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FILED  
SUPREME COURT  
STATE OF OKLAHOMA

ORIGINAL  
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA JAN 29 2021

PAYCOM PAYROLL, LLC, a Delaware  
limited liability company,

Plaintiff/Appellant,

v.

OKLAHOMA COUNCIL OF PUBLIC  
AFFAIRS, INC., an Oklahoma corporation,

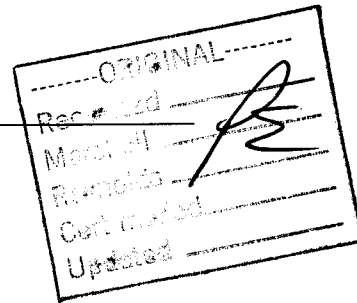
Defendant/Appellee.

JOHN D. HADDEN  
CLERK

Case No. #119344

**PETITION IN ERROR**

- PETITION IN ERROR
- AMENDED OR SUPPLEMENTAL PETITION
- CROSS PETITION
- COUNTER-PETITION
- DATE FIRST PETITION IN ERROR FILED: \_\_\_\_\_



**I. TRIAL COURT HISTORY**

COURT/TRIBUNAL: Oklahoma County District Court

COUNTY: Oklahoma

CASE NO.: CJ-2020-1950

JUDGE: Thomas E. Prince

NATURE OF CASE: Defamation / Tortious Interference, Oklahoma Citizens Participation Act

NAME OF PARTY FILING THIS PETITION IN ERROR: Paycom Payroll, LLC

**THE APPEAL IS BROUGHT FROM:**

- Judgment, Decree or Final order of District Court.
- Appeal from order granting summary judgment or motion to dismiss where motion filed after October 1, 1993 (Accelerated procedure under Rule 1.36).
- Appeal from Revocation of Driver's License (Rule 1.21(b)).
- Final Order of Other Tribunal.  
(Specify \_\_\_\_\_)
- Interlocutory Order Appealable by Right.
- Other:

**II. TIMELINESS OF APPEAL**

1. Date judgment, decree or order appealed was filed: December 30, 2020.
2. If decision was taken under advisement, date judgment, decree or order was mailed to parties: January 8, 2021 (for mailing to Plaintiff).

3. Does the judgment or order on appeal dispose of all claims by and against all parties?

Yes  No.

If not, did district court direct entry of judgment in accordance with 12 O.S. § 994?

Yes  No.

When was this done? \_\_\_\_\_

4. If the judgment or order is not a final disposition, is it appealable because it is an Interlocutory Order Appealable by Right?  Yes  No.

5. If none of the above applies, what is the specific *statutory* basis for determining the judgment or order is appealable? \_\_\_\_\_

6. Were any post-trial motions filed? No.

<u>Type</u>	<u>Date Filed</u>	<u>Date Disposed</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. This Petition is filed by:  Delivery to Clerk, or  
 Mailing to Clerk by U.S. Certified Mail, Return Receipt Requested, on \_\_\_\_\_

### III. RELATED OR PRIOR APPEALS

List all prior appeals involving same parties or same trial court proceeding: N/A

List all related appeals involving same issues: N/A

### IV. SETTLEMENT CONFERENCE

Is appellant willing to participate in an attempted settlement of the appeal by predecisional conference under Rule 1.250?  Yes  No

### V. RECORD ON APPEAL

A Transcript will be ordered.

No Transcript will be ordered because no record was made and/or no transcript will be necessary for this appeal

\_\_\_\_\_ A Narrative Statement will be filed

\_\_\_\_\_ Record is concurrently filed as required by Rule 1.34 (Driver's License Appeals, etc.) or Rule 1.36 (Summary judgments and motions to dismiss granted).

VI. JUDGMENT, DECREE OR ORDER APPEALED -- EXHIBIT "A"

VII. SUMMARY OF CASE -- EXHIBIT "B"

VIII. ISSUES TO BE RAISED ON APPEAL -- EXHIBIT "C"

IX. NAMES OF COUNSEL

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DATE: January 29, 2021.

  
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CERTIFICATE OF MAILING

I certify that a true and correct copy of this *Petition in Error* was mailed January 29, 2021, by depositing it in the U.S. Mail with postage prepaid and by electronic mail, to the attorneys for Defendant/Appellee:

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I further certify that a true and correct copy of this *Petition in Error* was mailed to the Oklahoma County Court Clerk on January 29, 2021.

  
John P. Falcone / Patrick Lee Neville Jr.

JUDGMENT, DECREE OR ORDER APPEALED – EXHIBIT “A”



IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY  
DEC 30 2020  
RICK WARREN  
COURT CLERK  
48

PAYCOM PAYROLL, LLC, A DELAWARE )  
LIMITED LIABILITY COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
OKLAHOMA COUNCIL OF PUBLIC AFFAIRS, )  
INC., an OKLAHOMA CORPORATION, )  
 )  
Defendant. )

Case No. CJ-2020-1950

ORDER SUSTAINING DEFENDANT'S  
MOTION TO DISMISS SECOND AMENDED PETITION

This matter is before the Court on the Defendant's Motion to Dismiss Second Amended Petition, filed October 15, 2020. The Motion to Dismiss is presented under the mechanism of the Oklahoma's Citizens Participation Act. See 12 O.S. 2014, § 1430, et al. ("OC Pact"). Having received argument of counsel and reviewed the Parties' submissions, the Court Finds and Orders as follows:

1. Plaintiff initiated this case on April 22, 2020. Thereafter, on June 29, 2020, the Defendant filed its first Motion to Dismiss. On July 24, 2020, contemporaneously with filing its Response to the Motion to Dismiss, the Plaintiff filed a "Verified Amended Petition". The Court conducted a hearing on August 14, 2020, sustained the Motion to Dismiss, and granted the Plaintiff leave to file an Amended Petition.

2. On August 28, 2020, Plaintiff filed its Second Amended Petition ("SAP"). Thereafter, on October 15, 2020, the Defendant filed its Motion to Dismiss Second Amended Petition. The Court conducted a hearing on November 20, 2020, at which all Parties were present by and through their respective attorneys. At the conclusion of the hearing, the Court directed the

Parties to file supplemental briefs on the following schedule: Defendant to file a supplemental brief on or before December 8, 2020; Plaintiff to file a Response on or before December 18, 2020; and, Defendant to file a Reply on or before December 23, 2020. The Court further announced to the Parties on November 20, 2020, that, following receipt of the supplemental briefs, the Court would rule without further hearing or argument from the Parties. By requesting supplemental briefs at the conclusion of the November 20, 2020, hearing, the Court, in effect, extended the deadline set out in 12 O.S. 2014 Supp., § 1434A, that establishes a time frame within which the Court is required to rule on a Motion to Dismiss filed under the OCPact.

## I.

### THE PARTIES

3. Plaintiff, Paycom Payroll, LLC (“Paycom”), alleges in the SAP that it is a “payroll and human resources software solutions services provider headquartered in Oklahoma City”. See SAP ¶ 6. Paycom further alleges in the SAP that it employs thousands of Oklahoma residents and that it provides payroll and related services to thousands of Oklahoma businesses. See SAP ¶ 7; Paycom Response in Opposition to Defendant’s Motion to Dismiss Second Amended Petition, page 2.

4. Defendant, the Oklahoma Council of Public Affairs, Inc. (“OCPA”), describes itself, in part, as follows: “[s]ince 1993, the Oklahoma Council of Public Affairs has advocated in favor of free enterprise and limited government in Oklahoma. OCPA believes the free market is the single greatest tool in the world for lifting the most people out of poverty in the least amount of time . . . . OCPA’s very existence relies on the freedom of speech and association”. See OCPA Motion to Dismiss Second Amended Petition, page 3.

## II.

### PAYCOM'S ALLEGED CLAIMS FOR RELIEF

5. Paycom has alleged two (2) claims for relief in the SAP: defamation and tortious interference.

6. Paycom also alleged that all of the publications at issue here arose in the context of “the COVID-19 public health emergency . . .”. See SAP ¶’s 13, 14, 15 & 23. Paycom further alleged, in part, as follows:

7. Paycom . . . is frequently involved in debate and discussion as to governmental action and the management of the Oklahoma economy.

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43. OCPA’s false Statements that Paycom is advocating for the mandatory closure of most businesses has also damaged Paycom with Paycom’s prospective and actual customers – all of which are businesses.

44. OCPA’s dissemination of the false Statements about Paycom has damaged Paycom’s reputation in the community, in particular its reputation as a supporter and champion of businesses.

45. OCPA’s dissemination of the false Statements about Paycom has caused and will cause Paycom to suffer damages, including lost revenue and/or remediation expenses to mitigate the damages caused by OCPA’s false Statements.

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63. Defendant OCPA used improper and unfair means to interfere with Paycom’s contracts, business relations and prospective business relations by authoring and disseminating its false Statements about Paycom to third party businesses.

## III.

### PAYCOM'S FACTUAL ALLEGATIONS

7. It is undisputed that, on or about March 20, 2020, Paycom released a letter signed by Paycom’s Chief Executive Officer, Chad Richison, addressed to “the Honorable Kevin Stitt”,



discussing certain aspects of the COVID-19 “public health crisis”. See Exhibit “A” to OCPA Motion to Dismiss Second Amended Petition; Paycom Exhibit 0001.

8. It is further undisputed that, on March 22, 2020, Paycom’s Chief Executive Officer forwarded a second letter to the Governor of the State of Oklahoma, in which Paycom advocated for certain “actions”, including “ten bullet-point proposals. . .”. See Paycom Response Brief filed November 9, 2020, page 3; Paycom Exhibit 002; SAP ¶ 17. Paycom’s letter of March 23 2020, set out a list of “recommendations”, including the following:

**Temporarily suspend personal-touch services in order to social distance, which includes, but is not limited to, hair salons, nail salons, spas and massage parlors.**

\*\*\*

**Innovate how grocery stores operate** by providing drive-thru pick up or delivery for all customers and encouraging the use of technology (emphasis added).

9. It also is undisputed that, on March 23, 2020, OCPA authorized the issuance of a publication on its official website.” See Paycom Exhibit 003-004; SAP ¶ 18. The specific statement from the OCPA publication that is at issue in this action is as follows:

**While some individuals are urging Gov. Kevin Stitt to issue an order mandating the closure of numerous businesses** across Oklahoma in response to the COVID-19/coronavirus event, the governor said he does not currently support that action.

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**Some individuals have called for Stitt to order most businesses to close** and have the government control how others operate, including grocery stores. **Chad Richison, CEO of Paycom, is among those who have advocated such actions.** (emphasis added).

10. Paycom has alleged the following damages:

A. That Paycom suffered generalized damages in the form of a loss of reputation in the community. See SAP ¶’s 30 & 44.

B. That Paycom incurred mitigation expenses to address or respond to the actions of OCPA, as reflected by the professional fees allegedly charged Paycom by a public relations firm, totaling \$14,596.60. See SAP ¶'s 46-48.

C. That Paycom suffered a loss of annualized recurring revenue, including an alleged loss totaling \$645,613.00, determined from a comparison of the alleged losses “from Oklahoma clients” and the alleged losses from “clients throughout the remainder of the United States . . .”. See SAP ¶'s 49-52.

11. Paycom has not identified the loss of any specific clients, existing or prospective, and/or that it suffered the breach of any identified contract due to the publication by OCPA.

#### IV.

##### A SUMMARY OF THE ARGUMENTS MADE BY OCPA

12. As its primary defense in this case, OCPA relies on the foundational principles of free speech, as reflected by holding in Gaylord Entertainment v. Thompson, 1998 OK 30, 958 P.2d 128. See OCPA Motion to Dismiss, filed June 29, 2020, page 17; OCPA's Motion to Dismiss Second Amended Petition, filed October 15, 2020, page 18; OCPA's Reply Brief, filed November 13, 2020, page 4. In response to the Court's directive of November 20, 2020, OCPA's Supplemental Brief, filed December 8, 2020, at pages 7-10, argued that the common-law privilege of “fair comment” provides a defense here. See OUII 28.4. Because the “fair comment” defense was discussed in Gaylord Entertainment. (Id., at page 144, note 63), the Court finds that this was not a new defense and that OCPA asserted it in a timely fashion. The Court in Gaylord Entertainment v. Thompson, Id., also as stated, in part, that the “constitutional freedom of expression and discussion, if it is to fulfill its historic function, must . . . enable the member of society to cope with the exigencies of their time”:

Restraint upon free speech is prohibited by the terms of Art. 2 § 22, Okl. Const. The State's free-speech-and-press guarantee protects the public by allowing issues to be freely and vigorously discussed. . . .

\*\*\*

**There should be “no potential interference” with a meaningful dialogue of ideas concerning self-government; nor should there be a threat of liability that causes “self-censorship.”** Protected speech not only encapsulates the rights of the speaker, but also those of the listener.

**The constitutional freedom of expression and discussion, if it is to fulfill its historic function, must embrace all issues about which information is needed (or appropriate) to enable the members of society to cope with the exigencies of their time. *Advocacy for or against a proposed law is the purest form of political speech.*** The state cannot hence burden the free exchange of political ideas about the objective of an initiative proposal.

*Id.*, at 138-140 (emphasis added).

13. OCPA argues that, for purposes of 12 O.S. 2014, § 1434, Paycom has failed to establish “by *clear and specific evidence* a prima facie case for each essential element of the claim in question”, and specifically argues that:

- A. Special damages have not been shown by Paycom.
- B. Actual malice has not been shown by Paycom.
- C. That the OCPA publication was not defamatory.
- D. That the statement attributed to Paycom was true; and,
- E. That the published statements do not rise to the level of actionable conduct.

14. Secondly, OCPA further argues that it has *shown “by a preponderance of the evidence* each essential element of a valid defense” to Paycom’s claims, including the following:

- A. That the First Amendment protects the debate of public affairs.
- B. Paycom’s claims fail under the holding of Gaylord Entertainment v. Thompson,

1998 OK 30, 958 P.2d 128; and,

- C. The Fair Comment Privilege shields the conduct by OCPA.

V.

**THE OCPACT REQUIRES A PLAINTIFF TO  
ESTABLISH ITS *PRIMA FACIE* CASE WITH SUFFICIENT  
DETAIL TO *SHOW* THE FACTUAL BASIS FOR ITS CLAIM**

15. The Court in Krimbill v. Talarico, 2018 OK CIV APP 37, 417 P.3d 1240, outlined the structure of the OCPact:

In an OCPA proceeding, the initial burden is on the defendant seeking dismissal to show that the plaintiff's claim 'is based on, relates to, or is in response to the [defendant's] exercise of the right of free speech, the right to petition, or the right of association.' 12 O.S. Supp. 2014 § 1434(B). **The burden then shifts to the plaintiff to *show* 'by clear and specific evidence a *prima facie* case for each essential element of the claim in question.'** *Id.*, § 1434(C). If § 1434(C) is satisfied, the burden shifts back to the defendant to *show* "by a preponderance of the evidence" a defense to the plaintiff's claims. *Id.*, § 1434(D). If the plaintiff's *prima facie* case fails, or the defendant shows a defense by a preponderance of the evidence, the suit is dismissed.

*Id.*, at 1245.

16. The Court in Krimbill, also set out other controlling legal principles for purposes of the OCPact:

- A. A suit must be *meritless* to be dismissed under the OCPact. *Id.*, at 1249.
- B. The Court may consider the pleadings in determining whether a *prima facie* case has been shown. *Id.*, at 1246.
- C. Disputed questions of material fact cannot be resolved in an OCPact dismissal proceeding. *Id.*, at 1247.
- D. When the Plaintiff is a "public figure", he must show the additional element of malice. *Id.*, at 1253.
- E. The actual malice standard requires proof that a defendant acted with knowledge that a publication was false or with reckless disregard of whether it was false or not. *Id.*, at 1253.

F. The malice element of a *prima facie* case may be shown by circumstantial evidence. *Id.*, at 1253-1254.

G. The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. *Id.*, at 1253.

H. For purposes of the third step or stage of an OCPact proceeding, “the court may only properly consider *defenses that turn solely on a question of law*”. *Id.*, at 1249.

17. In Southwest Orthopaedic Specialists, P.L.L.C. v. Allison, 2018 OK CIV APP 69, 439 P.3d 430, the Court describe the applicable standard for a Motion to Dismiss under the OCPact and cited as persuasive authority a decision by the Texas Supreme Court:

Texas courts, interpreting the earlier Texas act (the TCPA), which is practically identical to the OCPA, caution that ‘pleadings that might suffice in a case that does not implicate the TCPA may not be sufficient to satisfy the TCPA’s “clear and specific evidence” requirement.’ *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). Additionally, ‘**[b]are, baseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a *prima facie* case under the TCPA.**’ *Id.* at 592.

¶ 19 The latter standard appears appropriate. **Something more fact-intensive than general allegations that the required elements exist should be necessary to show a *prima facie* case pursuant to the OCPA.** Although the OCPA procedure is styled as a ‘motion to dismiss,’ the standard of evidence required is somewhat *more specific than that required to resist a traditional motion to dismiss*, in that something more than formulaic recitals of elements and a simple claim of damages is necessary. Pleadings that would be sufficient to withstand a traditional motion to dismiss will not always withstand a dismissal motion under the OCPA. **Texas appears to have placed particular emphasis on the damages element, probably because this is an element that a plaintiff has the capability of proving and is a strong indicator of merit. . . . We will analyze this case pursuant to the rules set out by the Texas Supreme Court in *In re Lipsky*.**

*Id.*, at 436 (emphasis added).

18. In *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015), the Texas Supreme Court described the applicable standard for a Motion to Dismiss under Texas’ version of the CPA, in part, as follows:

Fair notice of a claim under our procedural rules thus may require something less than 'clear and specific evidence' of each essential element of the claim. Because the Act requires more, mere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not suffice. Instead, a **plaintiff must provide enough detail to show the factual basis for its claim. 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 590-591 (emphasis added).

19. As noted above, there are no disputed facts concerning the fact of the publication by OCPA, the letters by Paycom that preceded the OCPA publication and/or the content of those writings. In other words, none of the facts in the context of those events have been contested by the Parties. The Court, therefore, finds that, for purposes of the first step of the procedural mechanism of the OCPact, Paycom's claims against OCPA relate to or are in response to the OCPA's exercise of the right of free speech. See 12 O.S. Supp. 2014 § 1434(B).

## VI.

### **PAYCOM HAS FAILED TO SHOW SUFFICIENT EVIDENCE OF EACH ELEMENT OF THE DEFAMATION CLAIM**

20. The elements of a claim of defamation are set out in OUJI 28.2 as follows:

In order to recover for defamation, [Plaintiff] has the burden of proving the following five elements by the greater weight of the evidence:

1. The statement exposed [Plaintiff] to public hatred, contempt, ridicule or disgrace;
2. [Defendant] communicated the statement to (a person)/persons) other than [Plaintiff];
3. (That person)/(Those persons) reasonably understood the statement to be about [Plaintiff];
4. The statement was false; however, minor inaccuracies do not amount to falsity if the statement is substantially true; and,

5. The statement caused [Plaintiff] to suffer (a financial loss)/(damage to Plaintiff's reputation and/or emotional injury).

In addition, [Plaintiff] must prove by clear and convincing evidence that:

6. [Defendant] either knew the statement was false or had serious doubt whether the statement was true or false. (emphasis added).

See 12 O.S. 2011, § 1441.

A. Paycom Has Not Shown Special Damages As Are Required In This Case

21. During the hearing on November 20, 2020, the Court expressed from the bench that the Court had concluded that Paycom had sufficiently shown its alleged damages for purposes of the OCPact. The Court has now reconsidered that “from the bench” pronouncement. See Conterez v. O'Donnell, 2002 OK 67, 58 P.3d 759, 761–762, as corrected (Sept. 27, 2002) (a “trial court is not bound by, and may hence reconsider, all of its mid-litigation rulings at any time before the case comes to an end”); 12 O.S. 2011, § 953 (defining a “final judgment”).

22. Because the publication at issue is not “actionable per se”, Paycom is required to show “special damages” to establish a *prima facie* claim of defamation. See Brock v. Thompson, 1997 OK 127, 948 P.2d 279, 292, as corrected (Apr. 3, 1998) (“[a] writing is actionable *per se* when the language used is susceptible of but a single meaning that is opprobrious”); Sturgeon v. Retherford Publications, Inc., 1999 OK CIV APP 78, 987 P.2d 1218, 1223 (“[a] party relying on a publication that is not *per se* defamatory must plead and prove special damages”); Robert K. Bell Enterprises, Inc. v. Tulsa County Fairgrounds Trust Authority, 1985 OK 10, 695 P.2d 513, 517 (“special damages is essential to state a cause of action where the publication is not libelous per se”); McKenney v. Carpenter, 42 Okla. 410, 141 P. 779, 780 (1914) (“[i]t is not every written charge against an individual that will sustain a suit for damages, and, where the article itself is not libelous per se, there must be an allegation of special damages, before a recovery can be had”).

23. Additionally, Paycom's Chief Executive Officer should be considered a "public figure", further establishing the obligation on Paycom to show "special damages". See Luper v. Black Dispatch Pub. Co., 1983 OK CIV APP 54, 675 P.2d 1028, 1031 (where the Court found that Clara Luper was a "'public figure' . . . by virtue of her civil rights work, radio show, and books"); Wright v. Haas, 1978 OK 109, 586 P.2d 1093, 1096 (where the Court held that the plaintiff there was a "public figure" because he "voluntarily injected himself into the vortex of the public controversy by writing his letter addressed to the editor with the intent it be published").

24. Special damages consist of "something having economic or pecuniary value". See Miskovsky v. Tulsa Tribune Co., 1983 OK 73, 678 P.2d 242, 248 (where the Court sustained a demurrer to the Petition where the Plaintiff alleged that he had "been damaged in his business and reputation in the amount of \$10,000" without showing by proper averment how the special damages were occasioned"); Restatement (Second) of Torts § 575 (1977) ("[s]pecial harm . . . is the loss of something having economic or pecuniary value").

25. In tort actions, "the recovery for pecuniary harm is restricted by the rules as to causation". See 23 O.S. 2011, § 61; Abercrombie & Fitch Stores, Inc. v. Penn Square Mall Ltd. Partnership, 2018 OK CIV APP 56, 425 P.3d 757, 764; Thompson v. Presbyterian Hospital, Inc., 1982 OK 87, 652 P.2d 260, 263-264 ("when there is no evidence from which the jury could reasonably find a causal nexus between the negligent act and the resulting injuries"); Martin v. Griffin Television, Inc., 1976 OK 13, 549 P.2d 85, 92-93 ("[t]he prohibition of recovery of damages because of uncertainty and too speculative in nature applies to the fact of damage and not to the amount of damage").

26. Each of the cases cited by Paycom on pages 14-15 of its November 9, 2020, Brief that addressed the right of recovery of alleged "public relations mitigation expenses" in a



defamation case is distinguishable from this case, upon the following basis: each of them involved allegations of libel "per se", which does not exist here. Moreover, actual damages (and not merely presumed damages) must be proven for a defamation plaintiff to be able to pursue a claim that does not involve allegations of libel "per se". See Mitchell v. Griffin Television, L.L.C., 2002 OK CIV APP 115, 60 P.3d 1058, 1061 & 1066 ("[s]lander is actionable *per se*, without a showing of actual damage, if it falls within the first four sections of 12 O.S.1991 § 1442 . . . [and] the Legislature contemplated presumed damages for slander *per se*"); Restatement Second of Torts, § 558 (stating, in part, that "[t]o create liability for defamation there must be: . . . (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication").

27. In Kee v. Armstrong, Byrd & Co., 1915 OK \_\_\_, 151 P. 572, overruled in part on other grounds by Dusabek v. Martz, 1926 OK 431, 249 P. 145, 149, the plaintiff alleged a claim of libel stemming from a newspaper article. Id., at 573. The plaintiff there was engaged in the retail sale of "musical instruments . . .". Id., at 575. The Court reversed the jury verdict for the plaintiff, in part, because the plaintiff had failed to present proof of "the names and addresses of prospective customer who had refused to purchase pianos, organs, . . . by reason of" the article. Id., at 575-576. The Court in Kee concluded that, although the general allegation that the plaintiff had "lost many prospective customers" was sufficient to avoid a "general demurrer to the petition", more specific evidence was required to sustain a verdict at trial:

**Plaintiff attempted to establish its case by showing the volume of business immediately prior to the appearance of this article and the volume immediately following its appearance, and to ascribe the decrease in the volume of business to the baneful effect this article had upon the public mind. But that was entirely too indefinite. There are many things that will cause a business to fluctuate, and many times business fluctuates without any apparent cause.**

Id., at 575 (emphasis added); See Bokoshe Smokeless Coal Co. v. Bray, 1916 OK 111, 155 P. 226 (where the plaintiff sought lost future profits because of an eviction from a coal mine).

28. For purposes of the Motion to Dismiss, the Court accepts as true the allegation that Paycom has suffered damages to its reputation and good-will, that it has incurred charges by a public relations firm, and has suffered a loss of annualized revenue during the relevant period. However, in the absence of any specific client, existing or prospective, that Paycom lost and/or that it suffered the breach of any identified contract(s) due to the publication by OCPA, Paycom has failed to show the special damages that are required for this case. Consequently, Paycom has not shown a *prima facie* case of defamation.

B. Actual Malice Has Not Been Shown

29. Paycom has alleged in ¶ 54 of the SAP that “OCPA acted intentionally and with malice toward Paycom and with reckless disregard for its rights . . .”.

30. The only evidence shown by Paycom on the issue of alleged malice by OCPA consists of the two (2) documents attached as its Exhibits 0062 & 0072. Exhibit 0062 is an email exchange, on or about January 25, 2018, between former Governor Frank Keating and Chad Richison, regarding facts related to Governor Keating service on the Board of Regents for the University of Oklahoma. Exhibit 0072 is a letter of resignation submitted on or about October 10, 2017, by Larry V. Parman – resigning from the Paycom Board of Directors. Paycom argued that both events evidence “a contentious history between it and OCPA . . . and that OCPA views it as a policy opponent”. See Paycom Brief in Opposition to Motion to Dismiss, filed November 9, 2020, page 11.

31. As a matter of law, Exhibits 0062 & 0063 and the alleged “contentious history between” Paycom and OCPA do not constitute direct or circumstantial evidence that OCPA acted

with knowledge that the publication was false or with reckless disregard of whether it was false or not. See 12 O.S. 2011, § 2401 (defining relevant evidence); OUJI 3.25 (defining circumstantial evidence as “the proof of facts or circumstances which gives rise to a reasonable inference of other connected facts”).

32. Based on the absence of any evidence of actual malice by OCPA, Paycom has failed to show a *prima facie* case of defamation.

C. The Remaining Challenges to the Defamation *Prima Facie* Case Raise Fact Issues

33. As noted above, OCPA has challenged Paycom’s *prima facie* case with respect to the following additional elements of a defamation claim: i.e., (1) that the OCPA publication was not defamatory; (2) that the statements therein attributed to Paycom were true; and (3) that the statements published by OCPA do not rise to the level of actionable conduct.

34. The Court finds that the remaining challenges to Paycom’s *prima facie* case raise issues of fact that may not be resolved in the context of the Motion to Dismiss. See Stewart v. NYT Broadcast Holdings, L.L.C., 2010 OK CIV APP 89, 240 P.3d 722, 725 (holding that, for purposes of the “fair comment” defense, whether the publication was substantial accurate presents a question for a jury); Tuffy’s, Inc. v. City of Oklahoma City, 2009 OK 4, 212 P.3d 1158, 1162-1163 (“[w]hen reviewing a motion to dismiss, the Court must take as true all of the challenged pleading’s allegations together with all reasonable inferences which may be drawn from them. The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts. A pleading must not be dismissed for failure to state a legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts which would entitle the plaintiff to relief”).

## VII.

### **PAYCOM HAS FAILED TO SHOW SUFFICIENT EVIDENCE OF THE DAMAGES ELEMENT OF TORTIOUS INTERFERENCE**

35. The elements of a claim of tortious interference are set out in OUJI 24.1:

[Plaintiff] claims that [he/she/it] had a contract with [Third Party] in which they had agreed to<sup>6</sup>[Describe the terms of the contract]. [Plaintiff] also claims that [Defendant] intentionally and wrongfully interfered with this contract, and that [he/she/it] suffered damages as a direct result. In order to win on the claim of intentional interference with a contract, [Plaintiff] must show by the weight of the evidence that:

1. **[Plaintiff] had a contract with [Third Party];**
2. [Defendant] knew [or under the circumstances reasonably should have known] about the contract;
3. **[Defendant] interfered with the contract [or induced the Third Party to breach the contract, or made it impossible for the contract to be performed];**
4. [Defendant]'s conduct was intentional;
5. [Defendant] used improper or unfair means; and
6. **[Plaintiff] suffered damages as a direct result of [Defendant]'s actions.**

See OUJI 24.2 (setting out the elements of the tort of interference with prospective economic advantage, to include the following: that “[Defendant] interfered with the [prospective] business relationship by: causing [Third Party] not to [enter into]/[continue] the [prospective] business relationship . . .”).

36. In Wilspec Techs., Inc. v. DunAn Holding Grp., Co., 2009 OK 12, 204 P.3d 69, the Court described a tortious interference claim, in part, as follows:

For the past seventy-five years . . . **this Court has repeatedly protected contractual relationships between parties from unprivileged, unjustified, and inexcusable interference from one who is not a party to the contract or business relation.**

Id., at 73 (emphasis added).

37. As noted above, no specific client(s) or contracts allegedly lost and/or breached due to the publication by OCPA have been identified by Paycom. See Mac Adjustment, Inc. v. Property Loss Research Bureau, 1979 OK 41, 595 P.2d 427, 428 (where the Court reversed a jury verdict on a claim for tortious interference “[a]fter carefully examining the evidence [and finding] . . . that Mac has completely failed to show that it lost any business as a proximate result of Bureau’s actions”).

38. Based on the absence of any evidence that Paycom lost any specific, existing or prospective, client(s) and/or suffered the breach of any identified contract(s), Paycom has failed to show a *prima facie* case of tortious interference and/or prospective economic advantage.

#### VIII.

39. The third step or phase of a OCPact proceeding, based on the holding in Krimball, supra., is for the Court to determine whether, as a matter of law, the defendant has shown a defense to the plaintiff’s claims. Id., at 1245-1246 & 1249 (“the court may only properly consider *defenses that turn solely on a question of law*”). In light of the Court’s holding that Paycom has failed to show a *prima facie* case of either a claim of defamation or tortious interference, the Court declines to address the alleged defenses raised by OCPA in a third step or phase of this OCPact proceeding.

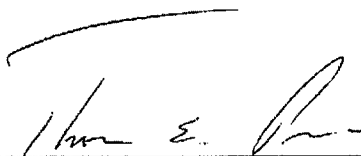
40. Finally, the Court rejects Paycom’s claim that the “commercial speech exemption” applies here because the record does not demonstrate that OCPA is “primarily engaged in the business of selling or leasing goods or services . . .”. See 12 O.S. 2011, § 1439; Castleman v. Internet Money Ltd., 546 S.W.3d 684, 690-691 (Tex. 2018) (holding that the commercial-speech exemption applies only to *certain* communications related to a good, product, or service in the marketplace . . .”).

**ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, for the reasons and upon the grounds stated herein, the Motion to Dismiss the Second Amended Petition should be and is HEREBY sustained and, consequently, the above-styled action is dismissed with prejudice.

IT IS SO ORDERED.

DATED this 30<sup>th</sup> day of December, 2020.

  
\_\_\_\_\_  
Thomas E. Prince  
Judge of the District Court

CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_\_ day of December, 2020, a true and correct copy of the above and foregoing instrument was mailed to the following:

Andrew W. Lester  
Anthony J. Ferate  
Spencer Fane LLP  
9400 N. Broadway Extension, Ste. 600  
Oklahoma City, OK 73114-7423

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\_\_\_\_\_  
Deputy Court Clerk

**CERTIFIED COPY**  
AS FILED OF RECORD  
IN DISTRICT COURT

JAN 22 2021

**RICK WARREN** COURT CLERK  
OKLAHOMA COUNTY

  
\_\_\_\_\_  
Rick Warren

## SUMMARY OF CASE – EXHIBIT “B”

Plaintiff/Appellant (“Paycom”) is a business in the business of serving businesses. Defendant/Appellee (“OCPA”) is a think tank with a history of smearing policy opponents.

Paycom, through its CEO, penned two letters to Governor Stitt calling for him to innovate and support local businesses in advance of the COVID-19 pandemic. The letters did not call for Governor Stitt to close any businesses. Nonetheless, OCPA disseminated on its website, on social media, and to thousands of Oklahomans via email the false statement that the “CEO of Paycom [was] among those who [had] advocated” for Governor Stitt to “order most businesses to close.” OCPA followed that false statement with a hatchet-job attack on the CEO. Paycom incurred immediate public relations mitigation expenses but still suffered a disproportionate loss of annualized recurring revenue from Oklahoma businesses cancelling its services. Paycom sued.

OCPA filed a first motion to dismiss under the Oklahoma Citizens Participation Act and OKLA. STAT. ANN. TIT. 12, § 2012. Judge Prince did not rule in favor of OCPA on any of the grounds it actually argued but decided that Paycom had not plead defamation *per se* and thus needed to plead special damages. Paycom amended. OCPA filed a second motion to dismiss under only the Oklahoma Citizens Participation Act. Judge Prince announced that Paycom had sufficiently plead special damages but then demanded additional briefing on an affirmative defense that OCPA had not actually argued and the actual malice standard. After additional briefing was finished and shortly after he was appointed to the Court of Civil Appeals by Governor Stitt, Judge Prince drafted a seventeen (17)-page *Order* reversing his earlier rulings and dismissing the suit.

The Oklahoma Citizens Participation Act is primarily procedural and designed to facilitate early resolution of meritless suits. This suit was not meritless. Judge Prince repeatedly disregarded proper procedure in arriving at a politically preferred result. The *Order* needs overturned.

ISSUES TO BE RAISED ON APPEAL -- EXHIBIT "C"

- Judge Prince should have recused after he was appointed to the Court of Civil Appeals by Governor Stitt. He instead reversed himself and issued a final ruling in favor of OCPA. OCPA is an ally and frequent defender of Governor Stitt, and the publication at issue in this suit was a defense of how Governor Stitt handled the State response to the COVID-19 pandemic. At a minimum, his actions gave the appearance of impropriety, in violation of the Code of Judicial Conduct. Moreover, Paycom had no opportunity to be heard and was not left any recourse. There were no hearings between December 18, 2020, when Judge Prince was appointed, and December 31, 2020, when he assumed a position on the Court of Civil Appeals. The *Order* was filed December 30, 2020, and not served on Paycom until January 8, 2021. “Justice must satisfy the appearance of justice, even though this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *Miller Dollarhide, P.C. v. Tal*, 2007 OK 58, ¶ 17, 163 P.3d 548, 554.

- Judge Prince did not properly apply controlling precedent, specifically *Krimbill v. Talarico*, 2018 OK CIV APP 37, 417 P.3d 1240. He disregarded and downplayed circumstantial evidence in favor of Paycom and interpreted the strictures of the Oklahoma Citizens Participation Act in an unconstitutional manner, which increased the burden on Paycom, denied Paycom its constitutional right to seek redress through the Oklahoma County District Court, and subjected Paycom to potential sanctions and a judgment for attorney fees, costs, and expenses.

- Judge Prince erred in finding that OCPA had timely asserted the common law defense of “fair comment” in its first and second motion to dismiss, as stated in Numbered Paragraph 12 of the *Order*. OCPA never actually argued “fair comment,” and the Court does a disservice to District Court Rule 4 when it retroactively reads its preferred arguments into filings.



- Judge Prince erred and abused his discretion in finding that Paycom had failed to establish a prima facie case that it had suffered special damages. Numbered Paragraph 28 of the *Order* is inherently contradictory. It states “the Court accepts as true the allegation that Paycom has suffered damages to its reputation and good-will, that it has incurred charges by a public relations firm, and has suffered a loss of annualized revenue during the relevant period” but also that “Paycom has failed to show [] special damages.” Paycom is not required to identify specific lost business clients, especially when doing so is impossible without the benefit of discovery. It is unreasonable to expect Paycom to list all of its lost business clients during the relevant time. Such would invoke confidentiality concerns, and many of the lost business clients are likely irrelevant.

- Judge Prince erred and abused his discretion in finding that Paycom had failed to establish a prima facie case of actual malice. Numbered Paragraphs 29 through 32 of the *Order* downplay various pieces of evidence and disregard others entirely. The attorneys for OCPA acknowledged and even argued that a contentious relationship exists between Paycom and OCPA. It is bizarre that the Court considered an alleged and detailed and acknowledged contentious history, a statement from a former OCPA director and governor that OCPA engages in “slander” and “smear[s]” against policy opponents, a patently false statement about Paycom and gratuitous attack on its CEO, which were included in an otherwise-unrelated publication, a failure by OCPA to communicate with Paycom for comments or corrections prior to publication, and an absence of others who made similar or the same “mistake” and arrived at the conclusion that Paycom had failed to establish that OCPA acted knowingly or with reckless disregard for the truth.

- Judge Prince erred and abused his discretion in finding that Paycom had failed to establish a prima facie case of tortious interference because it had failed to identify specific lost business clients, as stated in Numbered Paragraph 38 of the *Order*. Paycom is not required to

identify specific lost business clients, especially when doing so is impossible without the benefit of discovery. Tortious interference does not require pleading special damages. The Oklahoma Citizens Participation Act allows for circumstantial evidence to establish a prima facie case.

- Judge Prince erred and abused his discretion in relying upon case law pertaining to Freedom of the Press, when OCPA is not a newspaper, broadcaster, or other media entity.

- Judge Prince erred and abused his discretion in finding that the Commercial Speech Exemption to the Oklahoma Citizens Participation Act, OKLA. STAT. ANN. TIT. 12, § 1439(2), is inapplicable. His ruling conforms with precedent in other States but is directly contrary to the express language of the statute and requires a finding that a think-tank which sells access to its publications is not “primarily engaged in the business of selling . . . goods or services . . . .”