TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-23-00293-CV

Texas Tribune, Inc., ProPublica, Inc., Vianna Davila, Jeremy Schwartz, and Lexi Churchill, Appellants

v.

MRG Medical LLC, Appellee

FROM THE 345TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-22-005105, THE HONORABLE MADELEINE CONNOR, JUDGE PRESIDING

M E M O R A N D U M   O P I N I O N

This dispute arises from a news story about the efforts of MRG Medical, LLC, and its founder, Kyle Hayungs, to secure contracts from local governments. The Texas Tribune, Inc.; ProPublica, Inc.; Vianna Davila; Jeremy Schwartz; and Lexi Churchill appeal from the district court's denial of their motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA). *See generally* Tex. Civ. Prac. & Rem. Code §§ 27.001–.011. We reverse and render judgment dismissing MRG Medical's claims and remanding for further proceedings.

BACKGROUND[1]

Hayungs founded MRG Medical in 2017 "to lower health care costs through telemedicine." While attempting to persuade local governments to contract with MRG Medical, Hayungs formed relationships with local officials. Hays County Judge Ruben Becerra, for example, edited marketing materials for the company and helped Hayungs with a federal grant application. Bexar County Commissioner Tommy Calvert served on MRG Medical's advisory board.

When the COVID-19 pandemic began in early 2020, Hayungs shifted his focus to supplying COVID-19 tests to local governments. Hayungs had previously cultivated a relationship with Dr. Henry Legere, the founder of Reliant Immune Diagnostics. Dr. Legere had developed a mobile app called MD Box to help people track symptoms for certain ailments and access diagnostic tests. When the pandemic began, Dr. Legere modified the app to include COVID-19 and acquired "a large quantity of antibody tests" manufactured by a Chinese company called Wondfo Biotech. Hayungs started negotiating with Dr. Legere for Reliant to purchase MRG Medical and hire Hayungs. Hayungs, meanwhile, set out to convince Hays County and other local governments to purchase tests from Reliant. Becerra and Calvert appeared in a video with Hayungs that promoted the value of Reliant's tests. This effort provoked significant opposition, including from Hays County Commissioner Walt Smith. No local governments ultimately purchased tests from Reliant. The negotiations for Reliant to purchase MRG Medical also ended without a deal.

---

[1] We draw our recitation of the background facts from the pleadings and affidavits, which we set out in the light most favorable to the nonmovant. *See, e.g.*, *RigUp, Inc. v. Sierra Hamilton, LLC*, 613 S.W.3d 177, 182 (Tex. App.—Austin 2020, no pet.).

On September 25, 2020, the Texas Tribune and ProPublica jointly published an article ("Article") on their websites titled "How a local Texas politician helped a serial entrepreneur use COVID-19 to boost his business."[2] In addition to the information we have already set out, the Article describes a conversation between Hayungs and Becerra at a "county government conference" in Galveston in October 2019. A person who was present for the conversation told the Texas Tribune that Hayungs "said his focus was to ensure deals can 'move' without officials having to 'write big checks.'" The Article then explains, in parentheses, that "[i]n Hays County, contracts below $50,000 do not have to go out for competitive bidding." Another person who was present told the Tribune that "[o]nce I heard that" from Hayungs, "it was like, dude, you're going to end up in prison."

On September 26, 2022, MRG Medical sued Texas Tribune, ProPublica, and the three reporters who worked on the story (collectively, "Media Defendants") for business disparagement, tortious interference with current and prospective contracts, and civil conspiracy. MRG Medical based its claims on four "statements" within the Article:

1. "The [Media Defendants'] statement and/or provision of information implying that MRG engaged in illegal conduct by avoiding competitive public procurement by 'keeping' contracts under $50,000.00. In addition, stating that the founder was 'going to prison.' As discussed above, MRG's conduct was not illegal."
2. "Co-Conspirator [Walt] Smith's and the [Media Defendants'] statement and/or provision of information implying that MRG was selling unreliable, non-FDA authorized COVID tests and/or was not compliant with federal law. In fact, MRG was not selling COVID tests. In addition, the tests Reliant offered were authorized for sale by the FDA."

[2] ProPublica titled the article "The COVlD-19 Charmer: How a Self-Described Felon Convinced Elected Officials to Try to Help Him Profit From the Pandemic." We refer to both publications as a single article because MRG Medical does not take issue with ProPublica's headline.

3. "[The Media Defendants'] statement and/or implication implying that MRG was bribing elected officials."
4. "The [Media Defendants'] statement and/or provision of information implying that MRG was a fly-by night operation being led by a 'serial entrepreneur.'"

The Media Defendants filed a motion to dismiss under the TCPA and attached, among other things, copies of the Article as it appeared on the websites of both the Tribune and ProPublica; a demand letter from MRG Medical's counsel; ProPublica's response, with an email exchange between Vianna Davila and Hayungs attached; and a screenshot from Hayungs' Facebook account showing a picture with Hayungs and Becerra. The parties subsequently executed a Rule 11 agreement in which, among other things, MRG Medical agreed that business disparagement was the only tort underlying its civil conspiracy claim. *See Enterprise Crude GP LLC v. Sealy Partners, LLC*, 614 S.W.3d 283, 308 (Tex. App.—Houston [14th Dist.] 2020, no pet.) ("A defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable."). MRG Medical filed a response that began with an extended discussion of the Texas Tribune's history, its place in the media landscape of Texas, and its financial connection with one of MRG Medical's competitors. In the next part of the motion, MRG Medical argued that the TCPA does not apply and, in the alternative, that it could present a prima facie case for each claim by clear and specific evidence. To carry that burden, MRG Medical attached items including: articles supporting its claims about the Texas Tribune and the media in general; affidavits from Becerra and other government officials with whom Hayungs interacted with; copies of contracts between MRG Medical and third parties that were terminated after the Article was published; an affidavit from the owner of Prime Care stating that he terminated the contract with MRG Medical because of implications of the Article; and a report showing MRG Medical's financial situation.

The district court denied the motion following a hearing. This interlocutory appeal ensued. *See* Tex. Civ. Prac. & Rem. Code § 51.014(12).

LEGAL STANDARDS

The TCPA "protects speech on matters of public concern by authorizing courts to conduct an early and expedited review of the legal merit of claims that seek to stifle speech through the imposition of civil liability and damages." *Lilith Fund for Reprod. Equity v. Dickson*, 662 S.W.3d 355, 363 (Tex. 2023). Courts review a motion to dismiss under the TCPA using a three-step process. *Montelongo v. Abrea*, 622 S.W.3d 290, 296 (Tex. 2021). First, the movant bears the initial burden to show the TCPA applies because the "legal action" against the movant is "based on or is in response to" its "exercise of the right of free speech, right to petition, or right of association." Tex. Civ. Prac. & Rem. Code § 27.003(a). If the movant meets that burden, the claimant may avoid dismissal by establishing "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). If the claimant meets that burden, the court must still grant the motion if the movant "establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id.* § 27.005(d).

We review de novo whether each party met its respective burdens under the TCPA. *O'Rourke v. Warren*, 673 S.W.3d 671, 679–80 (Tex. App.—Austin 2023, pet. denied). In determining "whether a legal action is subject to or should be dismissed under this chapter," we may "consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability

or defense is based." Tex. Civ. Prac. & Rem. Code § 27.006(a). We review the pleadings and evidence in the light most favorable to the nonmovant. *O'Rourke*, 673 S.W.3d at 680.

DISCUSSION

The Media Defendants argue in six issues that the district court erred by denying their motion to dismiss. First, they argue that the TCPA applies to MRG Medical's claims and those claims are barred by the statute of limitations. If we disagree on limitations, the Media Defendants argue MRG Medical still failed to present prima facie evidence in support of each claim and that the district court erred in overruling their evidentiary objections.

The TCPA Applies

The Media Defendants argue in their first issue that the TCPA applies because MRG Medical's lawsuit "is based on or is in response to" their exercise of "the right of free speech." Tex. Civ. Prac. & Rem. Code § 27.005(b).

The TCPA defines the exercise of the right of free speech as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). A "matter of public concern" means a "statement or activity regarding" a "public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity"; a "matter of political, social, or other interest to the community"; or a "subject of concern to the public." *Id.* § 27.001(7). "To be a matter of public concern, a claim must have public relevance beyond the interests of the parties." *O'Rourke*, 673 S.W.3d at 681 (citing *Szymonek v. Guzman*, 641 S.W.3d 553, 565 (Tex. App.—Austin 2022, pet. denied)). Private disputes "that merely affect the fortunes of the litigants are not matters of public concern." *Morris v. Daniel*, 615 S.W.3d 571, 576 (Tex. App.—Houston [1st Dist.] 2020, no

pet.) (citing *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 136 (Tex. 2019)). In analyzing whether the TCPA applies to a suit, we focus on the plaintiff's pleadings, which are the "best and all-sufficient evidence of the nature of the action," while also considering the pleadings and other evidence "in the light most favorable to the nonmovant and prevailing party below." *O'Rourke*, 673 S.W.3d at 681 (citing *Crossroads Cattle Co. v. AGEX Trading, LLC*, 607 S.W.3d 98, 102 (Tex. App.—Austin 2020, no pet.)).

MRG Medical argues that the Article has no public relevance because no public money was ever spent on a contract with MRG Medical. While it is true that MRG Medical never secured a contract with the government, that does not necessarily mean the dispute is a private one. The Article concerns the involvement of two public officials with MRG Medical and its founder, the efforts of those officials to secure government contracts for MRG Medical and Reliant, and the resistance to those efforts by other elected government officials. This was essentially a dispute about the proper allocation of public funds, and "where the public's purse goes, so goes the public's concern." *See PNC Inv. Co. v. Fiamma Statler, LP*, No. 02-19-00037-CV, 2020 WL 5241190, at *5 (Tex. App.—Fort Worth Sept. 3, 2020, no pet.) (mem. op.). Adding to the public interest, the Article raises concerns about the accuracy and usefulness of the tests, which were intended as part of the government response to the COVID-19 pandemic. *Cf. Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509–10 (Tex. 2015) (per curiam) (holding that allegations concerning whether nurse anesthetist "properly provided medical services to patients" were matter of public concern). Taken as a whole, the article concerns a matter with "public relevance beyond the interests of the parties." *See O'Rourke*, 673 S.W.3d at 681. We conclude that the Media Defendants carried their initial burden to demonstrate that the TCPA applies and sustain their first issue.

Limitations

The Media Defendants argue in part of their second issue that they established that the statute of limitations bars MRG's claims.

Even if a party establishes by clear and specific evidence a prima facie case in support of its claim, the court must still dismiss the case if the movant proves the essential elements of any valid defense by a preponderance of the evidence. *See* Tex. Civ. Prac. & Rem. Code § 27.005(d); *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018). The statute of limitations is an affirmative defense that must be proven by the defendant. Tex. R. Civ. P. 94. To prevail on a limitations defense, the movant must show "(1) when the cause of action accrued, and (2) that the plaintiff brought its suit later than the applicable number of years thereafter—i.e., that 'the statute of limitations has run.'" *Draughon v. Johnson*, 631 S.W.3d 81, 89 (Tex. 2021) (quoting *Provident Life & Acc. Ins. v. Knott*, 128 S.W.3d 211, 220 (Tex. 2003)).

A plaintiff may not recast its claim "in the language of another cause of action" to avoid limitations. *Gandy v. Williamson*, 634 S.W.3d 214, 243 (Tex. App.—Houston [1st Dist.] 2021, pet. denied); *see Earle v. Ratliff*, 998 S.W.2d 882, 893 (Tex. 1999). In determining which limitations period applies, we "are not bound by the labels parties place on their claims" but look to the "real substance of the claims." *Pollard v. Hanschen*, 315 S.W.3d 636, 642 n.4 (Tex. App.—Dallas 2010, no pet.). To determine the real substance of the claims, we examine MRG's Medical's petition. *See Brumley v. McDuff*, 616 S.W.3d 826, 833 (Tex. 2021) (examining "the substance of the plaintiff's pleadings" to determine nature of plaintiff's claim). The Media Defendants argue that a one-year limitations period applies to MRG Medical's claims because the substance of each is defamation. *See Nath v. Texas Child.'s Hosp.*, 446 S.W.3d 355, 370 (Tex. 2014) (citing cases applying one-year statute of limitations to claims of business

disparagement and tortious interference "when the sole basis" for each "claim is defamatory statements"). The parties do not dispute that the claim began to accrue on September 25, 2020, when the Tribune and ProPublica published the Article.

We start with business disparagement. Defamation and business disparagement are alike "in that both involve harm from the publication of false information." *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015) (orig. proceeding). The two torts, however, serve different interests. *Id.* "Defamation serves to protect one's interest in character and reputation, whereas disparagement protects economic interests by providing a remedy for pecuniary losses from slurs affecting the marketability of goods and services." *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 417 (Tex. 2020). To state a claim for defamation, a plaintiff must allege "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." *In re Lipsky*, 460 S.W.3d at 593. A defamatory statement, then, "is one that 'tends [ ] to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Innovative Block*, 603 S.W.3d at 417 (quoting Restatement (Second) of Torts § 559 (Am. L. Inst. 1977)). Business disparagement, in contrast, "encompasses falsehoods concerning the condition or quality of a business's products or services that are intended to, and do in fact, cause financial harm." *Id.* The "publication of a disparaging statement concerning the product of another" is actionable as business disparagement "when (1) the statement is false, (2) published with malice, (3) with the intent that the publication cause pecuniary loss or the reasonable recognition that it will, and (4) pecuniary loss does in fact result." *Id.* (citing *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003)).

The Media Defendants argue that the challenged statements constitute defamation rather than business disparagement because the statements "are not about the condition or quality of any product or service MRG offers" but rather its reputation. MRG Medical responds that it asserted a claim for business disparagement because it alleged special damages. The Media Defendants reply that the distinction between business disparagement and defamation is the nature of the alleged falsehoods rather than the plaintiff's damages.

We agree with the Media Defendants. MRG Medical relies on the supreme court's statement that "if the gravamen of the plaintiff's claim is for special damages (e.g., an economic injury to the plaintiff's business), rather than general damages to its reputation, then the proper cause of action may be for business disparagement." *Id.* at 417–18. But "the nature of a plaintiff's injury is no more than a proxy," and an imperfect one, because defamation plaintiffs may recover special damages. *Id.* at 418; *see Waste Mgmt. of Texas Inc. v. Texas Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014). "Where the torts meaningfully diverge, then, is not in the nature of the injury but instead in the nature of the alleged falsehoods." *Innovative Block*, 603 S.W.3d at 418. That is, the distinction is whether the falsehood affects the plaintiff's reputation or the marketability of the plaintiff's good and services. *See generally id.*

We next consider whether the four challenged statements allegedly damage MRG Medical's reputation or the marketability of its goods and services. MRG Medical alleged in its petition that, at all relevant times, it "provided seamless proprietary solutions for tele-health, remote patient monitoring, disease specific chronic care management, biometric sensors, and other goods and services" but "never offered COVID testing to anyone." The first and third challenged statements (avoiding competitive bidding rules and paying bribes) do not disparage

any product or service of MRG Medical's but rather its reputation for honesty and lawful behavior. The fourth statement (that MRG Medical is a "fly-by night operation being led by a 'serial entrepreneur'") impacts its general reputation but does not disparage the quality of MRG Medical's telehealth services. *See Innovative Block*, 603 S.W.3d at 417 (characterizing defamatory statement as "one that 'tends [ ] to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him'" (quoting Restatement (Second) of Torts § 559 (Am. L. Inst. 1977)); *Hancock v. Variyam*, 400 S.W.3d 59, 63 (Tex. 2013) (describing defamation "as the invasion of a person's interest in her reputation and good name").

The Media Defendants argue that the second challenged statement—"that MRG was selling unreliable, non-FDA authorized COVID tests and/or was not compliant with federal law"—cannot "be read as disparaging the 'condition or quality' of any of MRG [Medical]'s products or services" because MRG Medical never sold COVID tests. We agree. Business disparagement encompasses disparaging statements "about the product of another," *Innovative Block*, 603 S.W.3d at 417, but MRG states in its live petition that it "has never offered COVID testing to anyone." In other words, neither the Wondfo antibody test nor any other COVID-19 test was a "product[] or service[]" of MRG Medical. *See id.* Moreover, the harm MRG Medical alleges flowed from this statement was that third parties canceled their contracts with MRG Medical because they did not wish to be associated with MRG Medical. Considering all these allegations together, the second statement concerns MRG Medical's reputation rather than the marketability of its telehealth services. The substance of the second statement supports a claim for defamation rather than business disparagement. *See Hancock*, 400 S.W.3d at 63; *Amini v. Spicewood Springs Animal Hosp., LLC*, No. 03-18-00272-CV, 2019 WL 5793115, at *9 (Tex.

App.—Austin Nov. 7, 2019, no pet.) (mem. op.) (dismissing business disparagement claim because "[i]n essence, [plaintiffs] seem to argue that . . . [the defendant] disparaged the hospital's overall business practices and, by extension, its professional reputation" rather than hospital's commercial product or activity).

Because MRG's business disparagement claim is based solely on defamatory statements, the one-year statute of limitations applies. *See Nath*, 446 S.W.3d at 370 (explaining that one-year statute of limitations applies to business disparagement claim based solely on defamatory statements (citing *Hurlbut v. Gulf Atl. Life Ins.*, 749 S.W.2d 762, 766 (Tex. 1987)). The same period applies to the civil conspiracy theory because it "shares a limitations period with that of its underlying tort." *See Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019). A one-year limitations period also applies to MRG's claims of tortious interference with prospective and existing contracts because those claims are based on the same four statements. *See Nath*, 446 S.W.3d at 370 (concluding that "if a tortious interference claim is based solely on defamatory statements, the one-year limitations period for defamation claims applies").

Having concluded that limitations bars all of MRG Medical's claims, we do not reach the Media Defendants' remaining issues.[3] *See* Tex. R. App. P. 47.1 ("The court of appeals

[3] Because we conclude that the statute of limitations bars all MRG's claims, we need not reach the Tribune's arguments that the statements are accurate reports of third party-statements on matters of public concern, *see* Tex. Civ. Prac. & Rem. Code § 73.005 (providing that "accurate reporting of allegations made by a third party regarding a matter of public concern" is defense), and that the Article does not reasonably support the alleged implications, *see Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 635 (Tex. 2018) ("[A] plaintiff who seeks to recover based on a defamatory implication—whether a gist or a discrete implication—must point to 'additional, affirmative evidence' within the publication itself that suggests the defendant "intends or endorses the defamatory inference." (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990))).

must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.”).

CONCLUSION

We reverse the district court’s order and render judgment dismissing MRG Medical’s claims. We remand to the district court to consider the Media Defendants’ request for court costs, attorney’s fees, and sanctions.

____

Rosa Lopez Theofanis, Justice

Before Chief Justice Byrne, Justices Kelly and Theofanis

Reversed and Rendered in Part; Remanded in Part

Filed: May 22, 2024