

CAUSE NO. 01-1181
IN THE SUPREME COURT OF TEXAS

**TANA OIL AND GAS CORPORATION
AND ROBERT B. ROWLING**

Petitioners,

v.

**TOM C. McCALL
AND DAVID B. McCALL,**

Respondents.

**On Appeal From the Third Supreme Judicial District of Texas
at Austin, Texas**

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

Respondents, Tom C. McCall and David B. McCall (the "McCalls"), file this their Brief on the Merits.

STATEMENT OF THE CASE

The McCalls initially sued Tana and Rowling for abuse of process and malicious prosecution, along with other causes of action. (CR Vol. I, pp. 2-51). The McCalls' suit against Tana and Rowling arose out of a prior suit filed against

the McCalls by Tana and Rowling in Nueces County, Texas. (RR Ex. Vol., P. Ex. 8, 12, 14).

Before trial, the court granted the McCalls' Motion for Partial Summary Judgment on their abuse of process claim, and, in two separate rulings, granted Tana and Rowling's Motion for Summary Judgment on the McCalls' claims of malicious prosecution, intentional infliction of emotional distress, invasion of privacy, prima-facie tort and conspiracy. (CR Vol. II, p. 297; Supp. CR Vol. I; RR "Motion for Partial Summary Judgment", Vol. 1 of 1, p. 50). Prior to trial, the McCalls timely filed their First Supplemental Petition alleging a cause of action for tortious interference with the attorney-client relationship. The First Supplemental Petition did not specify the nature of the damages sought and alleged that the McCalls **"... have suffered damages greatly in excess of the minimum jurisdictional limits of this honorable Court, for such sums each of them now sues."** (CR Vol. II, p. 272). Although Tana and Rowling's First Supplemental Answer filed on May 1, 2000 contained a special exception to an award of attorneys fees to the McCalls as an element of damages for tortious interference, Tana and Rowling did not present the exception to the trial court for a ruling. (RR Vol. 3, pp. 292-295).

On May 8, 2000, immediately prior to trial, the trial court reversed the prior order granting a partial summary judgment on the McCalls' claim of abuse of process and rendered judgment on that claim for Tana and Rowling. (RR Vol. 3, p. 221, l. 1-15; CR Vol. II, p. 322). On the same day, Tana and Rowling filed a

“Motion to Strike Claim for Tortious Interference” claiming that the McCalls refused to produce a copy of the fee contract with their client, Niemeyer. (CR Vol. II, pp. 298-299). The motion to strike was not based on any alleged deficiency in the McCalls’ pleadings. Before trial, Tana and Rowling also filed a “Motion For Directed Verdict That Affirmative Defense To Tortious Interference is Established as a Matter of Law.” (RR Vol. 2, p. 49, l. 11-25; pp. 50-51, l. 1-6; RR Vol. 3, pp. 6-12, l. 1-17; RR Vol. 3, p. 172, l. 14-25; p. 173, l. 1-9). Tana and Rowling’s motion was based solely on their affirmative defense of justification. (CR Vol. II, p. 303). During trial, the court was advised of Judge Dan Beck’s ruling that no tortious interference had occurred with the filing of the Fayette County suit. (RR Vol. 2, p. 80, l. 22-25; p. 81, l. 1-7; p. 95, l. 15-20; RR Vol. 3, p. 26, l. 22-25; p. 27, l. 1-3; p. 45, l. 20-25; p. 46, l. 1-2).

On May 9, 2000, Judge Garcia, during a bench conference relating to an evidentiary matter, suddenly and unexpectedly advised counsel that he was going to grant Tana and Rowling’s motion to strike the McCalls’ tortious interference claim. (RR Vol. 3, p. 161, l. 11-21; C.R. Vol. 2, pp. 298-306). In their motion, Tana and Rowling requested that the McCalls’ tortious interference claim be stricken in accordance with the remedies provided in TEX.R.CIV.P. 215.2(5). (C.R. Vol. 2, p. 299). After making the ruling, Judge Garcia left the bench and went back to the jury room to visit with the jury, outside of the presence of counsel, and dismissed the jury. (RR Vol. 3, p. 162, l. 16-20). (CR Vol. XII, p. 321). The May 9, 2000 order was subsequently withdrawn on May 10, 2000,

when an order was signed granting Tana and Rowling's motion for directed verdict on the tortious interference claim. (CR Vol. II, pp. 323-324, 335). The May 10th order stated, in relevant part that (1) "... Plaintiffs have neither pled nor demonstrated that Plaintiffs suffered any actual damage or loss;" (2) "... in response to Defendants' Motion, Plaintiffs have not reformed their pleadings or addressed argument to rebut or avoid Defendants' legal argument;" and (3) "... even if Plaintiffs could establish all of the elements of this cause of action, the Court is of the opinion that as a matter of law Defendants would prevail on the affirmative defense of justification." (CR Vol. II, p. 324).

On May 10, 2000, the trial court signed a judgment based on the directed verdict. (CR II, p. 323). On May 15, 2000, the Court signed an Amended Final Judgment based on the directed verdict. (CR Vol. II, p. 335). On May 18, 2000, the McCalls' request for findings of fact and conclusions of law was denied. (C.R. Vol. 2, p. 336). After an appeal by the McCalls to the Third Court of Appeals in Austin, Texas, the trial court's judgment was affirmed, except as to the McCalls' claim for tortious interference, which was remanded for trial on the merits.

REPLY TO ISSUES PRESENTED

The Court of Appeals correctly remanded for trial the McCalls' claims against Tana and Rowling for tortious interference with the attorney-client relationship.

STATEMENT OF FACTS

The Interference

Tom C. McCall and David B. McCall are attorneys licensed in the State of Texas and both practice law with the firm of McCall & Ritchie, L.L.P. in Travis County, Texas. (RR Vol. 3, p. 67, l. 2-22; RR Vol. 3, p. 68, l. 1-7; p. 71, l. 11-21).

John Niemeyer has been a client of Tom and David McCall since 1992. (RR Vol. 3, p. 75, l. 17-25; p. 76, l. 1-7). Niemeyer initially retained the McCalls to represent him in a dispute with Tana after Tana drilled a horizontal well on his mother's tract of land in Fayette County, Texas. (RR Vol. 3, p. 76, l. 12-19; p. 78, l. 1-6). The first lawsuit between Tana and Niemeyer was settled in 1994. (RR Vol. 3, p. 78). Rowling was not a party to this suit and did not sign the settlement agreement. (P. Ex. 18, Ex. C.)

After the settlement, Niemeyer asked the McCalls to monitor the royalties being paid by Tana to Niemeyer. (RR Vol. 3, p. 78, l. 17-21; p. 79, l. 1-6). In response to Niemeyer's request in 1995, David McCall commenced an investigation into the royalty payments being paid by Tana to Niemeyer. (RR Vol. 3, p. 80, l. 3-25). On September 6, 1995, a letter was sent by David McCall to Aquila Southwest Pipeline Corporation. (RR Vol. 3, p. 88, l. 17-25; P. Ex. 1). Aquila responded to McCalls' letter by furnishing documents relating to disbursements by Aquila to Tana. (RR Vol. 3, p. 91, l. 2-14; P. Ex. 3). On December 6, 1995, David McCall sent Tana a letter advising that the McCalls still represented Niemeyer, and requested documentary evidence relating to prices and

amounts of money received by Tana for periods of production after the date of the prior settlement agreement. (RR Vol. 3, p. 80, l. 3-25; p. 88, l. 1-6; p. 90, l. 15-22; P. Exs. 1, 2, 3). David McCall also talked to a Tana representative during the course of the investigation. (RR Vol. 3, p. 91, l. 19-25; p. 92, l. 1-3). After finishing the investigation and obtaining the services of Don Rhodes, an oil and gas consultant, the McCalls concluded that Tana was underpaying royalties to Niemeyer. (RR Vol. 3, p. 92, l. 4-16). Niemeyer instructed the McCalls to file a lawsuit against Tana, and a written fee agreement was signed by Niemeyer and the McCalls. (RR Vol. 3, p. 157, l. 12-25; p. 158). On October 19, 1995, the McCalls filed Niemeyer's suit against Tana in Fayette County, Texas.¹ (RR Vol. 3, p. 92, l. 17-25; p. 93, l. 1-23). Rowling was not named as a party to this suit. (P. Ex. 18, Ex. D). At all times, the McCalls acted solely as attorneys for Niemeyer and had never entered into any personal contracts or business ventures with Tana or Rowling. (RR Vol. 3, p. 89, l. 9-25).

On October 27, 1995, Tom McCall received a telephone call from Jim Caldwell, an in-house counsel with Tana. (RR Vol. 3, p. 94, l. 14-25; p. 95, l. 1-10; p. 126, l. 16-25). Caldwell demanded that McCall dismiss the Niemeyer lawsuit or ***“something was going to happen.”*** (Emphasis added; RR Vol. 3, p. 101, l. 11-25; p. 102, l. 1-3; p. 105, l. 4-23; p. 127, l. 8-25; p. 128, l. 1-7). Tom

¹ Contrary to Tana and Rowling's material factual and legal misstatement in its Brief, the Fayette County suit was not filed in violation of the terms of the prior release agreement. This same argument was rejected by Judge Dan Beck in the Fayette County suit, with his ruling denying Tana's counterclaim for breach of contract against Niemeyer being affirmed on appeal in *Niemeyer v. Tana*, 39 S.W.3d 380 (Tex.App.—Austin 2001, pet. denied).

McCall asked Caldwell if he was threatening him and Caldwell would not answer the question. (RR Vol. 3, p. 102, l. 1-14; pp. 103-104, l. 15-21; p. 105, l. 4-17; p. 128, l. 1-7). In a bill of exception hearing during the trial of this case, which testimony was not offered at trial, David McCall testified that he spoke by phone with R. Clay Hoblit, Tana's lead attorney, who yelled and screamed at him. (RR Vol. 3, pp. 107-108). During the conversation, Hoblit told David McCall that "... *if we (the McCalls) went forward, we were going to find out what it's like to piss off a billionaire (Rowling).*" (Emphasis added; RR Vol. 3, pp. 109-110). David McCall also received a letter from R. Clay Hoblit stating, in relevant part, that "**If you choose to proceed with the lawsuit**, we will obviously avail ourselves of all legal remedies against *you* and your clients." (Emphasis added; P. Ex. 4).

On November 2, 1995, the fax machine in McCalls' office started running and Tom McCall saw that Tana had filed a lawsuit in Nueces County, Texas. (RR Vol. 3, p. 129, l. 1-25). After reading Tana's allegations that the McCalls and Niemeyers had breached their contract and lease with Tana, Tom McCall thought Tana was trying to play a joke or intimidate the McCalls. The suit also alleged that in filing the Fayette County suit, the McCalls and Niemeyers had tortiously interfered with a contract between Tana and prospective purchasers of production. (P. Ex. 7, p. 9). In the suit, Tana requested, among other things, that the Nueces County District Court declare that the prior release and settlement agreement precluded Niemeyer's suit then pending against Tana before Judge Dan Beck in Fayette County, Texas. (P. Ex. 7, p. 8). Tom McCall requested that his secretary

call the Nueces County District Clerk to see if the lawsuit had been filed. (RR Vol. 3, p. 130, l. 8-25; p. 131, l. 1-2). She reported back to him that the suit had been filed. (RR Vol. 3, p. 131, l. 1-2). Tana sued not only the McCalls, but also sued Niemeyer and his entire family, for not less than \$15 million in actual damages and \$20 million in punitive damages. (RR Vol. 3, p. 134, l. 1-8; p. 139, l. 3-19). Tom McCall testified that he was not a party to any contract with Tana and that Tana knew its allegations were false at the time it filed the Nueces County suit. (RR Vol. 3, p. 134, l. 7-25; p. 135, l. 1-23; P. Ex. 7). Because Tana sued not only the McCalls, but Niemeyer and his entire family, the McCalls felt that the Niemeyer family needed independent representation and Britton D. Monts was brought in to represent the Niemeyers. (RR Vol. 3, p. 154, l. 18-25; p. 155, l. 1-7).

After Tana sued the McCalls, Jim Caldwell, Tana's in-house counsel, wrote a letter to Mr. Ben Campbell at United Oil & Minerals, who was then a client of the McCalls' firm. In the letter, Caldwell falsely represented to United that the McCalls were representing Tana in a suit styled *Retamco Operating, Inc. v. United Oil and Minerals, Inc.* (P. Ex. 8). Caldwell alleged that the McCalls had a conflict of interest and requested that Mr. Campbell instruct the McCalls to cease further action in the *Retamco* suit. (P. Ex. 8). The *Retamco* suit dealt with an overriding royalty interest that only burdened United's working interest and did not affect Tana's interest in the well. The McCalls never represented Tana's interest in the *Retamco* suit. (RR Vol. 3, p. 138). Caldwell's attempt to get the

McCall attorneys fired by United was not successful. (RR Vol. 3, p. 136, l. 16-25; p. 137, l. 20-25; p. 138, l. 12-25; P. Ex. 8; pp. 140-141; P. Ex. 11).

In December of 1995, Tana admitted, in response to the McCalls' Requests for Admissions, that the McCalls were not parties to the Niemeyer oil and gas lease, or the release and settlement agreement. In spite of the admissions, Tana continued to allege in its First Amended Petition filed in the Nueces County suit, in January of 1996, that the McCalls and Niemeyers had breached their agreements. (RR Vol. 3, pp. 140-142, P. Ex. 11, Answer Nos. 1, 3; P. Ex. 12). In the First Amended Petition, Rowling also joined the lawsuit as a plaintiff against the McCalls and their clients. (RR Vol. 3, p. 143, l. 1-6). The McCalls did not know Rowling and had never entered into any contract with him. (RR Vol. 3, p. 143, l. 16-25). Even though Rowling was not a party to the Niemeyer suit, the Niemeyer oil and gas lease, or the prior release and settlement agreement between the Niemeyers and Tana, Rowling also sued the McCalls and Niemeyers for breaching the Niemeyer oil and gas lease and the terms and provisions of the prior release and settlement agreement. (RR Vol. 3, p. 144, l. 5-12; P. Ex. 12). Rowling joined Tana's claim that they recover \$20 million in punitive damages and not less than \$15 million in actual damages. ***In the amended pleading, Tana and Rowling failed to reveal to the Court that both of Tana's contracts of sale with which the McCalls allegedly tortiously interfered had closed for the full sale price on November 7th and 9th of 1995.*** (Emphasis added; RR Vol. 3, p. 190, l. 13-25; pp. 191-193, l. 1-21; P. Ex. 22, 23). Although Rowling was suing for

tortious interference with Tana's contracts of sale, he was not a signatory party to Tana's contracts of sale or the assignments to the purchasers. (P. Ex. 22, 23).

On or about March 5, 1996, Tana and Rowling filed their Second Amended Original Petition in the Nueces County suit. (RR Vol. 3, p. 146, l. 19-25; p. 147, l. 1-19; P. Ex. 14). The pleading continued to assert claims of tortious interference with contract, prospective advantage and conspiracy claims against the McCalls, along with other claims, and requested at least \$35,000,000 in actual and punitive damages against the McCalls and the Niemeyers. (P. Ex. 14). On March 15, 1996, Rowling, filed Answers to Requests for Admissions in the Nueces County suit admitting, like Tana, that the McCalls were not parties to either the Niemeyer oil and gas lease or the release and settlement agreement. (RR Vol. 3, p. 145, l. 5-24; P. Ex. 15). Even after admitting those facts, Tana and Rowling, in their Second Amended Original Petition filed in the Nueces County suit, continued to allege that "... *Defendants are now ineptly attempting to circumvent their contractual obligations in the Release and Settlement Agreement and other agreements with Plaintiff.*" (P. Ex. 14, p. 12; P. Ex. 15, CR Vol. II, p. 229). They also alleged that the McCalls engaged in an abuse of process by, among other things, "... *threatening improper action with the ... the state controller's office [sic], State Bar of Texas and the Courts of this state*" and requested not less than \$35,000,000.00 in actual and punitive damages.² (P. Ex. 14, p. 19). Tana and

² See Texas Rules of Disciplinary Procedure 15.11 (1992), reprinted in Tex. Govt. Code Ann., T.2, Subt. G, App. A-1, which prohibits suits relating to communications with Disciplinary Counsel.

Rowling again requested that the Nueces County District Court declare that the prior release and settlement agreement precluded the Niemeyer suit then pending before Judge Beck in Fayette County, Texas. (P. Ex. 14, p. 12). The Nueces County suit was ultimately ordered abated by the Thirteenth Court of Appeals at Corpus Christi, Texas. *In re McCall*, 967 S.W.2d 934 (Tex.App.—Corpus Christi 1998, original proceeding); (CR Vol. I, pp. 146-160). In conditionally issuing a writ of mandamus against the Nueces County District Court, the Court of Appeals held that the Fayette County District Court was the court of dominant jurisdiction. Rowling never appeared in the Fayette County suit and the McCalls were never joined as parties in the Fayette County suit.

Tana and Rowling aggressively prosecuted the Nueces County case and Tom McCall testified that he had 19 volumes of pleading and discovery documents in his office. (RR Vol. 3, p. 148, l. 9-25; p. 149, l. 1-9; P. Ex. 13).

On October 4, 1996, Tom McCall was non-suited as a party to the Nueces County suit. (RR Vol. 3, p. 151, l. 1-11; P. Ex. 16). On July 7, 1998, the Fayette County District Court ruled that Niemeyer had a legal right to file his suit against Tana. (CR Vol. I, p. 162). Rowling non-suited David McCall on or about January 20, 1999 and Tana non-suited David McCall during the appeal of this case. (Supp. CR, Ex. H-2 Defendant's Motion to Reconsider)

In spite of the attack on them, the McCalls refused to dismiss the Niemeyer suit and terminate their contractual relationship with their client. After much additional time and expense, they were ultimately able to resume prosecution of

Neimeyer's suit in Fayette County, Texas. (RR Vol. 3, p. 155, l. 15-25; p. 156, l. 1-2).

The Bill of Exception Hearing During Trial

After the trial court summarily dismissed the jury in the McCalls' suit, the McCalls presented additional evidence to the Court in a Bill of Exception hearing to demonstrate the nature of the damages being sought by the McCalls. (RR Vol. 3, p. 167, l. 18-25; p. 168, l. 1-4). Tom McCall testified that he tried to keep his time records in the Nueces County suit. (RR Vol. 3, p. 179, l. 3-5, P. Ex. 20). The time spent by McCall in the Nueces County suit was in trying to remove the obstacle to getting back to Niemeyer's suit in Fayette County. (RR Vol. 3, p. 180, l. 13-25; p. 182, l. 16-25; p. 183, l. 1-4). The lawsuit against the McCalls interfered with their attorney-client relationship and increased the difficulty and expense of representing Niemeyer in the Fayette County suit. (RR Vol. 3, p. 181, l. 1-10; p. 187, l. 22-25; p. 188, l. 1-7). McCalls' firm spent approximately 1,000 hours defending the Nueces County suit and had expenses of approximately \$21,000.00. (RR Vol. 3, p. 181, l. 17-25; p. 182, l. 1-15). McCall testified that he felt the reasonable value for his firm's lost time was \$275,000.00. (RR Vol. 3, p. 184, l. 13-25). The value of the time spent by Britton D. Monts in the Nueces County proceeding was estimated to be \$321,750.00 with out-of-pocket expenses of \$5,948.45. (RR Vo. 3, p. 185, l. 4-25; p. 186, l. 1-18; P. Ex. 21).

SUMMARY OF THE ARGUMENT

Tana and Rowling were not legally justified in knowingly filing a suit containing false allegations against the McCalls in an attempt to force the McCalls to dismiss their client's lawsuit against Tana. Under our adversarial system of justice, Niemeyer was entitled to loyal, faithful and aggressive representation by the McCalls, whom he had selected as his counsel of choice. The McCalls should not have been forced to choose between abandoning their responsibilities to their client, or being subjected to frivolous and harassing litigation and injury in a distant venue as part of Tana and Rowling's litigation strategy to interfere with and cause a termination of the attorney-client relationship.

The McCalls had a property interest in their contract with Niemeyer, which was intentionally and tortiously interfered with by Tana and a significant portion of the damages being sought by the McCalls are in the nature of lost wages, or increased cost of performance of the Niemeyer contract, as a result of the lost time and expenses incurred in removing the tortious impediment to performance of the contract. The McCalls incurred no attorney's fees nor did they pay any attorney's fees during the course of the Nueces County suit. The fact that the McCalls are attorneys does not make their damage claim for the value of their lost time and expenses to be "attorneys fees", at least in the context used by Tana and Rowling.

Based on the McCalls' general damage pleading before the trial court on remand, it is premature at this time for Tana and Rowling to engage in a philosophical debate as to the nature of the damages that might ultimately be

recovered by the McCalls under their tortious interference claim. The McCalls should have the opportunity to pursue the full range of damages available to any party whose contract has been the subject of tortious interference.

The facts of this case are both rare and extreme. Counsel is unable to find any reported case in Texas of a party conducting extended litigation against opposing counsel based on fraudulent pleadings filed for the purpose of forcing dismissal of a client's suit. Contrary to Tana and Rowling's assertion of "endless litigation" if the decision of the Court of Appeals is not reversed, the Court's decision will actually restrict, rather than encourage litigation. The opinion's message is clear: if you file a false lawsuit against opposing counsel in the effort to force dismissal of a suit, you are liable for tortious interference damages sustained by the attorney, including "attorneys fees." This is a reasonable and measured rule of law crafted by the Court of Appeals to deter other litigants from engaging in such conduct.

ARGUMENT

No Legal Right to Sue Opposing Counsel

A justification defense is based on either the exercise of (1) one's own legal rights or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203 (Tex. 1996); *Butnaru v. Ford Motor Co.*, 2001 WL 618149 (Tex. 2001).

Texas law has long provided that **"attorneys are authorized to practice their profession, to advise their clients and interpose any defense or offense**

without making themselves liable for damages.” *Kruegel v. Murphy*, 126 S.W. 343 (Tex.Civ.App. 1910, writ ref’d). (Emphasis added). An attorney may assert any of his client’s rights without being personally liable for damages to the opposing party., *Bradt v. West*, 892 S.W.2d 56 (Tex.App.—Houston [1st Dist.] 1994, writ denied); *Morris v. Bailey*, 398 S.W.2d 946 (Tex.Civ.App.—Austin 1996, writ ref’d n.r.e.); *Renfroe v. Jones & Associates*, 947 S.W.2d 285 (Tex.App.—Fort Worth 1997, pet. denied); *Maynard v. Caballero*, 752 S.W.2d 719 (Tex.App.—El Paso 1988, writ denied); *Taco Bell Corp. v. Cracken*, 939 F.Supp. 528 (N.D. Tex. 1996); *White v. Bayless*, 32 S.W.3d 271 (Tex.App.—San Antonio 2000, pet. denied). There was never any privity of contract between the McCalls and Tana and Rowling, with the McCalls’ sole duty being to represent Niemeyer in his adversarial proceeding against Tana. *Bryan & Amidei v. Law*, 435 S.W.2d 587 (Tex.Civ.App.—Fort Worth 1968, no writ); *Mitchell v. Chapman*, 10 S.W.3d 810 (Tex.App.—Dallas 2000, pet denied). After hiring the McCalls to file his suit, Niemeyer was entitled to zealous representation by the McCalls without a suit compromising that representation. *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996). In view of the well-established law that the McCalls, as attorneys, had no liability or duty to Tana or Rowling, Tana and Rowling did not have a legal right or justification to sue the McCalls for merely filing suit on behalf of their client. There was absolutely no legal justification or privilege for Tana and Rowling to knowingly engage in what, in effect, was an extortion attempt, make false accusations in a suit, or join in a “judicial drive-by shooting”

against the McCalls, in an attempt to force them to dismiss their client's lawsuit. Although Tana and Rowling argue that there was never any finding that the Nueces County suit was frivolous or without merit, the McCalls submit that the suit against them was frivolous and without merit as a matter of law because of the long established law that no cause of action exists against an attorney for merely filing suit for a client.

In their Motion for Directed Verdict, Tana and Rowling apparently relied solely upon the argument that the filing of all lawsuits is a legal right as a matter of law. In making this argument, Tana and Rowling ignore the fact that "a party may not exercise an otherwise legitimate privilege by resort to illegal or tortious means." *Prudential Insurance Co. of America v. Financial Review Services, Inc.*, 29 S.W.3d 74, 81 (Tex. 2000). Tana and Rowling also ignore the fact that their own past conduct flies in the face of their current privilege argument. By now arguing that a lawsuit can never constitute tortious interference, they necessarily admit that their Nueces County suit against the McCalls was frivolous and not justified. The Third Court of Appeals, under the egregious facts of this case, correctly rejected Tana and Rowling's argument that the filing of the suit against the McCalls was legally justified. "Litigation is a powerful weapon, and when instituted in bad faith for the purpose of causing damage or loss, it is a wrongful method of interference." *Hughes v. Houston Northwest Med. Ctr., Inc.*, 680 S.W.2d 838, 842 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)

Damages

Texas law recognizes that an attorney-client relationship can be the subject of tortious interference. *Stuessy v. Byrd, Davis & Eisenberg*, 381 S.W.2d 126 (Tex.Civ.App.—Austin 1964, no writ); *Jamail v. Thomas*, 481 S.W.2d 485 (Tex.Civ.App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.). With regard to actual damages, interference with contractual relations encompasses all invasions of contractual relations, including any act which makes more difficult or retards performance of the contract. *Tippett v. Hart*, 497 S.W.2d 606 (Tex.Civ.App.—Amarillo 1973), writ ref'd n.r.e., 501 S.W.2d 874 (Tex. 1973); *Bellefonte Underwriters Ins. Co. v. Brown*, 663 S.W.2d 562 (Tex.App.—Houston [14th Dist.] 1983) rev'd in part on other grounds, 704 S.W.2d 742 (Tex. 1986). A significant portion of the damages being sought by the McCalls includes not only their out-of-pocket expenses, but the value of their lost time incurred in removing the intentional and tortious impediment to the performance of the Niemeyer contract. The claim also consists of the time and expenses of another attorney brought in to assist in removing the impediment to performance of the Niemeyer contract. The damages being sought by the McCalls are analogous to a lost wage claim that might be made by an attorney who was not able to work as a result of an automobile accident. An argument that a negligently injured attorney cannot recover for lost wages because the recovery would constitute “attorney’s fees” is simply not supportable in law. The McCalls did not pay any attorney’s fees, or incur an obligation to pay attorney’s fees, as a result of the Nueces County suit.

However, the McCalls did incur substantial damages that they would not have suffered but for the wrongful conduct of Tana and Rowling. Although the McCalls could move the Nueces County District Court for Rule 13 sanctions, such sanctions are discretionary and are not the McCalls' exclusive remedy as suggested by Petitioners. TEX.R.CIV.P. 13. In fact, the nature of the damages sought by the McCalls may not be available in their entirety under Rule 13 sanctions. *Beasley v. Peters*, 870 S.W.2d 191 (Tex.App.—Amarillo 1994, no writ). The McCalls, by becoming practicing attorneys, did not give up the right to seek redress through the courts for injuries inflicted on them by way of tortious interference with their contractual relations.

Premature

The McCalls submit that based on the record before the Court, it is premature for Tana and Rowling to engage in a philosophical debate as to the nature of the damages that might ultimately be recovered by the McCalls under their tortious interference claim. On remand, the McCalls' live pleadings before the court will be their First Supplemental Petition, which contains only a general claim for damages that does not specify the nature of the damages being sought. Although Tana raised a special exception to an award of attorney's fees under the McCalls' tortious interference claim, the record does not reflect that the exception was ever presented to the Court. *Nassar v. Hughes*, 882 S.W.2d 36 (Tex.App.—Houston [1st Dist.] 1994, writ denied); TEX.R.CIV.P. 90. Accordingly, Tana and

Rowling have not preserved for appellate review any complaints as to the nature of the damages that may be recovered by the McCalls on remand.

PRAYER

Respondents, Tom C. McCall and David B. McCall respectfully request that this Court deny Tana and Rowling's Petition for Review and for such other and further relief to which they may show themselves justly entitled.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondents' Brief on the Merits has been sent this 19th day of April, 2002, to the following by certified mail, return receipt requested:

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