NUMBER 13-16-00451-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

URBAN ENGINEERING AND MURRAY F. HUDSON P.E., Appellants,

v.

SALINAS CONSTRUCTION TECHNOLOGIES, LTD., Appellee.

On appeal from the 117th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Justice Hinojosa

Appellee Salinas Construction Technologies, Ltd. (Salinas) filed suit against appellants Urban Engineering and Murray F. Hudson P.E. (collectively Urban) alleging

causes of action for defamation and business disparagement. Urban filed motions to dismiss under the Texas Citizens Participation Act[1] (TCPA), *see* TEX. CIV. PRAC. & REM. CODE ANN. ch. 27 (West, Westlaw through 2015 R.S.), and chapter 150 of the Texas Civil Practice and Remedies Code. *See id.* ch. 150 (West, Westlaw through 2015 R.S.). Urban brings this interlocutory appeal from the trial court's denial of both motions. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.014(a)(12), 150.002(f) (West, Westlaw through 2015 R.S.).

By two issues, Urban argues: (1) the trial court erred in denying its TCPA motion to dismiss because Salinas failed to present clear and specific evidence establishing a prima facie case for its claims and because Urban established the qualified-privilege defense by a preponderance of the evidence; and (2) the trial court abused its discretion in denying Urban's chapter 150 motion to dismiss because Salinas's certificate of merit does not support a business-disparagement claim. We reverse and remand.

I. BACKGROUND

The pleadings and evidence pertinent to the motions to dismiss reflect the following:

A. Salinas Submits Bid for Road Project

Urban was retained by the City of Corpus Christi (Corpus Christi or the City) to serve as the engineer on a public-construction project to repair Waldron Road. As part of its duties under the contract, Urban was required to "analyze bids, evaluate, prepare

[1] The Texas Citizens Participation Act is commonly referred to as an "anti-SLAPP" law—"SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation." *Entravision Commc'ns Corp. v. Salinas,* 487 S.W.3d 276, 278 n.2 (Tex. App.—Corpus Christi 2016, pet. denied).

bid tabulation, and make recommendations concerning award of the contract." Potential bidders for the project were required to provide a "Statement of Experience." The City notified bidders that it would assess whether they were "responsible" based on interviews with references and consideration of the bidder's past projects. The City also instructed bidders that "[b]y listing reference contact information, [the bidder] indicates its approval . . . to contact the individuals listed as a reference."

Of the four companies who submitted bids for the project, Salinas submitted the lowest bid. Salinas's bid was accompanied by the required "Statement of Experience" which set out information on construction projects completed within the last five years as well as all past projects completed with Corpus Christi. Salinas also provided that it was in current litigation with the City of Seguin.

B. Urban's Recommendation

By letter dated March 5, 2015, Urban recommended to Corpus Christi that the City not award the project to Salinas based on the following:

1. Demonstrated lack of performance in maintaining schedule on an on-going project with the City of Corpus Christi and others.

2. Non-performance and current disbarred status with another municipality due to current litigation.

3. Lack of experience with proposed construction techniques.

Urban informed the City that Salinas's current projects with Corpus Christi and the Texas Department of Transportation (TxDOT) were behind schedule. Urban also stated that Salinas "does not have or has not committed the necessary resources to put the projects back on schedule." Urban informed the City that another municipality was forced to file

a "failure to perform" complaint with the bonding company and that the "project was currently in [l]itigation." Urban stated that the last project completed by Salinas for the City was completed behind schedule. Urban also represented that multiple projects with TxDOT were completed behind schedule. Finally, Urban stated that Salinas "does not have [the] demonstrated resources or capacity to accomplish required work within mandated schedules nor does it have requisite experience working with and in the materials particular to this project location and design." Urban ultimately recommended that the City award the contract to the second-lowest bidder.

In response to Urban's March 5 letter, Salinas's attorney sent correspondence to the City alleging that Urban's letter was "misleading, inaccurate, or false, as it relates to Salinas[.]" Salinas disputed that it had a "demonstrated lack of performance in maintaining schedule on an on-going project with the City of Corpus Christi." Salinas explained that the project was behind schedule because of "several City utility conflicts." Salinas also stated that another project with the City was extended from 210 to 645 days as a result of the City's change orders for additional work.

Salinas maintained that the allegation it was in "disbarred status"[2] with another municipality was inaccurate. Salinas explained that it was in litigation with the City of Seguin because it had completed work but had not received payment. Salinas disputed that the suit was filed for "non-performance."

[2] The record indicates that the term "disbarred" or "debarred" refers to a contractor being disqualified from future projects with a governmental entity.

Finally, Salinas maintained that Urban's statement that it lacked "experience with proposed construction techniques" was false. Salinas asserted that it had completed projects within a close proximity to the Waldron Road project utilizing the same techniques and under similar conditions.

Urban submitted a follow-up letter to the City on March 31 clarifying its process for evaluating bids. Urban explained that its recommendation was "based on [the] Statement of Experience provided by contractors and information obtained from entities' references in that Statement of Experience." Urban stated that its review "is not exhaustive and our recommendation is based upon information provided to us by others." Urban further maintained that it relied on such information "to be factual." As part of its evaluation process, Urban contacted (1) Salinas's insurance company to verify coverage, (2) a City of San Antonio inspector who provided a favorable recommendation for the project superintendent, (3) a TxDOT representative who stated that Salinas was behind schedule and did not have the capacity to put the project back on schedule, (4) the City of Seguin who stated that Salinas did not complete contracted work and that they were currently in litigation resulting in Salinas being "disbarred" from future contract consideration, and (5) a Corpus Christi representative who stated that Salinas had failed to perform on a past contract and is currently having performance problems on a project. Urban also reviewed the Statement of Experience provided, which did not list any projects within the last five years that included the type of construction proposed for the Waldron Road project.

On June 16, 2015, the City passed and adopted a city ordinance rejecting Salinas's bid and awarding the contract for the project to the next-lowest bidder. The ordinance included several factual findings and incorporated Urban's March 5 recommendation.

On June 19, the City sent a "Notice of Proposed Debarment" to Salinas. The notice stated that the City was considering "debarring" Salinas pursuant to a city ordinance, which would operate to exclude Salinas from contracting with the City for a certain period. The notice listed the following reasons for debarment: (1) unsatisfactory performance on the "Horne Road project;" (2) "failure to perform/violations of city contracts;" (3) and those reasons set out in the city ordinance which awarded the Waldron Road project to another contractor.

C. Salinas Files Suit

Salinas filed suit against Urban alleging causes of action for defamation and business disparagement. Salinas attached to its lawsuit two certificates of merit by engineer L. David Givler.[3] Each certificate stated the following: "In my professional opinion, [Urban] was negligent and breached the applicable standard of care of an engineer under the same or similar circumstances." Givler identified multiple statements in Urban's March 5 correspondence as "not objective" and "not truthful." Salinas opined that when assessing the resources, capacity and experience of a contractor, a professional engineer "should engage in a reasonable investigation, review applicable documents and communicate with the contractor as appropriate." Givler asserted that

[3] Salinas filed separate certificates of merit against Urban Engineering and Murray Hudson. However, the certificates of merit are virtually identical.

Urban "did not engage in a reasonable investigation and . . . was not objective and truthful." Givler stated that Urban "did not meet the normal and applicable standard of care when [it] failed to reasonably investigate the issues upon which he made statements." Givler concluded that Urban's breach of its standard of care caused harm and injury to Salinas and was "harmful to its business reputation." Urban filed an answer to the lawsuit asserting the defense of "qualified privilege."

D. Motions to Dismiss

Urban later filed a motion to dismiss pursuant to the TCPA. Urban contended that its statements to the City were based upon its exercise of free speech because they were communications made in connection with a matter of public concern. Urban further contended that Salinas could not produce clear and specific evidence for the elements of their causes of action. Urban's motion incorporated its contract with the City.

Urban also filed a motion to dismiss Salinas's business-disparagement claim pursuant to section 150.002 of the civil practice and remedies code, arguing that the certificates of merit filed by Salinas did "not identify or otherwise discuss any maliciously made untrue statements published by [Urban]." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002.

Salinas filed a response to the motions, arguing that Salinas "has clear and specific evidence of each element" of its claims. In support of its response, Salinas attached the following: the affidavit of Daniel Salinas, president of Salinas Construction Technologies; Urban's March 5 letter; the City ordinance; notice of proposed debarment;

a transcript from the debarment hearing; Givler's certificates of merit; and documentation which Salinas relied on in demonstrating that Urban's statements were false.

By its response, Salinas generally maintained that Urban's statements were false and misleading and that "Salinas is a well-qualified construction contractor, has completed prior projects for the City of Corpus Christi on time and not under default, and is not debarred from any contracts by any other municipality." Salinas argued that Urban was negligent in publishing the false statements because Urban "failed to engage in a reasonable investigation, review applicable documents, and communicate with the contractor as appropriate." Salinas further argued that Urban "acted with reckless disregard for the truth when they did not retract or otherwise modify their statements concerning Salinas after being apprised of the false, inaccurate, misleading, and defamatory nature of their statements in the [March 5] letter." Salinas maintained that Urban could not claim a qualified privilege because the statements were made with malice. Salinas also argued that its certificate of merit sufficiently established the element of malice so as to avoid dismissal of its business-disparagement claim.

Urban filed a reply in which it urged its qualified-privilege defense as a basis for dismissing Salinas's defamation claim. Urban cited evidence that it relied on information provided by references to be factual.

Following a hearing, the trial court denied Urban's motions. This interlocutory appeal followed.

II. TEXAS CITIZENS PARTICIPATION ACT

The TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding). The legislature enacted the TCPA "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 [persons] to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West, Westlaw through 2015 R.S.). "The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *Lipsky*, 460 S.W.3d at 589 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.002). When a plaintiff's claim implicates a defendant's exercise of First Amendment rights, chapter 27 allows the defendant to move for dismissal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West, Westlaw through 2015 R.S.); *Andrews Cnty. v. Sierra Club*, 463 S.W.3d 867, 867 (Tex. 2015).

Under the TCPA's two-step dismissal process, the initial burden is on the defendant to show by a preponderance of the evidence that the plaintiff's claim "is based on, relates to, or is in response to the [defendant's] exercise of" the right of free speech, the right to petition, or the right of association. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West, Westlaw through 2015 R.S.). If the defendant satisfies this burden, the burden shifts to the plaintiff to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id*. § 27.005(c).

The clear and specific standard "neither imposes a heightened evidentiary burden or categorically rejects the use of circumstantial evidence when determining the plaintiff's prima-facie-case burden under the Act." *Andrews Cty.*, 463 S.W.3d at 867; *see Lipsky*, 460 S.W.3d at 591 ("In a defamation case that implicates [chapter 27], pleadings and evidence that establish[] the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss."). The phrase "clear and specific evidence" has been defined as more than mere notice pleading, but not more than the burden of proof required for the plaintiff to prove at trial. *See Lipsky*, 460 S.W.3d at 590–91. In determining whether the clear and specific standard has been met, a trial court must consider the pleadings and evidence that explain "the facts on which the liability . . . is based." TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a); *see United Food & Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, 430 S.W.3d 508, 511–12 (Tex. App.—Fort Worth 2014, no pet.). The standard is met when the plaintiff, for each essential element of her claim, provides the "minimum quantum" of "unambiguous," "explicit" evidence "necessary to support a rational inference that the allegation of fact is true." *Lipsky*, 460 S.W.3d at 590.

"Conclusory statements are not probative and accordingly will not suffice to establish a prima facie case." *Serafine v. Blunt*, 466 S.W.3d 352, 358 (Tex. App.—Austin 2015, no pet.) (citing *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 355 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)). In other words, "bare, baseless opinions" are not "a sufficient substitute for the clear and specific evidence required to establish a prima facie case" under the TCPA. *In re Lipsky*, 460

S.W.3d at 592. "Opinions must be based on demonstrable facts and a reasoned basis." *Id*. at 593 (citing *Elizondo v. Krist*, 415 S.W.3d 259, 265 (Tex. 2013)).

Even if the nonmovant carries its section 27.005(c) burden, however, the trial court shall dismiss the legal action if the movant establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d).

We review de novo the trial court's determinations that the parties met or failed to meet their section 27.005 burdens. *Tex. Campaign for the Env't v. Partners Dewatering Int'l, LLC*, 485 S.W.3d 184, 192 (Tex. App.—Corpus Christi 2016, no pet.); *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 282 (Tex. App.—Dallas 2015, pet. denied).

III. PRIMA FACIE CASE

By their first issue, Urban argues that the trial court erred in denying its TCPA motion to dismiss. The parties do not dispute that Salinas's action "is based on, relates to, or is in response to" Urban's exercise of the right to free speech, and we agree. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b); *Hicks v. Grp. & Pension Administrators, Inc*., 473 S.W.3d 518, 530 (Tex. App.—Corpus Christi 2015, no pet.) (concluding that an email to school board trustees concerning the selection of a third party health insurance administrator was a communication on a matter of public concern and, therefore, constituted the exercise of the right to free speech under the TCPA). Therefore, we must address whether Salinas met its burden of "establish[ing] by clear and specific evidence a prima facie case for each essential element of the claim in question." TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

A. Defamation

The elements for defamation include (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 593–94; *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

Urban first argues that Salinas failed to present clear and specific evidence of the requisite degree of fault. Urban also maintains that its communications were protected by a qualified privilege. We first address qualified privilege and its relation to the degree of fault necessary to support a defamation claim.[4]

1. Qualified Privilege and the Requisite Degree of Fault

A private individual suing for defamation is required to prove negligence in the making of the statement, while a public figure is required to prove actual malice. *See Neely v. Wilson*, 418 S.W.3d 52, 61 (Tex. 2013). It is undisputed that Salinas is not a public figure. However, a plaintiff who is a private entity must still prove actual malice when its claims raise a qualified privilege. *See Shell Oil Co. v. Writt*, 464 S.W.3d 650, 655 (Tex. 2015); *Maewal v. Adventist Health Sys./Sunbelt, Inc.*, 868 S.W.2d 886, 893 (Tex. App.—Fort Worth 1993, writ denied); *see also Mem'l Hermann Health Sys. v. Khalil*,

[4] We disagree with Salinas that Urban did not preserve the issue of qualified privilege for appeal. Urban invoked qualified privilege in its pre-hearing answer and presented the issue to the trial court in both its reply and in its arguments at the hearing on its motion to dismiss. In its order denying Urban's motion to dismiss, the trial court stated that it considered the motion, Salinas's response, the "reply thereto," and the arguments of counsel. Accordingly, Urban has preserved the issue for appeal. *See* TEX. R. APP. P. 33.1; *Levinson Alcoser Assocs., LP v. El Pistolon II, Ltd.*, __ S.W.3d __, __, No. 15-0232, 2017 WL 727269, at *3 (Tex. Feb. 24, 2017) (concluding in certificate-of-merit appeal that architects preserved their argument that the affidavit did not demonstrate the purported expert's requisite knowledge where architects questioned the expert's knowledge of their area of practice both in written pleadings before the hearing and again at the hearing on architects' motion to dismiss).

No. 01-16-00512-CV, 2017 WL 1149684, at *7 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, no pet. h.) (mem. op.).

"Qualified privileges against defamation exist at common law when a communication is made in good faith and the author, the recipient or a third person, or one of their family members, has an interest that is sufficiently affected by the communication." *Cain v. Hearst Corp*., 878 S.W.2d 577, 582 (Tex. 1994); *see Neely*, 418 S.W.3d at 62. Stated another way, a qualified privilege protects communications made in good faith on a subject in which the author has an interest or a duty to another person having a corresponding interest or duty. *Free v. Am. Home Assurance Co*., 902 S.W.2d 51, 55 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Pioneer Concrete of Tex., Inc. v. Allen*, 858 S.W.2d 47, 49 (Tex. App.—Houston [14th Dist.] 1993, writ denied). If a conditionally privileged statement is motivated by malice, however, the privilege is lost. *Pioneer*, 858 S.W.2d at 49. Whether a qualified privilege exists is a question of law. *Yeske v. Piazza Del Arte, Inc*., ___ S.W.3d ___, ___, No. 14-15-00633-CV, 2016 WL 7436507, at *7 (Tex. App.—Houston [14th Dist.] Dec. 22, 2016, no pet.); *Houston v. Grocers Supply Co.*, 625 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1981, no writ).

Urban made the statements at issue pursuant to its contractual duties as the City's retained engineer. Urban was required by the contract to "analyze bids, evaluate, prepare bid tabulation, and make recommendations concerning award of the contract." In turn, the City had a corresponding interest in the assessment of potential bidders—to award the road construction contract to a responsible bidder. We conclude as a matter

of law that Urban's statements were protected by a qualified privilege.[5] *See Yeske*, 2016 WL 7436507, at *7; *Grocers Supply Co.*, 625 S.W.2d at 800; *see also Baytown Const. Co. v. Buchannan/Soil Mechanics, Inc.*, No. 14-88-00798-CV, 1990 WL 3018, at *4 (Tex. App.—Houston [14th Dist.] Jan. 11, 1990, writ denied) (op., not designated for publication) (concluding that statements made by a project engineer retained by a municipality for an airport improvement project concerning the capabilities of a bidder were protected by a qualified privilege); *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1291 (Ohio 1995) (explaining that "[p]ublic policy dictates . . . that those who provide information to government officials who may be expected to take action with regard to the qualifications of bidders for public-work contracts be given a qualified privilege"). Therefore, Salinas was required to present clear and specific evidence that Urban's statements were made with actual malice. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c); *Pioneer*, 858 S.W.2d at 49; *Kelly v. Diocese of Corpus Christi,* 832 S.W.2d 88, 91 (Tex. App.—Corpus Christi 1992, writ dism'd) (explaining that where a privilege is established by a defendant to a defamation claim, the plaintiff is required to establish an abuse of that privilege); *see also Ford v. Bland*, No. 14-15-00828-CV, 2016 WL 7323309, at *3 (Tex. App.—Houston [14th Dist.]

[5] As noted above, whether a qualified privilege exists is a question of law. *See Yeske v. Piazza Del Arte, Inc*., ___ S.W.3d ___, ___, No. 14-15-00633-CV, 2016 WL 7436507, at *7 (Tex. App.—Houston [14th Dist.] Dec. 22, 2016, no pet.). However, to the extent that a qualified privilege is classified as an affirmative defense for purposes of the TCPA, we also conclude that Urban has established the existence of the privilege by the preponderance of the evidence. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d) (West, Westlaw through 2015 R.S.); *Denton Pub. Co. v. Boyd*, 460 S.W.2d 881, 885 (Tex. 1970) (explaining that privilege is an affirmative defense in an action for libel); *but see Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000) (explaining that a plaintiff claiming defamation based on a publication as a whole must prove that the publication is not otherwise privileged).

Dec. 15, 2016, no pet.) (mem. op.) (explaining that a defamation plaintiff must prove actual malice if the defendant has established a qualified privilege).

2. Malice

A defendant acts with malice "only if he knew of the falsity or acted with reckless disregard concerning it[.]" *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003); *see Tex. Campaign for the Env't*, 485 S.W.3d at 201. Reckless disregard is a subjective standard that focuses on the conduct and state of mind of the defendant. *Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002) (citing *Herbert v. Lando*, 441 U.S. 153, 160 (1979)). A defendant must "have, subjectively, significant doubt about the truth of his statements at the time they are made." *Id*. at 596. "An error in judgment is not enough" to establish reckless disregard. *Casso v. Brand*, 776 S.W.2d 551, 563 (Tex. 1989). "Mere negligence is not enough." *Forbes*, 124 S.W.3d at 171.

Salinas relies on evidence Urban failed to conduct a reasonable investigation before making statements which Salinas contends were false or misleading. Salinas cites to Givler's affidavit in which Givler opined that Urban "did not engage in a reasonable investigation and . . . was not objective and truthful in making the statements in the March 5, 2015, letter." Givler also stated that Urban "failed to reasonably investigate the issues upon which he made statements." Givler further stated that "a professional engineer should engage in a reasonable investigation, review applicable documents and communicate with the contractor as appropriate." Salinas also relies on evidence that Urban failed to contact Salinas directly to verify the representations made by Salinas's

references. Finally, Salinas maintains that Urban's failure to retract its letter after being notified of the inaccuracies is evidence of malice.

Assuming, without deciding, that Salinas presented clear and specific evidence that Urban was negligent in failing to conduct a "reasonable investigation," Salinas presented no evidence that Urban had reason to know the statements it published were false or that Urban had significant doubt about the truth of the statements when it published the March 5 letter. The Statement of Experience signed by Salinas notified bidders that the determination of whether a bidder was "responsible" would be based on interviews with the provided references. The record reflects that Urban received negative reports from several sources—Corpus Christi, the City of Seguin, and TxDOT—concerning Salinas's ability to timely complete projects. These consistent reports provided Urban with no reason to have significant doubt regarding the truth of the statements made in its letter to the City. We further note that Salinas does not contend Urban misrepresented what it was told by the references.

An actual malice determination focuses not on what the defendant should have done or did not do. *See Tex. Campaign for the Env't*, 485 S.W.3d at 201. Neither does the determination focus on what a defendant would have known had it researched the matter. *Id.* "A failure to investigate fully is not evidence of actual malice[.]." *Bentley*, 94 S.W.3d. at 593. Instead, the focus is on the speaker's state of mind *at the time of the publication*. *See Forbes*, 124 S.W.3d at 173. We conclude that Salinas failed to present clear and specific evidence that Urban either knew the statements to be false or entertained serious doubts as to the truth of the statements made at the time of

publication. *See id*. For this reason, Salinas's argument that Urban failed to retract its statements also fails. Whether or not Urban later entertained doubts concerning the truth of its March 5 letter is not relevant to its state of mind at the time of the publication. *Cf. id.* Because Salinas failed to carry its burden on an essential element of its defamation claim, the trial court erred in denying Urban's motion to dismiss the cause of action.

B. Business Disparagement

Salinas was also required to present clear and specific evidence of malice to support its business-disparagement claim. "To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff." *In re Lipsky*, 460 S.W.3d at 592. A business-disparagement claim is similar in many respects to a defamation action. *Forbes*, 124 S.W.3d at 170. "The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests." *Id*.; *see also Waste Mgmt. of Tex., Inc*. *v. Tex. Disposal Sys. Landfill, Inc.,* 434 S.W.3d 142, 155 (Tex. 2014) (discussing distinction between damages in defamation and business disparagement cases).

For the reasons noted in our discussion of defamation, Salinas has failed to present clear and specific evidence of malice—an essential element of business disparagement. *See supra* Part III.A.2. Because Salinas has not carried its burden, Urban is entitled to dismissal of the business-disparagement claim under the TCPA.

C. Summary

Conducting a de novo review, we conclude that the trial court erred in denying Urban's motion to dismiss under the TCPA. *See Tex. Campaign for the Env't*, 485 S.W.3d at 192; *Sutterfield*, 482 S.W.3d at 282. We sustain Urban's first issue. Due to our disposition of this issue, we need not address Urban's second issue. *See* TEX. R. APP. P. 47.1 (stating that the appellate court must address every issue raised and necessary to final disposition of the appeal).

IV. CONCLUSION

We reverse the trial court's denial of Urban's TCPA motion to dismiss, and we remand the case to the trial court for further proceedings as required by the statute and to order dismissal of the suit. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.009.

LETICIA HINOJOSA
Justice

Delivered and filed the
25th day of May, 2017.