Affirmed and Memorandum Opinion filed October 20, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00971-CV

DAVID R. STONE, Appellant

V.

ANTHONY S. MELILLO, M.D. AND BAY OAKS ORTHOPAEDICS AND SPORTS MEDICINE, P.A., Appellees

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Cause No. 2018-53457

MEMORANDUM OPINION

In this interlocutory appeal, appellant David R. Stone appeals the trial court's denial of his motion to dismiss under the Texas Citizens Participation Act ("TCPA").[1] Presenting ten points of error, Stone contends the trial court erred in denying his motion to dismiss. We affirm the trial court's order.

[1] *See* Tex. Civ. Prac. & Rem. Code §§ 27.001–.011. The TCPA was amended in 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1–12, 2019 Tex. Gen. Laws 684. The 2019

I. BACKGROUND

Stone began treatment at Bay Oaks Orthopaedics & Sports Medicine, P.A., ("Bay Oaks") with Anthony S. Melillo, M.D., in 2010 for an on-the-job injury of his left knee.[2] In 2010, Melillo performed a left knee anterior cruciate ligament ("ACL") reconstruction and advised Stone that he would likely develop arthritis in his knees and might need knee replacement surgery in the future. Stone's left knee injury was treated conservatively by Melillo through 2015, including a series of injections and physical therapy, to alleviate knee pain and swelling in the left knee. In September of 2015, Stone presented with bilateral knee pain, was noted to have bilateral knee arthritis, and was given a corticosteroid injection and advised to try Voltaren for pain. On October 5, 2015, at Stone's request, Melillo gave Stone a stem cell injection in his left knee. The medical records reflect Melillo advised Stone he would recommend a total knee replacement if the stem cell injection failed.

Magnetic resonance imaging ("MRI") taken of Stone's knees on October 19, 2015 revealed that Stone had meniscal tears and arthritis in both knees. According to medical records, Stone wanted both of his knees "arthroscoped and cleaned out" in the hopes that further stem cell injections would improve his knees. After performing the arthroscopies on Stone's knees in November 2015, Melillo confirmed Stone had meniscus tears and damaged articular cartilage in both knees. Following the surgery, Stone reported to Melillo that his knee pain had lessened.

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amendments do not apply to this case, which was filed on August 10, 2018. *See id*. §§ 11–12, 2019 Tex. Gen. Laws at 687 (providing that amendments apply to actions filed on or after September 1, 2019). We refer to the TCPA version applicable to this dispute.

[2] Melillo conducts his medical practice out of Bay Oaks, and is the owner of Bay Oaks. Melillo and Bay Oaks generally do not distinguish between the individual and the entity, instead referring to the two collectively as "Plaintiffs" and "Appellees." We will follow that convention and refer to Melillo and Bay Oaks as "Appellees."

Stone returned for one final visit on January 1, 2016, reporting less knee pain bilaterally, though he was experiencing some sliding in his left knee.

In April 2016, Stone called Melillo and expressed anger that he was still experiencing pain in both of his knees. Melillo recalls that Stone threatened him, and Melillo interpreted the threat to be both physical and professional in nature. There was no further contact between Stone and Melillo until February of 2018, when Stone appeared and began distributing flyers at Bay Oaks and Houston Physicians' Hospital. The flyer consisted of a letter by Stone accusing Melillo of improperly performing the 2015 arthroscopies, leaving Stone with the only option of total knee replacement to both knees. Stone alleges in the letter that he is in constant pain as a result of the improperly performed scoping procedures, which he claims Melillo advised him to have with the goal of making money from the knee replacement surgeries made necessary by the arthroscopies. Stone asserted that Melillo pushed him to undergo knee surgeries when Stone did not need it.

Shortly after the flyers were distributed, Melillo retained counsel who sent a cease and desist letter to Stone.

On August 6, 2018, Stone appeared outside Bay Oaks' offices displaying a sign stating "Dr. Antonio Millilo [sic] has ruined my quality of life with botched and unnecessary surgery!" On August 7 and 8, Stone appeared outside Houston Physicians' Hospital displaying the same sign. Dr. Melillo was present at each location at the time Stone picketed.

On August 10, 2018, Melillo and Bay Oaks filed the underlying lawsuit alleging defamation and seeking a temporary restraining order, and temporary and permanent injunction.

Appellees' defamation claim is based upon alleged false statements contained in the flyer and published on Stone's sign. Appellees' petition further claims that Stone was stalking Melillo in August 2018, and states Melillo was concerned Stone might be in the preliminary stages of a "copy-cat revenge killing." Appellees sought to prevent Stone from picketing or otherwise traveling within 1,000 feet of Bay Oaks, Houston Physician's Hospital, Melillo's home, Melillo, or any family member, as well as to prevent Stone from engaging in defamatory speech. Appellees sought and the court granted a temporary restraining order and temporary injunction; however, on August 27, 2018, Appellees nonsuited any claims seeking injunctive relief enjoining Stone from making future defamatory statements. The temporary injunction was vacated on September 11, 2018, and the merits of that ruling is not an issue in this appeal.

On August 16, 2018, Stone filed in the trial court a Motion to Dismiss under the TCPA, which was followed by two supplemental motions. Appellees responded and Stone filed a reply. Stone asserted that Melillo's lawsuit is based on, relates to, or is in response to his exercise of the right of free speech, right to petition, or right of association. In his reply, Stone argued that Melillo could not establish by clear and specific evidence a prima facie case for each element of the pleaded legal actions. Appellees responded and produced affidavits and medical records to support the claimed falsity of the following statements, constituting nearly the entirety of the flyer, as well the statement on the sign:

- "In late November 2015, I saw Dr. Melillo about my knees still hurting and was telling him that I wanted to have stem cell treatments done to see if that would help with the issues I was having and he suggested that he go in, (surgery) and clean up the trash (loose cartilage) in my knees and to take out the excess fluids so that the stem cells would have a chance."

- "I did indeed have the scope work done on my knees and I was thinking that he was going to do just that and that only."
- "Instead, after surgery, I experienced a feeling in my knees that I've never felt before . . . it felt as though there was nothing there to cushion the bones as I was walking and the pain was the most horrible pain I had ever felt with my knees before."
- "Before the surgery (scope work) my right knee was ok and didn't hurt at all but after he worked on my knees, the right one was just as bad as the injured knee. The reason I even let him do the right knee was because he said that it had fluid on it and it would help the stem cells to take a better hold."
- "In early December, we went to Vail, Colorado to see the doctors about injecting stem cells into my knees, all with Dr. Mellilo's [sic] approval."
- "I received my bone marrow stem cells in hopes that everything was going to take root and grow and heal my knees, I was hoping and praying hard it worked because now, thanks to Dr. Mellilo [sic], I had not just one, but two bad knees."
- "So then two months went by and I still had extreme pain and Dr. Mellilo [sic] told me point blank that the pain would be gone by then and I would be able to resume my duties at work."
- "After all of the problems and trying to get some kind of help from Dr. Mellilo [sic], all he could say was that he told me all along that I would be needing knee replacement of both knees . . . he was pushing me toward that since the very beginning and I never understood why he would push that when I didn't need it . . . funny how I needed it only after he did the scope work."
- "Whenever Dr. Melillo did the scope work to 'clean' up my knees, he took out way more than he should have and has now caused me to be bone on bone and has rendered any treatments that I've had done, useless."
- "Financially, I have lost so much because of what this doctor has done to me . . . I've lost my home and other assets because I've not been able to work like I normally do and the companies that usually hire me are worried about a liability in me. I don't have the same quality of life that I used to have because of the pain and my inability to do the things that I used to do . . . simple things like walking or hiking or even just doing certain things around my home, I am in pain 24 hours a day and all because Dr. Mellilo [sic] doing what he did to my knees."

- "My intent and wish in writing this letter, is to educate people on the problems that can happen with doctors. They don't know everything and they are not God, but sometimes the money is just too good for them to pass up referring certain kinds of procedures that may or may not help someone but will definitely increase their bank accounts."
- "Also, not to leave anything out, Dr. Melillo said that he doesn't believe in surgery . . . I say this because we were talking about stem cell treatments and he said he was having them done on his back, that he didn't believe in having the surgery. This was said after the fact that my knees were ruined by him."
- "I have no other options because of what Dr. Melillo did to me. I trusted him with my health and welfare and he totally ruined my knees and my ability to make a living."
- "Dr. Antonio [sic] Mellilo has ruined my quality of life with botched and unnecessary surgery!"

After a hearing on October 19, 2018, the trial court denied Stone's Motion to Dismiss. Stone timely perfected this appeal.[3]

II. Analysis

A. TCPA Framework

Codified in chapter 27 of the Civil Practice and Remedies Code, the TCPA protects citizens from retaliatory lawsuits that seek to silence or intimidate them on matters of public concern. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015); *see generally* Tex. Civ. Prac. & Rem. Code §§ 27.001–.011. The purpose of the statute 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; *see also* Tex. Civ. Prac. & Rem. Code § 27.002.

To effectuate the statute's purpose, the TCPA provides a three-step decisional process to determine whether a lawsuit or claim should be dismissed under the statute. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132

[3] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(12) (providing that a person may appeal from an interlocutory order that denies a motion to dismiss under section 27.003).

(Tex. 2019). Under the first step, the trial court must dismiss the action if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the movant's exercise of (1) the right of free speech; (2) the right to petition; or (3) the right of association. Tex. Civ. Prac. & Rem. Code § 27.005(b); *Creative Oil & Gas,* 591 S.W.3d at 132; *Lipsky*, 460 S.W.3d at 586–87. "But under the second step, the court may not dismiss the action if the non-moving party 'establishes by clear and specific evidence a prima facie case for each essential element of the claim.'" *Creative Oil & Gas,* 591 S.W.3d at 132 (quoting Tex. Civ. Prac. & Rem. Code § 27.005(c)). "Under the third step, the movant can still win dismissal if he establishes 'by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.'" *Id*. (quoting § 27.005(d)).

The evidence the trial court considers in determining whether a legal action should be dismissed under the TCPA includes the pleadings and affidavits filed by the parties. Tex. Civ. Prac. & Rem. Code § 27.006(a); *see also Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

B. STANDARD OF REVIEW

Whether the TCPA applies to a particular claim is an issue of statutory interpretation that we review de novo. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018). When construing a statute, our objective is to determine and give effect to the Legislature's intent. *Id.* (quoting *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003)). We construe the TCPA liberally to effectuate its purpose and intent fully. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018). We view the pleadings and evidence in the light most favorable to the non-movant. *Stallion Oilfield Servs., Ltd. v. Gravity Oilfield Servs., LLC*, 592 S.W.3d 205, 214 (Tex. App.—Eastland 2019, pet. denied); *Brugger v.*

Swinford, No. 14-16-00069-CV, 2016 WL 4444036, at *2 (Tex. App.—Houston [14th Dist.] Aug. 23, 2016, no pet.) (mem. op.); *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 214–15 (Tex. App.—Houston [1st. Dist.] 2014, no pet.).

C. APPLICATION

In his appeal, Stone challenges the trial court's denial of Stone's Motion to Dismiss under the TCPA. Stone raises ten specific issues: 1) the trial court erred in denying TCPA relief on Appellees' request for explicit injunctive relief against defamation; 2) the trial court erred in refusing TCPA relief on Appellees' legal action requesting an injunction expressly against "picketing"; 3) the trial court erred in refusing TCPA relief on Appellees' legal action requesting an exclusionary-zone injunction; 4) the trial court erred in denying TCPA relief on Appellees' defamation claims, generally; 5) the trial court erred in denying TCPA relief as to the defamation claim arising from the first pled statement; 6) the trial court erred in denying TCPA relief as to the defamation claim arising from the second pled statement; 7) the trial court erred in denying TCPA relief as to the defamation claim arising from the third pled statement; 8) the trial court erred in denying TCPA relief as to the defamation claim arising from the fourth pled statement; 9) the trial court erred in denying TCPA relief as to the defamation claim arising from the fifth pled statement; and 10) the trial court erred in denying TCPA relief as to the defamation claim arising from the sixth pled statement.

We address these issues below.

1. FIRST STEP—THE RIGHT OF FREE SPEECH

As the movant, Stone had the burden to show by preponderance of the evidence that the nonmovant has asserted a "legal action" that is based on, relates

to, or is in response to the movant's exercise of one of the three rights delineated in the statute. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b).

Stone contends that the underlying lawsuit is based on, related to, or is in response to his right of free speech. Appellees do not dispute this argument. Appellees' Original Petition facially demonstrates that the defamation claim was brought in response to Stone's exercise of his right of free speech. We find that Stone has met his initial burden under the TCPA. The burden shifted to Appellees to provide clear and specific evidence establishing a prima facie case for each essential element on their claims.

2. SECOND STEP—PRIMA FACIE CASE

a. INJUNCTIVE RELIEF

Stone asserts that Appellees pleaded two legal actions pursuant to the TCPA: defamation and injunctive relief. Thus, he posits that Appellees must establish a prima facie case for the injunctive relief sought. We disagree with Stone that the TCPA applies to a request for injunctive relief where the injunctive relief is tied to or dependent upon a cause of action.

The express language of the TCPA contemplates that the relief sought is not a legal action but is merely a component of a legal action: a "legal action" is "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." Tex. Civ. Prac. & Rem. Code § 27.001(6). Here, the "legal action" is Appellees' cause of action for defamation, which provides the basis for their requested equitable relief in the form of temporary and permanent injunctions. A temporary injunction is a remedy that is available only if a probable right to relief has been established in

connection with a cause of action. *See Butnaru v. Ford Motor Co*., 84 S.W.3d 198, 204 (Tex. 2002).

At least the First, Second, Third and Fifth Courts of Appeals have determined the TCPA does not allow a request for injunctive relief to be separately challenged when it is linked to a cause of action. *See Cavin v. Abbott*, 03-19-00168-CV, — S.W.3d —, 2020 WL 3481149, at *2 (Tex. App.—Austin June 26, 2020, no pet. h.) (holding that TCPA did not apply to daughter's request for injunction prohibiting father from contacting daughter through any means of communication, where injunctive relief was dependent on daughter's underlying claim for father's wrongful act of assault); *Thang Bui v. Dangelas*, No. 01-18-01146-CV, 2019 WL 5151410, at *5–6 (Tex. App.—Houston [1st Dist.] Oct. 15, 2019, pet. denied) (mem. op.) (stating that injunctive relief was a remedy tied to a defamation claim and "a remedy request is not separately challengeable apart from the cause of action to which it is linked"); *Van Der Linden v. Khan*, 535 S.W.3d 179, 203 (Tex. App.—Fort Worth 2017, pet. denied) (holding that "injunctive relief is a remedy, not a stand-alone cause of action" in suit for tortious interference with a contract, tortious interference with prospective business relations, and defamation); *cf. Ruder v. Jordan*, No. 05-14-01265-CV, 2015 WL 4397636, at *6 (Tex. App.—Dallas July 20, 2015, no pet.) (mem. op.) (declining to review separately trial court's denial of TCPA dismissal of injunctive relief because it was ancillary to defamation claims already reviewed). We agree with these sister courts.

Accordingly, we hold that the TCPA does not apply to support dismissal of Appellees' request for an injunction separately from the claim for defamation on which the requested injunctive relief is based. *See GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 620 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("Injunctive relief is proper where the applicant demonstrates the

following four grounds for relief: 1) the existence of a wrongful act; 2) the threat of imminent harm; 3) the existence of irreparable injury; and 4) the absence of an adequate remedy at law."). Stone's first three issues address the trial court's refusal to give TCPA relief on aspects of the injunctive relief sought by Appellees. In light of our ruling that the injunctive relief sought by Stone is not subject to the TCPA, we overrule Stone's first three issues.

b. DEFAMATION

Because the TCPA applies to their claim, to avoid mandatory dismissal Appellees were required to bring forth "clear and specific evidence" establishing a prima facie case for each essential element of their defamation claim. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b), (c). The statute does not define "clear and specific," so we apply the ordinary meaning of those terms: "clear" means "unambiguous," "sure," or "free from doubt," and "specific" means "explicit" or "relating to a particular named thing." *O'Hern v. Mughrabi*, 579 S.W.3d 594, 604 (Tex. App.—Houston [14th Dist.] 2019, no pet.). As the Supreme Court of Texas has explained in describing clear and specific evidence, the act requires the plaintiff to "provide enough detail to show the factual basis for its claim." *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017) (per curiam) (internal quotation omitted).

"Prima facie evidence" is that "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Lipsky*, 460 S.W.3d at 590 (internal quotation omitted). A prima facie case may be established through circumstantial evidence. *Id*. at 591. However, conclusory statements are not probative evidence and accordingly will not suffice to establish a prima facie case. *O'Hern*, 579 S.W.3d at 604; *see also Lipsky*, 460 S.W.3d at 592 (explaining that "bare, baseless opinions" are not "a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA").

"Defamation is generally defined as the invasion of a person's interest in her reputation and good name." *Hancock v. Variyam*, 400 S.W.3d 59, 63 (Tex. 2013). To maintain a defamation claim, the plaintiff must prove that (1) the defendant published a false statement of fact; (2) the statement defamed the plaintiff; (3) the defendant acted with actual malice, if the plaintiff is a public figure or a public official, or negligently, if the plaintiff is a private individual; and (4) the statement proximately caused damages. *See Anderson v. Durant*, 550 S.W.3d 605, 617–18 (Tex. 2018); *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 53 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

To resist a TCPA motion to dismiss a defamation claim, the pleadings and evidence must establish "the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff." *Landry's, Inc.*, 566 S.W.3d at 54 (quoting *Lipsky*, 460 S.W.3d at 591).

Stone raises a separate issue for each allegedly defamatory statement summarized by Appellees in their Original Petition—six in total—claiming that Appellees failed to demonstrate a prima facie case for each of the alleged defamatory statements pleaded by Appellees. His briefing argues that it is an open question how "granular" a court's analysis of a party's claims must be.

While the TCPA requires that each legal claim be analyzed individually, the TCPA does not require that each factual basis or theory of recovery underpinning a cause of action must be analyzed separately. Tex. Civ. Prac. & Rem. Code § 27.005(c). Here, Appellees have a single defamation cause of action, which is based upon statements made by Stone in a flyer he publicly distributed and a sign he publicly displayed. If Appellees are successful in presenting prima facie proof in support of their defamation claim as to any of the statements in the flyer or sign, then Appellees will have met their burden under the second step. *See Thang Bui*, 2019

WL 5151410, at *5; *see generally Landry's, Inc.*, 566 S.W.3d at 53–57. The TCPA does not require that Appellees produce evidence that each and every statement in Stone's flyer is defamatory to meet their burden under the TCPA, or to prove their cause of action at a trial on the merits. Rather, Appellees must establish "a prima facie case for each essential element" of their defamation claim against Stone. Tex. Civ. Prac. & Rem. Code § 27.005(c).

Our sister court recently decided a similar issue in a case involving defamatory statements made on Facebook about a member of the Vietnamese-American community's alleged affiliation with the Communist Party. *Thang Bui*, 2019 WL 5151410, at *5–6. In that case, the First Court of Appeals rejected the argument that the nonmovant was required to establish by clear and specific evidence a prima facie case for every category of the Facebook post she sought to have deleted, and found that each category of posts did not represent a separate legal action or claim for purposes of the TCPA. *Id*. Each fact-based theory of recovery is not a legal claim. *Id.*

We conclude that each alleged defamatory statement is not a separate "legal claim" under the TCPA. Accordingly, we overrule Stone's fifth, sixth, seventh, eighth, ninth and tenth issues. We now consider Stone's fourth issue—whether Appellees met their prima facie burden under the TCPA of producing clear and specific evidence supporting their claim for defamation.

i. DID STONE PUBLISH A FALSE STATEMENT OF FACT?

Appellees had the burden to present clear and specific evidence that Stone published a false statement of fact. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 439 (Tex. 2017). The defamatory statements are alleged to have been contained in the sign and flyer created by Stone and displayed or circulated at and around Melillo's offices. The Original Petition did not include specific statements

from the flyer. Rather, it contains summaries of the accusations in the flyer, and then attaches and incorporates a copy of the flyer and pictures of the sign. Appellees specifically state the "accusations in Stone's flyer are false." Appellees' claim is based upon the defamatory statements and nature of the flyer and sign in their totality.

On appeal, Stone argues that we must confine our analysis only to the specific statements contained in Appellees' petition and not consider the additional statements alleged in Appellees' response to the Motion to Dismiss. According to Stone, Appellee's petition contains six alleged false statements, while the response to the Motion to Dismiss asserts sixteen. Stone seeks to preclude consideration of other statements made in the flyer, outside of the statements summarized in the Petition.

The distinction Stone makes is not material to our analysis because the statements discussed below are sufficiently referenced by Appellees' petition and, as we conclude below, the evidence presented by Appellees is sufficient to meet their prima facie burden.

1. THE FLYER

We first examine the statements in the flyer. By demonstrating outside Bay Oaks and Physicians' Hospital and distributing the flyer on vehicles parked outside Bay Oaks, there is no dispute that Stone published his statements. The parties here dispute the falsity of the statements published by Stone. Appellees identify several statements within the flyer as false and cite an affidavit from Melillo along with Stone's medical records in support. Stone maintains that Appellees cannot meet their burden and characterizes the statements in his flyer as "bare baseless opinions." Only objectively verifiable statements, as opposed to mere statements of opinion,

are actionable as defamation. *Dallas Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753, 762 (Tex. 2019).

In the flyer, Stone makes statements of fact regarding the condition of his knees prior to and after the November 2015 arthroscopies. These include:

> "Before the surgery (scope work) my right knee was ok and didn't hurt at all but after he worked on my knees, the right one was just as bad as the injured knee. The reason I even let him do the right knee was because he said that it had fluid on it and it would help the stem cells to take a better hold."
>
> "I was hoping and praying hard it worked because now, thanks to Dr. Mellilo [sic], I had not just one, but two bad knees."
>
> "I have no other options because of what Dr. Melillo did to me. I trusted him with my health and welfare and he totally ruined my knees and my ability to make a living."
>
> "Also, not to leave anything out, Dr. Melillo said that he doesn't believe in surgery . . . I say this because we were talking about stem cell treatments and he said he was having them done on his back, that he didn't believe in having the surgery. This was said after the fact that my knees were ruined by him."

Appellees presented a sufficient quantity of evidence to support a rational inference that statements contained in the flyer are false. *See Lipsky*, 460 S.W.3d at 590. Melillo's affidavit and Stone's medical records demonstrate that Stone sought treatment from Melillo based on pain in his right knee in 2015. The arthroscopy was performed in order to address the reported pain and locking in the right knee. Melillo's affidavit further establishes that Stone's right knee suffered from meniscal tears and high grade chondromalacia, which often causes knee pain. Melillo's affidavit also demonstrates that Stone had longstanding medical issues in his left knee. Stone underwent an ACL reconstruction in 2010, following which he was advised that he may develop arthritis and require future treatment, including a total knee replacement. Stone also received conservative, non-surgical treatment from

Melillo for five years for pain and arthritis in his left knee. Melillo's affidavit constitutes some clear and specific evidence that Melillo did not cause the conditions in Stone's knees about which he complains.

Stone's flyer accuses Melillo of performing the arthroscopies incorrectly or performing a surgical procedure beyond the scope of what Stone agreed to:

> "I did indeed have the scope work done on my knees and I was thinking that he was going to do just that and that only. Instead, after surgery, I experienced a feeling in my knees that I've never felt before . . . it felt as though there was nothing there to cushion the bones as I was walking and the pain was the most horrible pain I had ever felt with my knees before."
>
> "Whenever Dr. Melillo did the scope work to "clean" up my knees, he took out way more than he should have and has now caused me to be bone on bone and has rendered any treatments that I've had done, useless."
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> "After all of the problems and trying to get some kind of help from Dr. Mellilo [sic], all he could say was that he told me all along that I would be needing knee replacement of both knees . . . he was pushing me toward that since the very beginning and I never understood why he would push that when I didn't need it . . . funny how I needed it only after he did the scope work."

Again, Melillo's affidavit provides clear and specific evidence that the arthroscopies were done in accordance with standard operative procedure. His affidavit and the corresponding medical records reflect that Stone already had "bone on bone" issues prior to the 2015 arthroscopies. The medical records further discredit Stone's assertion that he experienced "horrible" pain after surgery. Instead, the medical records reflect that Stone reported his pain had diminished or gone away. We conclude Appellees have met their burden of presenting clear and specific evidence of falsity as to at least some factual statements in the flyer.

2. The Sign

The sign held by Stone when demonstrating outside Stone's offices contained the following message: "Dr. Antonio Mililllo [sic] has ruined my quality of life with botched and unnecessary surgery." This statement is duplicative of statements and issues already addressed with respect to Stone's flyer.

The sign accuses Melillo of performing botched surgeries. "Botched" is commonly defined as "unsuccessful because of being poorly done or spoiled by mistakes." *Botched Definition*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/botched (last visited Sept. 16, 2020). Therefore, Stone accuses Melillo of performing his surgery poorly, or making mistakes in the surgery. As we have discussed *infra*, Melillo's affidavit constitutes some clear and specific evidence that the surgery was performed correctly according to standard operative procedure. Appellees also produce Stone's medical records, including the operative report for the arthroscopies performed in 2015 reflecting the status of Stone's knees, which further provides some evidence of the falsity of Stone's sign.

Stone also accuses Melillo of performing "unnecessary" surgeries. The parties here dispute the definition of "unnecessary." Stone claims that all elective surgeries are unnecessary; Appellees argue that unnecessary surgery is the equivalent of an assault. Using the term "unnecessary" in the context of a surgery gives the ordinary listener the understanding that the surgery was unwarranted or needless. *Unnecessary Definition*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/botched (last visited Sept. 16, 2020). The evidence brought forth by Appellees shows that the surgery was not unwarranted. The MRI taken of both Stone's knees indicated that an arthroscope was warranted. The medical records further establish that Stone pursued the surgery in hopes it would improve

his chances of positive results from stem cell injections, relieving his pain and arthritis.

We conclude that the statements made by Stone and discussed above are objectively verifiable, and therefore cannot be dismissed as merely baseless opinions. We further conclude that Appellees have met their burden of presenting clear and specific evidence that Stone published false statements of fact.

ii. WERE THE STATEMENTS DEFAMATORY?

The threshold question in a defamation action is whether the statement "is reasonably capable of a defamatory meaning" when examined "from the perspective of an ordinary reader in light of the surrounding circumstances." *Hancock*, 400 S.W.3d at 66. This inquiry is objective and involves two independent steps. *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 625 (Tex. 2018), *cert. denied*, 139 S. Ct. 1216 (2019). The first step is to decide "whether the meaning the plaintiff alleges is reasonably capable of arising from the text of which the plaintiff complains." *Id*. The second is to determine whether that meaning, if reasonably capable of arising from the text, "is reasonably capable of defaming the plaintiff." *Id*. "If the statement is not reasonably capable of a defamatory meaning, the statement is not defamatory as a matter of law and the claim fails." *Hancock*, 400 S.W.3d at 66.

Texas follows the common law rule that such statements are defamatory per se or per quod. *Dallas Morning News, Inc.*, 554 S.W.3d at 624. "Defamation per se occurs when a statement is so obviously detrimental to one's good name that a jury may presume general damages, such as for loss of reputation or for mental anguish." *Id*. (citing *Hancock*, 400 S.W.3d at 63–64). This presumption enables the plaintiff to recover nominal damages without proof of any specific loss. *Brady v. Klentzman*, 515 S.W.3d 878, 886 (Tex. 2017). On the other hand, "[d]efamation per quod is

defamation that is not actionable per se." *Lipsky*, 460 S.W.3d at 596. If the statement is defamatory per quod, the plaintiff must plead and prove damages to prevail. *Brady*, 515 S.W.3d at 886.

A statement constitutes defamation per se if it injures a person in his office, profession, or occupation. *Hancock*, 400 S.W.3d at 66. In *Hancock*, the supreme court determined that statements that a physician lacked veracity and dealt in half-truths in the context of violating division rules were not defamatory per se because they did not injure the physician in his profession. *Id*. at 67. The court found that the proper inquiry is whether "a defamatory statement accuses a professional of lacking a peculiar or unique skill that is necessary for the proper conduct of the profession." *Id*.

Stone's self-professed intent in writing the flyer was to educate other potential patients of Appellees by making public his accusations. Stone accuses Appellees of taking too much out of his knee during the 2015 arthroscope procedure, which Stone believes caused him to need a future knee replacement that otherwise could have been avoided. Stone also accuses Appellees of "ruining my knees" and performing "botched and unnecessary surgery." Taking the accusations at face value, an ordinary listener would believe that Stone is contending that Appellees lacked competence in performing the scoping surgery at issue, or purposely operated on Stone in such a way that would necessitate further orthopedic surgery. The accusations made by Stone in his flyer and sign go to the heart of the analysis undertaken by the supreme court in *Hancock*. 400 S.W.3d at 67. Stone directly accuses Appellees of lacking a peculiar skill necessary for the proper conduct of orthopedic surgery.

The statements made by Stone in the flyer and sign are capable of a defamatory meaning. A person of ordinary intelligence would perceive the flyer and

sign statements to negatively affect the reputation of Melillo in his profession. Accordingly, we conclude that Appellees have met their burden in demonstrating clear and specific evidence that the statements made by Stone were defamatory per se.

iii. DID APPELLEES PRODUCE EVIDENCE STONE ACTED NEGLIGENTLY?

"The degree and burden of proof required in a defamation case hinges on the status of the plaintiff as either a public figure or private individual." *HBO, A Div. of Time Warner Entm't Co., L.P. v. Harrison*, 983 S.W.2d 31, 35–36 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Stone argues that the Appellees are limited-purpose public figures; therefore, they are required to prove that Stone published the flyer and displayed the sign with actual malice. Appellees maintain that they are a private individual and entity, respectively, and thus need only establish negligence.

The Texas courts have established a three-step test to determine whether a defamation plaintiff is a limited-purpose public figure: (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Whether a person is a public figure is a question of law for the court to decide. *Klentzman v. Brady*, 312 S.W.3d 886, 904 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

A public controversy is more than simply a matter of interest to the public; it must be a dispute that has received public attention because the outcome affects the general public or some segment of it in an appreciable way. *Einhorn v.*

LaChance, 823 S.W.2d 405, 412 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.); *see also Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (finding that the general controversy surrounding divorce is not a public controversy for purposes of analyzing whether a party is a limited-purpose public figure). Stone attempts to brand the controversy as relating to the quality of Appellees' publicly offered knee-surgery services, and references Appellees' business social media posts and corresponding comments for support. Stone's argument would transform every individual or business that advertises services on social media or elsewhere into a limited-purpose public figure. The controversy at issue is Stone's allegation concerning Melillo's competency as an orthopedic surgeon, which is a private dispute about which people other than the immediate participants are unlikely to feel the impact of its resolution. *WFAA-TV, Inc.*, 978 S.W.2d at 571. It is Stone's flyer and sign that raise the discussion of Melillo performing "botched" and "unnecessary" surgeries.

The record does not reflect that the controversy was public, as there is no evidence the controversy received the attention of the general public or that the outcome of the controversy affected the public in an appreciable way. *Einhorn*, 823 S.W.2d at 412. While Appellees were at the center of the controversy, there is no evidence that Appellees sought any publicity or took any actions to insert themselves into the controversy. "A person does not become a public figure merely because he is 'discussed' repeatedly by a media defendant or because his actions become a matter of controversy as a result of the media defendant's actions." *Klentzman*, 312 S.W.3d at 905 (noting that the subject of plaintiff's writings became matter of controversy only as consequence of defendant's action and proclaiming that, "[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (citing *Hutchinson v.*

Proxmire, 443 U.S. 111, 135 (1979))). We conclude that Appellees are not limited-purpose public figures. Thus, as private figures, Appellees had to present clear and specific evidence that Stone acted negligently. "'Negligence' is established upon a showing the publisher knew or should have known that the defamatory statement was false." *HDG, Ltd. v. Blaschke*, 14-18-01017-CV, 2020 WL 1809140, at *7 (Tex. App.—Houston [14th Dist.] Apr. 9, 2020, no pet.) (mem. op.) (quoting *Ford v. Bland*, No. 14-15-00828-CV, 2016 WL 7323309, at *3 (Tex. App.—Houston [14th Dist.] Dec. 15, 2016, no pet.) (mem. op.)).

Appellees argue that Stone had personal knowledge of the falsity of his defamatory statements, because he was present before, during and after his examinations and procedures with Melillo. Stone maintains that Appellees have failed to demonstrate that Stone "entertained serious doubts as to the truth of any of his allegedly defamatory statements, much less that he knew them to be false."

Appellees produced evidence consisting of medical records reflecting Stone's treatment at Bay Oaks, as well as an affidavit from Melillo. The affidavit reflects that Melillo advised Stone in 2010 that he would likely develop arthritis in his knees and may require a total knee replacement. The records reflect that Stone and Melillo discussed the conditions of Stone's knees, attempted conservative treatment of Stone's knee pain for several years, and discussed various potential treatment options prior to the 2015 arthroscopies. This evidence is clear and specific in showing Stone engaged in conversation with his physician regarding his treatment and received counsel from Melillo. Because Stone was a party to those conversations, he knew or should have known that the defamatory statements were false. *See Van Der Linden*, 535 S.W.3d at 201 ("[I]f the facts conclusively prove that the publisher of a defamatory statement had personal knowledge of whether the statement was true or false, proving the statement false also suffices to prove that

the defamatory publisher acted with knowledge of the statement's falsity when she published it.").

iv. DID MELILLO PRODUCE EVIDENCE OF APPLICABLE DAMAGES?

Appellees argue that they have met their burden without additional evidence because they seek only general nominal damages. They do not seek recovery for any special damages. *See Anderson*, 550 S.W.3d at 618 (stating that special damages for specific economic losses are never presumed). In light of our ruling that the statements made by Stone are defamatory per se, Appellees have met their burden on the element of applicable damages because general damages are presumed. *Hancock*, 400 S.W.3d at 55 (explaining that if the statement is defamatory per se—that is, if it injures the plaintiff in its office, profession, or occupation—then nominal general damages are presumed).

We conclude Appellees satisfied their burden under the second step of the TCPA framework and brought forth clear and specific evidence establishing a prima facie case for each essential element of their defamation claim. Therefore, we overrule Stone's fourth issue with respect to Appellees' defamation claim.

III. CONCLUSION

We affirm the judgment of trial court.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Wise, Jewell, and Poissant.