Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00652-CV

John **HARWOOD**,
Appellant

v.

Brian **GILROY**,
Appellee

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2016CI11327
Honorable Antonia Arteaga, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: June 28, 2017

REVERSE AND RENDER; REMAND

In the underling lawsuit, Brian Gilroy sued John Harwood and Daniel Burch, alleging libel per se and defamation. Harwood filed a motion to dismiss Gilroy's claims pursuant to the Texas Citizens Participation Act ("TCPA"). The trial court denied the motion to dismiss, and this accelerated appeal by Harwood ensued. Because we conclude Gilroy did not satisfy his burden to establish a prima facie case with regard to his claims, we reverse the trial court's order and render

judgment dismissing Gilroy's libel per se and defamation claims against Harwood. We remand for further proceedings consistent with this opinion.[1]

BACKGROUND

Gilroy is a member of Wildlife Partners LLC, which purchases and sells exotic game animals. Gilroy establishes relationships with ranch managers and exotic game breeders, and he is the primary purchaser and seller of all game for Wildlife Partners. Harwood owns and operates an online auction site for the sale and purchase of exotic wild game named Wildlife Buyer LLC, and a dude ranch named Circle H Ranch. Burch operates and controls High Fence Wildlife Association ("High Fence"), which is an open forum Facebook page dedicated to the exotic game industry. The High Fence mission statement is as follows:

> [t]o preserve and protect High Fence Ranchers property and hunting rights, to preserve and enhance wildlife habitats behind high fences, to promote quality animal health and well-being of wildlife and to enable High Fence Ranchers the ability to assemble and create an environment for success. This will include family morals and values, market security and educational/information support in the industry.

On or about June 29, 2016, Burch posted, on the High Fence open forum, the alleged details of a business dispute between Wildlife Partners and a ranch that sells exotic game animals. The dispute involved whether a Kudu bull, which Gilroy bought, measured at sixty inches, sixty-one inches, or over sixty-one inches, and who took the measurements. Burch's post ended with the following statement: "Brian Gilroy and Wildlife Partners will go on the … DO NOT RECOMMEND Page of the High Fence[] Wildlife Association!!"

That same day, Gilroy posted a response to Burch's allegations on the High Fence open forum. On July 1, 2016, Harwood published, in the open forum, the following three posts:

> Brian Gilroy and his newest scam Wildlife Partners is a joke. He repeatedly agreed to buy animals from us which he would later back out on and then when he did buy

[1] Burch did not file a motion to dismiss, and is not a party to this appeal.

> an animal through Wildlife Buyer, LLC [sic] and then he killed it later by not feeding it well before he delivered it 2 weeks later to blame us for the whole incident. They misrepresent animals all the time and Gilroy didn't realize that the person he had sold the animal to is a good friend of my family and that I was aware of the problems before he even called me as a last ditch effort to try and recover a loss for which he was responsible for [sic]. These guys don't know what they are doing and have to call others to ask questions as how to [sic] catch or move an animal. They can't even move a giraffe 40 miles without killing it. My prediction is they will be out of business in less than 2 years.
>
> . . .
>
> One more thing. Circle H Ranch, Wildlife Buyer, LLC, and any of my other businesses will never do business with Gilroy as he can't be trusted. My family has been in the oil and gas business and agriculture for a very long time and Gilroy wouldn't last 15 minutes with us as we can see his scam coming from a mile away. My recommendation is to stay away from these guys or you will be involved in some lawsuits as investors start to sue Wildlife Partners and Gilroy over misrepresentations as animals sales are called up by court order.
>
> . . .
>
> Love that you put that up!! Thank you! Shows what an ass you are!! First of all it was 14 animals you purchased in total, and don't forget about the 23 that you backed out on after verbally agreeing to buy them before we sold you the 14 which I think shows an incredible control on our part (or stupidity). 1 axis broke its leg on delivery and you didn't have to pay for her I did!! The Lechwe wasn't misrepresented and was way bigger that your 17" that you claimed. Don't forget we still hold pictures of the animals you purchased. . . . So that's 2 out 14 that you say died, and 23+ that you backed out on after confirming you wanted them for more than two weeks. You also sold Transcaspian Urials through Wildlife Buyer that you purchased at the YO auction but then claimed they died in a text to Mr. Sadler. . . . Here's a picture of that 17" Lechwe that was misrepresented as a Big Lechwe Bull. Also how about those 45" Nubians you were selling that turned out to be 32"-38". Remember that??? The only thing I regret is that I didn't call you out on your BS earlier, but I knew that if I let you have enough rope you would eventually hang yourself. Mike Drop- -WOW!!

Gilroy later sued Burch and Harwood for defamation and libel per se. Harwood then filed a motion to dismiss Gilroy's claims pursuant to the TCPA. Gilroy responded, alleging Harwood's statements did not involve a matter of public concern, and the TCPA does not protect Harwood's speech because his comments fall under the "commercial speech" exemption to the TCPA. The trial court denied Harwood's motion to dismiss, and Harwood now appeals.

THE TCPA

The TCPA's purpose is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2015). The TCPA "shall be construed liberally to effectuate its purpose and intent fully." *Id.* § 27.011(b). To effect the statute's purpose, the Legislature has provided a two-step procedure to expedite the dismissal of claims brought to intimidate or to silence a defendant's exercise of these First Amendment rights. *See id.* § 27.003; *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding).

First, the defendant, who has moved to dismiss, must 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: (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); *In re Lipsky*, 460 S.W.3d at 586. This first step of the inquiry is a legal question that we review de novo. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

If the initial showing is made, 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." TEX. CIV. PRAC. & REM. CODE § 27.005(c). "The legislature's use of 'prima facie case' in the second step of the inquiry implies a minimal factual burden: '[a] prima facie case represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true.'" *Schimmel v. McGregor*, 438 S.W.3d 847, 855 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (citation omitted). Even if the plaintiff satisfies the second step, the court must still 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. TEX. CIV. PRAC. & REM. CODE § 27.005(d). In determining whether a legal action should be dismissed, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a).

On appeal, Harwood asserts he satisfied his burden of proof, and Gilroy did not satisfy his burden. Gilroy counters that the commercial speech exemption to the TCPA applies, and alternatively, he established his prima facie case and Harwood did not establish the essential elements of his defense. We address each contention in turn.

A. Exercise of "the right of free speech"

Harwood bore the initial burden to show Gilroy's claims were based on, related to, or in response to Harwood's exercise of his right to free speech. The TCPA broadly defines "exercise of the right of free speech" as "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). A "'[c]ommunication' includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1). Finally, a "[m]atter of public concern" is defined broadly to include "an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." *Id.* § 27.001(7). Thus, the Legislature expressed its intent that the statute, enacted to protect the right of free speech, be construed broadly. *See id.* § 27.011(b) (statute to be "construed liberally to effectuate its purpose and intent fully."). The exercise of the right of free speech as contemplated by the TCPA includes a person's right to communicate reviews or evaluations of services in the marketplace. *The Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353-54 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

In Gilroy's petition, he focused on Harwood's comments that (1) "Brian Gilroy and his newest scam Wildlife Partners is a joke," (2) "They misrepresent animals all the time," (3) "They can't even move a giraffe 40 miles without killing it," and (4) Harwood's third post, which according to Gilroy, made "totally false representations about Gilroy and several transactions to which, again, Harwood was not even a party to either the transaction or the conversations which he referenced."

However, to determine whether a lawsuit relates to the exercise of free speech, we must look to the context of the entire communication in which the allegedly defamatory statement is made. *Campbell v. Clark*, 471 S.W.3d 615, 624 (Tex. App.—Dallas 2015, no pet.). In this case, Harwood's comments were posted on an open forum dedicated to "preserv[ing] and enhance[ing] wildlife habitats behind high fences, [and] to promot[ing] quality animal health and [the] well-being of wildlife." The entirety of Harwood's posts contained statements regarding Gilroy's alleged treatment of animals that Gilroy purchased and his alleged business practices with regard to purchases of animals he made or failed to make. Therefore, after considering the context of the posts, we conclude Harwood's comments about Gilroy fall within the definition of "a communication made in connection with a matter of public concern." Therefore, Harwood satisfied his burden to establish that Gilroy's claims related to the exercise of Harwood's right of free speech. Accordingly, the burden then shifted to Gilroy to "establish[ ] by clear and specific evidence a prima facie case for each essential element of" his claims. TEX. CIV. PRAC. & REM. CODE § 27.005(c). However, before we address whether Gilroy satisfied his burden, we first address Gilroy's argument that Harwood's comments fall within the commercial speech exemption to the TCPA.

B. Applicability of Statutory Exemption

The TCPA

> does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

TEX. CIV. PRAC. & REM. CODE § 27.010(b). In determining whether the exemption applies, we examine whether:

> (1) the [defamation] cause of action is against a person primarily engaged in the business of selling or leasing goods or services;
> (2) the cause of action arises from a statement or conduct by that person [Harwood] consisting of representations of fact about that person's or a business competitor's [Gilroy's] business operations, goods, or services;
> (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's [Harwood's] goods or services or in the course of delivering the person's [Harwood's] goods or services; and
> (4) the intended audience for the statement or conduct [is an actual or potential buyer or customer].

Newspaper Holdings, 416 S.W.3d at 88-89. The burden of proving the applicability of the exemption was on Gilroy, as the party asserting it. *See id.* at 89.

In his brief on appeal, Gilroy attempts to satisfy his burden on each of the above four elements by raising arguments on each element. However, our review is limited to the pleadings and the affidavits before the trial court. *See* TEX. CIV. PRAC. & REM. CODE § 27.006(a). As to the first, second, and fourth elements, in his pleadings and affidavit, Gilroy asserted, in only a conclusory fashion, that Harwood is "a person primarily engaged in the business of selling or leasing goods or services" and that the complained-of statements "arise out of a 'commercial transaction in which the intended audience is an actual or potential buyer or customer.'" Gilroy merely contended: "Clearly, Harwood is a competitor of Gilroy's business entity and actually established that fact in his defamatory posts." The third element required Gilroy to show that

Harwood's statements were made "either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in" Harwood's "goods or services" or "in the course of delivering [Harwood's] goods or services." Gilroy raised no argument or factual contentions regarding the third element.

On this record, we must conclude Gilroy's conclusory statements amount to no evidence of the first, second, and fourth elements, and he made no factual contentions regarding the third element. Therefore, Gilroy did not satisfy his burden of proving the applicability of the commercial speech exemption to the TCPA. Accordingly, we next consider whether Gilroy "establish[ed] by clear and specific evidence a prima facie case for each essential element of" his claims. TEX. CIV. PRAC. & REM. CODE § 27.005(c).

C. Prima Facie Case

"The legislature's use of 'prima facie case' in the second step of the inquiry implies a minimal factual burden: '[a] prima facie case represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true.'" *Schimmel*, 438 S.W.3d at 855. Conclusory statements are not probative and accordingly will not suffice to establish a prima facie case. *John Moore Servs.*, 441 S.W.3d at 355. The statute requires that the proof offered address and support each "essential element" of every claim asserted with "clear and specific evidence." *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c). Accordingly, we examine the pleadings and the evidence in a light favorable to Gilroy to determine whether he marshaled "clear and specific" evidence to support each element of his cause of action. *John Moore Servs.*, 441 S.W.3d at 355.

Because the statute does not define "clear and specific" evidence, we give these terms their ordinary meaning. *See In re Lipsky*, 460 S.W.3d at 590. "Clear" means "free from obscurity or ambiguity," "easily understood," "free from doubt," or "sure." MERRIAM-WEBSTER'S COLLEGIATE

DICTIONARY 229 (11th ed. 2003); *see also* BLACK'S LAW DICTIONARY 287 (9th ed. 2009) ("unambiguous," "sure," or "free from doubt"). "Specific" means "constituting or falling into a specifiable category," "free from ambiguity," or "accurate." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, at 1198; *see also* BLACK'S LAW DICTIONARY, at 1528 ("explicit" or "relating to a particular named thing"). Clear and specific evidence has also been described as evidence that is "unaided by presumptions, inferences, or intendments." *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 726 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds*, *In re Lipsky*, 460 S.W.3d at 587, 591.

"The statute, however, requires not only 'clear and specific evidence' but also a 'prima facie case.'" *In re Lipsky*, 460 S.W.3d at 590. "In contrast to 'clear and specific evidence,' a 'prima facie case' . . . refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted." *Id.* "It is the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *Id.* (citations omitted). "[G]eneral allegations that merely recite the elements of a cause of action will not suffice." *Id.* at 590-91. "Instead, a plaintiff must provide enough detail to show the factual basis for its claim. In a defamation case that implicates the TCPA, 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." *Id.* at 591. The determination of whether a plaintiff presented prima facie proof of a meritorious claim is a question of law; therefore, we review the trial court's decision on this issue de novo. *Rehak Creative Servs.*, 404 S.W.3d at 726.

A plaintiff claiming defamation must prove (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. The status of the person

allegedly defamed determines the requisite degree of fault. A private individual, such as Gilroy, need only prove negligence.[2] *Id.* Finally, the plaintiff must plead and prove damages, unless the statements are defamatory per se. *Id.* Here, there is no dispute Harwood published statements about Gilroy to third parties. The dispositive issues we address are whether the statements were defamatory and whether Harwood was negligent in making the statements.

A statement is defamatory if the words tend to injure the plaintiff's reputation, exposing him to public hatred, contempt, ridicule, or financial injury, or if it tends to impeach the person's honesty, integrity, or virtue. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2011). To qualify as defamatory, a statement should be derogatory, degrading, somewhat shocking, and contain elements of disgrace. *John Moore Servs.*, 441 S.W.3d at 356. However, a communication that is merely unflattering, abusive, annoying, irksome or embarrassing, or that only hurts the plaintiff's feelings, is not actionable. *Id.* We construe the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987).

In addition, a statement must assert an objectively verifiable fact rather than an opinion. *Bentley v. Bunton*, 94 S.W.3d 561, 580-81 (Tex. 2002). "We classify a statement as fact or opinion based on the statement's verifiability and the entire context in which the statement was made." *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 875 (Tex. App.—Dallas 2014, no pet.). A statement is an opinion if it is "by its nature, an indefinite or ambiguous individual judgment that rests solely in the eye of the beholder" or is "a loose and figurative term employed as metaphor or hyperbole." *Palestine Herald–Press Co. v. Zimmer*, 257 S.W.3d 504, 511 (Tex. App.—Tyler

[2] We reject Harwood's contention that Gilroy is a public figure based solely on a single newspaper article written about Gilroy and Wildlife Partners in 2016 when he founded the company. *See Neely v. Wilson*, 418 S.W.3d 52, 70 (Tex. 2013) ("Public figure status is a question of law for the court.").

2008, pet. denied). "The Constitution protects statements that cannot reasonably [be] interpreted as stating actual facts about an individual made in debate over public matters in order to provide assurance that public debate will not suffer from lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation." *Bentley*, 94 S.W.3d at 580. Whether a statement is a statement of fact or opinion is a question of law. *Am. Heritage Capital*, 436 S.W.3d at 875.

Gilroy alleges he was defamed by the following false statements: (1) that his business is a "scam" and a "joke," and he "will be out of business in less than 2 years," (2) he repeatedly agreed to buy animals and then he either backed out of the agreement or ended up killing the animal, (3) he misrepresents animals, (4) "These guys don't know what they are doing," and (5) Gilroy "can't be trusted."

Some of Harwood's statements may not be actionable in isolation because they are evaluative opinion and/or rhetorical hyperbole that does not state or imply verifiable fact. "Rhetorical hyperbole" has been defined as "extravagant exaggeration [that is] employed for rhetorical effect." *Backes v. Misko*, 486 S.W.3d 7, 26 (Tex. App.—Dallas 2015, pet. denied) (quoting *Am. Broad. Cos. v. Gill*, 6 S.W.3d 19, 30 (Tex. App.—San Antonio 1999, pet. denied). For example, the use of "rewarding," "ripping off," and "bilking" when reviewed in context have been considered rhetorical hyperbole. *Rehak Creative Servs.*, 404 S.W.3d at 729.

However, in looking at the entirety of Harwood's publications, the gist of his statements is that some animals may have died while in Gilroy's care and that Gilroy may have misrepresented some of his animals. By posting these statements in a public forum dedicated to the exotic game industry, we conclude there was some evidence Harwood made defamatory statements about Gilroy.

Gilroy also had to show, by "clear and specific" evidence, that Harwood was at least negligent concerning the truth of his statements. *Newspaper Holdings*, 416 S.W.3d at 82, 85. Texas courts have defined negligence in the defamation context as the "failure to investigate the truth or falsity of a statement before publication, and [the] failure to act as a reasonably prudent [person]." *Id.* at 85; *Bedford v. Spassoff*, 485 S.W.3d 641, 648 (Tex. App.—Fort Worth 2016, no pet.). The plaintiff must show the defendant knew or should have known the defamatory statement was false. *French v. French*, 385 S.W.3d 61, 73 (Tex. App.—Waco 2012, pet. denied).

In Gilroy's response to Harwood's motion to dismiss, Gilroy asserted, in conclusory fashion, that Harwood's statements were false and Harwood "was negligent in that he knew the statements were false." As evidence, Gilroy relied on his own affidavit in which he disputed Burch's allegations regarding measuring of the Kudu bull. However, as Gilroy conceded in his affidavit, although Harwood's posts followed Burch's post, none of Harwood's three posts referred to the dispute over the Kudu bull. Instead, Gilroy then alleged Harwood's posts referred to a business transaction between Gilroy and a third party purchaser, Jeremy Williams. According to Gilroy's affidavit, Williams lied to Harwood about the transaction and Harwood then "gratuitously incorporated and posted those lies into his comments on the Facebook forum." However, Harwood never mentions Williams's name in his posts, nor does he refer specifically to any business transaction between Gilroy and Williams. At most, Harwood only stated that Gilroy "sold an animal to . . . a good friend of my family and . . . I was aware of the problems before he even called me as a last ditch effort to try and recover a loss for which he was responsible for [sic]." However, there is nothing in this statement from which a reasonable reader could infer Harwood was referring to the Gilroy-Williams dispute. Finally, Gilroy stated, again in conclusory fashion, that Harwood's statements that Wildlife Partners was a "scam" and his business was a "joke" were falsely made.

Gilroy had the burden to "establish[ ] by clear and specific evidence" that Harwood failed to investigate the truth or falsity of his statements before he posted the statements on the open forum and that Harwood failed to act as a reasonably prudent person. *See Newspaper Holdings*, 416 S.W.3d at 82, 85; *Bedford*, 485 S.W.3d at 648). Gilroy had to show Harwood knew or should have known the defamatory statements were false. *French*, 385 S.W.3d at 73. Gilroy's "[b]are, baseless opinions do not create fact questions, and neither are they 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. Therefore, on this record, we must conclude Gilroy did not carry his burden to "establish[ ] by clear and specific evidence" that Harwood was negligent in making his comments.

CONCLUSION

We conclude Gilroy did not satisfy his burden to establish a prima facie case with regard to at least one of the essential elements of his defamation claim against Harwood.[3] Therefore, the trial court erred in denying Harwood's motion to dismiss pursuant to the TCPA. We reverse the trial court's order and render judgment dismissing Gilroy's defamation and libel per se claims against Harwood. We remand for further proceedings consistent with this opinion.

Sandee Bryan Marion, Chief Justice

[3] On appeal, Gilroy asserts he need not establish the final element of his prima facie case—damages—because Harwood's statements were defamatory per se. Because Gilroy did not satisfy his burden of proof on the element of whether Harwood was negligent in making his statements, we need not address whether the statements were defamatory per se.