Affirm in part; Reverse and Remand in part; Opinion Filed December 29, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00316-CV

CARLOS MORALES, Appellant
V.
DAVID BARNES, Appellee

On Appeal from the 301st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-11-11126

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Evans

Appellant Carlos Morales asserts that the trial court erred in denying his motion to dismiss pursuant to chapter 27 of the Texas Civil Practice & Remedies Code. Morales also asserts that the trial court abused its discretion in granting appellee David Barnes's motion to disregard Morales's reply to Barnes's response to motion to dismiss. We affirm in part and reverse in part.

BACKGROUND

Barnes and Jennifer Lancashire (Lancashire) divorced on August 20, 2012. Following the divorce, Jennifer remarried. Jennifer and her current husband, David Lancashire, filed

separate lawsuits against Barnes for assault.[1] Morales is Jennifer's attorney in the assault litigation.

On September 26, 2014, Morales—on behalf of Lancashire—sent Credit Suisse, Barnes's employer, a "preservation of evidence" letter regarding the assault cases ("first communication"). In 2016, Barnes left Credit Suisse and went to work for UBS. Shortly thereafter on April 6, 2016, Morales sent a cease and desist letter to UBS ("second communication")—on behalf of Lancashire—alleging that Barnes had "maliciously and purposefully contacted third parties making false, misleading and/or defamatory statements about [Lancashire]." Following these letters, Barnes filed a lawsuit against Lancashire.[2] Barnes later amended his petition to include Morales as a named defendant.[3]

On January 5, 2017, Morales filed a motion to dismiss Barnes's lawsuit pursuant to chapter 27 of the Texas Civil Practice and Remedies Code. In his motion to dismiss, Morales argued that he was entitled to a dismissal of the petition because his actions were based on the exercise of free speech. Barnes filed a response on February 24, 2017. On February 24, 2017,

[1] The two assault lawsuits were consolidated and are ongoing cases in the 301st Judicial District Court in Dallas County. The entire trial court records for these consolidated cases were sealed.

[2] It appears that the underlying litigation in this case was filed under the same cause number as Lancashire's assault case against Barnes. As stated above, the trial court records for the two assault cases were consolidated and sealed. The appellate briefs, however, were not filed under seal nor has a motion to seal the record been filed with our Court's clerk. Hence, we have not ordered this record to be sealed. Further, we must hand down a public opinion explaining our decisions based on the record. *See* TEX. R. APP. P. 47.1 ("The court of appeals 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.") and 47.3 ("All opinions of the courts of appeals are open to the public . . . ."); and TEX. GOV'T CODE ANN. § 552.022(a)(12) (West 2012) ("Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law: final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases."). Although the record provided to us on appeal lacks the reasoning behind the trial court's sealing order, and our record is not sealed, and our opinion cannot be sealed, we will nevertheless reference only the factual information which was provided in the unsealed appellate briefing.

[3] In the second amended petition, Barnes alleged three causes of action against Lancashire and Morales: (1) tortious interference with business relations; (2) tortious interference with prospective business relations; and (3) civil conspiracy.

Barnes also filed a third amended petition which added factual information and a claim for intrusion on seclusion.[4]

The trial court set a hearing on the motion to dismiss for March 3, 2017. Morales filed a reply brief immediately preceding the hearing. On March 3, 2017, Barnes made oral objections and argued that the reply included "new grounds" for a dismissal, all new evidence supporting these "grounds," and all new legal authority. The trial court indicated its awareness of and concern about the time constraints in the TCPA for her to rule. By her questions, the trial court indicated her inclination to exercise her discretion to use the three-day civil local rule because the case was a civil case filed in county court at law before it was transferred to family court. Because of time constraints, the trial court, with agreement of counsel, set March 8 for completion of the hearing. Later on March 3, Barnes filed written objections to the reply and requested that the trial court disregard and not consider Morales's late-filed reply. On March 8, 2017, the trial court finished the hearing and entered an order denying the motion to dismiss. The trial court also granted Barnes's objections and request that the trial court disregard and not consider Morales's reply brief.

Morales then filed a notice of appeal regarding the trial court orders which (1) deny his motion to dismiss and (2) grant Barnes's objections to and request for the court to disregard his reply brief.

ANALYSIS

A. Texas Citizens Participation Act

Chapter 27 of the Texas Civil Practice & Remedies Code, also known as the Texas Citizens Participation Act, is an anti-SLAPP statute. *See* TEX. CIV. PRAC. & REM. CODE

[4] The Third Amended Petition retained the claim for civil conspiracy against Lancashire and Morales. However, as the appellate briefs do not address this cause of action, we do not address it in this opinion.

§§ 27.001-27.011 (West 2015); *Serafine v. Blunt*, 466 S.W.3d 352, 356 (Tex. App.—Austin 2015, no pet.). "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation." *Serafine*, 466 S.W.3d at 356. The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits. *See* TEX. CIV. PRAC. & REM. CODE § 27.002; *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). The legislature has instructed that the TCPA "shall be construed liberally to effectuate its purpose and intent fully." *See* TEX. CIV. PRAC. & REM. CODE § 27.011(b); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017).

B. Order Denying Motion to Dismiss

1) Standard of review

To obtain a dismissal under the TCPA, a defendant must show "by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right to free speech; (2) the right to petition; or (3) the right of association." *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b). We review this determination de novo. *See James v. Calkins*, 446 S.W.3d 135, 146 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). The burden then shifts to the non-movant to establish by clear and specific evidence a prima facie case for each element of the claim in question. *Id.* § 27.005(c). If the non-movant fails to meet this burden, the trial court must dismiss the action. *Id*. § 27.005(b). However, even if the non-movant does satisfy the second step, the court will dismiss the action if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense" to the plaintiff's claim. *Id*. § 27.005(d).

2) Step One: Does the TCPA apply to Barnes's claims?

The initial burden falls on Morales to establish by a preponderance of the evidence that the legal action brought is based on, relates to, or is in response to the party's exercise of the

right to free speech—free speech being Morales's only basis asserted in the trial court for the TCPA's application.[5] *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b)(1). The statute defines the "exercise of the right of free speech" as a communication made in connection with a matter of public concern. *See* TEX. CIV. PRAC. & REM. CODE § 27.001(3). The statute further defines "matter of public concern" as an issue related to: (1) health and safety; (2) environmental, economic or community well-being; (3) the government; (4) a public official or public figure; or (5) a good, product, or service in the marketplace. *See* TEX. CIV. PRAC. & REM. CODE § 27.001(7). Morales argues that he sent the letters described in the petition in his capacity as Lancashire's attorney and that the letters were a "matter of public concern" because they concerned false representations made by a licensed broker/wealth manager—Barnes—to the public and related to Barnes's service in the marketplace.

In this case, Barnes pleaded two separate communications form the basis of his claims: (1) a preservation of evidence letter dated September 26, 2014 sent by Morales (on behalf of Lancashire) to Credit Suisse, Barnes's former employer, regarding the assault cases; and (2) a cease and desist letter dated April 6, 2016 from Morales (on behalf of Lancashire) to UBS, Barnes's current employer. We will analyze each communication separately.

The first communication, the preservation of evidence letter, referenced the lawsuit but made no statement about the lawsuit or Barnes in the letter. It attached, however, the original petition that alleged Barnes assaulted the Lancasters. Neither the letter nor attached petition asserted Barnes made false representations to anyone or made statements in or pertaining to a business or marketplace or alleged anything that pertained to Barnes's work in the marketplace. Accordingly, Morales's argument that the first communication was a "matter of public concern"

[5] We note Morales did not assert in the trial court or on appeal that either of his communications pertained to the right to petition or assert that the pending lawsuit related to the right to petition. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001(4), 27.005(b)(2). As a result, nothing in this opinion pertains to a person's right to petition.

fails because it does not pertain in any way to Barnes's work in or making false representations related to the marketplace.

The second communication, the cease and desist letter, contained an allegation that Barnes "maliciously and purposefully contacted third parties making false, misleading and/or defamatory statements about [Lancashire]" using UBS's email. Thus, the second communication involved specific factual allegations that Barnes made disparaging communications to third parties using his employer's means of communication. We conclude this communication related to Barnes's service in the marketplace so it involved a "matter of public concern" that falls within the TCPA. *See AOL, Inc. v. Malouf*, No. 05-13-01637-CV, 2015 WL 1535669, at *2 (Tex. App.—Dallas Apr. 2, 2015, no pet.) (mem. op., not designated for publication) (article stating dentist had been charged with defrauding state taxpayers in Medicaid scam related to provision of services in the marketplace and constituted a matter of public concern).

3) Step Two: Did Barnes establish a prima facie case for his claims?

Because we conclude that the TCPA applies to one of Morales's communications, we must next consider whether Barnes met his burden by establishing, by "clear and specific evidence," a prima facie case on his causes of actions for (1) tortious interference with business relations and prospective business relations and (2) intrusion on seclusion. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c).

a) Tortious interference with business relations and prospective business relations

Morales contends that Barnes failed to meet his burden of proof in that he failed to prove each element of his claims by providing detailed evidence to show the factual basis for each element. A cause of action for tortious interference with business relations or prospective relations requires showing actual harm or damages suffered by the plaintiff as a result of the

defendant's interference. *See Anderton v. Cawley*, 378 S.W.3d 38, 59 (Tex. App.—Dallas 2012, no pet.); *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 659 (Tex. App.—Corpus Christi 1991, writ denied).

Here, Barnes concedes that his presentation of damages was insufficient. Barnes argues that this insufficiency was due to this Court's recent opinion in *Elliott v. S&S Emergency Training Solutions, Inc.*, No. 05-16-01373-CV, 2017 WL 2118787 (Tex. App.—Dallas May 16, 2017, pet. filed), which post-dated Barnes's presentation of evidence to the trial court. While it is true that Barnes filed his response to the motion to dismiss in February 2017—which pre-dates this Court's opinion in *Elliott*—we cannot agree our holding in the *Elliott* opinion impacted Barnes's existing evidentiary obligations. In *Elliott*, this Court applied the evidentiary requirements for damages from a 2015 Texas Supreme Court case, *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). *See Elliott*, 2017 WL 2118787, at *7 ("EMTS's general averment of 'hundreds of thousands of dollars' in lost revenue is as conclusory and unsupported by fact as the allegation of damages that was deficient in *Lipsky*."). As our 2017 decision merely applied the 2015 precedent set by the supreme court, we conclude Barnes was not exempt from complying with established evidentiary requirements for those seeking to demonstrate a prima facie case under the TCPA. Because Barnes did not meet his burden under the TCPA to establish, by clear and specific evidence, a prima facie case for each essential element of his tortious interference with business relations or tortious interference with prospective business relations, Morales's motion to dismiss should have been granted as to the second communication in connection with the claim for interference with existing and prospective business relations.

b) Intrusion on seclusion

There are two elements to an intrusion on seclusion cause of action: (1) an intentional intrusion, physical or otherwise, upon another's solitude, seclusion, or private affairs or

concerns, which (2) would be highly offensive to a reasonable person. *See Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993). Morales argues that intrusion on seclusion cases typically involve a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying. *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex. App.—Tyler 2005, pet. denied). Morales argues that Barnes's claim fails because it lacks any allegation of either a physical invasion or eavesdropping.

Barnes did not address the intrusion of seclusion claim in his brief, but in his response to the motion to dismiss he argued that Morales intentionally intruded on his right to earn a living and that his efforts to have Barnes fired would be highly offensive to a reasonable person. In support of this assertion, Barnes cites to *Household Credit Servs., Inc. v Driscol*, 989 S.W.2d 72 (Tex. App.—El Paso 1998, pet. denied) and argues that his facts are even more egregious. In *Driscol*, Driscol testified that Household Credit Services began calling her at work and at home after she fell behind on her VISA card balance. *Id.* at 78. She specifically testified that she received four to five calls a day, sometimes at 6:30 am on weekend mornings and after 11 pm on weekday evenings. *Id.* She further testified that the calls were "nasty" and "disrespectful" and continued despite her requests that they stop. *Id.* In addition, Ms. Driscol testified that collectors swore at her and began calling "incessantly at work." *Id.* at 78–79. For example, on one occasion, the calls were so numerous that a collector called Driscol's workplace 26 times in two hours. *Id.* at 79. Driscol's supervisor began to take the calls and requested that the collector stop calling the business but the calls continued. *Id.* Accordingly, based on these facts, the court held that the evidence was sufficient to support the jury's liability finding on Driscol's invasion of privacy cause of action.[6] *Id.* at 85.

[6] The courts appear to use "common law right to privacy" interchangeably with "intrusion on seclusion." *See Driscol*, 989 S.W.2d at 84 ("Under Texas law, there does exist a common-law right to privacy. There are three elements to consider: (1) an intentional intrusion; (2) upon the seclusion, solitude, or private affairs of another;

In this case, the only alleged intrusion at issue is the single cease and desist letter from Morales to UBS which alleged that Barnes had "maliciously and purposefully contacted third parties making false, misleading and/or defamatory statements about [Lancashire]." Several courts, including our own, have consistently held that an intrusion upon seclusion claim fails without evidence of a physical intrusion or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying. *See Soda v. Caney*, No. 05-10-00628-CV, 2012 WL 1996923, at *2–3 (Tex. App.—Dallas June 5, 2012, pet. filed) ("[Appellant] cites no authority, nor have we found any, where a Texas court concluded a party suffered an intrusion upon his seclusion absent evidence of a physical invasion or eavesdropping. On the contrary, other courts concluded evidence of a physical invasion or eavesdropping was necessary to sustain a claim for intrusion upon seclusion."); *Clayton*, 190 S.W.3d at 696 ("The invasion-of-privacy tort is typically associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying."); *Prince v. Nat'l Smart Healthcare Servs., Inc*, No. 01-09-00916-CV, 2011 WL 1632165, at *5 (Tex. App.—Apr. 28, 2011, no pet.) ("Intrusion upon seclusion is 'typically associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying.'") (citing *GTE Mobilnet of South Texas Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 618 (Tex. App.—Houston (14th Dist.) 2001, pet. denied). As stated above, Barnes did not make any assertion of a physical invasion or eavesdropping in his response to the motion to dismiss. However, even if these additional requirements were not applicable, Barnes's claim fails. Despite Barnes's assertions, a single letter directed at his employer is not more egregious than the numerous, harassing phone calls directed at Driscol's place of employment. Barnes

(3) which would be highly offensive to a reasonable person.") (internal citations omitted); *Valenzuela*, 853 S.W.2d at 513.

cites no authority, nor have we found any, where a Texas court concluded a party suffered an intrusion upon his seclusion based upon a single communication to his employer. Because Barnes did not meet his burden under the TCPA to establish, by clear and specific evidence, a prima facie case for each essential element of his intrusion on seclusion claim, Morales's motion to dismiss should have been granted as to the second communication in connection with the claim for intrusion on seclusion.

C. Order Granting Barnes's Objections to and Request that Trial Court Disregard Reply Brief

As stated above, Morales filed a reply to the motion to dismiss with attached exhibits just before the hearing began. At the hearing, Barnes made oral objections to the reply brief and later filed a motion to disregard the reply. In the motion to disregard, Barnes argued that (1) the reply is untimely under Dallas Local Rule 2.09; and (2) the reply cites to "new grounds" and new evidence which was not raised in the motion to dismiss. At the March 3 hearing, the trial court by her questions indicated her inclination to exercise her discretion to use the requirement in the civil local rules that documents filed less than three days before a hearing would not be considered. At the March 3 hearing, Morales did not discuss the trial court's discretion to manage her docket and did not file a written response to Barnes's motion to disregard the late-filed reply. The trial court granted the motion to disregard without specifying its reasons. Morales appealed this ruling. In his appellate brief, however, Morales only discusses that the local rule was adopted by the civil courts not the family courts, and fails to address the trial court's discretion to use the local rule as guidance to manage her docket or the argument that Morales's reply raised "new grounds" and new evidence, including affidavits and deposition transcript testimony, which were not raised in the motion to dismiss.

When a trial court issues an adverse ruling without specifying its reasons for doing so, the appellant must challenge each independent ground asserted by the appellee supporting the

adverse ruling because it is presumed that the trial court considered all of the asserted grounds. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); *Oliphant Fin. LLC v. Angiano*, 295 S.W.3d 422, 423–24 (Tex. App.—Dallas 2009, no pet.) ("If an independent ground fully supports the complained-of ruling or judgment, but the appellant assigns no error to that independent ground, we must accept the validity of that unchallenged independent ground, and thus any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment."). If the appellant fails to challenge all grounds supporting a ruling, we must accept the validity of the unchallenged grounds and affirm the adverse ruling. *See Oliphant*, 295 S.W.3d at 424; *Prater v. State Farm Lloyds*, 217 S.W.3d 739, 740–41 (Tex. App.—Dallas 2007, no pet.) ("When a separate and independent ground that supports a ruling is not challenged on appeal, we must affirm the lower court's ruling."). Because Morales fails to challenge all grounds upon which the trial court could have granted Barnes's motion to disregard, we accept the validity of the unchallenged grounds and affirm the order. *Id.* We resolve this issue against Morales.

CONCLUSION

We reverse the denial of the motion to dismiss as to all causes of action pleaded based on the second communication, a letter dated April 6, 2016 from Morales to UBS and render a partial judgment of dismissal of those causes of action. In all other respects, the trial court's judgment is affirmed. We remand to the trial court for further proceedings consistent with this opinion.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CARLOS MORALES, Appellant

No. 05-17-00316-CV V.

DAVID BARNES, Appellee

On Appeal from the 301st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DF-11-11126.
Opinion delivered by Justice Evans.
Justices Lang and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED AND RENDERED** in part. We **REVERSE** that portion of the trial court's judgment in regard to the denial of the motion to dismiss as to all causes of action pleaded based on the second communication, a letter dated April 6, 2016 from Carlos Morales to UBS and render a partial judgment of dismissal of those causes of action. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 29th day of December, 2017.