

CAUSE NO. C10369

<p><b>THE STATE OF TEXAS</b>  <b>on the Relation of</b>  <b>GEORGE DARRELL BEST,</b>  <b>Plaintiff,</b></p> <p><b>V.</b></p> <p><b>PAUL REED HARPER,</b>  <b>In His Official Capacity as Director</b>  <b>For the Somervell County Hospital District,</b>  <b>Defendant</b></p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p><b>IN THE DISTRICT COURT OF</b></p> <p><b>SOMERVELL COUNTY, TEXAS</b></p> <p><b>249<sup>TH</sup> JUDICIAL DISTRICT</b></p>
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**DEFENDANT’S ANTI-SLAPP MOTION TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Paul Harper, Defendant in the above-styled and numbered cause of action and files this his Anti-SLAPP Motion to Dismiss, and for the same would respectfully show the Court the following:

**I.**

Defendant Paul Harper incorporates by reference all pleadings that have been filed with the Court in this cause. Harper specifically offers the following evidence in support of Harper’s Anti-SLAPP Motion to Dismiss, filed concurrently with this motion:

Exhibit A: The Affidavit of Paul Harper

Exhibit B: The Affidavit of Deborah Harper

**II.**

Defendant Paul Harper, (“Defendant” or “Harper”) files this anti-SLAPP Motion to Dismiss pursuant to Chapter 27 of the Texas Civil Practice & Remedies Code, moving for dismissal of all claims asserted by Plaintiff, The State of Texas on the Relation of George Darrell Best (“Plaintiff”), and for an award of attorney’s fees, costs, and sanctions pursuant to Texas Civil

Practice and Remedies Code § 27.009(a)(1) and (a)(2). Defendant also requests a hearing to be set no later than the 60th day after the date of service of the motion pursuant to Tex. Civ. Prac. & Rem. Code § 27.004.

### **I. SUMMARY OF BASIS FOR MOTION AND RELIEF REQUESTED**

The present petition is an attempt by Plaintiff to punish Harper for exercising his constitutional right to petition the government and his right to free speech. A cause of action that attempts to infringe on a person's right to petition or to speak or associate freely is referred to as a "SLAPP" action (Strategic Lawsuit Against Public Participation). *Senate Cmte. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82<sup>nd</sup> Leg., R.S. (2011)*. The motion to dismiss such an action – an "anti-SLAPP" – motion was created in 2011 by the Texas Legislature through the Texas Citizen Participation Act ("TCPA"). *Id.* The stated purpose of the anti-SLAPP statute is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE § 27.002.

Pursuant to the anti-SLAPP statute, Harper hereby seeks dismissal of every claim in Plaintiff's Original Petition and First Supplemental Petition. Each of Plaintiff's claims are based on Harper's exercise of his right to petition and/or right of free speech and therefore the anti-SLAPP statute applies.

Here, each cause of action within the petition is based on, relates to, or is in response to Harper's exercise his right of free speech and/or right to petition. The Plaintiff cannot make a prima facie case as to each element of its claims and additionally, the evidence supports the affirmative defense of legislative immunity. Accordingly, Harper is entitled to dismissal of Plaintiff's claims pursuant to Texas Civil Practice and Remedies Code § 27.005. In addition,

Harper is entitled to an award of court costs, reasonable attorney's fees, other expenses incurred in defending against the legal action, and sanctions against the Plaintiff. TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1)(2).

## II. FACTUAL BACKGROUND

On or about May 11, 2013 Somervell County voters approved the formation of the Somervell County Hospital District (“Hospital District”).<sup>1</sup> *Harper Aff.* ¶ 3. After approval, Somervell County transferred, assigned, and delivered to the Hospital District a hospital known as Glen Rose Medical Center (“Medical Center”). *Harper Aff.* ¶ 4. Paul Harper ran for an elected position on the Board of Directors of the Hospital District in order to eliminate the property tax put in place by the temporary board that governed the District, which at the time was 10.5 cents. *Harper Aff.* ¶ 10. His stated goals as a board member were to enter into an agreement with a 3<sup>rd</sup> party to run the hospital and for the hospital district to remain in existence without assessing a property tax. *Harper Aff.* ¶ 11. Harper wanted to follow the lead of other county hospitals in Texas which have a 3<sup>rd</sup> party run its county hospital and has a hospital district that does not impose a tax. *Harper Aff.* ¶ 12. Harper was sworn in as a member of the Somervell County Hospital District on May 13, 2014. *Harper Aff.* ¶ 13.

On or about August 21, 2014, at a scheduled meeting of the Somervell County Hospital District Board of Directors, during a discussion on the Hospital District’s budget, Harper allegedly stated, “I move that we set the hospital district tax rate at zero”.<sup>2</sup> *Original Pet.* ¶ 5. Whether said or made as a motion, such comment was neither recognized by the Chair,

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<sup>1</sup> Chapter 286 of the Texas Health and Safety Code allows the creation of a hospital district to operate a county hospital.

<sup>2</sup> While Harper denies that this precise statement was made, Plaintiff’s pleadings are clear that they are predicated upon their belief that this was said.

seconded, discussed, debated nor voted upon. The proposed tax rate was set during the same meeting at .1195 per \$100 valuation. *Harper Aff.* ¶ 17.

Also on or about August 21, 2014, a blog post appeared on a website called the Somervell County Salon. *Original Pet.* ¶ 5. The website was created and is maintained by Harper's wife. *Deborah Harper Aff.* ¶ 1. In fact, the Plaintiff alleges that it was Harper "or one of his agents or others acting in his behalf" who wrote the blog post. *Original Pet.* ¶ 5. Plaintiff alleges that the blog post accuses Glen Rose Medical Center Administrator Ray Reynolds and CFO Michael Honea of "violating the law," includes derogatory and inflammatory statements about board members, and questions why anyone would want to do business with the Glen Rose Medical Center. *Original Pet.* ¶ 5.

Following a request to the Somervell County Hospital District under the Public Information Act, Plaintiff received documents containing text message communication allegedly between Harper and fellow board member John Parker and additional text message communication between Harper and Hospital District President Chip Harrison. *1<sup>st</sup> Supp. Pet.* ¶ 4. Plaintiff alleges that these communications contain secret discussions of public matters affecting the Somervell County Hospital District in violation of the Texas Open Meetings Act. *Id at* ¶ 5.

On or about September 4, 2014 Paul Harper was served with a lawsuit, filed by George Best, to remove Harper from office. *Original Pet.* ¶ 14. The State of Texas then intervened as Plaintiff in the lawsuit. *Notice of Appearance* ¶ 2. In support of its removal action, Plaintiff alleges that Harper exhibited incompetency by way of gross ignorance of his official duties and gross carelessness in the discharge of those duties, and official misconduct because of his alleged actions of making a "motion" to set the maximum tax rate at zero, authoring the blog post, and text messaging other board members. *See Original Pet.* ¶ 6; *1<sup>st</sup> Supp. Pet.* ¶ 4.

### III. APPLICABLE LEGAL STANDARDS

The anti-SLAPP statute was intended “to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” TEX. CIV. PRAC. & REM. CODE § 27.002. To achieve this, the anti-SLAPP statute provides a means for a defendant, early in the lawsuit, to seek dismissal of certain claims. *See id.* § 27.003.

If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action pursuant to the anti-SLAPP statute. *Id.* § 27.003(a). The moving party must show by a preponderance of the evidence that the legal action is based on, related to, or in response to a party's exercise of the right of free speech, right to petition, or right of association. *Id.* § 27.005(b). If the moving party meets this preponderance of the evidence threshold, the anti-SLAPP Motion to Dismiss shall be granted unless the Plaintiff “establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* § 27.005(b). Even if the Plaintiff meets its burden, the anti-SLAPP statute mandates dismissal if the movant establishes an affirmative defense by a preponderance of the evidence. *Id.* § 27.005(d).

In deciding a motion under the anti-SLAPP statute, the Court may consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based. *Id.* § 27.006(a). The “clear and specific evidence” by which the plaintiff must establish a prima

facie case is “evidence unaided by presumptions, inferences, or intendments.” *Sierra Club v. Andrews County*, 418 S.W.3d 711, 715 (Tex. App.--El Paso 2013, pet. filed).

If dismissal is granted, the court shall award court costs, reasonable attorney's fees, and other expenses to the moving party as well as “sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.” *Id.* § 27.009(a) (1), (2).

#### **IV. ALL OF PLAINTIFF’S CLAIMS ARE SUBJECT TO THE ANTI-SLAPP STATUTE BECAUSE THEY ARISE FROM HARPER’S ACTS IN FURTHERANCE OF HIS RIGHT TO PETITION AND RIGHT OF FREE SPEECH**

Each of Plaintiff’s claims against Harper shall be dismissed because it is clear on the face of the Petition that each claim is based on, relates to, or is in response to Harper’s exercise of his right to petition and right of free speech. *See* TEX. CIV. PRAC. & REM. CODE § 27.003(a). Specifically, each claim in the Petition and First Supplemental Petition is based entirely on Harper’s “motion” to set a maximum tax rate for the hospital district, authoring the blog post, or sending text messages to board members.

##### **A. Right to Petition**

Harper’s “motion” to set the maximum tax rate of the hospital district at zero constitutes an exercise of Harper’s right to petition.

The anti-SLAPP statute defines the “exercise of the right to petition” to include a communication in or about a proceeding before an entity that requires by rule that public notice be given before its proceedings. TEX. CIV. PRAC. & REM. CODE § 27.001(4)(A)(v). A communication is the making or submission of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic. *Id.* at § 27.001(1).

The Hospital District must give notice of its meetings before its proceedings. The bylaws of the Hospital District state:

2.8 Notice of Meetings. *Written or printed notice of any annual, regular or special meeting of the Board of Directors shall be delivered to each director and shall be posted as required by the Texas Open Meetings Act, TEXAS GOVERNMENT CODE, § 551.001, et seq. The notice shall state the date, hour, place and subject of the meeting, and shall be posted at a place convenient to the public in the administrative offices of the District. The Board shall provide notice of each meeting to the Somervell County Clerk for posting at the Somervell County Courthouse.*<sup>3</sup>

Thus, Harper's "motion" to set the maximum tax rate, which was allegedly made in the Hospital District's meeting, constitutes communications made in a proceeding before an entity that requires public notice be given before its proceedings. Therefore the alleged "motion" falls within the protection of the right to petition under the anti-SLAPP statute, and the burden shifts to the Plaintiff to establish by clear and specific evidence a prima facie case for each essential element of its incompetency claim regarding the "motion" on the tax rate.

**B. Right to Free Speech**

According to the plain text of the anti-SLAPP statute, "exercise of the right of free speech" means "a communication made in connection with a matter of public concern. TEX. CIV. PRAC. & REM. CODE § 27.001(3). Public concern includes issues related to "health or safety", "community well-being", or "a service in the marketplace". *Id.* at 27.001(7).

Here, the "motion" to set the maximum tax rate, the blog post, and the text messages all relate to health and safety, community well-being, and a service in the marketplace because they all relate to the Somervell County Hospital District and the Glen Rose Medical Center.

The Glen Rose Medical Center is funded in part by the Somervell County Hospital District. *Harper aff.* ¶ 5. The Medical Center is dedicated to the long-term health of the

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<sup>3</sup> Admitted at Suspension Hearing as State's Exhibit No. 1

community and traces its beginnings back to the Hanna Hospital established in 1945. *Harper aff.* ¶ 6. Through changes in name and ownership, the Glen Rose Medical Center has cared for residents of Glen Rose and the surrounding area for over 65 years. *Harper aff.* ¶ 7. The Glen Rose Medical Center provides inpatient care, senior care, diagnostics, emergency care, and outpatient care by over 50 doctors trained in radiology, urology, orthopedics, oncology, general surgery, gastroenterology, cardiology, and anesthesiology. *Harper aff.* ¶ 8. The Somervell County Hospital District oversees the operations of the Medical Center in part by funding and approving its budget. *Harper aff.* ¶ 5. Because the Medical Center, and by extension the Hospital District, are so intertwined with providing the community healthcare, discussions of the Hospital District or Glen Rose Medical Center and its budget or administration directly relates to health and safety, community well-being, and a service in the marketplace.

The “motion”, the blog post, and the text messages all relate to the Somervell Hospital District and the Glen Rose Medical Center and therefore directly relate to health and safety, community well-being, and a service in the marketplace.

Harper’s “motion” on the tax rate specifically relates to the health and safety of the residents of Somervell County who use the hospital for their healthcare needs. Thus, Harper’s “motion” made during the board meeting clearly implicate matters of public concern within the meaning of the anti-SLAPP statute, and the burden should shift to the Plaintiff to establish by clear and specific evidence a prima facie case that the “motion” on the tax rate was an incompetent act sufficient for removal from office.

Harper denies writing the blog post. *Harper aff.* ¶ 19. However, taking the facts as pled by the Plaintiff, it is apparent that the content of the blog post pertains to a matter of public concern and thereby implicates Harper’s right of free speech. As established above, the Hospital



District and the Glen Rose Medical Center relate to health and safety, community well-being, and a service in the marketplace. A statement made about the administration of the hospital, about the hospital board members, or about the hospital itself would clearly pertain to a matter of public concern. Therefore, the removal action in response to the blog post clearly implicates matters of public concern and the burden shifts to the Plaintiff to establish by clear and specific evidence a prima facie case that the blog post was an incompetent act sufficient for removal from office.

Although Defendant disputes the accuracy of the text messages attached to Plaintiff's First Supplemental Petition for Removal of Officer, taking the facts as pled by the Plaintiff, Harper's text messages clearly pertain to a matter of public concern and thereby implicates Harper's right of free speech and the protection of the anti-SLAPP statute. As examined above, communications regarding the Somervell Hospital District relates directly to health or safety, community well-being, and a service in the marketplace. The text messages contain discussions of public matters affecting the Somervell County Hospital District. The specific text messages cited by the Plaintiff includes texts regarding the tax rate for the hospital district and motions that may be made during the Hospital District Board meeting. Thus, Harper's text messages with fellow board members clearly implicates matters of public concern and the burden shifts to the Plaintiff to establish by clear and specific evidence a prima facie case that the text messages constitute incompetence and official misconduct sufficient to warrant removal from office.

**V. PLAINTIFF'S CLAIMS MUST BE DISMISSED BECAUSE PLAINTIFF CANNOT PRODUCE CLEAR AND SPECIFIC EVIDENCE SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE AS TO ANY CLAIM AND BECAUSE THE EVIDENCE SUPPORTS AN AFFIRMATIVE DEFENSE**

Because Plaintiff's claims arise out of Harper's exercise of his rights to petition and free speech, thus bringing those claims within the ambit of the anti-SLAPP statute, Plaintiff's claims must be dismissed unless Plaintiff establishes by clear and specific evidence a *prima facie* case for each essential element of the claims. TEX. CIV. PRAC. & REM. CODE § 27.005(c). Plaintiff cannot establish a *prima facie* case for any of its claims because each suffers from claim-specific defects that merit dismissal. Moreover, the claim of incompetence stemming from the "motion" on the tax rate is subject to the affirmative defense of legislative immunity. *See id.* § 27.005(d).

**1. Plaintiff Cannot Meet Its Burden to Avoid Dismissal of Its Incompetence Claim for Harper Making a "Motion" on the Tax Rate and for Authoring the Blog Post**

As an initial matter, Plaintiff's incompetence claim for "motioning" to set the tax rate to zero and for the blog post, fails because Plaintiff cannot prove Harper's actions rise to the levels of incompetence.

A county officer may be removed from office by a petition for removal for incompetency. TEX. LOC. GOV'T CODE § 87.013. Incompetency is defined as: a) Gross ignorance of official duties; b) Gross carelessness in the discharge of those duties; or c) Unfitness or inability to promptly and properly discharge official duties because of a serious physical or mental defect that did not exist at the time of the officer's election. *Id.* at § 87.011(2)(A-C).

A finding of incompetency requires more than mere error in judgment. *See Harper v. Taylor*, 490 S.W. 2d 227, 230 (Tex. Civ.App. – Beaumont 1972, no writ). A trial court can remove an elected officer only for one of the causes enumerated in § 87.013. *State of Texas ex rel. Eidson v. Edward*, 793 S.W.2d 1 (Tex. Crim. App. 1990). Plaintiff alleges Harper should be removed for incompetency due to gross ignorance of official duties and gross carelessness in the discharge of those duties because of the motion on the tax rate and the blog post. *Original Pet ¶*

14.

## Duties

The duties of a hospital district board member can be found in the bylaws of the Somervell County Hospital District and Chapter 286 of the Texas Health and Safety Code. Plaintiff states that Harper allegedly violated § 6.4(b) of the Hospital District bylaws which states it is a violation to “do any act with the intention of harming the District or any of its operations” and § 6.4(c) which states it is a violation to do “any act that would make it impossible or unnecessarily difficult to carry on the intended or ordinary business of the District.” *Id.* at ¶5. Plaintiff also states that Harper violated §2.11 which states “a director shall discharge the director’s duties in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the District. *Id.* at ¶9.

Although not pled as violations, duties of Hospital District board members under Chapter 286 of the Texas Health & Safety Code include, among other things:

- operating hospital facilities and for furnishing medical and hospital care for the district's needy inhabitants. TEX. HEALTH & SAFETY CODE § 286.073(a)(1).
- manage, control, and administer the hospital system and the resources of the district. *Id.* at § 286.074.
- adopt a budget by acting on the budget proposed by the administrator. The board may make any changes in the proposed budget that in its judgment the interests of the taxpayers demand. *Id.* at § 286.125(d).
- may authorize the district to impose a property tax. *Id.* at § 286.161(a).

Harper’s “motion” on the tax rate does not constitute gross ignorance or gross carelessness of his duties. Harper did not intend for his “motion” to harm the hospital district, he only wanted to eliminate the tax rate. Harper believed that a tax rate of zero would still allow the hospital district to function, as some hospital districts in Texas do not have a property tax. Harper believed that a hospital district that did not levy a tax would not force the Medical Center to shut

down as it had been serving the community for over 65 years and the hospital district only formed and began assessing a tax rate in 2013. By setting the tax rate at zero, Harper proposed changes in the budget that in his judgment the taxpayers demanded, as that is what he campaigned on and was elected to do. The Hospital District “may” but is not required to authorize the district to impose a property tax. Harper was following the leads of other Hospital Districts which do not impose such a tax. It is not a violation of his duties if his actions are within his duties. Harper acted in good faith, with ordinary care, and he reasonably believed his actions were in the best interest of the district. Because the Plaintiff cannot show by clear and specific evidence that Harper committed a gross ignorance of his duties, or a gross carelessness in the discharge of his duties, the petition should be dismissed.

Plaintiff’s incompetence claim for the blog post fails because Plaintiff cannot prove that Harper wrote the blog post. By sworn affidavit, attached to this motion, Harper’s wife, Deborah Harper, states she runs the Somervell County Salon blog and posts under the username Salon. Deborah Harper wrote the blog post which is at issue in this lawsuit under the username Salon. Deborah Harper is the author of the blog post, not Paul Harper. The Plaintiff cannot prove by clear and specific evidence that Paul Harper is the author of the blog post and therefore, Plaintiff cannot prove an essential element of its claim of incompetence, and the court shall dismiss the claim.

**2. Plaintiff Cannot Meet Its Burden to Avoid Dismissal of Its Incompetence Claim and Misconduct Claim for the Text Messages.**

Plaintiff states that the text message communication constitutes incompetency and official misconduct in violation of §551.143 of the Texas Government Code.

A county officer may be removed from office by a petition for removal for official misconduct. TEX. LOC. GOV’T. CODE § 87.013. “Official Misconduct” means intentional,

unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law. *Id. at § 87.011(3)*. The term includes an intentional or corrupt failure, refusal, or neglect of an officer to perform a duty imposed on the officer by law. *Id.* Under the Texas Open Meetings Act (“the Act”) every regular, special, or called meeting of a governmental body must be open to the public and comply with all the requirements of the Act. *See* TEX. LOC. GOV’T CODE § 551.002. The Act was passed on the premise that “citizens are entitled...not only to know what government decides but to observe how and why every decision is reached.” *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 300 (Tex. 1990). The Act applies only if there is 1) a gathering of a quorum of a governmental body’s members and 2) public business is deliberated or discussed. *Id. at 551.001(4)(A)*.

The Act requires written notice of the date, hour, place, and subject of each meeting with specificity sufficient to apprise the general public of the subject matter to be discussed at least 72 hours prior to the meeting. *Id. at 551.0411(b)*

Section 551.143 of the Texas Government Code, cited by the Plaintiff, is an Open Meetings Act enforcement provision, which reads in relevant part:

- (a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

This section is construed to apply the Open Meetings Act to members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body. Tex.

Att’y Gen. Op. GA – 0326. “Meeting in numbers less than a quorum” describes a method of forming a quorum. *Id*

The federal district court in *Esperanza Peace and Justice Center v. City of San Antonio*, found that in a civil context meeting in numbers less than a quorum for the purpose of secret deliberations refers to a quorum or more of a body that attempts to avoid the Open Meetings Act’s purposes by deliberately meeting in numbers physically less than a quorum in closed sessions to discuss public business and then ratifying its actions in a physical gathering of the quorum in a subsequent sham public meeting. *See Esperanza Peace and Justice Center v. City of San Antonio*, 316 F. Supp. 2d 433, 473-76; *accord Willmann v. City of San Antonio*, 123 S.W.3d 469, 478 (Tex. App.-San Antonio 2003, pet. denied); Tex. Att’y Gen. Op. No. JC-0307 (2000) at 8; Tex. Att’y Gen. LO-95-055, at 4; Tex. Att’y Gen. Op. No. DM-95 (1992) at 4; *see generally Hitt v. Mabry*, 687 S.W.2d 791, 794 (Tex. App.-San Antonio 1985, no writ).

Applying §551.143 as construed by the Attorney General and by the federal district court in *Esperanza*, the Plaintiff cannot establish by clear and specific evidence a prima facie case for a violation of the Texas Open Meetings Act, and therefore cannot show incompetency or official misconduct..

The Hospital District has seven elected members, and a quorum of the district is four members. In order for a violation of the Open Meetings Act to occur, four members of the hospital district must discuss the business of the hospital district. As shown by the attorney general opinion, the discussions do not have to occur simultaneously. The discussions can be carried from one person to another in order to constitute a walking quorum, however a quorum must eventually be established by four people being brought into the conversation in order for there to be a violation of the Open Meetings Act. It is not a violation for members to discuss

public issues in numbers less than a quorum as long as the discussion does not expand to encompass four or more members. Elected officials communicating with one another, in numbers less than a quorum, to learn about an issue or to discuss its merits is essential for good and efficient government. Limiting board members' ability to discuss issues with one another would seriously impede the board's ability to function.

Here, the Plaintiff has only brought forth text messages between Harper and two other board members, and fails to establish that the Open Meetings Act applies because no quorum was ever constituted. The Plaintiff cites a message that states, "I told Chip and Eugene I had a number of motion, did not get into what they were..." Here, Harper is not talking public business because he "did not get into what [the motions] were", and therefore no public business was discussed and the Open Meetings Act does not apply. Additionally, Harper is the Secretary of the Hospital District. The Secretary's responsibilities include preparing the agendas for all meetings of the Hospital District. Inherent to this responsibility is discussing with fellow board members the items they want added to the agenda.

The text message conversations between Harper and fellow board members does not constitute a violation of the Open Meetings Act and therefore does not rise to the level of incompetence or misconduct as alleged by the Plaintiff. Plaintiff's removal claim based on the text messages shall be dismissed because Plaintiff fails to establish by clear and specific evidence a prima facie case for incompetence or official misconduct.

### **3. Plaintiff's Claims Are Barred by Legislative Immunity**

Even if the Plaintiff is able to establish by clear and specific evidence a prima facie case for each essential element of its incompetency claim for the "motion" to set the tax rate, the claim must be dismissed because it is barred by legislative immunity, as Harper meets all three elements of legislative immunity.

The elements of the affirmative defense of legislative immunity are: 1) The defendant was a public official; 2) The defendant was sued for performing a legislative act; and 3) The defendant was sued in his individual capacity. *In re Perry*, 60 S.W.3d 857, 859 (Tex.2001). There could be a circumstance, albeit extraordinary, that might constrict the grant of legislative immunity when a plaintiff alleges that the action at issue violates the Equal Protection clause. *Id.* at 861. Plaintiffs have the burden to demonstrate an extraordinary circumstance that would warrant an exception to legislative immunity. *Id.*

Legislative immunity protects local officials performing legislative acts. *Camacho v. Samaneigo*, 954 S.W.2d 811, 823 (Tex.App. – El Paso 1997, pet. denied). A board member of a county hospital district is a local official. TEX. LOC. GOV'T. CODE 87.012(15); Tex Atty. Gen. Op. JM – 1064 (Tex. A.G.), 1989, WL 430706.

To determine whether something is a legislative act, a two-step approach is applied: 1) was the act legislative in form – that is, was the act an integral step in the legislative process (e.g., the act of voting), and 2) was the act legislative in substance – that is did the act reflect a discretionary, policymaking decision. *Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998).

In *Bogan v. Scott-Harris*, the Supreme Court of the United States held that local officials' acts of introducing, voting for, and signing an ordinance constituted legislative activities for the purposes of legislative immunity. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). The Supreme Court held that the Mayor's actions of introducing the budget and signing it into law, and the actions of the City Council in voting for the budget were legislative and thus were grounds for legislative immunity. *Id.* at 55-56. The Court reasoned that the actions were legislative because voting for an ordinance is quintessentially legislative and the act of introducing and signing a



budget into law is formally legislative. *Id.* at 55. Additionally, the court reasoned that the actions of both the Mayor and the Councilmembers were integral steps in the legislative process. *Id.*

Being sued in the Defendant's individual capacity means that the person is sued themselves and not against the entity that employed them. *Vela v. Rocha*, 52 S.W.3d 398, 403 (Tex.App.-Corpus Christi 2001, no pet.). In a suit against a person in an official capacity, a plaintiff is actually seeking to impose liability against the governmental unit the sued person represents, rather than on the individual specifically named. *Rocha*, 52 S.W.3d at 403 (citing *Graham*, 473 U.S. at 166, 105 S.Ct. 3099). Because legislative immunity protects only individual defendants, and not the governing bodies on which they serve, legislative immunity cannot be asserted when an individual is sued in her official capacity. *Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d 129, 133-34 (5<sup>th</sup> Cir.1986).

Here, Paul Harper meets all three elements of the affirmative defense of legislative immunity. Harper, as a board member of the Somervell County Hospital District is a public official, and meets the first element of legislative immunity because members of county hospital districts are considered to be public officials.

Making a motion on a tax rate is a discretionary legislative decision and therefore it meets the second element of legislative immunity. Making a motion on the tax rate is an integral step in the legislative process and the "motion" itself was a discretionary, policymaking decision. As was shown in *Bogan*, acts such as introducing, voting on and signing ordinances is quintessentially a legislative act because it is an integral step in the legislative process and a discretionary and policy making decision by the elected official. Here, during deliberations on the Hospital District's budget, Harper made a "motion" on setting the maximum tax rate. Setting the maximum tax rate is a required step in the legislative process prior to voting on the actual

adopted tax rate to fund the budget, and is adopted by ordinance. It is a discretionary decision because the board of directors is the entity which decides the amount of the tax rate. Additionally, there is no allegation that Harper has violated the Equal Protection clause. Therefore, Harper's "motion" on the tax rate is a legislative act, and meets the second element of legislative immunity.

Finally, Harper meets the third element, because he was sued in his individual capacity and not through the entity that employed him. The suit is against him, and not the hospital district as a whole.

Harper meets all three elements of the affirmative defense of legislative immunity and the Plaintiffs have not shown any extraordinary circumstance which would restrict Harper's legislative immunity. Therefore the Court shall dismiss the claim of incompetence based on the "motion" on the tax rate because Harper has proven the affirmative defense of legislative immunity.

#### **VI. HARPER SHOULD BE AWARDED COURT COSTS, ATTORNEY'S FEES, AND SANCTIONS AGAINST PLAINTIFF PURSUANT TO THE ANTI-SLAPP STATUTE**

Texas Civil Practices and Remedies Code § 27.009(a)(1) mandates that the Court award the moving party court costs, reasonable attorney's fees, and other expenses incurred in defending against this lawsuit.

In addition, under Texas Civil Practice & Remedies Code § 27.009(a)(2), the Court must award sanctions against the party who brought the legal action in an amount "sufficient to deter the party who brought the legal action from bringing similar actions." *Id.*

#### **VII. CONCLUSION**

For the foregoing reasons, Harper requests a hearing on its motion and thereafter a finding by the Court that Plaintiff's claims against Harper are legally and factually deficient and should be dismissed with prejudice pursuant to Chapter 27 of the Texas Civil Practice and

Remedies Code. In addition, Harper is entitled to recover its court costs, reasonable attorney's fees, and other expenses incurred in defending against this action, as well as to be awarded sanctions in an amount sufficient to deter Plaintiff from bringing similar actions in the future.

Respectfully submitted,

CANTEY HANGER LLP

/s/ David B. Dowell  
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(817) 877-2800  
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**ATTORNEYS FOR DEFENDANT,  
PAUL REED HARPER.**

**CERTIFICATE OF SERVICE**

The undersigned hereby acknowledges that a true and correct copy of the above-mentioned document was sent by:

_____	Overnight Mail (Federal Express)
_____	U.S. Mail, Certified, Return Receipt Requested
_____	Regular Mail
_____	Hand Delivery
_____	Facsimile
_____	E-filing

on this the \_\_\_ day of October, 2014 to:

Andrew W. Lucas  
PO Box 1335  
Glen Rose, Texas 76043

/s/ David B. Dowell  
David B. Dowell



place by the temporary board that governed the District, which at the time was 10.5 cents.

11. My additional goals as a board member were to enter into an agreement with a 3<sup>rd</sup> party to run the hospital and for the hospital district to remain in existence, but charge no hospital district property tax.
12. I am aware that at least one other Hospital District around the State does not impose a property tax, the Hospital District for Hood County.
13. I was sworn in as a member of the Somervell County Hospital District on May 13, 2014.
14. On or about August 21, 2014 I participated as a board member in the Somervell County Hospital District Board meeting.
15. I do not believe a tax of \$0.00 would harm the hospital district or the medical center.
16. I do not believe a tax rate of \$0.00 would force the Medical Center to shut down.
17. The proposed tax rate was set during the Hospital District board meeting on or about August 21, 2014 at .1195 per \$100 valuation. The actual tax rate was set during the Hospital District board meeting on or about September 18, 2014 at .1195 per \$100 valuation.
18. My wife Deborah, runs the Somervell County Salon website.
19. I did not make a blog post or write a blog post on or about August 21, 2014 on the Somervell County Salon website.

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Paul Harper

This Affidavit was subscribed and sworn to before me on this \_\_\_\_ day of \_\_\_\_\_, by Mr. Paul Harper. I have verified the identity of the affiant by a current identification card or other document used by a state or federal government containing a photograph and the signature of the affiant.

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Notary Public Signature

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My Commission Expires

AFFIDAVIT OF DEBORAH HARPER

STATE OF TEXAS                    §  
  §  
COUNTY OF                         §

BEFORE ME, the undersigned authority, personally appeared Mrs. Deborah Harper, who, being by me duly sworn, stated:

1. My name is Deborah Harper. I am over eighteen years of age, of sound mind, capable of making this affidavit and personally acquainted with the facts stated herein.
2. I am a resident of Somervell County, Texas.
3. I am married to Paul Reed Harper.
4. I created and maintain the website Somervell County Salon.
5. I post under the username Salon.
6. I wrote the blog post on or about August 21, 2014 which is the post at issue in this Petition for Removal.
7. I posted the blog post under the username Salon on the website Somervell County Salon on or about August 21, 2014
8. Paul Harper did not direct me to write or post the blog post, and all of the ideas expressed are strictly my own.



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Deborah Harper

This Affidavit was subscribed and sworn to before me on this \_\_\_\_ day of \_\_\_\_\_, by Mrs. Deborah Harper. I have verified the identity of the affiant by a current identification card or other document used by a state or federal government containing a photograph and the signature of the affiant.

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Notary Public Signature

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My Commission Expires