary.com/bearing+a+relation.)

[11] *See* Motion to Dismiss at 12.
[12] *See Id.* at 13.

Defendants also allude to the fact that *Russell* demands that, if a defamatory statement's relevance is in doubt, the doubt must be resolved in favor of the statement's relevance. In saying that, Defendants are relying on this passage: "[T]he court must consider the entire communication in its context, and must extend the privilege to any statement that bears some relation to an existing or proposed judicial proceeding. All doubt should be resolved in favor of its relevancy." *Russell v. Clark*, 620 S.W.2d 865, 870 (Tex. Civ. App. 1981).

But is there any doubt to be resolved? Defendants have yet to make any kind of coherent argument to support their contention that their accusation that Plaintiff "exposes himself" bears any relation whatsoever to their trespass Counterclaim. It seems to have been included in the Counterclaim entirely at random. It pertains to no other passage in the Counterclaim. It bears no relation to any of the other "facts" presented in the Counterclaim.

A. There is no protection for defamatory statements that bear no relation to the proceedings.

Defendants claim that they are protected by the "limited" requirement that the statement must bear some relation to the proceeding: "Under this limited standard, there can be no question that the statement concerning the manner of Mr. Mishkoff's

trespass had enough of a 'relation' to the proceeding to be afforded the protection of an absolute privilege."[13]

Defendants don't even bother to attempt to explain the supposed relationship between trespassing and exposing oneself, they simply insist that there's "no question" that the relationship exists. Because there is no law that clarifies the relationship between trespassing and exposing oneself, this is obviously not a question of law, it's a question of fact. Plaintiff looks forward to presenting the issue to a jury.

In *Jenevein v. Friedman*, the Court upheld the dismissal of a defamation lawsuit because the defamatory statement was protected by the litigation privilege. However, in doing so, the Court emphasized that its ruling was based on a determination that the defamatory statement *was* related to the underlying lawsuit:

> We reaffirm the principle that, for the litigation privilege to apply, the challenged defamatory statement must bear "some relation" to the subject matter of the underlying proceeding. We hold that the allegedly defamatory statement at issue bore some relation to the conspiracy-to-bribe count in the underlying judicial proceeding.

Jenevein v. Friedman, 114 S.W.3d 743, 744 (Tex. App. 2003).

Defendants claim that the defamatory statement in their Counterclaim is similarly protected, but they have put forth no theory that would support the

[13] *See* Motion to Dismiss at 13-14.

conclusion that committing a sexual offense bears any relation whatsoever to trespassing.

B. Defendants are claiming protection for something other than what they actually said.

It is impossible to discern from Defendants' Motion to Dismiss whether Defendants even admit to having made the defamatory statement, or if they are reluctantly admitting that they made the defamatory statement but that they actually meant to say something else.

Plaintiff does not understand how Defendants can claim protection for something other than what they said. If Defendants had actually said what they claim they ***meant*** to have said, perhaps it would have been relevant to the case, and perhaps it would have been protected. But they have made no effort to demonstrate the relevance of what they actually said, which therefore cannot possibly be protected. And what Defendants ***actually said*** is the crux of Plaintiff's defamation case.

C. No reasonable person can doubt the irrelevancy and impropriety of Defendants' defamatory statement.

In *Jenevein*, the Fifth Court of Appeals of Texas reiterated that "this Court has directly addressed this issue and has consistently required that the defamatory matter bear some relationship to the judicial proceeding to be protected by the privilege." *Jenevein,* 743, 746.

The Court in *Jenevein* then expressed the issue of privilege and relevance even more unequivocally by stating that they've adopted this language as "the rule in this Court": "The matter to which the privilege does not extend must be *so palpably wanting in relation to the subject-matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety*." *Id.* at 747 (emphasis in the original).

No reasonable person could believe that an accusation of a sexual offense could possibly have any relation to Defendants' trespass Counterclaim. The accusation is palpably irrelevant to the subject matter and is improper on its face. The Court cannot allow Defendants to hurl such a grievous and entirely unfounded accusation at Plaintiff while trying to hide behind a shield of litigation privilege.

V. ATTORNEY IMMUNITY

As they did for the Judicial Proceedings privilege, Defendants interpret the doctrine of Attorney Immunity to suggest that they are free to defame anyone they choose as long as they confine their defamatory statements to the contents of a judicial proceeding.

Defendants concede that an attorney "'may only be liable to nonclients for conduct outside the scope of his representation of his client …' *McDill v. McDill* (No. 03-19-00162-CV, 2020 WL 4726634, at *8 (Tex. App.—Austin July 30, 2020))."[14] Defendants' contention that they qualify for Attorney Immunity consists

[14] *See* Motion to Dismiss at 14.

of attempts to define the kind of conduct that falls *inside* the scope of their representation – because if their defamation of Plaintiff falls *outside* the scope of that representation, then Defendants have admitted that they are liable for their defamation, despite the doctrine of Attorney Immunity.

Essentially, Defendants are using circular reasoning to explain why they're immune from liability in this case:

(1) Defendants acknowledge that, if they include a defamatory statement in a lawsuit, they're immune from liability ***only*** if that statement falls within the scope of representing their client. But…

(2) Defendants also claim that ***any*** defamatory statement that they include in a lawsuit is immune from liability because everything they include in a lawsuit falls within the scope of representing their client!

This renders the caveat that an attorney "may only be liable to nonclients for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer" completely meaningless. If nothing an attorney says in a lawsuit is "outside the scope of his representation of his client" or "foreign to the duties of a lawyer," then Defendants must explain why so many courts have gone out of their way to reaffirm those limitations.

A. Immunity is conferred only on statements that are related to the proceedings.

The Court in *Russell* stressed that, to be protected by the doctrine of Attorney Immunity, the statement in question must be related to the judicial proceeding in which the statement appeared: "Yet this absolute privilege must not be extended to an attorney carte blanche. The act to which the privilege applies must bear some relationship to a judicial proceeding in which the attorney is employed, and must be in furtherance of that representation." *Russell v. Clark*, 620 S.W.2d 865, 868 (Tex. Civ. App. 1981).

Defendants have not explained how accusing Plaintiff of a sexual offense could possibly be related in any way to the charge of trespass, which was the subject of their Counterclaim. Similarly, Defendants have not explained how accusing Plaintiff of a sexual offense could possibly be characterized as furthering their representation of their client in a property easement dispute.

The Court in *Russell* also emphasized the link between Attorney Immunity and relevance by referencing what it called the "correct statement of the law" as found in the *Restatement of Torts*:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, ***if it has some relation to the proceeding*** (emphasis added).

Id. at 869.

To satisfy the requirement of relevance, Defendants insist that their defamatory statement somehow bears a relation to their Counterclaim because "it alleges that Mr. Mishkoff appears to enjoy being caught by Ms. Bryant's security cameras during his unauthorized presence on her real property."[15]

But that's not what Defendants said! Defendants didn't say that Plaintiff appears to enjoy "being caught." Defendants said that Plaintiff seems to enjoy "exposing himself." Rather than defending their actual statement, Defendants (a) have created a new and entirely fictitious statement, (b) are pretending that that's what they actually said, and (c) are defending *that* statement.

If Defendants are so ashamed of their defamation that they're embarrassed to quote it accurately in their Motion to Dismiss, then perhaps they shouldn't have defamed Plaintiff in the first place.

B. "Absolute immunity" is not absolute.

In 2021, the Texas Supreme Court reaffirmed that the "absolute" immunity provided to attorneys is not in fact absolute: "Conversely, attorneys are not protected from liability to non-clients for their actions when they do not qualify as 'the kind of conduct in which an attorney engages when discharging his duties to his client.'"

[15] *See* Motion to Dismiss at 16.

Landry's, Inc. v. Animal Legal Def. Fund, 631 S.W.3d 40, 47 (Tex. 2021). "Moreover, attorney immunity will not protect a lawyer when his 'acts are entirely foreign to the duties of an attorney.'" *Id.* "Not just any action taken when representing a client qualifies for immunity, however. Instead, attorney immunity generally applies when attorneys act in the uniquely lawyerly capacity of one who possesses 'the office, professional training, skill, and authority of an attorney.'" *Id.*

In order to maintain that their defamation of Plaintiff is protected by the doctrine of Attorney Immunity, Defendants are basically claiming that falsely accusing Plaintiff of a sexual offense is the kind of conduct that should be expected of attorneys who are pressing a trespass Counterclaim, even though that spurious accusation does absolutely nothing to advance their client's interests. And they are advancing the curious notion that making defamatory claims that are totally irrelevant to the case at hand is not "entirely foreign to the duties of an attorney." And finally, they are claiming that "professional training, skill, and authority of an attorney" uniquely qualifies them to hurl such a vile and baseless accusation.

These preposterous claims are insulting to the vast majority of attorneys who maintain their honor even as they zealously discharge their duties to their clients, and who would never dream that those duties include leveling defamatory and disgusting accusations that have nothing whatsoever to do with their case. (Plaintiff's father was an attorney, and Plaintiff personally resents the astonishing

proposition that attorneys routinely engage in such repugnant activities in the name of achieving justice for their clients.)

C. Accepting Defendants' dubious claim of immunity would open the door to further (and greater) abuses.

The implications of Defendants' attempt to hide behind the doctrine of Attorney Immunity are potentially far-reaching, and they risk invoking the law of unintended consequences. Affirming that Defendants have the absolute right to manufacture spurious and entirely irrelevant accusations as long as they appear within the confines of legal pleadings is likely to lead to much greater abuses. Unscrupulous attorneys could take advantage of simple lawsuits (say, trespass cases) to make as many defamatory accusations as they please with complete impunity, regardless of whether those defamatory accusations bear any relation whatsoever to their cases or are of any help to their clients. For example, consider these hypothetical excerpts from fictitious lawsuits:

- Complainant maintains that Respondent crossed her property without authorization, and further claims that Respondent was responsible for the assassination of President Kennedy.
- Complainant maintains that Respondent trespassed on her real property, and further claims that the Smith Meat-Packing Company deliberately poisoned their own products, thereby causing the deaths of thousands of their customers.

If Defendants maintain that the doctrine of Attorney Immunity gives them the right to defame Plaintiff (or anyone else) in a manner that is entirely irrelevant to their case, then by logical extension they are also maintaining that the doctrine of Attorney Immunity would give hypothetical attorneys the right to make the outrageous statements in the above examples, thus reducing the doctrine of Attorney Immunity to an absurd and nonsensical stream of meaningless words.

Attorney Immunity is intended to ensure "loyal, faithful, and aggressive representation by attorneys employed as advocates." *Mitchell v. Chapman*, 10 S.W.3d 810, 812 (Tex. App. 2000). Defendants are making a mockery of this critically important legal doctrine by claiming that they cannot faithfully represent their client without resorting to shameful tactics that threaten to bring disrepute to the entire legal community.

D. Defendants have failed to meet the high burden of proof that is required for the Court to dismiss Plaintiff's case.

The Court must resolve any question about Defendants' claim of Attorney Immunity in favor of Plaintiff:

> A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding,*289 S.W.3d 844, 848 (Tex.2009). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Valence Operating Co. v. Dorsett,*164 S.W.3d 656, 661

> (Tex.2005). Attorney immunity is an affirmative defense. *Sacks v. Zimmerman,*401 S.W.3d 336, 339–40 (Tex. App.–Houston [14th Dist.] 2013, pet. denied). Therefore, to be entitled to summary judgment, Cantey Hanger must have proven that there was no genuine issue of material fact as to whether its conduct was protected by the attorney-immunity doctrine and that it was entitled to judgment as a matter of law.

Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015)

Defendants are moving for summary judgment on the basis of Attorney Immunity. ("The court should consider the pleadings, supporting affidavits, and other evidence in the summary judgment context under Rule 166a."[16]) Defendants must prove they are entitled to judgment as a matter of law. Every reasonable inference by Plaintiff must be indulged, and any doubt must be resolved in Plaintiff's favor.

Defendants have failed to meet this high burden of proof. The Court must deny the motion for summary judgment that is included as an affirmative defense in Defendants' Motion to Dismiss.

VI. MISCELLANEOUS MISREPRESENTATIONS

Defendants' Motion to Dismiss includes several statements of supposed "facts" that are actually misrepresentations.

[16] *See* Motion to Dismiss at 7.

Plaintiff is not aware that these statements have any serious legal implications in this lawsuit, but he is uncomfortable with the idea of letting them stand unchallenged. These statements may turn out to be significant later in these proceedings, and Plaintiff does not want Defendants to be able to characterize them as being "uncontested" or "undisputed."

A. What Defendants suggest is a "photograph" may actually be a frame from a video.

Defendants claim that a photograph that appears in their Motion to Dismiss depicts Plaintiff smiling into Defendant Bryant's camera: "Below that statement is a (fully clothed) photograph of Mr. Mishkoff standing underneath Ms. Bryant's carport and smiling into Ms. Bryant's security camera."[17]

As Defendants point out, "the photograph bears a timestamp in the top right corner." This suggests that the image may not be a photograph at all, but may be a frame-capture from a video. If this is the case, the image may not represent Plaintiff smiling into Defendant Bryant's video camera after all, it may represent Plaintiff smiling at something else entirely while he's turning his head (perhaps joking with the surveyors who were standing a few yards away), and Defendants chose to submit this particular frame and characterize it as if it were a still photo.

[17] *See* Motion to Dismiss at 2.

Note that Plaintiff is not claiming that he was not smiling for the camera. Plaintiff has no idea of whether or not that's what he was doing. Plaintiff merely wants to point out that, from the evidence that Defendants have included in their Motion, it is impossible to make any definitive determination of the accuracy of Defendants' claim.

B. Defendants provide no evidence for their puzzling claim that Plaintiff "made sure that he was on full display" of Ms. Bryant's camera.

Astonishingly, Defendants deny saying something that they clearly said: "The only allegation in the Counterclaim was that Mr. Mishkoff trespassed onto Ms. Bryant's real property and made sure he was in full display of her security cameras when doing so."[18]

This claim is especially surprising because it's so easy to prove that it's false. Defendants did ***not*** say that Plaintiff "made sure that he was in full display of her security cameras." Instead, Defendants said that Plaintiff "seems to enjoy exposing himself to her security cameras." Any attempt to pretend that these two statements are even remotely synonymous is preposterous on its face.

Plaintiff does not understand what Defendants mean when they claim that he "*made sure* that he was in full display of her security cameras" (emphasis added).

[18] *See* Motion to Dismiss at 3.

How can they claim he did that? Did he search for the presence of video cameras and then strike a pose when he was sure that he was being recorded?

Defendants provide no evidence for the contention that Plaintiff "made sure that he was in full display of her security cameras" – and they are unable to provide such evidence simply because their contention is ridiculous.

C. Defendants attach emphatic significance to the fact that they are unable to view Plaintiff's genitals as he's walking away from the camera.

For some incomprehensible reason, Defendants want to emphasize that Plaintiff's genitals are not visible from the rear: "The next paragraph of the Counterclaim—time stamped **four seconds later**—shows Mr. Mishkoff walking away from the camera, fully clothed, with no genitalia in view."[19]

Plaintiff has no idea why Defendants consider their inability to glimpse his genitals to be so noteworthy, but propriety demands that Plaintiff make no further comment on the subject.

D. Defendants want the Court to fine Plaintiff $10,000 to discourage him from filing another lawsuit in 37 years.

Defendants have somehow convinced themselves that Plaintiff's lawsuit is part of some larger pattern: "Since this is the second lawsuit brought by Plaintiff

[19] *See* Motion to Dismiss at 3 (emphasis in the original).

against Ms. Bryant, there is a high likelihood that his serial litigation patterns will continue."[20]

Plaintiff is 73 years old. Other than a few small-claims cases, Plaintiff has filed exactly two lawsuits in his entire life. Simple extrapolation suggests that Plaintiff will file his next lawsuit in 2058, when he will be 109 years old. Plaintiff looks forward to meeting Defendants in court at that time, when he hopes he will still be energetic enough to defend his right to seek redress under the law every bit as vigorously as he is doing today.

Plaintiff feels that ordering him to pay a fine to discourage his tendency to file a lawsuit every 36.5 years is unreasonable and entirely unwarranted.

VII. LAW VS. FACT

Defendants claim that "a *reasonable* person could only interpret such statement [the defamatory statement] as an opinion" (emphasis added).[21]

Plaintiff disagrees, and notes that Defendants have firmly moved the question from one of law to one of fact, as there is no law that can help the Court determine whether Defendants' statement is actually an opinion.

If Defendants maintain that "a reasonable person" could only interpret their defamation as the expression of an opinion, Plaintiff is looking forward to

[20] *See* Motion to Dismiss at 17.
[21] *See Id.* at 10.

Defendants presenting that argument to a jury so we can learn how *those reasonable people* will decide that question of fact.

VIII. SUMMARY

Defendants' Motion to Dismiss addresses three major issues:

(1) Defendants' Right to Petition.

(2) Defendants' claim of Judicial Proceedings Privilege.

(3) Defendants' claim of Attorney Immunity.

All three arguments stray so far from the intent of these doctrines as to render those doctrines completely unrecognizable.

Defendants' claims further suffer from Defendants' baffling and consistent inability to confront their own words.

A. Defendants have not in any way demonstrated that they properly invoked the TCPA's protection from "retaliatory lawsuits."

According to the Court in *Lipsky*, the TCPA "protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). Nobody could seriously argue that Plaintiff was trying to intimidate or silence Defendants by filing a lawsuit to recover damages caused by the fact that Defendants included, in a trespass Counterclaim, an entirely unfounded accusation of a sexual offense.

Defendants' defamatory accusation has nothing to do with Defendants' exercise of their right to petition. Defendants' Motion to Dismiss pursuant to the

TCPA must fail because neither the letter nor the spirit of the TCPA protects Defendants from having to suffer the consequences of making a false accusation that is clearly defamatory on its face.

In the section of their Motion to Dismiss in which they discuss the right to petition, Defendants claim that Plaintiff's lawsuit actually concerns him being caught on camera: "By way of example only, Plaintiff will be unable to prove that the statement in Paragraph 9 of the Counterclaim is anything other than the author's opinion that Mr. Mishkoff enjoys being caught on Ms. Bryant's security cameras."[22]

Defendants, of course, are well aware that they're being sued for accusing Plaintiff of exposing himself, not for accusing Plaintiff of being caught on camera. If Defendants cannot even bring themselves to accurately represent the defamatory statement for which Plaintiff is suing them, how can they possibly claim that the TCPA protects their right to make that statement?

B. Defendants have not demonstrated that their invocation of Judicial Privilege protects their client (or the public) in any way.

According to the Court in *Howard*: "The [judicial] privilege afforded against defamation actions is founded on the 'theory that the good it accomplishes in protecting the rights of the general public outweighs any wrong or injury which may

[22] *See* Motion to Dismiss at 10.

result to a particular individual.'" *Howard v. Matterhorn Energy, LLC*, 628 S.W.3d 319, 333 (Tex. App. 2021).

Nobody could legitimately argue that Defendants labeling Plaintiff as a sex offender as part of a simple trespass Counterclaim does anything whatsoever to advance the protection of the general public. In fact, the suggestion that anyone seeking to avoid repercussions need only file a lawsuit to be able to level absurd and *totally irrelevant* accusations at innocent parties by hiding behind a claim of Judicial Privilege not only does not *advance* the protection of the general public in any way, it harbors the unfortunate potential of subjecting the general public to serious harm. The general public should not have to worry about whether someone is going to hurl unfounded accusations against them and then cynically duck and hide behind the convenient shield of the Judicial Proceedings Privilege.

C. Defendants' defamation falls far outside of what could even remotely be considered as being within the scope of representing their client.

Texas courts have explained the rationale behind the doctrine of Attorney Immunity: "This attorney-immunity defense is intended to ensure 'loyal, faithful, and aggressive representation by attorneys employed as advocates.'" *Williams v. City of Frisco*, CIVIL ACTION No. 3:17-CV-2124-B, at *3 (N.D. Tex. Nov. 7, 2017).

Accusing the plaintiff in a trespass Counterclaim of enjoying exposing himself in public is not an example of an attorney's "loyalty" to a client. It does not

indicate that an attorney is "faithful" to his client. It does suggest that the attorney is a bully, and that the attorney hopes to intimidate a pro se opponent by demonstrating that, if Plaintiff continues to press his lawsuit, he may be subject to a barrage of defamatory statements that are both terrifying and absurd at the same time.

Defendants' accusation that Plaintiff exposes himself is not intended to be of any benefit to their client. Instead, it is intended to cause harm to Plaintiff. It is a spear thrown by cowards who believe that they are protected by some kind of magical forcefield of Attorney Immunity that allows them to engage in any kind of repugnant behavior that they wish with total impunity, whether or not it is the slightest bit helpful in advancing the interests of their client.

The Court in *Haynes and Boone*, while strongly affirming the concept of Attorney Immunity, also noted that it is intended to protect attorneys from actions that fall "within the scope of client representation." That scope cannot possibly include accusing Plaintiff of committing a sexual offense, an accusation that has no conceivable relation to the lawsuit in which they are representing their client:

> To allow an adverse party to allege a claim against counsel representing an opponent in litigation, as Plaintiff seeks to do here, would create a conflict of interest between zealously advocating for a client's best interest and avoiding personal exposure to liability from non-parties in the discharge of an attorney's duties *within the scope of client representation*. *Haynes and Boone,* 631 S.W.3d at 74 (emphasis added).[23]

[23] *See* Motion to Dismiss at 15.

Defendants also describe the purpose of Attorney Immunity as ensuring that attorneys can "zealously advocate for a client's best interest."[24] Defendants have yet to explain how manufacturing fantastical accusations of a sexual offense as part of a trespass Counterclaim could possibly serve the "best interest" of their client.

Defendants do not make a serious effort to place their defamatory statement within the purview of the Attorney Immunity doctrine. Instead they claim that they said something other than what they actually said, and then they attempt to show that *that* statement would be covered by Attorney Immunity had they said it.

Specifically, Defendants claim that their defamatory statement is covered by Attorney Immunity because: "… it alleges that Mr. Mishkoff appears to enjoy being caught by Ms. Bryant's security cameras during his unauthorized presence on her real property."[25]

Of course, the defamatory statement does *not* allege that Plaintiff enjoys being caught by Defendant Bryant's security camera. It alleges that Plaintiff exposes himself.

If Defendants were claiming Attorney Immunity because they had accused Plaintiff of enjoying being caught on camera, that might be a valid claim. (Of course, if Defendants had limited themselves to accusing Plaintiff of enjoying being caught

[24] *See* Motion to Dismiss at 15.
[25] *See Id.* at 16.

on camera, Defendants would not have been sued for defamation.) But Defendants do not appear to be claiming Attorney Immunity because of what they actually said, which is that Plaintiff exposes himself in public. And if they're not seeking Attorney Immunity for what they actually said, Plaintiff sees no reason why it should be accorded them.

IX. THE JONES CONUNDRUM

Plaintiff would like to present a thought experiment to illustrate the dangers of maintaining that either the Right to Petition, the Judicial Proceeding Privilege, or Attorney Immunity are unequivocally absolute.

As a hypothetical example, imagine that a radio talk-show host was ordered to pay $50 million after losing a defamation lawsuit in a court in a Southwestern state. If any of the privileges in question were literally "absolute," that radio talk-show host could have sued someone (either the people involved in the actual lawsuit or anyone else) and defamed his unfortunate victims in that lawsuit, instead of on his radio show. And then, after filing his lawsuit, he could have discussed it on his radio show. Following this procedure could have saved him $50 million, because he theoretically would have enjoyed blanket and absolute protection from a defamation claim.

Of course, the theoretical lawsuit in question would have been absurd, and would likely have been dismissed quickly. But if the Attorney General of that same

state could file an astounding lawsuit that challenged election results in states other than his own, then no potential lawsuit is too farfetched to be considered as a hypothetical.

The point that Plaintiff is making, perhaps in a heavy-handed manner, is that there must be sensible limits even on "absolute" protections. In the example posited by Plaintiff, the hypothetical talk-show host clearly crossed a red line. And while the current case does not approach the level of seriousness posed by the hypothetical case, it does raise the question: Where should the Court draw the line?

Plaintiff maintains that Defendants crossed that line when they falsely and recklessly accused Plaintiff of a sexual offense as part of a trespass Counterclaim. A decision that rejects Defendants' various claims of privilege in this case would help to establish the precedent that all privileges have sensible limits, and might discourage similar frivolous claims of absolute protection in the future.

X. PRAYER

According to Justice Evelyn V. Keyes of the Court of Appeals for the First District of Texas:

> [T]he TCPA has come be construed so expansively as to operate as a de facto summary dismissal procedure not only for retaliatory suits but for *meritorious lawsuits* (emphasis added) that cannot colorably be construed as chilling First Amendment rights. And, even if the TCPA motion does not ultimately succeed, it can be used, as currently construed, to delay and to put plaintiffs in meritorious suits to the burden of defending themselves against frivolous TCPA motions by

> being forced to meet the threshold burden of proving a prima facie case. That cannot be the intent of the TCPA, and it is not.

Universal Plant Servs., Inc. v. Dresser-Rand Grp., Inc., No. 01-17-00555-CV, at *3-4 (Tex. App. Dec. 20, 2018)

This is a precise characterization of Defendants' Motion to Dismiss. The TCPA component of Defendants' motion is not intended to protect their rights; rather, it is a shameless attack on Plaintiff's First Amendment right to petition for redress of grievances.

Plaintiff's Libel Petition includes exactly one essential element (Defendants' accusation that Plaintiff exposes himself) which is clearly defamatory on its face. Defendants' Motion to Dismiss on TCPA-related issues can only be characterized as frivolous – and this will be true even if Defendants' motion succeeds on its non-TCPA-related issues.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that this Court:

A. Deny Defendants' TCPA Motion to Dismiss.

B. Impose sanctions against Defendants in an amount the Court determines sufficient to deter the bringing of similar actions by Defendants in the future.

As Defendants have suggested, no less than $10,000 would be "an appropriate sanction."[26]

C. Grant Plaintiff such other and further relief, special or general, legal or equitable, that Plaintiff may be justly entitled to receive.

Respectfully submitted,

Henry Mishkoff

/s/ Henry Mishkoff
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CERTIFICATE OF SERVICE

I certify that on August 16, 2022, a true and correct copy of the foregoing was sent to all parties who have made an appearance or their attorney of record in accordance with Texas Rules of Civil Procedure 21 and 21a.

/s/ Henry Mishkoff

[26] *See* Motion to Dismiss at 17.