

08-23-00323-CV

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IN THE COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

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ROBERTS MARKEL WEINBERG BUTLER HAILEY PC,
Appellant

Trial Court Cause No. 2023-CI-09527

vs.

LYNN MADISON
Appellee

On Appeal from the 224th Judicial District Court,
San Antonio, Bexar County, Texas

**APPELLEE'S MOTION FOR REHEARING AND EN BANC
RECONSIDERATION**

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RECORD REFERENCES

Appellant Roberts Markel Weinberg Butler Hailey, PC will be referred to as “RMWBH” or “Appellant.”

Appellee Lynn Madison will be referred to as “Appellee” or “Madison.”

Cause No. 2021CI05838, styled *Talise de Culebra Homeowners Association, Inc. v Lynn Madison*, pending in the 408th District Court of Bexar County, Texas will be referred to as the “Underlying Lawsuit.”

Cause No. 2023CI09527, styled *Lynn Madison vs. Roberts Markel Weinberg Butler Hailey PC and Talise de Culebra Home Owners Association, Inc.*, pending in the 224th District Court of Bexar County, Texas will be referred to as the “Current Lawsuit.”

Lis Pendens refers to the *Notice of Lis Pendens* filed on December 22, 2022, and recorded as Document No. 20220292949 in the Official Public Records of Bexar County, Texas.

Texas Citizens Participation Act (as contained under Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.*) will be referred to as “TCPA.”

Texas Civil Practice and Remedies Code will be referred to as “CPRC.”

Roberts Markel Weinberg Butler Hailey PC v. Madison, No. 08-23-00323-CV, 2024 Tex. App. LEXIS 3760, at *9 (Tex. App.—El Paso May 30, 2024, no pet. h.), this Court’s opinion, will be referred to as “Mem. Op.” and the page citations are those provided by Lexis Nexis.

Fair Debt Collection Practices Act (as contained at 15 U.S.C. § 1692, *et seq.*) will be referred to as “FDCPA.”

Texas Debt Collection Act (as contained in Texas Finance Code § 392, *et seq.*) will be referred to as “TDCA.”

Citations in Appellee's Brief to the Record are as follows:

CR – Clerk's Record (e.g. CR 1).

RR – Reporter's Record (September 12, 2023 Hearing) (e.g. RR 1).

Madison Br. – Madison's Responsive Brief in this Court (e.g. Madison Br. 5).

RMWBH Br. – Appellant's original brief in this Court (e.g. RMWBH Br. 6).

RMWBH Reply Br. – Appellant's reply brief in this Court (e.g. RMWBH Reply Br. 6).

TO THE HONORABLE JUSTICES OF THIS COURT OF
APPEALS:

COMES NOW Appellee Lynn Madison who files this Motion for Rehearing and *En Banc* Reconsideration of the Court's reversal of the trial court's denial of Appellant RMWBH's motion to dismiss under the Texas Citizens Participation Act and respectfully shows the following:

REASONS WHY *EN BANC* REVIEW IS NECESSARY

This is an appeal from the denial of RMWBH'S motion to dismiss Madison's statutory claims against it—solely in its capacity as a debt collector—under the TCPA.

In its memorandum opinion, the Court departed from its requisite standard of review of the denial of RMWBH's motion to dismiss by (1) inserting its own arguments in lieu of strictly holding RMWBH to its burdens of proof; (2) impermissibly shifting RMWBH's burdens under the TCPA to Madison twice; and (3) rewriting established federal and state law foreclosing the defense of attorney immunity for debt collector attorneys. Upon review, it appears the Court overlooked the standard requiring that pleadings,

evidence, and affidavits be viewed in the light most favorable to Madison, the nonmovant, when considering an appeal from the denial of a motion to dismiss under the TCPA. And despite the fact that RMWBH did not request findings of fact or conclusions of law in the trial court, this Court does not seem to have implied all findings necessary to support the trial court's ruling as is required under a de novo standard of review.

As a result of these errors, this Court is the first in Texas to extend the reach of the TCPA to debt collectors sued for deceptive, misleading, prohibited, and constitutionally unprotected debt collection conduct.

The Court's decision must be reconsidered.

**ISSUES FOR *EN BANC* REHEARING AND
RECONSIDERATION**

1. Did the Court apply the appropriate standard of review in considering the trial court's denial of RMWBH's motion to dismiss under the TCPA?
2. Did the Court impermissibly relieve RMWBH of its burdens of proof and improperly shift that burden to Madison in its TCPA analysis?
3. Did the Court err in finding that RMWBH is entitled to assert the defense of attorney immunity in its capacity as a debt collector in direct contradiction of settled federal and state law?

STATEMENT REGARDING ORAL ARGUMENT

Madison requests oral argument on her motion for reconsideration and *en banc* rehearing. The Court's decision making process will be aided by oral argument because this case involves the panel's (1) expansion of the TCPA's coverage to claims against debt collectors based on conduct prohibited by statute, and (2) the Court's divergence from United States Supreme Court and Texas precedent regarding the unavailability of the affirmative defense of attorney immunity for claims arising from conduct prohibited by statute by debt collector attorneys, in their sole capacity as debt collectors, under the TDCA and the FDCPA. Madison also believes that the record here, including proceedings in multiple courts, weighs in favor of granting oral argument on this motion.

STATEMENT OF PROCEDURAL HISTORY

Madison brings claims against RMWBH solely in its capacity as a debt collector for violations of the FDCPA, TDCA, Section 12.002 of the CPRC, a suit to quiet title and request for declaratory relief.

In the trial court, RMWBH filed a motion to dismiss under the TCPA alleging that because it is an attorney, it is wholly immune from all of Madison's statutory claims. RMWBH did not argue the legal implications of its status as a debt collector under the FDCPA or third-party debt collector under the TDCA in the trial court or in this Court, and has therefore waived those arguments on appeal.

The trial court correctly denied RMWBH's motion to dismiss under the TCPA. RMWBH appealed. This Court reversed, committing both errors of review and errors of law. These errors demand correction to ensure that the TCPA's scope remains limited to its original purpose: protecting constitutionally protected communication. The TCPA should not shield consumer debt collectors from liability to the consumers they are attempting to collect from when they engage in debt collection conduct prohibited by statute.

ARGUMENT AND AUTHORITIES

In this case, the trial court was asked to determine if RMWBH met its burden to establish that the TCPA applies to Madison's statutory claims against it under the FDCPA and the TDCA solely in its capacity as a debt collector. Madison claims that RMWBH engaged in statutorily prohibited debt collection conduct by knowingly filing a fraudulent *lis pendens* with the intent to harm Madison in violation of Section 12.002 of the CPRC.¹

Even with ample opportunity, RMWBH failed to address its statutory duties as a debt collector to Madison under the FDCPA and TDCA and has therefore waived these arguments.² As a matter of law, RMWBH owes these duties to Madison, even when it is engaged in litigation.³ RMWBH likewise declined to illuminate for the trial court or this Court the effect its status as debt collector has on Madison's

¹ The facts of this case have been extensively briefed by Madison. In an effort to reduce redundancy, Madison respectfully directs the Court to her petition (CR 7-9) and Madison's responsive briefing to this Court (Madison Brief ("Madison Br.") at 4-9, 33-40, 43-44, 45, 49-50, & 52.

² TEX. R. APP. P. 38.1(i); *see generally* RMWBH Br.; *see also* RMWBH Reply Br.; CR 25-61, 165-170; RR 16:6-11; Madison Br. at 28, 51, & 53.

³ *Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S. Ct. 1489 (1995); *Foster v. Zientz*, 2021 Tex. App. LEXIS 2307, at *11 (Tex. App.—Fort Worth 2021, no pet.); *Lombardi v. Bank of Am.*, Civil Action No. 3:13-CV-1464-O, 2014 U.S. Dist. LEXIS 32858, at *13 (N.D. Tex. 2014).

claims under Section 12.002 of the CPRC. Consequently, RMWBH did not establish that its conduct when acting in its role as a debt collector implicates its constitutional right to petition, or any other trigger for the protections of the TCPA.

In other words, the trial court was left to decide a motion to dismiss based on an invalid theory of wholesale attorney immunity by a party sued solely in its capacity as a debt collector. It correctly denied RMWBH's motion.

Thus, the only question at bar is:

Has RMWBH met its burden to show by a preponderance of the evidence that Madison's claims against it under Section 12.002 of the CPRC for knowingly filing a fraudulent lis pendens in its capacity as a debt collector is protected by the right to petition and therefore falls under the protection of the TCPA?

Again, RMWBH declined to illuminate this black box despite Madison's thorough briefing on the same. And considering the FDCPA and TDCA's treatment of debt collector attorneys when they are sued as debt collectors, the logical answer is a resounding "no."

Madison implores the Court to grant her motion for reconsideration and *en banc* rehearing.

1. The Court applied the incorrect standard in its review of the denial of RMWBH’s motion to dismiss.

When reviewing the denial of a motion to dismiss under the TCPA, an appellate court “must view the pleadings and the evidence in the light most favorable to the nonmovant.”⁴ Based on the Court’s opinion, Madison’s pleadings and evidence do not appear to have been analyzed under the appropriate standard of review.

Further, as already briefed by Madison, RMWBH did not request findings of fact or conclusions of law from the trial court.⁵ As such, in conducting a *de novo* review of the denial of RMWBH’s motion to dismiss under the TCPA, this Court is required to “imply

⁴ *Shopoff Advisors, L.P. v. Atrium Circle, GP*, No. 04-20-00310-CV, 2021 Tex. App. LEXIS 5184, at *7 (Tex. App.—San Antonio June 30, 2021, no pet.) (citing *Robert B. James, DDS, Inc. v. Elkins*, 553 S.W.3d 596, 603 (Tex. App.—San Antonio 2018, pet. denied)); *see also Abundant Life Therapeutic Servs. Tex. v. Headen*, No. 05-20-00145-CV, 2020 Tex. App. LEXIS 9751, at *6 (Tex. App.—Dallas Dec. 11, 2020, pet. denied) (“In undertaking our inquiry, we are mindful of our obligation to consider the pleadings in the light most favorable to the non-movant and supportive of the conclusion that the non-movant’s claims are not reliant on protected expression.”)

⁵ Madison Br. at 15 n.38 and n.39.

all findings necessary to support the trial court’s ruling.”⁶ Here, the Court does not appear to have adhered to this standard.

Finally, the Court impermissibly shifted RMWBH’s TCPA burden to Madison twice in its de novo review. Madison addresses these issues in turn.

2. In finding the TCPA applies to this case, the Court impermissibly relieved RMWBH of its burden and improperly shifted the burden to Madison.

As the Court notes, “[A] plaintiff’s pleadings are usually the best and all-sufficient evidence of the nature of the action.”⁷

As the Court also notes, Texas courts distinguish between protected speech and unprotected conduct.⁸ The San Antonio district

⁶ *Id.* at n.38; *Estate of Johnson*, 631 S.W.3d 56, 62 (Tex. 2021) (citing *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992)); *Jones-Hospod v. Maples*, No. 03-20-00407-CV, 2021 Tex. App. LEXIS 7285 (Tex. App.—Austin Aug. 31, 2021, pet. denied) (applying the de novo standard to a TCPA appeal with no findings of fact or conclusions of law).

⁷ Mem. Op. at *6 (quoting *Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017)) (internal quotations omitted).

⁸ *Shopoff*, 2021 Tex. App. LEXIS 5184, at *10; *Landry's, Inc. v. Animal Legal Def. Fund*, 631 S.W.3d 40, 46 (Tex. 2021); *Pacheco v. Rodriguez*, 600 S.W.3d 401, 410 (Tex. App.—El Paso 2020, no pet.); *Harrell v. Smith*, No. 05-22-00242-CV, 2022 Tex. App. LEXIS 8735, at *12 (Tex. App.—Dallas Nov. 30, 2022, no pet.); *Nath v. Baylor Coll. of Med. & Tex. Children's Hosp.*, No. 01-20-00401-CV, 2022 Tex. App. LEXIS 2271, at *16 (Tex. App.—Houston [1st Dist.] Apr. 7, 2022), *dism'd*, 2023 Tex. LEXIS 1289 (Tex. 2023); *Campbell v. Martell*, No. 05-19-01413-CV, 2021 Tex. App. LEXIS 3375, at *30-31 (Tex. App.—Dallas May 3, 2021, no pet.

where this case was transferred from applies a rigorous analysis regarding whether a movant under the TCPA can meet its initial burden of demonstrating protected communication, not unprotected conduct, is the basis of a nonmovant’s lawsuit.⁹

RMWBH does not challenge that the conduct of filing a lis pendens is an act of debt collection.¹⁰ Neither does RMWBH argue that the HOA assessments allegedly owed by Madison in the Underlying Lawsuit are not consumer debts.¹¹ This places Madison’s claims appropriately where they are currently pleaded—in debt collector conduct prohibited by statute.¹²

Madison and RMWBH agree that the scope of Madison’s claims is limited to RMWBH’s conduct of knowingly filing a fraudulent lis pendens as attorney debt collectors.¹³ However,

h.); *Tex. Dep’t of Ins. v. Stonewater Roofing, Ltd. Co.*, No. 22-0427, 2024 Tex. LEXIS 440, at *12 (June 7, 2024).

⁹ *Shopoff*, 2021 Tex. App. LEXIS 5184, at *10 (adopting *Pacheco*); *Garza v. Perez*, No. 07-23-00271-CV, 2024 Tex. App. LEXIS 2804, at *9 (Tex. App.—Amarillo Apr. 23, 2024, no pet. h.) (adopting *Shopoff*).

¹⁰ *See generally* CR 25-61, 165-70; *see generally* RR; *see also* RMWBH Br. and RMWBH Reply Br.

¹¹ *Id.*

¹² CR 5-16.

¹³ CR 33 at ¶ 13 (“Madison does not identify any other cause of its (sic) purported damages other than the filing of the lis pendens.”); RMWBH Reply Br. at 7 (“All of Appellee’s claims arise solely from RMWBH’s filing of a lis pendens[.]”).

Madison and RMWBH do not agree, as the Court states, that Madison's claims are based on or in response to its filing of the Underlying Lawsuit.¹⁴

As noted above, the Court misstates the scope of the issues of this appeal.¹⁵ The Court found that because Madison pleaded that the fraudulent lis pendens was filed in violation of section 12.002 gave the impression that the title to her property was incumbered, Madison was actually making "complaints centered on the information communicated in the notice of lis pendens."¹⁶

This is an error for two reasons. First, the purpose of a lis pendens is "twofold: (1) to protect the filing party's alleged rights to the property at issue in the lawsuit and (2) to put those interested in the property on notice of the lawsuit."¹⁷ The functional purpose of a lis pendens, therefore, is served upon its filing, regardless of its contents.¹⁸

¹⁴ Mem. Op at *9.

¹⁵ See p. 6 *supra*.

¹⁶ Mem. Op. at *9.

¹⁷ *Campbell*, 2021 Tex. App. LEXIS 3375 at*26-*27.

¹⁸ See *id.*

Second, it is RMWBH’s burden to establish by a preponderance of the evidence that, as a debt collector, Madison’s lawsuit is “based on, relates to, or is in response to” its right to petition.¹⁹

“Courts cannot blindly accept attempts by the defendant-movant to characterize the plaintiff-nonmovant’s claims as implicating protected expression.”²⁰ “In order to implicate the right to petition, the defendant-movant is required to demonstrate that the plaintiff-nonmovant’s claims alleged communications.”²¹ “When a claim does not allege a communication, and is instead based on a defendant’s conduct, the TCPA is not implicated.”²²

It is therefore improper for the Court to read a communication into Madison’s pleadings that RMWBH has not raised itself.²³

¹⁹ *Shopoff*, 2021 Tex. App. LEXIS 5184, at *4.

²⁰ *Id.* at *10 (quoting *White Nile Software, Inc. v. Carrington, Coleman, Sloman & Blumenthal, LLP*, No. 05-19-00780-CV, 2020 Tex. App. LEXIS 7097, at *5 (Tex. App.—Dallas Aug. 31, 2020, pet. denied)).

²¹ *Id.*

²² *Id.* (quoting *Pacheco*, 600 S.W.3d at 410); see also *Garza*, 2024 Tex. App. LEXIS 2804, at *9.

²³ *Shopoff*, 2021 Tex. App. LEXIS 5184, at *10.

a. *RMWBH did not establish that the TCPA applies to debt collectors for debt collection conduct prohibited by state and federal statute.*

Based on Madison’s research, no other court in Texas has extended the TCPA’s protections to attorney debt collectors, or any debt collectors, for alleged violations of debt collection laws or collection conduct alleged to have violated Section 12.002 of the CPRC.

RMWBH refused to address its invocation of the TCPA as a debt collector, but doing so was required for RMWBH to discharge its burden under the first step of the TCPA and shift the burden to Madison.²⁴

In its opinion, however, the Court stated, “Based on our review of Madison’s pleadings, however, we conclude the notice of lis pendens filed by RMWBH did qualify as a ‘communication’ within the scope of the TCPA.”²⁵

²⁴ *Id.*; As a result, the Court does not appear to have addressed every issue raised necessary to dispose of this appeal. See TEX. R. APP. P. 47.1.

²⁵ Mem. Op. at *10 citing *Ir. Family Ltd. P’ship v. Soloway*, No. 09-22-00192-CV, 2023 Tex. App. LEXIS 1696, at *7 (Tex. App.—Beaumont Mar. 16, 2023, pet. denied) (additional citing references omitted for brevity).

The Court cited *Soloway* to support its assertion. But in *Soloway*, the parties agreed that the filing of the lis pendens constituted the right to petition.²⁶ No such agreement exists here.

Madison has consistently maintained her position in both the trial court and this Court that RMWBH is being sued based on the conduct of a debt collector prohibited by statute, not a protected communication that invokes RMWBH's constitutional right to petition. RMWBH did not carry its initial burden, and the Court cannot do RMWBH's work for it.²⁷

b. RMWBH's evidence that the TCPA applies to Madison's claims is no evidence at all.

To meet its initial burden to show by a preponderance of the evidence that Madison's statutory claims fall under the protection of the TCPA, RMWBH did not present any relevant admissible evidence or evidence that the Court could consider under Rule 166a.²⁸ Instead, in its motion to dismiss, RMWBH pointed to the affidavit of Gregg S.

²⁶ *Id.*; see also *Round Table Physicians Grp., PLLC v. Medina*, 609 S.W.3d 299, at 303 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) (parties agreed filing the lien was an exercise of the movant's right to petition).

²⁷ *Shopoff*, 2021 Tex. App. LEXIS 5184, at *10.

²⁸ TEX. CIV. PRAC. & REM. CODE § 27.006(a).

Weinberg, Exhibit B, its original petition in the Underlying Lawsuit, and Exhibit C, the lis pendens.²⁹

Exhibit A contains one paragraph that piggy backs off of RMWBH's stale legal theories of absolute immunity for the filing of a fraudulent lis pendens.³⁰ That paragraph is impermissible hearsay. Specifically, it is a self-serving conclusory statement unsupported by admissible evidence.³¹

It states, "All actions taken by RMWBH in or relating to the Underlying Lawsuit were taken in its capacity as the attorney for the Association and were within the course and scope of its representation of the Association. All actions or inactions about which Plaintiff complains were taken by RMWBH in the course and scope of its attorney-client relationship with the Association and were within the course and scope of that representation."³²

²⁹ CR 42-52.

³⁰ CR 42 at ¶ 4; Madison Br. 23-25 and cited supporting authority; *see also Diogu Kalu Diogu v. Ratan-Aporn*, No. 01-14-00694-CV, 2015 Tex. App. LEXIS 6690, at *18-19 (Tex. App.—Houston [1st Dist.] June 30, 2015, pet. denied).

³¹ TEX. R. EVID. 802; TEX. R. CIV. P. 166a; *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 883-84 (Tex. App.—Dallas 2007, no pet.) (citing *Trejo v. Laredo Nat'l Bank*, 185 S.W.3d 43, 50 (Tex. App.—San Antonio 2005, no pet.)).

³² CR 42 at ¶ 4.

RMWBH fails to produce proof in the form of a retainer agreement or any other evidence to support this conclusory assertion that it has not provided services as debt collector on behalf of the HOA before or during the Underlying Lawsuit.³³

RMWBH also pointed to its original petition in the Underlying Lawsuit. Again, this does not dispose of RMWBH's duties or potential liability as a debt collector under the TDCA or FDCPA.³⁴ Thus, RMWBH's proof is no proof at all.

In summarily dragging Madison's claims under the awning of the TCPA, the Court did not reference RMWBH's evidence or legal arguments; rather the Court flipped RMWBH's burden onto Madison.

³³ The record demonstrates otherwise. *See* CR 161 (showing RMWBH was hired to collect the assessments on behalf of the HOA and had to subsequently ask the HOA for permission to file suit against Madison); CR 50; RMWBH Reply Br. at 13 n.12 (“It should not fall by the wayside that Appellant only acted as a debt collection [*sic*] under the FDCPA and TDCA in its capacity as an attorney for its client . . . which is why its actions are protected under attorney immunity.”); RR at 31 (“Yes, RMWBH is a debt collector. That’s true[.]”); CR 161 (“Please note: [RMWBH] is a debt collector. Any information obtained will be used for that purpose.”).

³⁴ *See* note 3 *supra*.

Thus, Madison respectfully requests that the Court grant her motion for reconsideration and *en banc* rehearing of the Court's opinion reversing the trial court.

3. As a matter of state and federal law, attorney immunity is not a valid defense to claims brought against attorney debt collectors in their capacity as debt collectors.

The burden never should have shifted to Madison after step one of the TCPA analysis. The Court, however, assumed that Madison met her burden under step two of the TCPA analysis.³⁵ That is, she established a *prima facie* case for each element of her claims. The burden then shifted back to RMWBH to “establish by a preponderance of the evidence each element of a *valid* defense to the nonmovant's claims.”³⁶

During the third step of the analysis, the Court stated, “Madison provides no evidence that RMWBH satisfies the definition of third-party debt collector. Accordingly, meritorious or not, the type of conduct alleged by Madison falls squarely within the scope of

³⁵ Mem. Op at *11.

³⁶ *Shopoff*, 2021 Tex. App. LEXIS 5184, at *5 (citing *Youngkin v. Hines*, 546 S.W.3d 675, 679-80 (Tex. 2018)) (emphasis added).

RMWBH’s representation of the HOA in the first lawsuit. Therefore, RMWBH established an affirmative defense to Madison’s claims.”³⁷

These three sentences cannot logically co-exist. During the first step of the TCPA analysis, RMWBH had to show it was not a debt collector. An impossible task. RMWBH’s legal status as a third-party debt collector is shown by its registering and maintaining a bond with the Texas Secretary of State.

Third-party debt collectors are required to obtain a surety bond and file it with the Texas Secretary of State to engage in debt collection in Texas. Tex. Fin. Code § 392.101(a). This section of the Finance Code, like the insurance code, covers “conventional licensing regulations that are triggered by the *role* a person *plays* in a *nonexpressive* commercial transaction, not what any person may or may not say.”³⁸ “[T]he First Amendment is inapplicable because the challenged laws regulate professional conduct, not speech.”³⁹

³⁷ Mem. Op. at *16; *but see* Madison Br. at 27 (citing *In re Lipsky*, 460 S.W.3d 579, 588 (Tex. 2015)).

³⁸ *Stonewater Roofing*, 2024 Tex. LEXIS 440, at *12.

³⁹ *Id.* at *3.

Just like the licensing requirements under the Insurance Code, RMWBH's bond evidencing its third-party debt collector status with the Texas Secretary of State demonstrates that as a matter of law, it is subject to the FDCPA and TDCA's limits on conduct. Conduct that is illegal under statute. This prohibited conduct does not invoke First Amendment protections.⁴⁰

The Court notes that Madison provided a screenshot from the Texas Secretary of State's official website for third-party debt collector bond searches. There is no mention that Madison footnoted the screenshot with the link to the website where the information was obtained.⁴¹

This website is maintained by the Texas Secretary of State and displays bond information for any registered third-party debt collectors in the State of Texas. A search for Appellant, "Roberts Markel" shows that RMWBH has complied with the statutory requirements under Tex. Fin. Code § 392.101 and has maintains bond number 103248082 with the Texas Secretary of State—enabling it to

⁴⁰ *See id.* at *11.

⁴¹ CR 84 at n.42 (<https://direct.sos.state.tx.us/debtcollectors/DCSearch.asp>).

engage in consumer debt collection in the State of Texas. Madison bears no burden to demonstrate “in whose favor the bond runs, or the amount of the bond” as the Court incorrectly suggests.⁴²

Madison requests this Court take judicial notice of RMWBH’s legal status as a debt collector because it cannot be reasonably disputed, and has not actually been disputed by RMWBH.⁴³ “An appellate court has the power to take judicial notice for the first time on appeal of adjudicative facts that are matters of public record and not subject to reasonable dispute because they can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.”⁴⁴

The inclusion of RMWBH in the Texas Secretary of State’s bond list as a registered third-party debt collector is prima facie evidence of RMWBH’s actual legal status as a third-party debt collector. A status it cannot legally disavow and one which it does not dispute.⁴⁵ Madison’s assertion is based on public information from a

⁴² Mem. Op. at *15.

⁴³ See note 33 *supra*.

⁴⁴ *Alsobrook v. MTGLQ Inv’rs, LP*, 657 S.W.3d 327, 329 (Tex. App.—Dallas 2021), *aff’d in part, modified in part*, 656 S.W.3d 394 (Tex. 2022).

⁴⁵ See note 33 *supra*.

source whose accuracy cannot be reasonably questioned. The entire page from which the screen shots are taken is reproduced for the Court's convenience in the Appendix of this motion.⁴⁶

RMWBH had the burden to establish a valid defense to *each* of Madison's claims.⁴⁷ It did not even bother to try. Once again, it is not the Court's job to meet RMWBH's burden for it.⁴⁸

As fully briefed by Madison, attorney immunity is not a recognized defense under the FDCPA. This is the first court in Texas to hold otherwise.⁴⁹ The only valid defense available to an attorney debt collector is the bona fide error defense, which RMWBH neither pleaded nor briefed in its motion to dismiss or this appeal. This is well-

⁴⁶ See App'x at Tab 1.

⁴⁷ *Elkins*, 553 S.W.3d at 603.

⁴⁸ At this juncture of its analysis, the Court noted, "During the hearing on the motion to dismiss, counsel for RMWBH stated it was the firm's policy to file a lis pendens 'in these situations.'" *Id.* at n.2. This is not competent evidence. TEX. R. CIV. P. 166a; TEX. R. EVID. 802. RMWBH has never produced any policies or procedures in the form of admissible evidence to support its position. Again, it is improper for the Court to shift RMWBH's burden to Madison in an effort to fill RMWBH's evidentiary chasms without reference to the pleadings and evidence before it. See *Shopoff*, 2021 Tex. App. LEXIS 5184, at *10.

⁴⁹ See note 3 *supra*.

settled federal law.⁵⁰ Federal courts in Texas have rejected the defense of attorney immunity under the TDCA, as well.⁵¹

As attorneys, RMWBH owes a duty to the tribunals it appears in front of under the Texas Rules of Professional Responsibility to avoid making false statements of material law to the court.⁵² It must also disclose authority in the relevant jurisdiction that does not support its position, as it is serving as its own counsel.⁵³ RMWBH failed to adequately address its legal duties and statutory obligations as a debt collector under the FDCPA and TDCA in its arguments before this Court and the trial court. As a debt collector, RMWBH is subject to specific requirements and limitations under these statutes—issues that are critical to properly reviewing and analyzing the trial court’s denial of RMWBH’s TCPA motion.

⁵⁰ *Id.*

⁵¹ *Id.*; see also *Foster*, 2021 Tex. App. LEXIS 2307, at *14-*15.

⁵² Under Rule 3.03 of the Texas Rules of Professional Conduct, a lawyer shall not “knowingly make a false statement of material fact *or law* to a tribunal;” or fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]” (emphasis added).

⁵³ *Id.*

By not fully addressing its statutory duties and obligations, RMWBH has left the Court without a comprehensive understanding of the legal context in which Madison's claims arise. By omitting discussion of the FDCPA and TDCA, which are directly relevant to Madison's claims, RMWBH has presented an incomplete picture of the legal issues at stake. The Court should not endorse or encourage such incomplete and highly curated argumentation, as it hinders a full and fair adjudication of the matter.

RMWBH and other debt collector attorneys like it should not benefit from a total and complete rewriting of existing Texas and federal jurisprudence based on arguments neither made nor preserved for appeal.

CONCLUSION

The TCPA is not intended to dispose of meritorious lawsuits based on conduct. As the movant, Appellant RMWBH had the burden to establish that the TCPA applies to Madison's claims against it in its capacity as a debt collector. It failed. Then, this Court made arguments on behalf of RMWBH neither made by RMWBH nor

preserved for appeal in lieu of strictly holding RMWBH to its burdens of proof.

The Court's unprecedented expansion of the TCPA's protection to debt collectors for claims based in prohibited debt collection conduct and practices must be scrutinized with the utmost care. The Court's repudiation of well-established federal and state law establishing the unavailability of the attorney immunity defense to debt collector attorneys will work as a systematic injustice to Texas consumers who happen to find themselves in the crosshairs of an attorney debt collector.⁵⁴

If the Court's opinion is not reconsidered, it will give the green light to debt collectors in Texas that happen to also be attorneys to act with impunity and flagrant disregard to the established rights of consumers and the duties owed to those consumers by debt collectors in pursuit of collecting debts from them.

⁵⁴ *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996) (“An unsophisticated consumer, getting a letter from an “attorney,” knows the price of poker has just gone up. And that clearly is the reason why the dunning campaign escalates from the collection agency, which might not strike fear in the heart of the consumer, to the attorney, who is better positioned to get the debtor's knees knocking.”).

PRAYER

For the reasons stated in her original response to RMWBH's motion to dismiss, in her briefing to this Court, and this motion, Appellee Lynn Madison prays that the Court grant her request for reconsideration and *en banc* rehearing on its decision to vacate the trial court's denial of Roberts Markel Weinberg Butler Hailey PC's motion to dismiss under the Texas Citizens Participation Act.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Per Rule 9.4 of the Texas Rules of Appellate Procedure, the undersigned certifies that this brief contains 4,040 words, exclusive of the portions described in Texas Rules of Appellate Procedure 9.4(i)(1).

/s/ Lindsey N. Duke
Lindsey N. Duke

CERTIFICATE OF SERVICE

I certify that on this day, a true and correct copy of this document was served on the following in accordance with the Texas Rules of Civil Procedure:

Signed June 13, 2024

/s/ Lindsey N. Duke
Lindsey N. Duke

APPENDIX

Tab 1: Full screenshot from the Texas Secretary of State's third-party debt collector bond search website search results for "Roberts Markel" and the link where this information was found.

Tab 1

Debt Collector Search

Section 392.101 of the Texas Finance Code prohibits a third-party debt collector or credit bureau from engaging in debt collection in Texas unless the third-party debt collector or credit bureau has obtained a surety bond and filed a copy of the bond with the Office of the Secretary of State.

On this site, you can search for individuals and entities that have filed debt collector bonds with the Office of the Secretary of State. The search results will indicate, based on the information filed with the Office of the Secretary of State, whether the bond is active, pending cancellation, or has been cancelled. All fields displayed are searchable.

Debt Collector File Number	Status
<input type="text"/>	<input type="text"/>
Principal Name	
<input type="text" value="roberts markel"/>	
Address	
<input type="text"/>	
City	
<input type="text"/>	
State	Zip Code
<input type="text"/>	<input type="text"/>
Bonding Company Name	
<input type="text"/>	
<input type="button" value="Search"/>	<input type="button" value="Start Over"/>

Found: 1 Displayed: 1

Principal Name: Roberts Markel Weinberg Butler Hailey, PC		# 1
Address:	2800 Post Oak Blvd 57th Floor Houston, TX 77056	
File Number:	20060226	
Status:	Active	
Date Filed:	11/27/2006	
Cancellation Date:		
Phone:	(713) 840-1666	
Bonding Company:	Travelers Casualty and Surety Company of America	
Bond No:	103248082	

Instructions:

- There is no fee for this service.
- Wildcard searches are permitted for debt collector principal name. Example: Principal Name **ABC%**
- Addresses provided were current on the date the Debt Collector was registered. The address provided may no longer be valid if the status is closed.

Available at:

<https://direct.sos.state.tx.us/debtcollectors/DCSearch.asp> (last visited June 13, 2024).

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William Clanton
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Envelope ID: 88799650
Filing Code Description: Motion for Rehearing
Filing Description: Motion for Rehearing
Status as of 6/14/2024 10:10 AM MST

Associated Case Party: LynnMadison

Name	BarNumber	Email	TimestampSubmitted	Status
William Clanton	24049436	bill@clantonlawoffice.com	6/13/2024 9:14:30 PM	SENT
Angela Zepeda		angela@clantonlawoffice.com	6/13/2024 9:14:30 PM	SENT
Lindsey Duke	24083489	lindsey@clantonlawoffice.com	6/13/2024 9:14:30 PM	SENT

Associated Case Party: Roberts Markel Weinberg Butler Hailey PC

Name	BarNumber	Email	TimestampSubmitted	Status
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