TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00704-CV

Appellants, Champion Printing & Copying LLC d/b/a Jerry Hayes Photography and Jerry Hayes// Cross-Appellants, Jennifer Nichols; Nichols Photographers, Inc.; and Jennifer Lindberg d/b/a Jennifer Lindberg Weddings

v.

Appellees, Jennifer Nichols; Nichols Photographers, Inc.; and Jennifer Lindberg d/b/a Jennifer Lindberg Weddings// Cross-Appellees, Champion Printing & Copying LLC d/b/a Jerry Hayes Photography and Jerry Hayes

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT NO. D-1-GN-14-001701, HONORABLE KARIN CRUMP, JUDGE PRESIDING

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

Jerry Hayes sued Jennifer Nichols and Jennifer Lindberg seeking damages and injunctive relief for alleged antitrust violations and tortious interference with contracts and business relations. Nichols and Lindberg asserted counter-claims for alleged defamation, business disparagement, and tortious interference with contracts and business relations. Proceedings at the trial court resulted in dismissal of Hayes's claims, the imposition of sanctions against Hayes for filing groundless pleadings, and, following a jury trial, a final judgment that awarded damages to Nichols and Lindberg for mental anguish and loss of reputation resulting from defamation by Hayes. Both parties appeal. We will reverse the trial court's award of mental-anguish damages to Nichols and affirm the judgment in all other respects.

BACKGROUND

This case involves a dispute between two types of wedding photographers: event photographers (hired by the wedding party to photograph the event) and vendor photographers (hired by wedding vendors to photograph their products, such as flowers, cakes, and catering displays). Appellant and cross-appellee Jerry Hayes is a vendor photographer, and his company is Champion Printing & Copying LLC (collectively, Hayes). Appellees and cross-appellants, Jennifer Nichols and Jennifer Lindberg, are event photographers who conduct business as Nichols Photographers, Inc., and Jennifer Lindberg Weddings, respectively (collectively, Nichols and Lindberg).

All parties work in Austin, Texas. Prior to the end of 2013, both Nichols and Lindberg had occasionally provided event photography at weddings at which Hayes provided vendor photography, each for their respective clients. In December 2013, Lindberg emailed Hayes informing him, in part: "I also wanted to let you know that I had an unexpected issue where a bride was very upset that I allowed a different photographer (you) to be there for her wedding. I think that for some people, it feels like a loss of control and an invasion of privacy." Because of this, she stated, she would no longer allow him to photograph at events for which she had been exclusively contracted.

The record indicates that upon receiving this email, Hayes began actively communicating with Lindberg's referral sources, such as wedding planners, vendors, and other members of the Austin wedding industry, through emails and public Facebook posts regarding Lindberg's December 2013 email, the ensuing conflict, and eventually the lawsuit. For example,

Hayes immediately forwarded Lindberg's email to an Austin-area wedding coordinator, Courtney Caplan.[1] His forwarded email, sent on December 27, 2013, included his own message:

> I just got this email from Jenn Lindberg and she's saying tomorrow's bride is "very upset" I'll be covering your work at tomorrow's wedding. I don't know if this is true, but now Jenn is saying she is not allowing you to have anyone other than her crew take photos when she's photographing.
>
> I've not sent her a reply but thought you should be aware of this, but I'm a little pissed off right now as I think this "upset" bride story is just BS. I'll wait until I cool off and speak with you before I send a reply.

Lindberg asserts that Hayes's email was false in several ways, including stating "tomorrow's bride" is upset when her original email referred to a past event and indicating Lindberg was not allowing Caplan to take certain actions. Hayes forwarded Lindberg's email to Caplan again on January 6, 2014, with a similar message:

> Here's that email from Jenn Lindberg. The 2nd paragraph she's saying there were 'unexpected issue[s]' with one bride and me and she checked with "legal counsel" and basically after the ones on the books with me she won't be allowing me to photograph. I can tell you this is BS.

The record shows that Caplan replied that she would not refer clients to Lindberg anymore. Lindberg testified at trial that she had not received any referrals from Caplan following these events. Similarly, on February 3, 2014, Hayes emailed Anna Martinez, a bride whose wedding Lindberg had previously photographed, stating, in part: "I really don't think this is even a situation, but one where

[1] Lindberg testified that Caplan was a "very well-known" wedding and corporate event planner who referred Lindberg an average of $22,000-worth of business per year.

your photographer is trying to bully me from shooting pre-event photos." On February 12, 2014, Hayes emailed wedding coordinator Becky Navarro regarding the conflict, stating "the next step's an attorney." Over the course of the first quarter of 2014, Hayes and Lindberg exchanged occasional emails about the situation. In a reply to Lindberg on April 3, Hayes copied Keith Burnham, who Lindberg testified is an Austin florist and Lindberg's office mate, and requested the contact information for Lindberg's attorney. On April 9, 2014, prior to filing suit, Hayes emailed a number of Austin-area wedding vendors, including the then-president of an international wedding planner association, Kevin Molesworth, requesting letters explaining why the vendors hired Hayes. Hayes's emails included the following statement:

> The reason I'm writing is I've run into a situation with a specific photographer which has run into a legal situation where she's claiming damages due to me taking photos before any guests[']arrival. So I'm needing to defend myself on why I photograph for you and others.

In June 2014, Hayes brought suit against Nichols and Lindberg, alleging that the two (and, at that point, four John Does) had conspired to restrain trade within the "high-end wedding market" in violation of the Texas Free Enterprise and Antitrust Act of 1983 (Texas Antitrust Act). The complaint also alleged that Nichols and Lindberg had tortiously interfered with existing contracts and with prospective business relations. Hayes sought both damages and injunctive relief. Nichols and Lindberg later filed counter-claims alleging that Hayes had defamed Nichols and Lindberg, disparaged their businesses within the Austin wedding industry, and interfered with their business relations, causing compensable damages.

On July 28, 2014, Hayes posted on his Facebook page a note thanking Austin-area event vendors who had attended a meeting at his attorney's office and promising follow-up information. In response to comments, on July 29, 2014, Hayes added a comment to the July 28 post, providing a "nutshell" account of the reason for his original post and explaining the lawsuit:

> This past December I received an email from a photographer who believes that their contract with their client prohibits all event vendors from taking photographs of their work with the photographer of their choice. A baker can't have photos of their cakes, a restaurant owner can't have photos of their own restaurant, caterer food shoots; again with the photographer of their choice. (and before the event starts with no guests there)
>
> . . . .
>
> I'm grateful for all the support of all the 100's of event professionals across all fields and hope the other parties involved will come to their senses about this before it goes even further. They would be shocked if they overheard a vendor say to me, "I just won't recommend them anymore".

On July 30, 2014, Hayes responded again to comments on his July 28 post, stating:

> I'm doing my best to take the "high road" and not say who these photographers are for now. Although it's public record since I had to file a lawsuit in reply to their attorney's letter telling me to stop working on events they are working on or might get booked on

Over the next seven weeks, Hayes emailed groups of vendors and planners in apparent follow-up to the meeting referenced in Hayes's July Facebook post. The final email, sent on September 21, 2014, went to approximately 40 vendors and attached a "Declaration" for each one to sign and return. The email repeated much of the same sentiments as Hayes's Facebook posts. The attachment named Nichols and Lindberg specifically. It stated that they had amended their contracts with wedding

parties to prevent vendors from hiring vendor photographers, were attempting to monopolize the photography business, and produced photographs of inadequate quality. One witness, Tanya Posovatz, an Austin-area wedding planner and coordinator, testified that the recipients of these communications included approximately fifteen individuals who "controlled" ninety percent of the "high-end" weddings in Austin. These emails, Facebook posts, and the declaration, along with other communications, became the basis for Nichols and Lindberg's counter-claims for defamation, business disparagement, and tortious interference with prospective business relations.

Nichols and Lindberg moved for summary judgment as to all of Hayes's claims, which the court granted. Upon motion by Nichols and Lindberg, the trial court also imposed sanctions against Hayes, but not his attorney, for filing groundless pleadings. After granting in part and denying in part Hayes's summary-judgment motion on Nichols and Lindberg's counter-claims, the remaining counter-claims proceeded to a jury trial. The jury returned a verdict in favor of Nichols and Lindberg, finding Hayes liable for defamation, business disparagement, and tortious interference, and awarding damages. Hayes then moved for judgment notwithstanding the verdict, which the trial court granted in part, vacating the jury's verdict on the business-disparagement and tortious-interference theories but rendering judgment consistent with the verdict on the issue of defamation liability. Both parties appeal to this court.

Hayes claims in four issues that the trial court erred by (1) upholding the jury's finding of mental-anguish and injury-to-reputation damages, (2) awarding sanctions to Nichols and Lindberg, (3) partially denying summary judgment on Nichols and Lindberg's counter-claims, and (4) granting summary judgment on Hayes's original claims. In two cross-issues, Nichols and

Lindberg contend that the trial court erred in (1) failing to hold Hayes's counsel jointly and severally liable for the sanctions and (2) partially granting Hayes's motion for judgment notwithstanding the verdict. Based on the record presented, we will reverse the trial court's award of mental-anguish damages to Nichols and affirm the judgment in all other respects.

ANALYSIS

Damages

In his first issue, Hayes challenges the legal sufficiency of the evidence supporting the jury's award of damages to Nichols and Lindberg for mental anguish and injury to reputation. Hayes does not challenge the underlying finding of defamation liability . Rather, Hayes argues that no evidence supported the jury's findings that Nichols and Lindberg incurred compensable damages for mental anguish or injury to reputation. He argues that recovery for mental anguish outside the context of a personal-injury case has been limited by the Texas Supreme Court and that a heightened standard of proof accompanies such claims. Lindberg and Nichols had each testified on this matter at trial, and Hayes argues that their testimony does not suffice to support the jury's damages award. Lastly, Hayes asserts that no evidence exists to justify the amounts awarded. Nichols and Lindberg respond that they proffered legally sufficient evidence to support the damages awarded by the jury for mental anguish and injury to reputation. Nichols and Lindberg assert that no more than a scintilla of evidence is required, and that there is much more than that in the record. Accurately pointing out that Hayes does not challenge the jury's findings that Hayes's statements were defamatory, Nichols and Lindberg claim that their own testimony sufficiently established damages for both mental anguish and injury to reputation.

In a legal-sufficiency challenge, we review all evidence in the light most favorable to the verdict, crediting favorable evidence if a reasonable fact finder could, and disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). As this standard is applicable here, if more than a scintilla of evidence exists in the record to support the challenged finding, then the legal-sufficiency challenge fails. *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015). More than a scintilla of evidence exists if reasonable minds could arrive at the finding given the facts proved in the particular case. *Id*.; *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995).

The jury awarded Lindberg $15,000 for past injury to reputation, $25,000 for future injury to reputation, $20,000 for past mental anguish, and $10,000 for future mental anguish. The jury also awarded Nichols $5,000 for past injury to reputation, $10,000 for future injury to reputation, $5,000 for past mental anguish, and $10,000 for future mental anguish. We will address each award.

Mental anguish

In order to prevail on a claim for damages for mental anguish, a plaintiff must introduce evidence of "'a substantial disruption in [her] daily routine' or 'a high degree of mental pain and distress.'" *Hancock v. Variyam*, 400 S.W.3d 59, 68 (Tex. 2013) (quoting *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 443 (Tex. 1995)). The disruption must amount to "more than mere worry, anxiety, vexation, embarrassment, or anger." *Parkway*, 901 S.W.2d at 444; *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). An award of mental-anguish

damages requires "evidence of the nature, duration, and severity of the mental anguish." *Hancock*, 400 S.W.3d at 68 (quoting *Service Corp. Int'l v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2011)).

The Texas Supreme Court has provided guidance with respect to sufficiency of the evidence supporting the existence of mental-anguish damages. First, it has determined that "generalized conclusory descriptions" describing hardship, denial, and unease, did not suffice to show compensable mental anguish. *Guerra*, 348 S.W.3d at 232-33. It distinguished that evidence from testimony showing severe stress that lead to headaches, sleeplessness, and other physical symptoms that required medical treatment, as well as anxiety and depression that also required treatment, which did amount to some evidence of substantial disruption in daily routine or a high degree of mental pain and distress. *Id.* Additionally, the Court has upheld an award of damages for mental anguish based on a plaintiff's testimony of his own embarrassment within his lifelong community, distress, loss of sleep, as well as disruption and distress within his family, when it was coupled with others' testimony confirming his depression and major change in demeanor. *Bentley v. Bunton*, 94 S.W.3d 561, 606-07 (Tex. 2002). Lastly, the Court has concluded that compensable mental anguish was not shown by a plaintiff's testimony recounting embarrassment, disruption, and distraction, absent evidence regarding medical attention sought, the effect of any anxiety or depression on plaintiff's life, or corroborating evidence from other witnesses. *Hancock*, 400 S.W.3d at 70.

The evidence in the record demonstrates more than a scintilla of evidence that Lindberg suffered mental anguish. At trial, the court admitted emails and correspondence from Hayes to Lindberg's colleagues and main referral sources, as well as Hayes's public Facebook posts

and related comments in which Lindberg was called a "jerk," a "bastard," an "idiot," "selfish," and "entitled." Through documents and testimony, Lindberg described the timeline of events which revealed an extensive and targeted "campaign" by Hayes to negatively influence the opinions of professionals throughout Lindberg's business network. Lindberg testified, "It's hard for me to describe how threatening this was to my reputation and business and how stressful it's been and—when it happened and even now just rereading it." Lindberg testified that it was "crushing" for her to see Hayes's public commentaries on social media, which were visible to other area wedding professionals. She recounted that seeing public comments about her and her business that were found to be defamatory by the jury made her "sick to [her] stomach," "upset," "humiliated," "stressed," and "pained." Lindberg testified to experiencing grief over the loss of her career and stress from public humiliation. She testified that she experienced sleeplessness worrying about her capacity to meet the medical needs of her adopted children. She stated that because her children had special medical needs, she and her husband were required to prove financial stability in order to qualify for the adoption, and because of the impact of Hayes's statements on her business, she was concerned about her ability to provide for their frequent hospital visits and expensive medications. She further testified that in the fall of 2014, afraid that the stress of the situation was affecting her parenting, she sought medical treatment and was prescribed antidepressants. She also testified that the Lindbergs' family counselor recommended that she undergo individual counseling to address her high stress level. Lastly, Lindberg testified that she expected to undergo therapeutic treatment for trauma, grief, and loss following the trial. This testimony was also uncontested and unimpeached on cross-examination.

Thus, Lindberg identified specific events and physical and emotional symptoms that she experienced as a result of Hayes's defamatory actions. She stated that she sought medical treatment for those physical symptoms as well as counseling for her mental and emotional symptoms. She testified to humiliation within her professional community of twelve years and other facts related to the nature and severity of her mental anguish. Consequently, we agree that there was more than a scintilla of evidence supporting the finding. *See Gharda*, 464 S.W.3d at 347. Accordingly, we overrule Hayes's legal-sufficiency challenge to mental-anguish damages awarded to Lindberg.

Nichols testified in support of her own mental anguish claim, which was also uncontradicted and unimpeached on cross-examination. She testified that she felt humiliated and upset by Hayes's Facebook posts and "likes" on others' comments to his posts. The totality of her testimony as to the nature, duration, and severity of her mental anguish is as follows:

> Q. How did you feel about seeing Mr. Hayes' "likes" to these photographers being jerks . . . ?
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> A. It was humiliating. These are people that are seeing these disparaging remarks that I've spent close to a decade building relationships with and going out of my way to, you know, send images to for their portfolio, trying to accommodate vendors. Vendor relationships are extremely important in my business and I've worked really hard for a long time to build these relationships. And to see someone humiliating me and painting me in a negative light on a public forum was really upsetting.
>
> . . . .
>
> Q. Ms. Nichols, have you experienced any kind of emotional suffering as a result of this lawsuit?

A. Yes.

Q. Can you tell me about that a little bit? Tell me specifically how you suffered.

A. It's been a year of extreme stress and anxiety, time away from my business and clients, time away from my family. I have two young children. I've missed out on a lot of important, you know, school events this year. My daughter has an end-of-the-year event today that she's really disappointed I can't be there. Loss of sleep, financial stress, humiliation, experience from Mr. Hayes' disparagement of us on a public forum and to dozens, and he claims even hundreds, of our industry peers and people that I've worked many years to build positive relationships with.

But Nichols did not testify to any specific facts tending to show that she had experienced a substantial disruption in her daily routine from mental anguish. Her testimony instead tends to indicate that her routine had been disrupted by the legal proceedings. Her testimony as to the nature, duration, and severity of her mental anguish, while demonstrating stress, anxiety, and humiliation, does not meet the high standard of proof required by *Parkway*, 901 S.W.2d at 445, and *Saenz*, 925 S.W.2d at 614. Consequently, we must conclude that there is legally insufficient evidence showing that Nichols suffered anything more than mere worry, anxiety, vexation, embarrassment, or anger. Because these are not compensable mental-anguish damages, we sustain Hayes's challenge to the mental-anguish damages awarded to Nichols.

Injury to reputation

Hayes also asserts that Nichols and Lindberg failed to offer legally sufficient evidence of injury to their reputations. Competent evidence is required to support an award of reputation damages. *Hancock*, 400 S.W.3d at 68 (citing *Bentley*, 94 S.W.3d at 606; *Saenz,* 925 S.W.2d at 614). Lindberg testified that referrals from wedding coordinators had decreased significantly since the

conflict with Hayes began. Documents that were admitted also provided some evidence of Nichols and Lindberg's loss of reputation within the Austin wedding industry, including specifically a statement by Kathi Thomas, who Lindberg testified is an Austin wedding coordinator, stating that she would never recommend the photographers discussed by Hayes. Emails in evidence show that wedding coordinator Courtney Caplan responded to communications from Hayes by stating she would cease referring clients to Lindberg, and Caplan testified that she had not, in fact, referred any business to Lindberg since that date. Lindberg testified that previously 90 percent of her work came through referrals and she had generally been booked 12 to 18 months in advance, but that by June of 2015, she had received no referrals from any wedding coordinators for weddings in 2016. Similarly, Nichols testified that following the events leading up to the lawsuit, she had received no direct referrals or inquiries from many vendors from whom she had previously received referrals. In addition, Kevin Molesworth, a wedding and event producer in Austin, specifically testified at trial that Nichols's reputation, which had previously been "very good," had diminished since the lawsuit.

Some contradictory evidence was presented regarding the diminishment of Nichols and Lindberg's reputation. Molesworth testified that he would not work with Nichols or Lindberg in the future because of the exclusivity clause in their contracts, not because of any actions by Hayes. Two other wedding coordinators, Caplan and Olivia Toepfer, also testified at the trial that they would not refer clients to Nichols and Lindberg because of the conflicts between Nichols and Lindberg's contracts and the desires of other vendors to have their products photographed. However, emails admitted into evidence showed that Molesworth, Caplan, and Toepfer each stated that they would stop referring clients to Nichols and Lindberg in direct response to Hayes's statements. It is

well-established that "jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony." *City of Keller*, 168 S.W.3d at 819. In light of the discretion that we must give to the jury's assessment of evidence, for both Lindberg and Nichols, we conclude that the record provides evidence supporting the jury's finding that a reasonable person would have a lowered opinion of Nichols and Lindberg based on Hayes's statements. *See Memon v. Shaikh*, 401 S.W.3d 407, 421 (Tex. App.—Houston [14th Dist.] 2013), *judgment withdrawn on other grounds*, No. 14-12-00015-CV, 2014 WL 6679562 (Tex. App.—Houston [14th Dist.] Nov. 25, 2014, no pet.) (mem. op.). This constitutes more than a scintilla of evidence and is therefore an adequate basis for the jury to reasonably conclude that Nichols and Lindberg had suffered compensable injury to reputation and would continue to suffer such damages in the future. Accordingly, we overrule Hayes's challenge to the legal sufficiency of the evidence of compensable injury to reputation.

Amount of damages for mental anguish and injury to reputation

Evidence must support both the existence of compensable mental anguish and the amount awarded. *Hancock*, 400 S.W.3d at 68 (citing *Bentley*, 94 S.W.3d at 606; *Saenz*, 925 S.W.2d at 614). "Non-economic damages, such as mental anguish damages, 'cannot be determined by mathematical precision; by their nature, they can be determined only by the exercise of sound judgment.'" *Bennett v. Grant*, No. 15-0338, 2017 WL 1553157, at *3 (Tex. Apr. 28, 2017) (quoting *Bentley*, 94 S.W.3d at 605). Nonetheless, there must be "evidence that the amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding." *Saenz*, 925 S.W.2d at 614. We review "amounts awarded for non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not disguised

disapproval of the defendant." *Bentley*, 94 S.W.3d at 605. Our review is one of factual sufficiency, examining the entire record to determine whether damage awards are supported by insufficient evidence—that is, whether they are excessive or unreasonable. *Id.* at 606.

We first review the record for evidence that is sufficient to uphold the jury's award to Lindberg of $20,000 for past mental anguish and $10,000 for future mental anguish. As detailed above, Hayes's statements caused Lindberg significant suffering that disrupted her daily routine and required medical and mental-health treatment. There is inherent difficulty in the appellate review of mental-anguish damages because of the inability of such damages to be mathematically quantified. Yet, there must be evidence in the record showing the amount is "fair and reasonable." *Saenz*, 925 S.W.2d at 614. Certainly, Texas courts have upheld larger awards for similar injuries. *See Bunton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2004) (affirming an award of $150,000 for defamation that plaintiff testified "had cost him time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his children at school"); *Bishop Abbey Homes, Ltd. v. Hale*, No. 05-14-01137-CV, 2015 WL 9167799, at *19 (Tex. App.—Dallas Dec. 16, 2015, pet. denied) (mem. op.) (concluding that evidence supported mental-anguish damages award of $417,712, as originally requested by plaintiffs, but not $1,600,000 awarded by jury); *MBR & Assocs. v. Lile*, No. 02-11-00431-CV, 2012 WL 4661665, at *13 (Tex. App.—Fort Worth Oct. 4, 2012, pet. denied) (mem.op.) (upholding past and future mental anguish damages of $300,000 where plaintiff established mental and emotional suffering from fraud and deceptive trade practices relating to foundation repair of plaintiff's home). Based on the record before us, we conclude that the jury could have reasonably determined that the amounts awarded to

Lindberg were reasonable compensation for the mental-anguish damages she suffered. Because we conclude above that the mental-anguish damages awarded to Nichols are not supported by sufficient evidence, we need not address those amounts.

The jury also awarded Lindberg $15,000 for past injury to reputation and $25,000 for future injury to reputation, and it awarded Nichols $5,000 for past injury to reputation and $10,000 for future injury to reputation. Evidence in the record specifically shows injury to reputation for both Nichols and Lindberg, particularly the statements of referral sources, colleagues, and acquaintances in response to Hayes's statements. Considering the targeted nature of Hayes's communications to immediate colleagues and referral sources of Nichols and Lindberg's, as well as his defamatory characterization of Nichols and Lindbergs' actions, the amounts awarded by the jury for past and future injury to reputation are not outside of the bounds of reason. *See, e.g.*, *Memon*, 401 S.W.3d at 422 (determining that evidence supported $250,000 award for past damage to reputation where statements were targeted to plaintiff's acquaintances and colleagues and relying on evidence of hearers' responses to defendant's statements) (citing affirmations of awards for damage to reputation in: *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 310, 330 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ($100,000 for injury to reputation caused by defamatory statements to plaintiff's professional colleagues alleging dishonesty and unethical professional conduct); *Peshak v. Greer*, 13 S.W.3d 421, 423-24, 427 (Tex. App.—Corpus Christi 2000, no pet.) ($55,000 for past and future injury to reputation based on two letters to authorities that accused plaintiff aircraft inspector of breaking into defendant's airplane); *Bolling v. Baker*, 671 S.W.2d 559, 571 (Tex. App.—San Antonio 1984, writ dism'd w.o.j.) ($25,000 for damage to reputation when employer told plaintiff's

coworkers that plaintiff was "a liar" and "not trustworthy"); *Whalen v. Weaver*, 464 S.W.2d 176, 181-82 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.) ($15,000 for single statement accusing the plaintiff of "embezzling company funds and of being a thief" in presence of three attorneys and "several unnamed and unknown parties")). We conclude that factually sufficient evidence exists in the record to support the amount of the awards to Nichols and Lindberg for injury to reputation.

Having concluded that Nichols mental-anguish damages award is not supported by sufficient evidence, we sustain Hayes's first issue with regard to the $15,000 for past and future mental anguish awarded to Nichols. Because we conclude that the awards to Nichols for injury to reputation and to Lindberg for both injury to reputation and mental anguish are supported by legally and factually sufficient evidence, we overrule Hayes's first issue with respect to those awards.

Sanctions

Following the grant of Nichols and Lindberg's motion for summary judgment disposing of all of Hayes's claims, Nichols and Lindberg moved for sanctions against Hayes and his attorney, asserting improper filing of groundless claims under Texas Rule of Civil Procedure 13 and Chapters 9 and 10 of the Civil Practice and Remedies Code. Following a hearing and supplemental filings, the trial court granted Nichols and Lindberg's motion, and sanctioned Hayes in the amount of $41,518.75. In his second issue, Hayes asserts that the trial court erred in awarding sanctions to Nichols and Lindberg because the court lacked jurisdiction, the order was based on no evidence, and the order failed to list the specific reasons for the sanction or explain how the amount was calculated.

Nichols and Lindberg, as cross-appellants, claim the trial court erred in not holding Hayes's counsel jointly and severally liable for the sanctions awarded.

We review a trial court's imposition of sanctions under an abuse-of-discretion standard. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Zeifman v. Nowlin*, 322 S.W.3d 804, 809 (Tex. App.—Austin 2010, no pet.). We may reverse the trial court's ruling only if the trial court acted without reference to any guiding rules and principles, such that the ruling was arbitrary or unreasonable. *Low*, 221 S.W.3d at 614. If some evidence supports a court's decision to impose sanctions, we will not hold that it abused its discretion. *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014) (citing *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009)). In reviewing sanctions orders, we are not bound by the trial court's findings of fact and conclusions of law; instead, we must independently review the entire record to determine whether the trial court abused its discretion. *American Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (citing *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852 (Tex.1992)).

Jurisdiction

Hayes first asserts that the trial court lacked jurisdiction to rule on Nichols and Lindberg's motion for sanctions. Judge Eric Shepperd of County Court at Law No. 2 presided over the hearing on the motion for sanctions in Travis County District Court and issued the order. Both parties rely on Travis County Local Rule 17, which recites the authority granted in the Texas Government Code[2] to judges of Travis County district courts and statutory county courts to hear any

[2] Rule 17.1 cites to the Government Code generally, without specifying a section, but the Rule tracks the language of section 74.094: "A district or statutory county court judge may hear and determine a matter pending in any district or statutory county court in the county regardless of

civil case filed in the district courts or county courts, and authorizes the Travis County Court Administrator to assign each available county-court judge to hear any matter. *See* Travis County (Tex.) Civ. Dist. Ct. Loc. R. 17.1. Hayes claims that this authority is limited by Sections 25.0003 and 25.2292 of the Government Code, which set out the jurisdiction of statutory county courts, limiting their jurisdiction over civil cases to those in which the amount in controversy is more than $500 and does not exceed $250,000. *See* Tex. Gov't Code §§ 25.0003, .2292. Hayes argues that while Judge Shepperd presided, the district court lacked jurisdiction because Nichols and Lindberg sought over $1,000,000 in damages, which exceeds the maximum amount in controversy over which county courts have jurisdiction. Nichols and Lindberg argue in response that assignment of a county-court judge to a district court does not limit the district court's jurisdiction.

By statute, a "statutory county court judge may hear and determine a matter pending in any district . . . court in the county," and any order or judgment signed in this manner "is valid and binding as if the case were pending in the court of the judge who acts in the matter." *Id.* § 74.094(a). The only statutory limitation on a statutory county court judge's assignment is geographical. *Id.* § 74.054(b) ("An active statutory county court judge may not be assigned to hear a matter pending in a district court outside the county of the judge's residence."); *see Lopez v. State*, 57 S.W.3d 625, 628-29 (Tex. App.—Corpus Christi 2001, pet. ref'd). The San Antonio Court of Appeals has addressed the application of this statute where the amount in controversy is outside the jurisdiction of the county court. *See Texas Animal Health Comm'n v. Garza*, 980 S.W.2d 776 (Tex. App.—San

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whether the matter is preliminary or final or whether there is a judgment in the matter." Tex. Gov't Code § 74.094.

Antonio 1998, no writ). The court looked to a Texas Supreme Court decision addressing a related issue and concluded that it authorized "'a statutory county court judge to hear, determine, and sign a judgment in a matter pending in district court ***outside his court's jurisdiction*** without transferring the case.'" *Id*. at 777 (quoting *Camacho v. Samaniego*, 831 S.W.2d 804, 811 (Tex. 1992)); *see In re Nash*, 13 S.W.3d 894, 897-98 (Tex. App.—Beaumont 2000, no pet.) (distinguishing transfer of case to county court, which may affect jurisdiction, from assignment of county court judge to sit in district court, which does not necessarily affect jurisdiction of district court presided over by county court judge). We agree and conclude that the court did not lack jurisdiction over the motion for sanctions.

Validity and enforceability of order

In his second point, Hayes argues that the sanctions order was supported by insufficient evidence to satisfy the statutory requirements for the imposition of sanctions under Texas Rule of Civil Procedure 13 or Chapter 10 of the Civil Practice and Remedies Code. Where, as here, sanctions are sought and granted under both Chapter 10 and Rule 13, we will uphold the order if the sanctions were warranted under either provision. *Zeifman*, 322 S.W.3d at 809; *see Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 411-13 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (affirming the judgment of the trial court imposing sanctions where Chapter 10 requirements were met but Rule 13 requirements were not).

Chapter 10 of the Civil Practice and Remedies Code authorizes a "court that determines that a person has signed a pleading or motion in violation of Section 10.001" to "impose a sanction on the person, a party represented by the person, or both." Civ. Prac. & Rem. Code

§ 10.004(a). Section 10.001 states in pertinent part that the signing of a pleading or motion constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

> (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and]
>
> (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

Id. § 10.001. Thus, the pleading or motion at issue must not be brought for an improper purpose and must be both legally and factually sound. *Id.* A document that fails on any one of these elements violates the section. *See Low*, 221 S.W.3d at 617; *Hung Tan Phan v. An Dinh Le*, 426 S.W.3d 786, 794 (Tex. App.—Houston [1st Dist.] 2012, no pet.). The supreme court has held that sanctionable violations under Chapter 10 do not require a finding of bad faith or malicious intent. *Low*, 221 S.W.3d at 617. "Chapter 10 provides that a claim that lacks a legal or factual basis—without more—is sanctionable." *Nath*, 446 S.W.3d at 369 (citing *Low*, 221 S.W.3d at 617). The trial court does not need additional evidence of bad faith in order to impose sanctions under Chapter 10. *See id.* The pleading alone can be sanctionable. *See id.*

To survive a Chapter 10 challenge, each claim must have evidentiary support or be likely to have evidentiary support after a reasonable opportunity for discovery. Civ. Prac. & Rem. Code § 10.001. The trial court's order contained the following finding:

> Sanctions are also appropriate against Plaintiff under Chapter 10 and Rule 13 because Plaintiff knew or should have known that it was groundless to assert in the above pleadings and motion that Defendants, two local photographers, control [the] world-wide high-end wedding industry about which he pled and because his pronouncements online about the lawsuit are evidence that he authorized the lawsuit and the above pleadings and motion in bad faith and for the improper purpose of discrediting Defendants to gain a competitive advantage over them.

In short, this paragraph indicates that the trial court found Hayes to have (1) made groundless assertions of fact, and (2) brought the lawsuit for improper purposes, in violation of Section 10.001. Evidence in the record supports these findings. Hayes's Original Petition, First Amended Petition, and Second Amended Petition asserted restraint-of-trade causes of action. As discussed below, restraint of trade is an antitrust claim, and it requires a showing of an antitrust injury, which has been defined as an injury of the type antitrust laws were intended to prevent. *In re Memorial Hermann Hosp. Sys.*, 464 S.W.3d 686, 705 (Tex. 2015) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Hayes alleged antitrust violations based on the actions of two local wedding photographers, Nichols and Lindberg, who asserted contractual rights relating to weddings they had been hired to photograph. As detailed below, on this record, it was not error for the trial court to conclude that Hayes's assertions of antitrust injury were unsubstantiated and groundless. Hayes's petitions also claimed damages for tortious interference with prospective business relations, which requires an independently tortious act. Hayes asserted

no independently tortious act other than the antitrust-type action discussed herein. Therefore, each claim in Hayes's pleadings did not have evidentiary support nor was each likely to have evidentiary support after a reasonable opportunity for discovery.

The record indicates that Hayes was familiar with Nichols and Lindberg and their businesses, two husband-and-wife event photography teams, and familiar with the industry, having pled that at the time the lawsuit was initiated that he had 32 years' experience in the field. As such, it was not an abuse of discretion for the trial court to conclude that Hayes knew or should have known that Nichols and Lindberg did not control a significant market share of the international (or, in fact, local) wedding industry and that an antitrust cause of action based on this fact situation was groundless. Therefore, the pleadings support the trial court's imposition of sanctions against Hayes. Because Hayes brought a cause of action that lacked any factual basis, the pleadings—without more—are sanctionable under Chapter 10, and the trial court did not abuse its discretion by awarding sanctions to Nichols and Lindberg. Because we conclude that the imposition of sanctions comports with the requirements of Chapter 10, we need not reach the issue of whether it satisfies the requirements of Rule 13.

Third, Hayes claims that the sanctions order did not comply with the requirements listed in Chapters 9 or 10 of the Civil Practice and Remedies Code.[3] He claims that the order lacked an identification of the specific pleadings being addressed, how they violated the specific statute, and

[3] While Nichols and Lindberg moved for sanctions under both Chapters 9 and 10 of the Civil Practice and Remedies Code, the motion was granted under only Chapter 10. Sanctions under Chapter 9 may not be imposed in any proceeding to which the sanctions provisions of either Chapter 10 or Rule 13 apply. *See* Tex. Civ. Prac. & Rem. Code § 9.012(h).

the proper basis for damages. Because we have determined the sanctions were appropriate under Chapter 10, we address only the following requirements: "A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed." Tex. Civ. Prac. & Rem. Code § 10.005. The order sufficiently described the violating conduct as discussed above: the filing of pleadings that were factually groundless because they claimed that two local photographers control the world-wide high-end wedding photography industry and were brought for an improper purpose. The order also specifically identified the pleadings being addressed:

> Plaintiff's Original Petition, Plaintiff's First Amended Petition, Plaintiff's Second Amended Petition, and Plaintiff's Motion to Compel Mediation were brought in violation of Texas Civil Practice and Remedies Code Chapter 10 and Texas Rule of Civil Procedure 13.

It also identified the specific basis for the sanction imposed:

> There is a direct relationship between the sanction the Court imposes here and the conduct for which the sanction is imposed and good cause for the sanction, since Defendants reasonably incurred attorney's fees, court costs, and expenses in defending against Plaintiff's groundless pleadings and motion.

The sanctions order, therefore, ties the sanction to the conduct in question and lists the basis for the amount of the sanction. The amount of the sanction correlates to the attorneys' fees incurred by Lindberg and Nichols. Accordingly, the order meets the requirements of Section 10.005 and is therefore not invalid or unenforceable for lack of specificity.

Finally, Hayes claims that only live pleadings can be sanctioned, but we disagree. Hayes is correct that "the trial court must examine the circumstances existing at the time the pleading was filed" when determining whether pleadings are groundless. *Shaw v. County of Dall.*, 251 S.W.3d 165, 171 (Tex. App.—Dallas 2008, pet. denied). Nevertheless, a party or counsel can be sanctioned for pleadings that have been superseded. *See Nath*, 446 S.W.3d at 371. Accordingly, we overrule Hayes's second issue.

Joint and several liability for sanctions

Nichols and Lindberg, in their first issue as cross-appellants, also challenge an aspect of the trial court's imposition of sanctions. Nichols and Lindberg argue that the trial court erred in not holding Hayes's counsel jointly and severally liable for the sanctions. Though presented as a single issue, the briefing attempts to assert two errors: that the trial court erred in not imposing sanctions against Hayes's attorney, and that the trial court erred in not holding Hayes and his attorneys jointly and severally liable for the sanctions imposed. While the former addresses the existence of liability on the part of Hayes's attorney, the latter issue relates to the responsibility for payment if the attorney were also sanctioned.[4]

Nichols and Lindberg did not bring either of their complaints about the sanctions order to the attention of the trial judge. In order to preserve error for appeal, a timely and sufficiently specific objection must be raised to the trial court, which must rule on the objection. Tex. R. App. P. 33.1. Where a party fails to complain of a sanction imposed and fails to ask the trial court to

[4] Nichols and Lindberg did not request joint and several liability in their motion for sanctions.

reconsider its actions in imposing the sanction, the party waives any complaint about the trial court's actions. *Id.*; *see Wilner v. Quijano*, No. 01-11-00322-CV, 2012 WL 5311147, at *3 (Tex. App.—Houston [1st Dist.] Oct. 25, 2012, no pet.) (mem. op.) (citing *Howell v. Texas Workers' Comp. Comm'n*, 143 S.W.3d 416, 450 (Tex. App.—Austin 2004, pet. denied)); *Birnbaum v. Law Offices of G. David Westfall, P.C.*, 120 S.W.3d 470, 476 (Tex. App.—Dallas 2003, pet. denied). The record reveals that Nichols and Lindberg did not object to the sanctions order on this basis once it was entered. The issue was never raised in the trial court, the trial judge did not have the opportunity to correct the allegedly erroneous order, and error was not preserved. *See Birnbaum*, 120 S.W.3d at 476. We overrule Nichols and Lindberg's first cross-issue.

Summary judgment

In his third and fourth issues, Hayes challenges the trial court's rulings on two of the motions for summary judgment that were disposed of in the course of the proceedings below. He asserts that the trial court erred in granting Nichols and Lindberg's motion for summary judgment on Hayes's original claims and in partially denying Hayes's motion for summary judgment on Nichols and Lindberg's counter-claims. Because we find the trial court did not err in granting Nichols and Lindberg's motion or in partially denying Hayes's, we will overrule both issues.

Standard of review

We review the trial court's summary judgment de novo. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012). Summary judgment is proper when there are no disputed issues of material fact and the movant is

entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). The movant bears the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Id.*; *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.* (citing *Henkel v. Norman*, 441 S.W.3d 249, 250 (Tex. 2014) (per curiam)). Where, as here, the trial court's orders do not specify the grounds for its summary judgment, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *See Southwestern Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015) (quoting *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003)).

Nichols and Lindberg's motion for summary judgment on Hayes's claims

In his third issue, Hayes asserts that the trial court erred in granting Nichols and Lindberg's motion for summary judgment against all claims in Hayes's First Amended Petition. He claims that the motion was an improper method of challenging "deficiencies in pleadings." In the alternative, he asserts that the motion failed as a matter of law because he raised genuine issues of material fact that defeated summary judgment.

First, citing to the supreme court's opinion in *Swilley v. Hughes*, 488 S.W.2d 64 (Tex. 1972), Hayes claims that the trial court erred in granting Nichols and Lindberg's motion for summary judgment because a summary judgment on the pleadings is akin to a general demurrer, which is prohibited by Texas Rule of Civil Procedure 90. Hayes claims the proper vehicle for challenging deficiencies in pleadings is special exceptions and the plaintiff must be given an opportunity to

amend his pleadings before a motion for summary judgment is properly brought or considered by the court. Nichols and Lindberg respond that the trial court followed proper procedure and did not err in granting their motion for summary judgment disposing of all claims in Hayes's petition because the petition demonstrated no cause of action existed.

Summary judgment may be used to challenge the sufficiency of a pleading "if a pleading deficiency is of the type that could not be cured by an amendment." *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998) (citing *Swilley*, 488 S.W.2d at 67). Because we conclude below that allowing Hayes an opportunity to amend his pleadings would not have cured the defects therein, summary judgment was an appropriate method of challenging Hayes's pleadings, and the trial court did not err on this basis.

Second, Hayes argues that the summary judgment motion failed as a matter of law because Hayes raised genuine issues of material fact.[5] Hayes's live petition at the time of the

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[5] We note that Nichols and Lindberg's motion for summary judgment was titled "Defendants' Traditional Motion for Summary Judgment." Documents filed at the trial court addressing the motion referred to the traditional summary judgment rule and standard. However, the trial court's order stated,

> Came for consideration at a hearing on September 30, 2014, "Defendants' Traditional Motion for Summary Judgment", which Defendants' counsel stated at the hearing to be, and which the Court finds to be, both a Traditional and No-Evidence Motion for Summary Judgment.

On its face, the motion for summary judgment does not move on the basis of Rule 166a(i). Also, there is no other indication in the record before us that the motion was amended or that Hayes was given notice that the motion was being amended to include a no-evidence motion. "Although Rule 166a does not prohibit a hybrid [both traditional and no evidence] motion, the motion must give fair notice to the non-movant of the basis on which the summary judgment is sought." *Waite v. Woodard, Hall, & Primm, P.C.*, 137 S.W.3d 277, 281 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (citing *Waldmiller v. Continental Express, Inc.*, 74 S.W.3d 116, 123 (Tex. App.—Texarkana

summary-judgment hearing asserted claims for: (i) conspiracy to restrain trade; (ii) tortious interference with existing contracts; (iii) and tortious interference with prospective relations. Nichols and Lindberg's motion asserted that Hayes's antitrust claims were groundless, in part because Hayes failed to assert an antitrust injury that would establish standing and a material element of the cause of action. Nichols and Lindberg also argued that any interference with Hayes's contracts was not tortious but instead justified assertion of their own contractual rights, and that they were entitled to judgment as a matter of law. On appeal, Nichols and Lindberg maintain that the motion for summary judgment was properly granted.

We begin by reviewing the central claim in Hayes's underlying petition, which is illegal restraint of trade under Section 15.05(a) of the Texas Business and Commerce Code. That Section states: "Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful." Tex. Bus. & Com. Code § 15.05(a).[6] This is part of the Texas Antitrust Act, which is intended to maintain and promote economic competition. *Id.* §§ 15.01, .04. The Texas Antitrust Act is modeled on two federal statutes, the Sherman Antitrust Act and the Clayton Act, and provides that it is to be interpreted "in harmony with federal judicial interpretations of comparable federal antitrust

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2002, no pet.)). Accordingly, we review the motion on traditional grounds only.

[6] In his original and amended petitions, Hayes also cites to Subsection (c) of Section 15.05, which prohibits anti-competitive tying restraints and exclusive-dealing arrangements. However, Hayes has not argued or briefed facts or legal theories supporting any claim under Subsection (c). Because the issue is inadequately briefed, it is waived. *See* Tex. R. App. P. 38.1. Even if it were not waived, however, it would not change our decision, because Subsection (c) is subject to the same analysis under which we affirm the summary judgment on Hayes's Subsection (a) claims, that no antitrust injury was or could have been pled under these circumstances.

statutes" to the extent consistent with its purpose. *Id.* § 15.04; *In re Memorial Hermann*, 464 S.W.3d at 708; *Caller-Times Publ'g Co. v. Triad Commc'ns, Inc.*, 826 S.W.2d 576, 580 (Tex. 1992).

The Texas Antitrust Act grants a private right of action only to persons "whose business or property has been injured by reason of any conduct declared unlawful in Subsection (a), (b), or (c) of Section 15.05." Tex. Bus. & Com. Code § 15.21(a)(1). Therefore, a plaintiff must prove an "'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *In re Memorial Hermann*, 464 S.W.3d at 705 (quoting *Brunswick*, 429 U.S. at 489). The plaintiff must show coincidence between his own injury and the public detriment that generally results from the alleged violation. *Id*. at 705 n.81 (citing *Austin v. Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385, 1389-90 (11th Cir. 1990). The Texas Supreme Court has held:

> On its own, the elimination of a single competitor does not constitute proof of an anticompetitive effect for every market and context. Claims of improper restraint of trade require a plaintiff to plead a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market.
>
> . . . .
>
> In order to successfully allege injury to competition, a . . . claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably. At a minimum, the claimant must sketch the outline of the antitrust violation with allegations of supporting factual detail.

Id. at 709-10 (internal citations omitted). Alleged economic damage to a single competitor is insufficient to show antitrust injury: "a plaintiff cannot demonstrate the unreasonableness of a restraint merely by showing that it caused him an economic injury." *Regal Entm't Grp. v. iPic-Gold*

Class Entm't, LLC, 507 S.W.3d 337, 348 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991); *Marlin v. Robertson*, 307 S.W.3d 418, 425 (Tex. App.—San Antonio 2009, no pet.)). A plaintiff may satisfy his burden "'by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services.'" *Id*. (quoting *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1371 (3d Cir. 1996)). In other words, an antitrust plaintiff must plead facts that support anticompetitive action and a concomitant injury to the plaintiff.

In his second amended petition, the live pleading at the time of the summary-judgment hearing, Hayes failed to allege anticompetitive effects of Nichols and Lindberg's actions, instead merely stating that "contractually requiring event clients to refrain from use or dealings with any other photographer at the event" had the effect of substantially lessening competition in high-end pre-event photography, reducing availability of higher-quality services, and raising prices. Hayes further pled that "conspirators' agreement significantly restrains trade in that it unlawfully restrains trade and lessens competition in the small market of high-end event photography," again failing to allege injury to competition. *See id*. Hayes's petition also failed to allege reduction of output, increase in price, or deterioration in quality of goods and services with supporting facts.

The petition also failed to allege injury of the type antitrust laws were intended to prevent. It described two alleged antitrust injuries: "Hayes had contracts cancelled and prospective business lost due to the actions of conspirators" and "Hayes has lost pre-event vendor photography business because of conspirators' anti-competitive actions." These allegations are simply claims of

injury to Hayes' own position as a competitor in the market accompanied by the unsupported legal conclusion that competition has been restrained unreasonably. *See id*. Hayes's restraint-of-trade cause of action was based entirely on Nichols and Lindberg's alleged interference with Hayes's contracts. As such, these facts do not allege illegal restraint of trade as it is recognized under the Texas Antitrust Act. Because Hayes's petition and response to Nichols and Lindberg's motion for summary judgment do not establish that he is entitled to bring a cause of action under the Texas Antitrust Act, we conclude that no genuine issue of material fact exists and Nichols and Lindberg were entitled to judgment as a matter of law. The trial court did not err in granting summary judgment on this claim.

Hayes's petition also asserted causes of action under tortious interference with existing contracts and tortious interference with prospective business relations. To prove tortious interference with an existing contract, a plaintiff must prove: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was the proximate cause of plaintiff's damages; and (4) actual damage or loss. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996) (citing *Holloway v. Skinner*, 898 S.W.2d 793, 795-96 (Tex. 1995)). However, "[e]ven if a plaintiff establishes the elements of this cause of action, a defendant may still prevail upon establishing the affirmative defense of justification." *Id.*

In their motion for summary judgment, Nichols and Lindberg asserted that any interference with Hayes's contracts that did occur was privileged against suit under the defense of justification. "Under the defense of legal justification or excuse, one is privileged to interfere with another's contract (1) if it is done in a bona fide exercise of his own rights, or (2) if he has an equal

or superior right in the subject matter to that of the other party." *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 691 (Tex. 1989). In their answer and motion for summary judgment, Nichols and Lindberg claim that they had a contractual right to provide photography services for the two weddings at issue, to the exclusion of other photographers. Hayes did not contest that Nichols and Lindberg operated under contracts that contained exclusivity clauses or that their actions were in furtherance of those provisions. Hayes instead challenges Nichols and Lindberg's assertion of the justification defense, contending that it fails because Nichols and Lindberg's contracts illegally restrain trade. As discussed above, Hayes has no cognizable claim for illegal restraint of trade on these facts. Hayes also asserts that in order to be privileged, the rights must be asserted in good faith, which he contends is a fact question to be decided by the jury. However, the supreme court has held that, "if the trial court finds as a matter of law that the defendant had a legal right to interfere with a contract, then the defendant has conclusively established the justification defense, . . . and the motivation behind assertion of that right is irrelevant." *Texas Beef*, 921 S.W.2d. at 211; *see Community Health Sys. Prof'l Servs. Corp. v. Hansen*, No. 14-1033, 2017 WL 2608352, at *16 (Tex. June 16, 2017). Consequently, the trial court did not err in granting summary judgment on Hayes's claim for tortious interference with existing contract.

The elements of a claim for tortious interference with prospective business relations are: (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the

interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 923 (Tex. 2013). Nichols and Lindberg moved for summary judgment in part on the basis that Hayes could not prove element three because the alleged predicate tort or unlawful conduct was illegal restraint of trade for which Hayes had no cognizable claim. Because we agree that the claim for illegal restraint of trade fails on this record, any tortious-interference claim relying on that as the predicate tort must also fail.

Because an antitrust injury cannot stand upon this factual situation, and because the Business and Commerce Code does not provide a private right of action for restraint of trade without an antitrust injury, *see* Tex. Bus. & Com. Code § 15.21(a)(1), Hayes would not have been able to cure this defect by amending his pleadings. Since the only independently tortious act that might support the claim for tortious interference with prospective business relations was restraint of trade, this claim also could not have been cured by amendment. Lastly, because the interference-with-contracts cause of action was unsustainable due to Nichols's and Lindberg's justification privilege as a matter of law, this claim also was not subject to cure by amendment of the pleadings. *See Delgado v. Combs*, No. 07-11-00273-CV, 2012 WL 4867600, at *3 (Tex. App.—Amarillo Oct. 15, 2012, no pet.) (mem. op.) (citing *Swilley*, 488 S.W.2d at 67 (stating summary judgment is proper where "the facts alleged by a plaintiff establish the absence of a right of action or an insuperable barrier to a right of recovery")). Accordingly, special exceptions were not required and summary judgment was appropriate.

For the reasons above, we conclude that the trial court did not err in granting summary judgment on Hayes's claims, and we overrule Hayes's third issue.

Hayes's motion for summary judgment on Nichols and Lindberg's counter-claims

In his fourth issue, Hayes asserts that the trial court abused its discretion by denying, in part, Hayes's motion for summary judgment on Nichols and Lindberg's counter-claims for defamation, business disparagement, and tortious interference with prospective business relations. The trial organized its order by addressing each allegedly defamatory or disparaging statement separately, and Hayes specifically contends that the trial court erred in denying his motion with respect to statements in four Facebook posts and three emails from Hayes to third parties. Hayes argues that the statements at issue were made in the course of a judicial proceeding and are therefore absolutely privileged. He maintains that, even if posted prior to initiation of judicial proceedings or made to parties who are not involved in the judicial proceedings, the statements cannot serve as the basis of Nichols and Lindberg's counter-claims. In the alternative, Hayes argues the statements failed to be defamatory or disparaging as a matter of law. In response, Nichols and Lindberg argue that these are not the type of statements intended to be protected by the judicial-proceedings privilege.

Hayes first cites to Civil Practice and Remedies Code Section 73.002(b)(1)(A) as a statutory basis for the privilege protecting the statements at issue. Section 73.002 states that publication by a newspaper or periodical of a fair, true, and impartial account of a judicial proceeding is privileged and cannot be a ground for a libel action. Tex. Civ. Prac. & Rem. Code §§ 73.002(a); (b)(1)(A). It is a codification, specific to members of the media, of the common-law judicial privilege that has long been recognized by the United States and Texas Supreme Courts.

Neely v. Wilson, 418 S.W.3d 52, 68 (Tex. 2013) (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975)). Because Hayes is neither a newspaper nor a periodical, Section 73.002 does not apply.

The common-law judicial-proceedings privilege holds that any written or oral communications made during the course of judicial proceedings are privileged against subsequent liability for defamatory claims of action. *Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex. 1994); *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942). "Underpinning the judicial privilege is the notion that a 'trial is a public event. What transpires in the court room is public property.'" *Neely*, 418 S.W.3d at 68 (citing *Craig v. Harney*, 331 U.S. 367, 374 (1947)). The privilege facilitates proper administration of justice by encouraging full and free disclosure by witnesses. *Bird*, 868 S.W.2d at 772 (citing *James v. Brown*, 637 S.W.2d 914, 917 (Tex. 1982)). It protects against claims of libel, slander, intentional infliction of emotional distress, defamation, and business disparagement. *See Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003); *Bird*, 868 S.W.2d at 772; *Laub v. Pesikoff*, 979 S.W.2d 686, 690 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Attaching to all aspects of the judicial proceedings, the privilege extends to statements made by the judge, jurors, counsel, parties, and witnesses, including statements made in open court, pre-trial hearings, depositions, affidavits, and any of the pleadings or other papers in the case. *James*, 637 S.W.2d at 916-17; *Knox v. Taylor*, 992 S.W.2d 40, 51-52 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

There are seven statements at issue that form the basis, in part, for Nichols and Lindberg's claims for defamation, business disparagement, and tortious interference: four Facebook posts and three emails, each written by Hayes. The posts were available publicly on the internet but

addressed to colleagues and acquaintances. The emails were addressed to certain colleagues individually. Each post or email discussed the conflict between Hayes and Nichols and Lindberg, and some mentioned legal proceedings. Hayes asserts that each statement is protected by the judicial-proceedings privilege. Although the judicial-proceedings privilege originated to protect statements made in a courtroom, it has been extended to include statements made in quasi-judicial or legislative proceedings, statements made in contemplation of and preliminary to such a proceeding, and statements made to persons not involved in the proceeding. *See Neely*, 418 S.W.3d at 68; *Daystar Residential, Inc. v. Collmer*, 176 S.W.3d 24, 27 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (citing *Watson v. Kaminski*, 51 S.W.3d 825, 827 (Tex. App.—Houston [1st Dist.] 2001, no pet.)); *Thomas v. Bracey*, 940 S.W.2d 340, 344 (Tex. App.—San Antonio 1997, no writ). However, Hayes cites no direct authority for the proposition that the privilege would extend to a litigant's personal emails or social-media posts. When Texas courts have applied the judicial-proceedings privilege to out-of-court statements, they have done so consistent with the underlying reasoning for the privilege—that the benefit of the communication to the public in facilitating the administration of justice outweighs the potential harm to the individual. *Shell Oil Co. v. Writt*, 464 S.W.3d 650, 655 (Tex. 2015); *Bird*, 868 S.W.2d at 771; *Leigh v. Parker*, 740 S.W.2d 101, 103 (Tex. App.—Austin 1987, writ denied).[7] The Texas Supreme Court has articulated that the

[7] For example, the privilege was applied to statements made by an attorney in newspapers prior to filing a lawsuit regarding how new information would affect the lawsuit. *See Daystar Residential, Inc. v. Collmer*, 176 S.W.3d 24, 27 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). A report to the Department of Justice was determined to be privileged, even though it was made prior to initiation of legal proceedings. *See Shell Oil Co. v. Writt*, 464 S.W.3d 650, 655 (Tex. 2015). Statements to the Attorney General preliminary to a lawsuit were also held privileged. *See Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762 (Tex. 1987). The privilege has been applied to

"absolute privilege only attaches in situations that 'involve the administration of the functions of the branches of government.'" *Hurlbut*, 749 S.W.2d at 768 (citing 3 J. Dooley, *Modern Tort Law*, § 36.09 (B. Lindahl Ed. 1984 and Supp. 1987)). In contrast, applying the privilege to Hayes's emails and Facebook posts would not serve the underlying purpose of the judicial-proceedings privilege, and Hayes's motion for summary judgment did not show otherwise. Hayes did not conclusively show that these statements are privileged under Section 73.002 or the common-law judicial-proceedings privilege. Therefore, the trial court did not err in denying summary judgment on the basis of privilege as to the statements contained in the Facebook posts and emails at issue.

In the alternative, Hayes asserts that even if not privileged, these statements are not defamatory or disparaging as recognized at law. Hayes asserts that the Facebook posts in exhibits A-3, A-4, F-1, and F-2 attached to his motion, as well as emails in exhibits F-4 and F-5, did not identify Nichols and Lindberg or their economic interests, which he asserts are essential elements of defamation and business disparagement, respectively. However, "it is not necessary that the individual referred to be named if those who knew and were acquainted with the plaintiff understand from reading the publication that it referred to plaintiff." *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 894 (Tex. 1960); *see Cox Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 433 (Tex. App.—Austin 2007, pet. denied). While the question of whether an individual is referred to

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letters written by attorneys to potential defendants prior to filing suit. *See Watson v. Kaminski*, 51 S.W.3d 825, 827 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Krishnan v. Law Offices of Preston Henrichson, P.C.*, 83 S.W.3d 295, 302 (Tex. App.—Corpus Christi 2002, pet. denied). The privilege has been applied to out-of-court statements by an attorney so long as they had some relationship to the proceeding and were in furtherance of the attorney's representation. *See Russell v. Clark*, 620 S.W.2d 865, 870 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

is generally a question of law for the court, the question can be submitted to a jury where the contested language is ambiguous or of doubtful import. *Ledig v. Duke Energy Corp.*, 193 S.W.3d 167, 180 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Denton Publ'g Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970), *partially abrogated on other grounds*, *KMBT Operating Co. v. Toledo*, 492 S.W.3d 710, 714-15 (Tex. 2015)). The posts and emails each mention photographers and either indicate that the photographers' identities are public record because of the lawsuit or reference certain events that could identify the Nichols and Lindberg to common acquaintances. Comments to the Facebook posts and responses to the emails indicate at least some third parties understood from reading the publications that they referred to Nichols and Lindberg. Indeed, one of the parties' common colleagues, Kevin Molesworth, testified at trial that "everyone knew who Hayes was talking about." We conclude the statements sufficiently identified Nichols and Lindberg, such that they created a genuine issue of material fact that precluded disposition by summary judgment. Therefore, on this basis, the trial court did not err in denying summary judgment on any claims arising from the statements in these exhibits.

Hayes also asserts that there was no statement of fact, an essential element of a defamation action, contained in the email attached to his motion as exhibit B-1. A statement is not actionable unless a reasonable fact-finder could reasonably conclude that the statement implies an assertion of fact, considering the entire context of the statement. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) (definition adopted by Texas Supreme Court in *Bentley*, 94 S.W.3d at 579). The statement must also be objectively verifiable as fact. *Id.* at 21; *Bentley*, 94 S.W.3d at 583. Whether a statement was an actionable statement of fact is a question of law. *Bentley*, 94 S.W.3d

at 580. Exhibit B-1 is a string of emails beginning with a December 2013 email from Lindberg to Hayes, which Hayes forwarded to others with his own messages. Hayes's statements include, "I think this 'upset bride' story is BS," and "I can tell you that this is BS." In its full context, a reasonable fact-finder could reasonably conclude that these statements were assertions of the fact that Lindberg's email contained false statements. The assertions could be objectively verified as fact by evidence of Lindberg's email and of the existence of a bride's complaint. Therefore, the trial court did not err in denying summary judgment on claims arising from the statements in this exhibit.

Lastly, Hayes asserts that the statements in emails to vendors attached to his motion as exhibits F-4 and F-5 were not actionable because they were true. Substantial truth is a complete defense to defamation. *See Neely*, 418 S.W.3d at 63; *Knox*, 992 S.W.2d at 54. However, both emails stated that Hayes was defending himself in a legal situation against a photographer who was claiming damages as a result of his actions. These emails were dated April 9, 2014. Hayes himself had not yet filed a lawsuit, and the record contains no evidence that any photographer had pursued legal action against him at that time or claimed damages as a result of his actions. Therefore, the statements are not defensible as substantially true, and the trial court did not err in denying summary judgment on any claims arising from the statements in these exhibits on this basis. Having determined the trial court did not err in denying summary judgment as it relates to the foregoing statements, we overrule Hayes's fourth issue.

Judgment not withstanding the verdict

In their second cross-issue, Nichols and Lindberg complain that the trial court erred in granting Hayes's judgment notwithstanding the verdict (JNOV) as to their claims for business

disparagement and tortious interference. They ask that we reverse and render judgment granting the damages awarded them by the jury. We review a JNOV under the legal-sufficiency standard, crediting evidence supporting the verdict if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *See City of Keller*, 168 S.W.3d at 823; *Enzo Invs., LP v. White*, 468 S.W.3d 635, 642 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). The evidence is legally sufficient if it would enable reasonable and fair-minded people to reach the challenged verdict. *See City of Keller*, 168 S.W.3d at 827. A trial court may grant a JNOV if there is no evidence to support one or more of the jury's findings. *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003). We must consider the evidence and inferences as they tend to support the verdict, not with a view toward supporting the judgment. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex. 1990); *Kalmbach v. Seminole Pipeline Co.*, No. 03-96-00249-CV, 1998 WL 132971, at *2 (Tex. App.—Austin Mar. 26, 1998, no pet.) (mem. op.). If we find more than a scintilla of evidence in the record that supports the jury's verdict, we must reverse the JNOV. *Bank of Am., N.A. v. Eisenhauer*, 474 S.W.3d 264, 265 (Tex. 2015).

Nichols and Lindberg first argue that because a JNOV may only be granted where a directed verdict would have been appropriate, and because Hayes's motion for directed verdict was denied, it follows that the court should have denied the JNOV as well. They also claim that because the court had already denied summary judgment on all statements that were submitted to the jury, the court had already decided that there was sufficient evidence to support the jury's verdict. Finally, they argue that evidence supporting the verdict exists in the record, specifically citing to their own testimony. Hayes, as cross-appellee, points to the complete lack of documentary evidence supporting

the Nichols and Lindberg's testimony, arguing that without supporting data, the testimony of Lindberg and Nichols alone is insufficient to support the amount of damages in the jury's verdict.

First, we disagree that Texas Rule of Civil Procedure 301 precludes a JNOV in a case where a motion for directed verdict was previously denied. "A trial court may submit issues to the jury, subject to reserving rulings on questions of law until after verdict, when the same questions may be presented for consideration of a JNOV." *Henderson v. Texas Commerce Bank-Midland, N.A.*, 837 S.W.2d 778, 782 (Tex. App.—El Paso 1992, writ denied) (citing *Bishop v. Allied Fin. Co.*, 483 S.W.2d 46, 49 (Tex. App.—Dallas 1972, no writ)); *see Aquila Sw. Pipeline, Inc. v. Harmony Expl., Inc.*, 48 S.W.3d 225, 232, 246 (Tex. App.—San Antonio 2001, pet. denied) (affirming trial court's JNOV granted after motion for directed verdict on same grounds was denied); *Lee v. Harris Cty. Hosp. Dist.*, No. 01-12-00311-CV, 2013 WL 5637049 (Tex. App.—Houston [1st Dist.] Oct. 15, 2013, pet. denied) (mem. op.) (same); *Garton v. Rockett*, 190 S.W.3d 139, 144, 149 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (affirming in part and reversing in part JNOV granted after motion for directed verdict on same issues was denied). Second, we disagree that denial of summary judgment precludes a JNOV. A summary judgment is denied where the opponent of the motion raises a genuine issue of material fact so that the movant is not entitled to judgment as a matter of law. It does not constitute a finding that sufficient evidence exists to support the jury's findings and damages awarded. The trial court did not err on these procedural grounds when it partially granted the JNOV.

In partially granting the JNOV, the trial court determined that Nichols and Lindberg did not provide sufficient competent evidence to support the amount of damages relating to their

claims for business disparagement and tortious interference with prospective relations. The jury awarded Lindberg $25,000 in past lost profits and $150,000 in future lost profits resulting from interference with business relations, as well as $50,000 for past injury to financial interest and $350,000 for future injury to financial interest from business disparagement. It awarded Nichols $25,000 in future lost profits resulting from interference with business relations and $50,000 in future financial interest injury resulting from business disparagement. The court's order partially granting the JNOV stated that the evidence provided by Nichols and Lindberg with respect to pecuniary losses constituted only an "indicator of an estimate of damages." The order further stated that because no documentary evidence or expert testimony was provided to demonstrate the existence of essential facts of injury to their financial interest, Nichols and Lindberg's testimony alone did not support the jury's damages awards.

Evidence of financial injury must be legally sufficient as to both the existence and the amount of damages. *See Hurlbut*, 749 S.W.2d at 767. Legal sufficiency is evaluated against the jury charge. *See Burbage v. Burbage*, 447 S.W.3d 249, 260 (Tex. 2014) ("The jury charge sets the standard.") (citing *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) ("[I]t is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge.")). Here, the jury was asked "what sum of money, if paid now in cash, would fairly and reasonably compensate [Lindberg or Nichols, respectively] for her injuries, if any, that were proximately caused by the [business disparagement or interference]?" Thus, Nichols and Lindberg were required to demonstrate the amounts of damages awards that would fairly and reasonably compensate each for her financial injury and lost profits.

In order to prevail on a claim for business disparagement, a plaintiff must establish a financial loss that has been "realized or liquidated." *Hurlbut*, 749 S.W.2d at 767; *MacFarland v. Le-Vel Brands LLC*, No. 05-16-00672-CV, 2017 WL 1089684, at *10 (Tex. App.—Dallas Mar. 23, 2017, no pet.) (mem. op.). Direct financial loss can include specific lost sales, loss of trade, or loss of other dealings. *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex. App.—Fort Worth 2007, pet. denied). With respect to financial injury already sustained, the supreme court has held that speculative and conclusive testimony, without demonstrable factual explanation, is legally insufficient to support awards based on an estimated value. *See Burbage*, 447 S.W.3d at 260 ("We require some concrete basis for an estimate.") (citing *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 159-61 (Tex. 2012)).

Similarly, a party may recover lost profits only if it shows by competent evidence the amount of the loss with reasonable certainty. *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994). Lost profits are damages for the loss of net income to a business and, broadly speaking, reflect income from lost business activity, less expenses that would have been attributable to that activity. *Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002). While it is not necessary for lost profits to be established with absolute certainty, evidence of lost profits must be based upon objective data from which the loss can be determined with a reasonable degree of exactness. *Texas Instruments*, 877 S.W.2d at 279. At a minimum, estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained. *See id.* The supreme court has held that although records are not required to be produced in court, supporting documentation (or the lack thereof) may affect the weight of the evidence. *See Holt*

Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 84 n.2 (Tex. 1992). A party seeking damages for lost profits from future business opportunities must "adduce evidence establishing that prospective customers would have done business with the plaintiff absent the defendant's misconduct." *Horizon Health Corp. v. Acadia Healthcare Co.*, No. 15-0819, 2017 WL 2323106, at *5 (Tex. May 26, 2017) (citing *Heine*, 835 S.W.2d at 85). To support the recovery of lost profits, the record must contain evidence sustaining one complete calculation of lost profits. *Heine*, 835 S.W.2d at 84. For the reasons explained below, we conclude that the evidence is legally insufficient to establish the amount of injury to financial interest and lost-profits damages with reasonable certainty, and therefore the trial court did not err in granting the JNOV in part.

Lindberg relied entirely on her own testimony to support her estimate of fair and reasonable compensation. She testified that she estimated her total losses would be "about $700,000." When asked by the court to lay a foundation for the $700,000 figure, she offered general testimony regarding her knowledge about her business and her regular practice of projecting income and expenses, but she did not offer evidence to explain her underlying calculations. Texas courts have not sanctioned any particular method of determining lost profits, but a party must be able to explain their chosen method and provide a complete calculation. *Id.* at 85. Lindberg offered no testimony explaining the method she used to arrive at her estimate, and she presented no documentary evidence, specific facts, or objective data to support her testimony. Her testimony included statements that she thought her business grossed "250[,000]" and netted "115[,000]" in 2013, but she did not explain how these amounts might have been used to estimate her projected total losses. Instead, Lindberg offered conclusory approximations and generalizations.

Similarly, Nichols testified that following Hayes's statements, her business "seem[ed] to be [down] about 25 percent." No documentary or other supporting evidence, such as basic accounting or business records, was admitted to provide objective facts, figures, or data from which the amount of fair and reasonable compensation for injuries or lost profits could be ascertained. Nichols did not expound on her methodology for calculating her 25-percent estimate. There was no specific evidence, with supporting documents, to provide a net-profits analysis as required. *See Miga*, 96 S.W.3d at 213. The numbers Nichols testified to included only gross figures: she charged an average of approximately $6,000 per wedding, and she did "about 30 weddings" in 2015, "around 20 to 25" in 2014, and in previous years she did "usually around 25 on average" weddings per year. Furthermore, she offered no testimony or evidence regarding her reasonable expectations going forward for future earnings.

Therefore, neither Nichols nor Lindberg supported her testimony with objective facts, figures, or data from which the amount of past financial injury or future lost profits could be ascertained. No method for determining lost profits was explained, and no complete calculation was provided. Additionally, neither offered evidence establishing an amount of business that they would have obtained absent the Hayes's misconduct. Moreover, neither Lindberg nor Nichols delineated between damages arising from business disparagement and those arising from tortious interference, and their general estimates did not distinguish between past and future damages. Because estimates of damages cannot be based solely on conclusory testimony absent supporting objective data, *see Texas Instruments*, 877 S.W.2d at 279, Nichols and Lindberg's testimony alone did not suffice to support the verdict in this case. Therefore, the trial court did not err in concluding that insufficient

evidence supports the jury's finding of damages for business disparagement and tortious interference with prospective business relations for both Lindberg and Nichols and entering a JNOV as it relates to these claims. We overrule Nichols and Lindberg's second cross-issue.

CONCLUSION

With respect to Hayes's challenge to Nichols's award for mental-anguish damages, we reverse and render judgment that Nichols take nothing on that claim. We affirm the district court's judgment in all other respects.

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed in Part; Reversed and Rendered in Part

Filed: August 18, 2017